Creditor preferences in Chapter 6 of the Companies Act 71 of 2008: The position of SARS – a comparative study

By

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Declaration

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

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Chapter One: Background and introduction

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

1.1 Background information

Business rescue is defined in section 128(1)(*b*) of the Companies Act as follows:

> "Business rescue" describes proceedings to undertake the facilitation of the rehabilitation of a company that is financially distressed by providing for –
>
> (i) the temporary supervision of the company, and of the management of its affairs, business and assets;
> (ii) a temporary moratorium of rights of claimants against the company or in respect of property in its possession; and
> (iii) the development of an implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, assets, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in exist on a solvent and healthy financial basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's lenders or shareholders than would result from the immediate liquidation of the company".[1]

Cassim is of the opinion that section 128(1)(*b*)(iii) entails saving the company as a going concern or if this is not possible, then as an alternative or secondary objective, to restructure the company to produce a return for the company's lenders or shareholders that is better or healthier than the return that would have resulted from the immediate liquidation of the company.[2]

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1 Act 71 of 2008. Hereafter referred to as the Act.
2 Cassim FHL *et al* (2012) *Contemporary Company Law* 2nd ed Juta & Co Ltd Claremont at 864.

1.2 Problem statement

Business rescue replaced the judicial management methodology and process, which was initially introduced in the 1926 Companies Act[3] and was retained in the 1973 Companies Act.[4] Since its inception, judicial management has not been the best-suited method for the rehabilitation of financially distressed companies.[5] Judicial management orders were not frequently granted by courts, but in events that they were, it seldom restored the affected company to financially healthy space, more often than not resulting in liquidation in any event.[6] The court in *Le Roux Hotel Management (Pty) Ltd*[7] held that 'the limited scope of judicial management in this country and described the institution as 'this moribund old horse.' With the long line of judicial precedents, the court endorsed the need for a progressive business-rescue regime to be introduced by legislative intervention in South Africa. This was achieved by using case studies of different jurisdictions such as the United Kingdom, the United States of America, Australia and Canada who have already a functioning business rescue regime in place.[8] This need was then realised in the new Act in 2011.

The objective of business rescue is the facilitation, reorganising and rehabilitation of a company that is in financial distress.[9] Financial distress is the trigger of the business rescue process.[10] When a company is in financial distress, the company is unable to pay all its current debts when it becomes due and payable within the immediately ensuing six months or the said company is likely to become insolvent within the same said period.[11] The essence of financial distress is a liquidity problem or an inability of the company to pay its debts.[12] When the above is said to happen, business rescue

3 Companies Act 46 of 1926.
4 Seligson M "The Impact of Business Rescue on Tax Claims: does SARS enjoy a preference under s135 of the Companies Act against a company in Business-rescue Proceedings?" 2014 *Business Tax and Company Law Quarterly* at 3.
5 *Ibid*.
6 *Ibid.*
7 *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd* (2001) 1 ALL SA 223 (C) at 55.
8 Selignson M (n 3) at 4.
9 Veldhuizen PJ "Regulation and control of Business-Rescue Practitioners" 2015 *Business Tax and Company Law Quarterly* at 26.
10 Cassim FHL *et al* (n 2) at 864.
11 *Ibid.*
12 *Ibid.*

aims to restore the company to a profitable commercial juristic person, to restore the affairs of the company in such a way that it either maximizes the likelihood of the company continuing in existence on a solvent basis, or results in a better return for the lenders of the company if it were to become liquidated, the company's return to healthy taxpaying status and avoiding of the company's liquidation.[13]

A fundamental principle underlying business rescue is that it must offer a better outcome in respect of placing the company in the prospect of financial success than liquidation.[14] The current predominant opinion accepts that the outcome of placing the company under business rescue must provide for a better outcome for the business as a whole.[15] Business rescue is often used to release the assets of a business and to distribute the proceeds to the affected parties in line with the provisions of the Act.[16]

> "Chapter 6 of the Act sets several instances where the calculation of voting rights and the distribution of assets are in conflict with the provisions of the Insolvency Act.[17] This inconsistency in the two pieces of legislation was the subject of litigation by South African Revenue Services (SARS)[18] fairly early on in the introduction of business rescue".

In *Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration*[19] the court upheld the interpretation of the ordinary meaning of section 145(4)(*b*) in the Act, while SARS is a preferential creditor as per the Insolvency Act[20] (which thus, in turn gives SARS the upper hand),[21] SARS is not a preferential creditor in business rescue proceedings.[22] The case further offered guidance several of issues surrounding voting rights, valuation of subordinated rights and preferences. In determining classes of creditors, SARS should be treated as a separate category.[23] furthermore, to

13 Veldhuizen PJ (n 8) at 26.
14 Turnaround Management Association (TMA) of Southern Africa Practice Note number 7: SARS at 2.
15 *Ibid*.
16 *Ibid*.
17 *Ibid*.
18 Hereinafter referred to as SARS.
19 *Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration* WC HC 15080/12 October 2012.
20 24 of 1936.
21 SARS affords the right to receive payment before other unsecured creditors.
22 TMA (n 13) at 2.
23 *Ibid*.

determine their vote, they should be treated as an unsecured creditor and have the same vote as would an unsecured creditor.[24] "Should the business rescue, however, be converted into liquidation (and assuming the business rescue plan was duly approved), then creditors' ranking (including that of SARS) in business rescue will prevail in liquidation".[25]

1.3 Research methodology

The method being followed in this thesis is a literature-based approach that encompasses an explanatory and comparative approach.

1.4 Limitations

This thesis is aimed at understanding current legislation that is in place in respect of how it is applied and how it may be applied to better the current way it is being applied.

1.5 Literature review

The theoretical base of this study is based on sources of law that defines what business rescue is regulated within South Africa. The history and development of business rescues will be explored whereby Chapter 6 of the Act will be discussed in great depth as to what business rescue is, the procedure of business rescue, and when business rescue is applicable, etc. I will introduce tax legislation to look at how tax laws impact companies undergoing business rescue. As an auxiliary leg, I will introduce journal articles where business rescue and tax laws have an impact on companies undergoing business rescue that has been interpreted and discussed. A comparative analysis will be drawn with regards to the different business rescue mechanisms in different jurisdictions and how they have been applied within those jurisdictions.

1.6 Outline/proposed structure

The main aim of the thesis is to gather information and then evaluate the same to gain a better understanding regarding the current laws regulating business recuse and then

24 TMA (n 13) at 3.
25 *Ibid.*

drawing focus to tax laws that have an impact on companies undergoing business rescue.

The thesis will consist of five chapters which will consist of an introduction, the history and development of business rescue, how tax laws impact a company undergoing business rescue, comparison with other jurisdictions and how they deal with the problem statement and finally a conclusion.

Chapter one

Background and introduction

Chapter one, which is the current chapter, will introduce the reader to the topic which will be discussed within the thesis.

Chapter two

Analysis of business rescue under Chapter 6 of the Companies Act 71 of 2008

Chapter two will discuss business rescue in detail by analysing the Act, looking at the history of business rescue, the amendments that have been made to enhance it, the business rescue procedure, etc.

Chapter three

Analysis of the impact of tax laws on companies undergoing business rescue

Chapter three will discuss creditor preferences by analysing section 135 of the Act and taking a closer look at the ranking of creditors and the ranking of SARS.

Chapter four

Analysis of business rescue and tax laws: The United Kingdom and Australia

Chapter four will entail a comparative study of the business rescue proceedings/mechanisms, creditor preferences within these jurisdictions and the impact of tax laws on companies undergoing business rescue proceedings within Australia and United Kingdom.

Chapter five

Conclusion

Chapter five will entail the conclusion and where possible recommendations in respect of the thesis statement and the research which was obtained and discussed within this thesis.

Chapter Two: Analysis of business rescue under Chapter 6 of the Companies Act 71 of 2008

2.1 Introduction

Prior to the commencement of the Act and the development of business rescue in South Africa, it is important to understand what procedures and mechanisms existed and which process offered a mechanism to restructure companies under financial distress.

2.2 History of the development of corporate law procedures

South African history and sources of insolvency law are derived from a combination of Roman-Dutch law and English law.[26] Common law and aspects of case law[27] have also contributed to the development of insolvency law within South Africa.[28] The laws under the Twelve Tables[29] stipulated that if a debtor was unable to pay his debts, his creditors have the right to seize the debtor and sell him into slavery *(manus iniectio)* or cut the debtors body into pieces.[30] Through the age of time, *a lex poetelia* was passed which prohibited the sale of the debtor in slavery in execution of a judgment debt, after which, imprisonment replaced such sale as a form of punishment as a result of the

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26 Darko-Mamphey D *Legislating Business Rescue in South Africa: A Critical Evaluation* (LLM Thesis 2010 University of Fort Hare) at 13.

27 See in this regard *Childerley Estate Stores v Standard Bank of S.A. Ltd* 1924 O.P.D. 163 where the presiding judge, De Villiers J, qualified the *locus classicus* on the subject of the court's powers to rescind judgments. The issue was whether the plaintiff could rely on section 26 of the Insolvency Act of 1916 which states that every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent. It was held that the whole frame of the particulars of claim indicates that Mr. Berman, for the plaintiff, advanced a number of arguments in support of his main submissions which raise issues that are not covered in the particulars of claim. The court held that it has been the practise to insist on a precise statement of the ground of action in cases connected with insolvent estates and if the plaintiff in such a suit desires to rely not merely upon the provisions of the statute, but upon the common law, it is essential that his declaration should contain a count to that effect so as to give effect to the common law. The judge concluded at page 168 by stating: "We arrive at this position then that so far as *justus error* is concerned default judgments may in some cases be set aside under the Roman –Dutch law on the ground of *justus error*, and that judgments whether by default or not, may be set aside in cases mentioned on the ground of *instrumentum noviter repertum*, though some of the cases are nowadays obsolete. See also *De Wet and Others v Western Bank Ltd* 1977 2 SA 1033 (W).

28 Darko-Mamphey D (n 26) at 13.

29 *Ibid*.

30 Sharrock R *et al* (2017) *Hockleys Insolvency Law* 9th ed Juta Cape Town at 13.

debtor's inability to pay his debts.[31] Further down history, the *mission in possessionem*[32] was introduced whereby the "praetor issued decrees to allow creditors to possess the assets of the debtors as a form of execution of judgment".[33] The Ordinance of Amsterdam, passed in 1777, has laid the groundwork for South African insolvency law.[34] Ordinance 64 of 1843 was re-enacted with minor alterations, additions, and modifications as Cape Ordinance 6 of 1843 which changed and consolidated the law pertaining to the *cession bonorum*.[35] The first Uniform Act for the then Union of South Africa was the Insolvency Act 32 of 1916.[36] All previous insolvency ordinances were repealed by the Insolvency Act[37] of 1916 which followed the structure of the Transvaal Act 13 of 1895.[38] The Insolvency Act of 1916 has been amended by Act 29 of 1926 and Act 58 of 1934[39]; all these amendments of the Insolvency Act have been repealed by the current Act in place which is the Insolvency Act 24 of 1936.[40]

The Cape Joint Stock Companies Limited Liability Act 23 of 1861 was the first company law legislation in South Africa.[41] The aforesaid legislation is almost a mirror of the English Joint Stock Companies Act 1844 and the Limited Liability Act, 1855.[42] The 1973 Companies Act was enacted on the foundations of 19th Century British law. The Companies Act 46 of 1926 foundations is based on the Transvaal Companies Act 31 of 1909, in which this Transvaal Companies Act was founded on the English Companies (Consolidation) Act of 1908.[43] When the Companies Act 61 of 1973 had been enacted this brought much divergence between the English and South African

31 Sharrock R (n 30) at 10.
32 Execution against the debtor's property.
33 Darko-Mamphey D (n 26) as per Sharrock (n 29) at 10.
34 *Ibid*.
35 Sharrock R (n 30) at 11.
36 Burdette DA *A framework for the Corporate of Insolvency Law in South Africa* (Part 1 of LLD 2002 University of Pretoria) at 33.
37 Insolvency Act 32 of 1916.
38 Burdette DA (n 36) at 33.
39 *Ibid*.
40 Insolvency Act 24 of 1936.
41 Darko-Mamphey D (n 26) at 14.
42 Darko-Mamphey D (n 26) at 15.
43 Darko-Mamphey D (n 26) at 14 as per Cronje "Historical background of South African Insolvency Law", prepared for South African Law Reform Committee and the World Bank Insolvency Law Database www.business-rescue.co.za/historyofchapter6development/pdf.

company law.[44] Major departures, for example, the establishment of a company having a share capital, the virtual abrogation of *ultra vires* doctrine, etc. from the English legal system were brought about as a result of the South African Companies Act 61 of 1973 as well as formal restructuring.[45]

2.3 Judicial Management in terms the Companies Act 61 of 1973

The purpose of judicial management was that

> "where there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or meet its debts or to meet its obligations and become a successful concern, the court may if it appears just and equitable, grant a judicial management order in respect of that company."[46]

The term "reasonable profitability" as set out in section 427[47] created uncertainty.[48] In *Noordkaap Lewendehawe Ko-operasie Bpk v Schreuder*[49] the court held that the difference between the words "probable" and "possible" was material.[50] The judge stated that in legal terminology, something that is possible is less likely to happen than something that is "probable".

Judicial management encompassed a combination of the normal principles of company law with specific reference to the management of the company combined with the principles of insolvency law can give effect and create optimum benefit for the creditors and the members of the company.[51] Judicial management "was a process in terms of which a company who is experiencing a non-permanent financial difficulty as a result of poor management, negligence by management, or any other unforeseen financial situation was placed in the hands of a judicial manager"[52] who took control of

44 Cilliers *et al Corporate Law* 3 (2000) at 24.
45 *Ibid.*
46 Darko-Mamphey D (n 26) at 15.
47 The 1973 Act.
48 *Ibid*.
49 *Noordkaap Lewendehawe Ko-operasie Bpk v Schreuder* 1974 (3) SA 102 (A).
50 *Ibid*.
51 Cilliers *et al* (n 44) at 24.
52 It should be noted that the court maintains a discretion as seen in the case of *Maynard v Office Appliance (SA) (Pty)* Ltd 1929 WLD 290, the judge rejected an application for the appointment of a judicial manager based on the allegation that there had been mismanagement in the

the company with the sole purpose of restoring it into a state of profitability and optimum performance.[53]

2.3.1 Grounds for a judicial management order

Companies which has been placed in exceptional circumstances need to meet the following prerequisites:

(i) *"The company was unable to pay its debts or would probably be unable to meet its obligations"*: this is referred to as commercial insolvency and must be proven.[54] The mere fact that the liabilities exceed the assets of the company is insufficient grounds for a successful application for a judicial management order.[55] It must subsequently further be shown that the company is unable to meet its obligations. This entails that in events the company was likely to become unable to pay its debts, therefore the unlikelihood would be justifiable grounds for the commencement of the procedure.[56]

(ii) *"The company has not been prevented from becoming a successful concern*":[57] the 1973 Act was not clear at what point, or under which circumstances a company would be defined as not being successful concern since it was unable to meet its obligations and pay all outstanding and future debts had already become an unsuccessful concern.[58] By adding this as a requirement it makes it difficult to prove all grounds for judicial management.[59] There must be a reasonable probability that the company will be placed in a position to pay its

conduct of the company's affairs and pointed out the financial situation of the company can be dealt with by reducing the cost of management and increasing the capital of the company which can subsequently be dealt with by the directorship of the company. This is an example of how the court will assess each case based on its individual merits and not grant every company that seeks to have a judicial management order.

53 Cilliers *et al* (n 44) at 478; *Silverman v Doornhoek Mines Ltd* 1935 TPD 249.

54 Loubser A *A Some Comparative Aspects of Corporate Rescue in South African Company Law* (LLD 2010 UNISA) at 21.

55 *Ibid*.

56 Museta GM *The Development of Business Rescue in South African Law* (LLM 2011 University of Pretoria) at 9.

57 Section 427 (1)(*a*) & (*b*) of the 1973 Act.

58 Loubser A (n 54) at 22.

59 Sher LJ *The Appropriateness of Business Rescue as opposed to Liquidation: A critical analysis of the requirements for a successful business rescue order as set out in section 131 (4) of the Companies Act 71 of 2008* (LLM 2013 University of Johannesburg).

debts or meet its obligations and become a successful concern once again.[60] The court must be satisfied that there is a reasonable prospect that the company will be able to pay all of its debts if placed under judicial management, therefore the court will make use of a provisional judicial management order to ascertain whether judicial management will be successful in respect of the company paying back its debts.[61] This requirement is to prove that the company should be placed under judicial management was restrictive and tended to prevent the applications from being successful.[62]

(iii) "*The application must be just and equitable*": this requirement entails that judicial management must be the most appropriate measure that was not extraordinary but most suitable to the situation.[63] The question arises whether the court has sufficient knowledge and competence to make the relevant assessment to ascertain the above as there are no guidelines on how to adjudicate such instances.[64] In *Makhuva v Lukoto Bus Service (Pty) Ltd*[65] the court held that the mere fact that the alleged problems were capable of internal resolution by the majority of the shareholder would preclude it from finding that it would be just and equitable to place the company under judicial management.[66]

Where the applicant has proved the above-said requirements, the final decision is with the court to discretion whether the application will be successful or not.[67] In *Tenowitz v Tenny Investments*[68] the court refused to grant a final order of judicial management as a result of the applicant not discharging the onus of proving that the company "would become a successful concern in a reasonable period of time".[69]

60 Pretorius JT *et al* (1999) *Hahlo South African Company Law, Through the Cases* 6th ed Juta Cape Town at 737.
61 *Noordkaap Lewendehawe Ko-operasie Bpk v Schreuder* (n 44) at 110.
62 Loubser A (n 54) at 22.
63 Loubser A (n 54) at 25.
64 Museta GM (n 56) at 10.
65 1987 (3) SA 376 (V).
66 Loubser A (1991) *Casebook on the Law of Partnership, Company Law and Insolvency Law* Juta Cape Town at 148.
67 Museta GM (n 56) at 10.
68 1979 (2) SA 680 (E).
69 Museta GM (n 56) at 11.

2.3.2 Who can make a judicial management order?

An application for judicial management may be made by any person who may apply for a winding-up order.[70] It should be noted however that was no clear differentiation between which persons could make an application for winding-up and an application for judicial management.[71]

Various grounds have been laid down for granting a judicial management order, which has been provided for in section 427(1)[72] –

(a) "If, by the reasoning of mismanagement or any other cause –

(i) The company is unable to pay its debts or is probably unable to meet its commitments;

(ii) Has not become, or is prevented from becoming, a successful business concern;

(b) There is a reasonable probability that, if the company is placed under judicial management, it will be in a position to -

(i) Pay its debts or meet its obligations; and

(ii) Become a successful business concern, then a court may, if it appears just and equitable, grant a judicial management order.''

The court may also "grant an order of judicial management in respect of any company involved in an application for winding- up if it appears that it would be just and equitable to do so and possibly result in the grounds for the winding-up being removed," and the company becoming a successful concern once again.[73]

Section 346 (1)[74] deals with winding-up provides -

"an application to the court for the winding-up of a company may, subject to the provisions of this section, be made –

(a) by the company;

(b) by one or more of its creditors (including contingent or prospective creditors);

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70 Section 427(2) of the 1973 Act.
71 Museta GM (n 56) at 11.
72 The 1973 Act.
73 Section 427(3) of the 1973 Act.
74 The 1973 Act.

(c) by one or more of its members, or any person referred to in section 103 (3), irrespective of whether his name has been entered in the register of members or not;
(d) jointly by any or all of the parties mentioned in paragraphs (a), (b) or (c);
(e) in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company; or
(f) in the case of the discharge of a provisional judicial manager of the company."

2.3.3 The provisional judicial management order

Once any person or entity makes an application for judicial management against a company, the order must be granted.[75] The court may alternatively grant a provisional judicial management order on an application under section 427 (2) and/or section 427 (3) of the 1973 Act which states that the return day[76], or dismissal of the application, or make any order it deems just.

The provisional order must contain the following –

(i) "the directions stating that the company will be under management, subject to the supervision of the court, of a provisional judicial manager appointed by the Master, and that any other person vested with the management of the company's affairs shall be divested thereof from the date of the order";[77] and
(ii) "any other directions which the court considers necessary as to the management of the company, which includes the conferring powers on the provisional manager, subject to the rights of creditors to raise money without the authority of the members".[78]

The provisional order may also contain the condition that whilst the company is under judicial management, all legal proceedings as, well as the execution of all writs, summons and any other process against the company, be stayed and same may not

75 Section 427 (2) & (3) of the 1973 Act.
76 The return day may be more than sixty days after the date of the provisional order.
77 Section 428 of the 1973 Act.
78 *Ibid*.

continue without the leave of the court.[79] Upon the application of the applicant, a creditor or member, the provisional manager of the Master, the court may vary the terms of the order or discharge it at any time.[80]

Upon the provisional order being granted, all the company's assets are deemed to be in the custody of the Master up until a provisional manager has been appointed[81] and assumed office.[82] The appointee shall hold office up until such time he/she is discharged from office.[83] The duties of the appointee will from time to time include but are not limited to -

(i) "the provisional manager assuming the management of the company;
(ii) recover and reduce into possession all the assets of the company by lodging a copy of his/her letter of appointment with the registrar with seven days after appointment;
(iii) Preparing and laying before the meetings convened a report which must*, inter alia*, contain an account of the general state of the company's affairs;
(iv) A statement setting out the reasons why the company is in the position it is in;
(v) Statements of the company's assets and liabilities;
(vi) A list of creditors and the amount and nature of the claim of each creditor;
(vii) The particulars of the source from which money has been or is to be raised to carry on the same business of the company; and

79 Section 428 (2) of the 1973 Act.
80 Section 428 (3) of the 1973 Act.
81 The appointment of the provisional manager is made by the Master as per section 429 of the 1973 Act.
82 Section 429 of the 1973 Act
83 Magardie OMI *Companies in financial distress during business rescue proceedings* (LLM 2015 University of Pretoria) at 10.

(viii) The provisional manager's considerations and/or opinions as to the prospects of the company becoming a successful concern and of the removal of circumstances which prevents it from doing the same".[84]

The appointee shall be entitled to remuneration for the execution of his duties as provisional manager.[85] The said remuneration shall be fixed by the Master from time to time taking into account how the appointee has executed his/her duties as well as taking into consideration the recommendations of debtors and creditors.[86]

2.3.4 The final judicial management order

Once the court is satisfied with all the duties that have been carried out by the provisional manager, the court may grant a final order.[87] The order must outline the directions for the vesting of the management of the company, subject to the supervision of the court, the handing over of all matters and accounting by the provisional manager to the final manager if such manager is not the same person.[88] It is worth noting that the court may discharge the provisional order or make any order it may deem just and equitable.[89] In *Ladybrand Hotel (Pty) Ltd v Segal and another*[90] three aspects were mentioned by the judge that a pivotal part in the determination of whether a final order could be granted:

1. The death or lack of information brought before the court; this was information included trading and profit and loss accounts over a few months which gave a true reflection of the conduct of the applicant business in as regards various rates, taxes and future foresaw expenditures;
2. The merits of the application or such information as might be gathered from the papers. This including the opinions of the creditors and members of the company, the report from the judicial manager, the report from the Master and the Registrar which would all be weighed up by the court and

84 Section 430 of the 1973 Act.
85 Section 434A (1) of the 1973 Act.
86 Section 434A (2) of the 1973 Act.
87 Section 438 (2) of the 1973 Act.
88 Section 432(3)(*a*) of the 1973 Act.
89 Section 432(2) of the 1973 Act.
90 1975 (2) SA 357 (O).

3. The affidavits of the provisional judicial manager. This was the factual report based on the observations and opinions of the judicial manager.[91]

With specific reference to this aforesaid case, the reports from the judicial manager and the Master conflicted.[92] It was here that the third requirement was used by the court to gather as much factual information and using its discretion.[93]

The final judicial management order granted must contain the following –

(i) Directions whereby the management of the company's affairs are vested in the judicial manager subject to the supervision of the court, as to when the provisional judicial manager was to hand all matters over to the final judicial manager from which the judicial manager was thereafter discharged and;
(ii) Such other directions about the management of the company or any matter incidental thereto as the court might consider necessary.[94]

2.3.5 Cancellation of the judicial management order

In terms of section 440[95] the judicial manager or any other interested party could apply to the court to cancel the order. The judicial manager had to prove –

(i) He/she maintained the *locus standi under* section 433 (1) to bring forward such an application because he/she had formed the opinion in good faith that the continuance would not produce successful results;
(ii) The order should be cancelled under section 440, due to the operation not being beneficial in any way and
(iii) A winding-up order should ensure immediately.[96]

Mismanagement or incompetence by the judicial manager did not constitute a valid ground for the cancellation of the judicial management order.[97]

91 *Ibid.*
92 *Ibid.*
93 Museta GM (n 56) at 12.
94 Section 432 of the 1973 Act.
95 The 1973 Act.
96 Museta GM (n 56) at 16.
97 *Ibid.*

2.4 Business rescue in terms of the Companies Act 71 of 2008

2.4.1 The definition and purpose of business rescue

"Business rescue describes proceedings to undertake the facilitation of the rehabilitation of a company that is financially distressed by providing for –

(iv) the temporary supervision of the company, and the management of its affairs, business and assets;
(v) a temporary moratorium of rights of claimants against the company or in respect of property in its possession; and
(vi) the development of an implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, assets, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in exist on a solvent and healthy financial basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's lenders or shareholders than would result from the immediate liquidation of the company".[98]

Museta is of the opinion that the definition refers to the rehabilitation of a company and a plan to rescue a company in a manner that maximises its chances of survival.[99] Business rescue refers to the reorganisation of the company to re-establish it as a profitable entity and in turn, avoid liquidation and ensure that the company is placed in the position it was in before to the current financial position and become a viable contributor to the economy of the country once again.[100]

Magardie submits that the main purpose of business rescue is not to necessarily save the company and return it to its former glory, but to restructure the affairs of the company in such a manner that it either maximises the likelihood of the company

98 Act 71 of 2008. Hereafter referred to as the Act.
99 Museta GM (n 56) at 24.
100 Cassim FHL *et al* (n 2) at 781.

continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company.[101]

The test for a company to be placed under business rescue is whether or not the company is financially distressed as per the definition.[102] A company is considered to be financially distressed if –

> "(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing 6 months; or
>
> (ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 months."[103]

In light of the above, rescuing a company means the prevention of the company undergoing liquidation and rescuing the company to become a viable contributor to the economy and in turn turning the company around in such a manner that would prevent the company from undergoing a similar fate in the future.

2.4.2 Commencement of business rescue proceedings

Business rescue proceedings can commence either voluntarily by the directors of the company, or by way of a court process. During business rescue proceedings, the company's management will be placed under supervision and a moratorium on the rights of claimants against the company will operate.[104] Usually, proceedings are commenced by way of "resolution by the directors of the company or by the shareholders of the company, a creditor, trade union or an employee by making an application to the court for an order to place the company into supervision proceedings".[105]

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101 Magardie OMI (n 83) at 20.
102 Magardie OMI (n 83) at 13.
103 Section 128(1)(*f*) of the Act.
104 Bradstreet R, "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy" 2010 *SA Merc LJ* 22 at 195.
105 Rushworth J "A critical analysis of the business rescue regime in the Companies Act 71 of 2008" 2010 *Acta Juridica* at 376.

2.4.2.1 Commencement by resolution by the board of directors

The board of directors of a company may take a resolution to voluntarily commence business rescue proceedings if the directors have reasonable grounds of believing that the company -

(i) is financially distressed; and
(ii) there appears to be a reasonable prospect of rescuing the company.[106]

In *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others*[107] Dambuza AJA commented that when directors elect to place a company in business rescue by way of board resolution, they should 'truly believe that prospects of rescue exist and such belief must be based on a concrete foundation.[108]

2.4.2.2 Commencement by court order by an affected person

Business rescue proceedings can be commenced by way of application to a court by an 'affected person'.[109] Section 128(1)[110] holds that an affected person may be described concerning a company as:

(i) a shareholder or creditor of the company, it must be noted that no other comparable legal system gives authority to an individual that holds securities to apply for business rescue proceedings;
(ii) any registered trade union representing employees of the company; and if any of the employees of the company are not represented by a registered trade union, each of those employees or their representative.

The company nor its directors (in their capacity as such)[111] are therefore authorised to apply for business rescue proceedings.[112] A court may, however, make an order to grant in appropriate circumstances where a director has applied for relief from

106 Section 129 of the Act.
107 2015 JOL 33243 (SCA).
108 2015 JOL 33243 (SCA) at par 30.
109 Loubser A (n 54) at 51.
110 Of the Act.
111 The Act recognises the possibility that a director can be an affected person: see s 130(2). A director will often be an affected person by virtue of being a shareholder. Since a director can also be an employee of the company if a contract of service has been concluded.
112 Loubser A (n 54) at 52.

oppressive or prejudicial conduct by the company the capacity to apply for business rescue.[113] A few requirements need to be met before the court will grant the order.[114] First, the applicant must serve a copy of the application on the company and the Companies and Intellectual Property Commission,[115][116] followed by a notification by the applicant to each affected person in respect of the application in the prescribed manner.[117] After consideration of the application, the court may make an order to place the company under supervision and to commence business rescue proceedings, if it is satisfied that the company meets the threshold as contemplated in section 128(1)(*f*) of the Act.[118] If the court makes an order to commence business rescue proceedings, the court will appoint a business rescue practitioner, [119]which will exercise the prescribed statutory functions to attain the goals of restructuring the company back to economic value.[120] The practitioner shall vest control of management and control of the company in substitution for its board and pre-existing management, subject to the directors being obliged to cooperate and assist the practitioner in exercising the functions as they would.[121] Where the court is not pleased with the application, the court may dismiss the application together with any appropriate order, including an order of liquidation.[122]

2.4.3 Business rescue practitioner

2.4.3.1 Appointment of the practitioner

The practitioner is appointed to oversee and investigate the company's affairs, property, business, and financial situation. Furthermore, he/she is to determine whether there is a possibility for the company to be brought back to health.[123] If the practitioner believes that the company cannot be brought back to an economic value, the practitioner must notify the court, the company, and all affected persons

113 163(2)*(c)* of the Act.
114 Section 131(2) of the Act.
115 Hereinafter referred to as CIPC.
116 Section 131(2)*(a)* of the Act.
117 Section 131(2)*(b)* of the Act.
118 Magardie OMI (n 83) at 25.
119 Hereinafter referred to as the practitioner.
120 Magadie OMI (n 79) at 25.
121 *Ibid*.
122 Section 131(4)(1)(*b*) of the Act.
123 Section 141(2) of the Act.

and thereafter apply to the court for an order discontinuing the proceedings and placing the company into liquidation.[124]

The practitioner has a wide range of powers during the business rescue proceeding as afforded to him under the Act. Section 140(1) provides the practitioner with full management and control over the company in business rescue proceedings.[125] The power of full management and control include, but is not limited to:

"(i) delegating any power or function to a person who was part of the board or pre-existing management of the company";[126]

"(ii) the power to remove from office any person who forms part of the pre-existing management of the company, who does not have any other relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship or is related to a person forming part of such a relationship".[127]

The practitioner is an officer of the court during the business rescue proceedings and thus has to report to the court per any applicable rules of, or orders made by the court.[128] In addition to the aforementioned, the practitioner has the same duties, responsibilities, and liabilities of a director of the company as provided for in section 75 to 77 of the Act.[129]

2.4.3.2 Removal of the practitioner

The practitioner may be removed from office by way of a court order, which is followed "by an application by an affected person, after the adoption of a resolution by directors to begin business rescue proceedings".[130] Upon receipt of an

124 Section 141(2)(*a*)(i) and (ii) of the Act.
125 Section 140(1)*(a)* of the Act.
126 Section 140(1)*(b)* of the Act.
127 Section 140(1)*(c)* of the Act.
128 Section 140(3)*(a)* of the Act.
129 Section 140(3)*(b)* of the Act.
130 Section 139(1) of the Act.

application by an affected person, or on its own motion, the court may remove the practitioner from office on the following grounds:

(i) the practitioner is incompetent or fails to perform his duties;[131]
(ii) fails to exercise the proper degree of care in performing his functions;[132]
(iii) engaged in illegal acts or conduct;[133]
(iv) no longer satisfies the appropriate qualification requirements;[134]
(v) has a conflict of interest or lack independence;[135] or
(vi) incapacitated and unable to perform his functions and is unlikely to regain that capacity within a reasonable period.[136]

The company subject to the business rescue proceedings or any creditor who nominated the practitioner shall be bestowed with the responsibility of appointing a new practitioner in events such practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application to set aside the new appointment.[137]

2.4.4 Business rescue plan

The practitioner has the responsibility for the development and implementation of the business rescue plan[138] if approved in terms of the Act.[139] In conjunction with preparing the plan, the practitioner must also consult with the creditors, other affected persons and the management[140] of the company before doing so.[141]

131 Section 139(2)*(a)* of the Act.
132 Section 139(2)*(b)* of the Act.
133 Section 139(2)*(c)* of the Act.
134 Section 139(2)*(d)* of the Act.
135 Section 139(2)*(e)* of the Act.
136 Section 138(2)*(f)* of the Act.
137 Section 139(3) of the Act.
138 Hereinafter referred to as the plan.
139 Section 140(1)*(d)*of the Act.
140 Although the word "management" is used elsewhere to denote persons other than the directors, for example in section 140(1)*(c)*(i) on the removal of such persons from office, it appears to include both directors and other members of management here, as it is unlikely that the practitioner will be required to consult other persons involved in the management of the company, but not the directors. Consistency in terminology is, once again, shown not to be a strength of this Act.
141 Section 150(2)*(a)* of the Act.

The Act provides that the plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan.[142] The plan must further be divided into three parts, namely being:

(i) Part A – comprising of the background;[143]
(ii) Part B – comprising of the proposals;[144] and
(iii) Part C – comprising of the assumptions and conditions.[145]

Part A – Background

This section must contain the following:

(i) A complete list of the material assets of the company, as well as all the assets that were held as security by creditors when the business rescue proceedings began;[146] in obtaining and gathering this information, it will determine the actual condition of the company financially and determine the point of departure in terms of the plan.[147]
(ii) A complete list of the creditors of the company when the business rescue proceedings began, as well as an indication which creditors qualify in terms of insolvency law as secured, preferent and concurrent creditors and which creditors have proved their claims.[148]
(iii) The probable dividend that the creditors in the above-mentioned classes will receive in events that the company should be liquidated.[149] Business rescue practitioners have to be cautious in their estimates as there may be several factors that cannot be predicted with any degree of accuracy and that may influence these figures, such as whether purchasers of the assets will be found and that all creditors have proved their claims.[150] The determination of what consists of a probable dividend will require the services of an expert

142 Section 150(2) of the Act.
143 Section 150(2)*(a)* of the Act.
144 Section 150(2)*(b)* of the Act.
145 Section 150(2)*(c)* of the Act.
146 Section 150(2)*(a)*(i) of the Act.
147 Museta GM (n 56) at 31.
148 Section 150(2)*(a)*(ii) of the Act.
149 Loubser A (n 54) at 116.
150 *Ibid*.

such as an auditor or an accountant, which will, in turn, add to the costs of what is developing into an expensive procedure.[151]

(iv) A complete list of holders of issued securities of the company. This allows for such holders to part take in the business rescue proceedings.[152]

(v) A copy of the practitioner's written agreement about his remuneration. The finalisation of the practitioner's fees[153] will either encourage or demotivate him.[154]

(vi) A statement of whether the plan includes any proposal made informally by a creditor of the company.[155]

Part B – The proposal

This part of the plan explains and elaborates on the proposed measures to assist the company in overcoming the financial problems and managing the debts acquired.[156] The proposal must at least contain the following:

(i) The nature and duration of any proposed debt moratorium;[157]

(ii) The extent to which the company is to be released from the payments of its debts and the extent to which any debt is proposed to be converted to equity in the company or another company;[158]

(iii) The ongoing role of the company, and the treatment of any existing agreements in place;[159]

(iv) The property of the company that is proposed to be available to pay creditors claims;[160]

(v) The order of preference in which the proceeds of the company will be applied to pay creditors if the proposal is adopted;[161]

151 Loubser A (n 54) at 117.
152 Museta GM (n 56) at 31.
153 Section 150(2)*(a)*(v) of the Act.
154 As per section 143(1) & (6) The business rescue practitioner is entitled to charge fees and expenses in accordance with a tariff that the Minister may prescribe by regulation.
155 Section 150(2)(vi) of the Act.
156 Loubser A (n 54) at 119.
157 Section 150(2)*(b)*(i) of the Act.
158 Section 150 (2)*(b)*(ii) of the Act.
159 Section 150(2)*(b)*(iii) of the Act.
160 Section 150(2)*(b)*(iv) of the Act.
161 Section 150(2)*(b)*(v) of the Act.

(vi) The benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation;[162] and

(vii) The effect that the plan will have on the holder of each class of the company's issued securities.[163]

Part C – Assumptions and Conditions

This part of the plan must contain the following:

(i) A statement of the conditions that must be satisfied, if any, for the proposal to come into operation and to be implemented;[164]

(ii) The effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment;[165]

(iii) The circumstances in which the business rescue plan will end;[166] and

(iv) A projected balance sheet for the company as well as a statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed plan shall be adopted.[167]

The proposed plan must be concluded with a certificate by the practitioner stating that the information provided in the plan appears to be accurate, complete and up-to-date[168] and the projection provided are estimates made in good faith based on the factual information and assumptions as set out in the statement.[169]

The business rescue plan must be published by the company within twenty-five business days after the date of appointment of the practitioner or such longer period permitted by the court, on the company's application,[170] or the holders of a majority of the creditors voting interests.[171]

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162 Section 150(2)*(b)*(vi) of the Act.
163 Section 150(2)*(b)*(vii) of the Act.
164 Section 150(2)*(c)*(i) of the Act.
165 Section 150(2)*(c)*(ii) of the Act.
166 Section 150(2)*(c)*(iii) of the Act.
167 Section 150(2)*(c)*(iv) of the Act.
168 Section 150(4)*(a)* of the Act.
169 Section 150(4)*(b)* of the Act.
170 Section 150(5)*(a)* of the Act
171 Section 150(5)*(b)* of the Act.

The practitioner will convene with the creditors and "any other holders of a voting interest" of the company to consider and vote on the approval of the plan within ten business days after the publication of the plan.[172] The practitioner must then further explain the plan and the purpose of the plan to which must give an objective recommendation about the success of the scheme.[173]

Once the plan has been approved, it becomes binding upon the company and all its creditors and holders of its securities, whether or not such persons were present at the meeting;[174] votes in favor of the adoption of the proposed plan;[175] or in the case of creditors, have proven their claims against the company.[176] Following that, the practitioner must take steps necessary to implement the plan after which he must file a notice to the commission.

When the company is faced with a situation where the proposed plan is rejected, the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan or advise the meeting that the company will apply to the court to set aside the result of the vote because it was inappropriate.[177] In events that the practitioner does not take the aforementioned action, an affected person may take such action, failing which the practitioner must file a notice of termination of the business rescue proceedings.[178]

2.4.5 Termination of business rescue proceedings

Section 132(2) of the Act holds that business rescue proceedings are terminated in one of four ways:

(i) By court order;[179]

(ii) By the filing of a notice of termination by the practitioner;[180]

172 Section 151(1) of the Act.
173 Section 152(1)*(c)* of the Act.
174 Section 152(4)*(a)* of the Act.
175 Section 152(4)*(b)* of the Act.
176 Section 152(4)*(c)* of the Act.
177 Section 153(1)*(a)*(i) and (ii) of the Act.
178 The notice of termination of business rescue proceedings will be completed on a CoR 152.2 form after which the form must be submitted to the CIPC.
179 Section 132(2)*(a)* of the Act.
180 Section 132(2)*(b)* of the Act.

(iii) The business rescue plan has been proposed and rejected, without action being taken to extend the business rescue proceedings;[181] or

(iv) By the rejection or substantial implementation of a business rescue plan.[182]

2.4.6 Conclusion

Business rescue as a tool to rescue a company undergoing financial distress is a great improvement in comparison to judicial management. It has been set up to make an effort to involve all affected parties and through appropriate planning, as set out in the business rescue plan will ensure that all the affected parties are satisfied to the best of the practitioner's abilities to revive the company back to economic value. It has been noted that business rescue policies have a higher likelihood of being successful if they operate in a debtor-friendly system.[183]

181 Section 132(2)*(c)*(i) of the Act

182 Section 132(2)*(c)*(ii) of the Act.

183 Harmer RW 'Comparisons of Trends in National Law: The Pacific Rim' 1997 *Brooklyn Journal of International Law* 139 at 147; Bradstreet R (n 100) at 22.

Chapter Three: Analysis of the impact of tax laws on companies undergoing business rescue

3.1 Introduction

The impact of business rescue on the company's tax liabilities to SARS both prior to the commencement and post-commencement of business rescue proceedings has received little to no attention.[184] This chapter will discuss creditors preferences with an in-depth discussion on the ranking of SARS claims during liquidation and business rescue proceedings whereby a comparison will be drawn between the two to establish the rights SARS has to a claim of payment of outstanding tax debt of a company attempting to revive itself.

3.2 Preference of creditors

A typical definition of a creditor is a person or company to whom money is owing.[185] As with liquidation, business rescue creditors may also be ranked accordingly with regards to pay-outs.[186] "This portion should be divided into the effect or pre-commencement debt and then the priority of post-commencement debt".[187]

Section 135 of the Act stipulates the order and ranking of claims in business rescue[188] which provides that post-commencement financiers[189] enjoy a preferent status and this finance will form part of the administration costs of the business rescue procedure.[190] Section 135(3)(b) however, does not make a clear distinction whether or not secured post-commencement financiers will rank ahead of claims of unsecured post-commencement financiers.[191] The Act states that post-commencement financiers will

184 Seligson M (n 4) at 4.
185 The Oxford Dictionary of Law.
186 Le Roux I & Duncan K "The naked truth: creditor understanding of business rescue: A small business perspective" 2013 *SAJESBM* 57 at 59.
187 *Ibid*.
188 Section 135(3) of the Act.
189 These are investors which take a risk by investing money in a company that is undergoing business rescue.
190 Levenstein, E & Barnett, L. In business rescue, where do you rank? http://www.werksmans.com/legal-briefs-view/in-business-rescue-wheredo-you-rank/ [Date of access 08/02/2020].
191 *Ibid*.

enjoy preference "in the order in which it was incurred over all unsecured claims" of the company.[192]

Section 135 of the Act states:

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

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

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

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated in 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 expenses 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 of 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.

192 Barnett L & Levenstein E "Where you stand in the Business Rescue queue" 2013 *Without Prejudice* at 10.

(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".[193]

In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another*[194] the court carefully considered together with Section 135 of the Act the ranking of creditors whereby Kgomo J states unambiguously that creditors rank in the following order of preference during business rescue proceedings:

(i) Payment of the practitioner's remuneration and expenses as stipulated in section 143 of the Act and other claims arising out of the costs/disbursements;[195]

(ii) "Claims by all employees who have worked since the commence of the proceedings for any remuneration, reimbursement for expenses, or other amounts of money relating to employment, which becomes due and payable by a company to an employee during the proceedings";[196]

(iii) Claims by secured lenders or creditors for any loan or supply made after the commencement of the proceedings (that is secured post-commencement financiers);[197]

(iv) Claims by unsecured lenders or creditors for any loan or supply made after the commencement of the proceedings (that is unsecured post-commencement financiers;[198]

(v) Claims by secured lenders of creditors for any loan or supply made before the commencement of the proceedings; [199]

(vi) Claims by employees for remuneration, reimbursement for expenses, or other amounts of money relating to employment, which becomes due and payable

193 Section 135 of the Act.
194 (13/12406) [2013] ZAGPJHC 109 (10 May 2013).
195 *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (n 196) at 21.
196 *Ibid*.
197 *Ibid*.
198 *Ibid*.
199 *Ibid*.

by a company to an employee prior to the commencement of the proceedings;[200] and

(vii) Claims by unsecured lenders or creditors for any loan or supply made before the commencement of the proceedings.[201]

One can deduct from the above list that claims of secured creditors prior to the commencement of business rescue proceedings do not enjoy preference over the ranking of claims of secured and unsecured post-commencement financiers.[202]

Employees who render a service to the company after the commencement of business rescue proceedings are ranked before post-commencement finance.[203] Next are the secured creditors "in order in which they were incurred".[204] "A secured creditor is ranked on the same level and will benefit from its security depending on the extent of its realisation of the underlying asset/s".[205] Creditors who provided finance to the company after the commencement of business rescue proceedings are considered to be unsecured and next ranked, in the order in which the claims were incurred, "thus ranking below rescue costs and secured creditors but above all other creditors, including 'preferent' creditors".[206]

In a more recent case, the matter concerned whether a business rescue practitioner enjoys a "super preference" over all creditors, whether secured or not during liquidation proceedings. In *Diener N.O. v Minister of Justice and Others*[207] the applicant who was the business rescue practitioner brought an application against the Minister of Justice, The Master of the High Court of South Africa, the joint liquidators of the estate at issue and the estates only secure creditor FirstRand Bank Limited.[208] JD Bester Labour Brokers were placed voluntarily under business rescue whereby the applicant Mr. Diener was appointed as the practitioner for the company. After the commencement of the proceedings but before the applicant was appointed as the practitioner, JD Bester

200 *Ibid*.
201 *Ibid*.
202 *Ibid*.
203 Le Roux I & Duncan K (n 186) at 59.
204 Le Roux I & Duncan K (n 186) at 61.
205 *Ibid*.
206 *Ibid*.
207 2019 (4) SA 374 (CC).
208 *Ibid*.

instructed Cawood Attorneys to launch an urgent application against FirstRand Bank, a secured creditor, to stay the sale in execution of JD Besters immovable property as it was JB Besters only asset of value, in which the order to this effect was granted.[209] Cawood Attorneys submitted its account for the services rendered to the applicant, in which the applicant went on to claim as one of the expenses incurred in the proceedings.[210]

The applicant instructed Cawood Attorneys to bring an application to convert the proceedings into liquidation proceedings.[211] The applicant provided the joint liquidators with his account and Cawood Attorneys account for services rendered.[212] The liquidators could not agree whether the practitioner's remuneration should be given preference.[213] The matter was referred to the Master whereby the Master held that the applicant was required to prove a claim in the estate of JD Bester.

The applicant challenged the decision of the Master by making an application the High Court whereby the High Court held that section 135(4) of the Companies Act must be read with section 97 of the Insolvency Act. On this reading, the court found that remuneration of the business rescue practitioner and the expenses incurred during business rescue proceedings, to the extent that these have not been paid during business rescue proceedings and during liquidation, can be paid only after the costs set out in section 97 have been paid. The action was dismissed.[214]

The applicant approached the Supreme Court of Appeal where he argued that the claim for remuneration by a business rescue practitioner was not a concurrent claim, but a special class of claim created by section 135 of the Companies Act. He argued that it enjoys a special and novel preference and that it grants the business rescue practitioner security over all assets, even above securities existing when the business rescue practitioner takes office. He submitted further that the position created by the Companies Act for the remuneration and expenses of the business rescue practitioner places the

209 *Ibid*.
210 *Ibid*.
211 *Ibid*.
212 *Ibid*.
213 *Ibid*.
214 *Ibid*; Kubhela N The ranking of the business rescue practitioner's claim in liquidation proceedings http://www.derebus.org.za/the-ranking-of-the-business-rescue-practitioners-claim-in-liquidation-proceedings/ [Date of access 09/02/2020].

business rescue practitioner in a more favourable position than the best position that can be occupied by a secured creditor.[215] The Supreme Court of Appeal held that it is only section 135(4) of the Companies Act that is concerned with the consequences of a failed business rescue, retaining the preferences created in respect of post-commencement finance on liquidation, subject only to the costs of liquidation. It held that section 135(4), says nothing of the super preference contended for over secured assets. The Supreme Court of Appeal further held that section 143, is also not concerned with liquidation. It held that this section regulated the business rescue practitioner's right to remuneration during business rescue proceedings. It concerns the tariff in terms of which business rescue practitioners are remunerated, the additional contingency-based remuneration that the business rescue practitioner may negotiate, and the business rescue practitioner's claim for unpaid remuneration, which ranks in priority before the claims of all other secured and unsecured creditors. The Supreme Court found that sections 135(4) and 143(5), whether taken individually or in tandem, do not create the super preference contended for by Mr Diener. The appeal was, therefore, dismissed.[216]

The applicant took the matter to the Constitutional Court whereby the Constitutional Court held that: that unlike section 89(1) of the Insolvency Act, section 135(4) of the Companies Act makes no reference to using secured assets to pay the practitioner. In contrast to sections 135(4) and 89(1), in much clearer terms, creates a preference over secured assets for the costs of liquidation. The Constitutional Court further held that the effect of super preference is that the claim for remuneration of the business rescue practitioner would rank ahead of the costs of liquidation. The business rescue practitioner would also enjoy preference over secured creditors even if a court, on challenge to a director's resolution to institute business rescue proceedings, set aside that resolution and were to grant an order placing the company in liquidation. The Constitutional Court held that there is nothing in the Companies Act, or anywhere else, which would suggest that the legislature had intended the rights of secured creditors to be diluted where liquidation of the company supersedes business rescue proceedings through the ranking in preference of the business rescue practitioner's remuneration and expenses, above the claims of secured creditors. The Constitutional Court dismissed the appeal.[217]

215 *Ibid*.
216 *Ibid*.
217 *Ibid*.

This court has laid down a settled principle in company law in that the remuneration of a business rescue practitioner will not take preference over secure claims in event the business rescue proceedings are converted to liquidation. Such business rescue practitioner will have to prove his claim against the insolvent estate as would all creditors in terms of section 44 of the Insolvency Act.[218] "To hold security, the business rescue practitioners will be required to secure their claims by way of a guarantee or surety with the shareholders of a financially distressed company".[219]

3.3 The ranking of SARS claims during liquidation proceedings

SARS enjoys the status of preferent creditor during insolvency or liquidation procedures, which thus gives SARS an *"automatic legislative entrance"* to be a creditor whose claim ranks high.[220] Section 96 – 103 of the Insolvency Act 24 of 1936[221] sets out the ranking of creditors during the liquidation process as follows:[222]

(i) "The costs and expenses of the liquidator must be paid before any other class of creditors";[223]

(ii) "Secured creditors hold the benefit of a security interest over some of the assets of a company and are first in line to receive a share of the proceeds after some of the expenses have been paid";[224]

(iii) "Preferent creditors are entitled in the event of insolvency to receive a preferential right to payment after the secured creditors".[225] "The preferent creditors are paid from the proceeds of unencumbered assets in an order which is set out in the Insolvency Act".[226] This class of creditors includes SARS, employees remuneration up to a certain

218 Kubhela N The ranking of the business rescue practitioner's claim in liquidation proceedings http://www.derebus.org.za/the-ranking-of-the-business-rescue-practitioners-claim-in-liquidation-proceedings/ [Date of access 09/02/2020].
219 *Ibid*.
220 Section 99 of the Insolvency Act 24 of 1936; Govender, R SARS to play active role in rescue of businesses https://www.iol.co.za/business-report/economy/sars-to-play-active-role-in-rescue-of-businesses-1501385 [Date of access 31/07/2019].
221 Hereinafter referred to as the Insolvency Act.
222 Section 96-103 of the Insolvency Act.
223 Section 96-98 of the Insolvency Act.
224 Section 99-102 of the Insolvency Act.
225 Govender R SARS to play active role in rescue of businesses https://www.iol.co.za/business-report/economy/sars-to-play-active-role-in-rescue-of-businesses-1501385 [Date of access 31/07/2019].
226 Section 99-102 of the Insolvency Act.

prescribed amount and an individual holding a general notarial bond ranks the lowest.[227]

(iv) The concurrent creditors are last in line whereby they are ranked equally in which the remainder of the proceeds will be paid to such creditors.

As SARS is a preferent creditor during the liquidation process or winding up of an estate, it has often left the rest of the estate with very little to nothing to distribute to the concurrent creditors.[228] It is for this reason why various case law has been rising since the inception of business rescue.[229] SARS being a preferent creditor during the liquidation process does not automatically mean that the same status will apply during business rescue proceedings.[230]

3.3 The ranking of SARS claims during business rescue proceedings

Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration [231] caused a great commotion concerning SARS and business rescue, whereby the business rescue practitioners had sought an extension for the submission of their proposed business rescue plan, but at the meeting with the creditors, SARS insisted that it should be ranked as a preferent creditor and that the "business rescue practitioners should accordingly take into account SARS' attitude based on the additional weight it would carry as a creditor".[232] The business rescue practitioners refused to consider SARS statements. They insisted that they had taken senior counsel's advice to the effect that the classification of creditors as per the Insolvency Act was not applicable in the Act, which contains no statutory preferences such as are found in the Insolvency Act.[233]

SARS applied to Court for an order declaring the decision taken by the business rescue practitioners at the creditor's meeting unlawful and invalid to approve the business

227 Pretorius AR *The rights and obligations of the South African Revenue Service in a business rescue process* (LLM 2015 University of North West) at 15.
228 *Ibid*.
229 *Ibid*.
230 *Ibid*.
231 *Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration* WC HC 15080/12 October 2012.
232 SAICA at https://www.saica.co.za/integritax/2174._SARS_and_business_rescue.htm.
233 *Ibid*.

rescue plan.[234] SARS further sought to interdict the business rescue practitioners from distributing any monies of the company pursuant to the business rescue plan.[235] Following this SARS requested the Court to declare that the business rescue practitioners must put the company into liquidation.[236]

The legal issue in question was the interpretation of section 145(4)*(a)* and *(b)* of the Act, which stipulates that:

> "145(4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors" voting interests-
>
> (a) "a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and
> (b) a concurrent creditor who would be subordinated in liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount if any, that the creditor could reasonably expect to receive in such liquidation of the company.''[237]

SARS' argued that its status as a preferent creditor under section 99 of the Insolvency Act meant that its claims would rank above ordinary concurrent creditors under section 103 of the Insolvency Act.[238] "It is an unsecured creditor in section 145 and had a voting interest at the creditors meeting equal to the value of its claim against the company".[239] SARS further argued that ordinary concurrent creditors under section 103 of the Insolvency Act "are included in the class of concurrent creditors who would be subordinated in a liquidation".[240] In essence, SARS prospect was to be considered a preferent unsecured creditor under section 145(4)*(a)* of the Act and to have a voting interest equal to the value of its claim.[241] The remainder of the non-preferent concurrent creditors would have been disenfranchised concurrent creditors in terms of the provisions of section 145(4)(*b*). In the event of SARS being treated as

234 *Ibid*.
235 *Ibid*.
236 *Ibid*.
237 Section 145(4)*(a)* & *(b)* of the Act.
238 SAICA at https://www.saica.co.za/integritax/2174._SARS_and_business_rescue.htm.
239 *Ibid.*
240 *Ibid*.
241 *Ibid*.

a preferent concurrent creditor, the SARS vote would have carried the "day and the business rescue plan would have been rejected at the meeting, contrary to the wishes of the majority of the company's creditors".[242]

Judge Fourie's view was that "SARS' construction was not only contrary to the ordinary grammatical meaning of the words but also led to an illogical result that failed to balance the rights and interests of the relevant stakeholders".[243] The court further held that no statutory preferences were created under the Act, and the legislature had been to confer such a preference on SARS in business rescue proceedings, it would have made such intention clear.[244] SARS is not, by virtue of its preferent status in section 99 of the Insolvency Act, a preferent creditor under business rescue proceedings in terms of Chapter 6 of the Companies Act.[245]

Judge Fourie held the aforesaid as follows:

> "However, no statutory preferences are created in Chapter 6 of the Companies Act (71 of 2008) such as are contained in Sections 96–102 of the Insolvency Act (24 of 1936). I would have expected that, if the legislature intended to confer a preference on SARS in business rescue proceedings, it would have made such intention clear. This could easily have been done, but no trace of such an intention on the part of the legislature is found in the Act. In my view, the language of the aforesaid provisions of the Companies Act (71 of 2008), read in context, and having regard to the purpose of business rescue proceedings, justifies only one conclusion, namely that SARS is not, by its preferent status conferred by Section 99 of the Insolvency Act (24 of 1936), a preferent creditor for purposes of business rescue proceedings under the Act."[246]

242 *Ibid*.
243 *Ibid.*
244 *Ibid*.
245 SAICA at https://www.saica.co.za/integritax/2174._SARS_and_business_rescue.htm.
246 *Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration* WC HC 15080/12 October 2012.

Judge Fourie referred to Delport[247] about the notion of a preferent creditor "whose claim is not secured, but who ranks above the claims of concurrent creditors".[248] What is being referred to here is those who have the statutory preferences in section 96 to section 102 of the Insolvency Act.[249] Judge Fourie considered the argument put forward by Delport which was the same interpretation as that put forward by SARS.[250] Judge Fourie noted that Delport accepted that "this interpretation that a concurrent creditor who would be subordinated in liquidation in terms of section 145(4)*(b)* of the Companies Act would be grossly unfair to the concurrent creditors".[251] Judge Fourie held that as per his knowledge "the ordinary meaning of the concept of subordination meant that a creditor's claim that was subject to subordination or back ranking agreement, was what is being considered in subparagraph (b)".[252] it was further held that in his view section 144(2) of the Act did not lend any support for the interpretation contended for by Henochsberg.[253]

The judgment in *Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration* is the first step to clarify the position of SARS in business rescue proceedings,[254] and thus accordingly, "SARS would enjoy no greater voting interest in comparison to other concurrent creditors of the company with the result that there is no basis on which to impeach the voting procedure that had been followed by the business rescue practitioners".[255]

3.4 Conclusion

A company that is undergoing business rescue proceedings is not 100% certain as to whether the business rescue plan will bring the company in a state of solvency or pay

247 Delport in Delport PA *et a*l (2019) *Henochsberg on the Companies Act 71 of 2008* Loose leaf ed LexisNexis Durban.
248 SAICA at https://www.saica.co.za/integritax/2174._SARS_and_business_rescue.htm.
249 *Ibid*.
250 *Ibid*.
251 *Ibid*.
252 *Ibid*.
253 *Ibid*.
254 Govender, R SARS to play active role in rescue of businesses https://www.iol.co.za/business-report/economy/sars-to-play-active-role-in-rescue-of-businesses-1501385 [Date of access 31/07/2019].
255 SAICA at https://www.saica.co.za/integritax/2174._SARS_and_business_rescue.htm.

all of its creditors.[256] Section 135 of the Act stipulates the order and ranking of claims in business rescue. In terms of this section, post-commencement financiers are preferred in the order and preference created by the Act.[257] In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* Kgomo J stated in unequivocal terms that creditors ranked in the aforementioned order of preference during business rescue proceedings. This list makes it clear that the "claims of secured lenders prior to business rescue proceedings rank after the claims of both secured and unsecured post-commencement financiers".[258] Post-commencement financiers can thus seek comfort in that the court in *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* has at least for now, settled the much-debated position of the ranking of creditors who hold security for their claims prior to the commencement of business rescue proceedings.[259]

In the matter of *Diener N.O. v Minister of Justice and Others,* the court had to ascertain whether the fees of a business rescue practitioner enjoyed a "super preference" in respect of claims that are to be paid out. The matter went to the High Court, the Supreme Court whereby it reached the Constitutional Court whereby it was found by the court that there was no way that the interpretation contended for by the applicant would be tenable. The Constitutional Court, therefore, dismissed the appeal.[260]

The position of SARS in business rescue proceedings has been confirmed in *Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration* in which Judge Fourie held that SARS is to be treated and ranked as a concurrent creditor when a company is undergoing business rescue proceedings.[261] Pretorius is of the opinion that SARS is rated differently when a company undergoes business rescue, in the manner that whereby SARS is considered a concurrent creditor, it gives a

256 Pretorius AR (n 227) at 23.
257 Levenstein, E & Barnett, L. In business rescue, where do you rank? http://www.werksmans.com/legal-briefs-view/in-business-rescue-wheredo-you-rank/ [Date of access 08/02/2020].
258 *Ibid*.
259 *Ibid*.
260 *Diener N.O. v Minister of Justice and Others* 2019 (4) SA 374 (CC).
261 *Commissioner for SARS v Beginsel NO and Makhuba Transport in Administration* WC HC 15080/12 October 2012.

financially distressed company a breathing space to get back to a financially suitable position, without having to pay SARS its share first with money the company don't have.[262] If SARS was afforded the preferent creditor status, SARS would receive its full payment, just after secured creditors, and before any other creditors.[263]

Chapter four: Analysis of business rescue and Tax laws: United Kingdom and Australia

4.1 Introduction

262 Pretorius AR (n 227) at 24.
263 *Ibid*.

The impact of globalisation has determined the pace of jurisdictions moving away from liquidations to business rescues processes.[264] The last two or three decades have seen countries overhaul their legal systems to assist financially struggling companies as opposed to closing them.[265]

Australia and South Africa have a lot of aspects in common, from sport to the weather, but most importantly the two countries also share a lot in terms of the legal terms as it shares Anglo heritage and more specifically company law.[266] We may have similar legislation, but the legislation does not operate similarly as social conditions and a different commercial environment should be taken into consideration.[267] When faced with difficulty in respect of South African company law, we generally turn to comparable legal systems for guidance.[268] This chapter will draw an analysis between Australian and English regimes of business rescue.

4.2 Australia

The Australian provisions which regulate corporate insolvency and business rescue are likely to be the closest provisions to the present business rescue mechanisms utilized in South Africa.[269] Australia's influence on business rescue derived from the United States Chapter 11 and of its Bankruptcy Code.[270] Museta is of the opinion that these influences derived in the form of corporate theories that promote insolvency law as social benefit reflecting society's interests in the insolvent entity and that community interest are consistently represented.[271] The second is viewing insolvency from an economic perspective; in this instance insolvency provides a means to maximise the methods of collecting debt owed by creditors.[272] The evaluation of the theories, official

264 Darko-Mamphey D (n 26) at 37.
265 *Ibid*.
266 Anderson C, "Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective" 2008 *PERJ* 104 at 104.
267 *Ibid*.
268 Loubser A "Business recuse in South Africa: a procedure in search of a home?" 2007 *Comparative and International Law Journal of Southern Africa* at 163.
269 Magardie OMI (n 83) at 36.
270 Museta GM (n 56) at 49.
271 Museta GM (n 56) at 49-50.
272 Museta GM (n 56) at 50.

management created the opportunity for the aims of the theories to be achieved in the form of business rescue utilized in Australia.[273]

4.2.1 Official management

Official management was introduced in respect of the enactment of uniform legislation in the 1960's[274] whereby the main features included the following:

(i) "A temporary moratorium in which the legal proceedings could be taken against the company only where there was leave of the court";[275]
(ii) "There was a transfer of management functions during that period, whereby an official manager would be appointed that would attempt to restore the company to a more productive state";[276]
(iii) "Unsecured creditors would have to wait for the distribution of their money";[277] and
(iv) "The decision to place a company under official management was a majority decision that became binding upon the minority of the creditors".[278]

An inquiry into the developments in bankruptcy and company law practice, in particular, the Cork Report conducted by the United Kingdom Insolvency Law Review Committee was conducted by the Australian Law Reform Commission.[279] Upon completion of the inquiry a Harmer Report was issued, the report found that the legislative approach that Australia had maintained in respect of insolvency was conservative and placed little focus on positively encouraging the possible preservation of the business and employed staff to regain financial stability.[280] Furthermore, it was found that a more constructive and practically effective approach to give the company breathing space from its creditors and allow an orderly administration in which the affected parties could make an informed decision to consider whether or not to wind-up the company or to

273 *Ibid*.
274 Ford HAJ and RP Austin (1990) *Principals of Company Law* 5th ed. Butterworths Sydney at 550.
275 *Ibid*.
276 *Ibid*.
277 *Ibid*.
278 *Ibid*.
279 Museta GM (n 56) at 49.
280 Museta GM (n 56) at 50.

seek the continuance of the corporate entity, needed to be employed.[281] This would generally come in the form of legislation that would encourage steps at ab early stage and create a considerable advantage over the current procedures in place that were available to companies.[282] Thus this led to a proposal to resolve the deficiencies but due to the lack of use and success, official management was abolished by the Corporate Reform Act of 1992.[283]

Australia made use of official management which was an alternative to liquidation.[284] Official management was a form of administration that was adopted from judicial management.[285] However in 1993 following an agreement that official management was not an effective mechanism, Australia passed the Corporate Law Reform Act[286], which repealed the legislation that created official management and replaced it with voluntary administration.[287] Official management was activated by a resolution of the company's creditors in which they could be placed under the control of an insolvency practitioner for a period of up to three years during which time a general moratorium operates.[288] Sealy[289] is of the opinion that despite official management's relative informality and lack of expense, it never gained popularity because the only purpose for which the procedure could be invoked was the unrealistic one of paying in full, within a predetermined time, all the company's outstanding debts.[290]

Official management faced the same faith as judicial management and was replaced with voluntary administration.[291]

4.2.2 Voluntary administration

281 *Ibid*.
282 Anderson C & Morrison (2003) *Corporate Voluntary Administration* 3rd ed Thomson Lawbook Sydney at 7.
283 Anderson & Morrison (n 243) at 5.
284 Magardie OMI (n 83) at 37.
285 In respect of South African law.
286 Of 1992.
287 Rajak and Henning "Business Rescue for South Africa"1999 *SALJ* at 263.
288 *Ibid*.
289 Darko-Mamphey D (n 26) at 39.
290 Rajak and Henning (n 264) at 263.
291 *Ibid*.

Voluntary administration procedure was included in the Corporate Law Reform Act enacting the relevant provisions as Part 5.3A of the Corporations Law Act which is a federal law in Australia.[292] The intention of the legislator in enacting voluntary administration was to establish a system that is capable of swift implementation, uncomplicated, cost-effective and that is flexible.[293] The objectives of corporate rehabilitation in Australia state that voluntary administration should ensure that the business, property, and affairs of the company to be administered maximise as much as possible the chances of the company continuing existence and have a better return for the company's creditors and members than having the result of immediate winding up.[294]

4.2.3 Appointment of the administrator

The process of voluntary administration is set off by the appointment of an administrator.[295] The administrator may be appointed in three ways to take over the affairs of the company.[296] Firstly, the appointment is made by the board of directors if it is of the opinion that the company is insolvent or is likely to become insolvent at a time in the future.[297] Secondly, an appointment may be made by a liquidator or provisional liquidator of the company in writing if he or she thinks that the company is or will become insolvent.[298] There is however a limitation on the liquidator in that if he or she wishes to appoint him or herself such liquidator is to obtain leave of the court.[299] Thirdly, an appointment may be made by a secured creditor who has a "charge"[300] over

292 Darko-Mamphey D (n 26) at 39.
293 Darko-Mamphey D (n 26) at 40.
294 Section 435A of the Corporations Act 2001.
295 The administrator must be a registered liquidator as per Section 448B of the Corporations Act 2001.
296 Darko-Mamphey D (n 26) at 44.
297 Section 436A (1) of the Corporations Act 2001.
298 Section 436B (1) of the Corporations Act 2001.
299 See in this regard the case of *Deputy Commissioner of Taxation v Foodcorp Pty Ltd* 1994 12 ACLC 508 where the court allowed the appointment of the liquidator as the administrator for the company.
300 The Oxford Dictionary of Law 2001 74 defines a "charge" as an interest in company property created in favour of a creditor example as a debenture holder, to secure the amount owing. A fixed charge is attached to specific assets while preventing the company from dealing freely with those assets without the consent of the lender. A floating charge does not immediately attach to any specific assets but 'floats' over all the company's assets until crystallization. In the event of the company not paying the debt the creditor can secure the amount owing in accordance with the terms of the charge. The Australian legislation sometimes uses the term "charge" rather than the more generic "secured creditor".

the whole or substantially the whole of the company's property if the secured creditor is entitled to enforce the charge.[301]

The three ways discussed above are the only ways in which an administrator may be appointed and once he or she is appointed, the administrator may only be removed at the first meeting of the creditors[302] or by the court.[303] A written consent[304] to be appointed as an administrator is mandatory and must be submitted to the Australian Securities and Investments Commission[305] by the end of the first business day after the appointment.[306] A written notice must be given to other parties not involved in the appointment of the administrator, that is, the company if not the appointer and any charge holder whose charge covers the whole or substantially the whole of the assets of the company if not the appointer[307] and must be published in appropriate newspapers within three business days.[308]

4.2.4 The powers and duties of the administrator

The administrator is provided with wide powers such as

- to control the company's business, property and affairs in the course of voluntary administration;
- to control the financial affairs of the company;
- terminating or disposing of all or part of the business or property; and
- performing and exercising all the functions and powers of the company or its officers.[309]

In addition to the above, the administrator is required to submit a report to the ASIC about past or present officers of the company who may have committed any offence

301 Section 436C (1) of the Corporations Act of 2001.
302 Section 436E of the Corporations Act of 2001.
303 Section 447B or the Corporations Act of 2001.
304 Section 448A of the Corporations Act of 2001 stipulates that the administrator must consent to his or her appointment before notice of the appointment is lodged with the Australian Securities and Investments Commission.
305 Hereinafter referred to as the ASIC.
306 Section 450A of the Corporations Act of 2001.
307 *Ibid.*
308 *Ibid.*
309 Section 437A of the Corporations Act of 2001.

that contributed to the insolvency of the company.[310] The report must contain any evidence regarding any officer of the company committing such offence.[311] To keep the creditors informed, the administrator is required to call the first meeting of creditors within five business days[312] of his or her appointment to consider the appointment of a committee of creditors.[313]

4.2.5 The moratorium

As with all other corporate rescue procedures, the moratorium is designed to give the company breathing space to allow the stakeholders to work out plans to rescue the business.[314] One of the effects of the appointment of an administrator is the triggering of a moratorium in the course of voluntary administration which amongst other things prevents the company from being wound up, prevents charges being enforced, prevents an owner or lessor recovering property which is being used by the company, prevents proceedings being commenced or continued against the company and any enforcement action in relation to proceedings already instituted.[315]

There are, however, exceptions to the application of the moratorium in which the specific persons will not be bound by the moratorium:

- "A holder of a charge over the whole or a substantial amount of the assets of the company acts before or during the decision period and enforces the charge in relation to all property of the company subject to the charge";[316]
- "A secured creditor holding a charge has entered into possession or assumed control of the property of the company or has entered into an agreement to sell such property or made arrangements for such property to be offered for sale by public auction or has exercised any other power in relation to such property;"[317]

310 Darko-Mamphey D (n 26) at 48.
311 *Ibid.*
312 Section 436E of the Corporations Act of 2001.
313 The initial timing of the meeting of creditors and the administrator which must be held within five business days as stipulated in section 436E has now been changed with the meeting now to be held within eight business days as stipulated in Corporations Amendment (Insolvency) Act 2007 Schedule 4.
314 Darko-Mamphey D (n 26) at 52.
315 See generally sections 440D, 440G, 440F of the Corporations Act of 2001.
316 Section 441A of the Corporations Act of 2001.
317 Section 441B of the Corporations Act of 2001.

- "A secured creditor who holds a charge over perishable property or an owner of such property where the company is under administration:;[318] and
- "Owners or lessors of property used, occupied by or in the possession of the company who have enforced a right to take possession of the property prior to administrator`s appointment".[319]

4.2.6 Termination of the voluntary administration process

The voluntary administration process will be terminated where the events mentioned in section 435C (2) or section 435C (3) occur after the commencement.[320] Section 435C (2) describes the normal outcome of the administration of a company where a deed of a company arrangement is executed by both the company and the deed`s administrator or alternatively the company`s creditors resolve under section 439C (b) that the administration should end.[321] In terms of section 435C (3) the administration of a company may also end as a result of the court orders under section 447A, or the convening period coming[322] to an end.[323] to arrange for the debt to be paid over a period of time in smaller amounts.[324]

4.2.7 Creditor preference

A long-standing principle in insolvency law is that the proceeds from preference recoveries are available for distribution in accordance with the statutory priorities as set out in section 556 of the Corporations Act.[325] Assets distributed under section 556 of the Corporations Act is called "free assets" of the company as these assets is not subject to any security.[326] The first priority payment from the free assets is the payment of the expenses of winding up, after those expenses are paid, the payment of

318 Section 441C of the Corporations Act of 2001.
319 Section 441F of the Corporations Act of 2001,
320 Section 435C of the Corporations Act of 2001.
321 *Ibid.*
322 Section 439 A (5) (a)- the convening period if the administration begins on a day that is in December, or is less than 28 days before Good Friday – the period of 28 days beginning on that day; or otherwise the period of 21 days beginning on the day when the administration begins.
323 Section 435C of the Corporations Act of 2001.
324 *Ibid*.
325 Wangmann K "The free assets of the company and when they are free to take equitable subrogation and the secured creditor" 2015 *Melbourne University Law Review* 1 at 2.
326 *Ibid*.

employees' wages is next followed by, superannuation contributions, workers compensation, leave entitlements and retirement payments.[327] When all priority debts have been paid, any remaining assets may be distributed to all unsecured creditors in accordance with the pari passu principle enshrined in section 555 of the Corporations Act.[328]

4.2.8 Ranking of the Australian Taxation Office in voluntary administration process

The Australian Tax Office[329] is a creditor in the voluntary administration process, it however classified to be different from the other creditors as a result of ATO being classified as a powerful creditor who can demand payment of tax from an owing party.[330] The ATO may insist on the tax debt to be paid by the directors of the company undergoing voluntary administration.[331] However, the ATO may enter into negotiations to arrange for the tax debt to be paid over a period of time.[332]

A Deed of Company Arrangement[333] is similar to South Africa's business rescue plan.[334] DOCA "is a contract between the company and its creditors to allow the company to restructure and trade itself out of its financial problems".[335] All outstanding debts due to the ATO are treated in the same manner as the other creditors in voluntary administration since the priority of tax liabilities were revoked in 1993.[336] Once the terms are set out in the DOCA, the ATO has to accept those terms if said terms are accepted by more than 50% of the creditors.[337] As a result of the aforesaid, the directors of a company undergoing voluntary administration tend to sometimes misuse the DOCA, but the ATO will resist the application thereof in some cases.[338]

327 Section 556 (1)(e) of the Corporations Act.
328 Wangmann K (n 321) at 2.
329 Hereinafter referred to as ATO.
330 Pretorius AR (n 227) at 54.
331 *Ibid*.
332 *Ibid*.
333 Hereinafter referred to as DOCA.
334 Pretorius AR (n 227) at 43.
335 *Ibid*.
336 Pretorius AR (n 227) at 44.
337 *Ibid*.
338 *Ibid*.

Section 555 of the Corporations Act states the following:

> "Except as otherwise provided by this Corporations Act 2001 all debts and claims proved in a winding-up rank equally and, if the property of the company is insufficient to meet them in full, it must be paid proportionately".

The ATO is concerned about the provisions of the Corporations Act being misused by companies undergoing voluntary administration to avoid paying its tax debts as well as sufficient dividends to other creditors.[339] The ATO enjoyed preference until 1993, but now the only claim the ATO has which has a preferential status is unpaid superannuation guarantee charges,[340] but since 1993, the ATO has ranked equally with other unsecured creditors in the voluntary administration process.[341]

4.3 United Kingdom

The Insolvency Act of 1986 presently regulating insolvency law in the United Kingdom[342] was the cause of an in-depth investigation into aspects pertaining to insolvency law that began in 1977 with the appointment of a committee to undertake a complete review of insolvency law which includes corporate insolvency law.[343] The Insolvency Law Review Committee submitted its report which contained several recommendations for changes within the English insolvency law to Parliament in 1982.[344] The Cork Report held that many cases of insolvency companies that could have potentially been rescued had been forced into liquidation as a result of not having fitting rescue procedures available to them.[345] The Cork Report further proposed the introduction of new corporate rescue procedures to assist companies that are undergoing financial difficulties with the appointment of an administrator who would

339 O'Flynn, K & Mainsbridge, R. Voluntary administration: The Australian experience [Online] Available: https://www.claytonutz.com/docs/VoluntaryAdministration_TheAustralianExperience.pdf. [Date of access 08/02/2020]
340 Pretorius AR (n 227) at 46.
341 O'Flynn, K & Mainsbridge, R. Voluntary administration: The Australian experience [Online] Available: https://www.claytonutz.com/docs/VoluntaryAdministration_TheAustralianExperience.pdf. [Date of access 08/02/2020]
342 Hereinafter referred to as the UK.
343 Loubser A (n 54) at 164.
344 *Report of the Review Committee on Insolvency Law and Practice* Cmnd 8558 (1982), hereafter referred to as the Cork Report.
345 Cork Report (n 291) at paragraph 493.

have wide powers normally conferred upon a receiver and manager appointed under a floating charge.[346] The recommendations of the Cork Report resulted in the introduction of a new formal corporate rescue procedure, the administration order procedure regulated by Part II of the Insolvency Act of 1983.[347] However, the administration order procedure was criticised for being complex and expensive with the focus being on the latter in that it was unsuitable for small to medium-sized companies.[348] A White Paper was published in July 2001 setting out the need for reform to the administration procedure which in turn followed by the Enterprise Act of 2002 which substantially replaced the provisions in the Insolvency Act of 1986 which regulated the administration procedure.[349]

4.3.1 Administration

As a practitioner under business rescue, an administrator is defined as an individual who is appointed to manage the affairs, business and property of the company to bring the company to a better financial position.[350] A company would be "in administration" while the appointment of the administrator is in force but this does not cease to be so because of the vacation of his office by an administrator in the events of death, resignation or otherwise or if the administrator is removed from office.[351]

The objectives of the administration are as follows:

- The company should be rescued as a going concern;[352]
- Achieving a better result for the company's creditors as a whole as opposed to a result of the company were to be wound up (without being in administration);[353] or

346 Cork Report (n 291) at paragraph 497.
.347 Loubser A (n 54) at 165.
348 Loubser A (n 54) at 166.
349 *Ibid.*
350 Paragraph 1 of Schedule B1 to the Insolvency Act of 1986 inserted by the Enterprise Act of 2002; Loubser A (n 54) at 166.
351 Paragraph 1(2)(a) of Schedule B1 of the Insolvency Act of 1986; Loubser A (n 54) at 166.
352 Paragraph 3(1)(a) of Schedule B1 to the Insolvency Act of 1986.
353 Paragraph 3(1)(b) of Schedule B1 to the Insolvency Act of 1986.

- Disposing of property to make a distribution to one or more secure preferential creditors.[354]

It has been argued that the first objective of rescuing the company must be given priority unless the administrator believes it is not reasonably practicable or that the administration would achieve a better result for the company's creditors as a whole and that the interests of the creditors of the company as a whole will not be harmed.[355]

> "The administration is designed to fill a gap which previously existed in corporate insolvency law in that there was no mechanism by which a company could be put under outside management for the benefit of unsecured creditors and the company itself".[356]

There was no effective step that could be taken to safeguard the company and its assets from precipitate action by creditors, for example, a levy of execution, enforcement of security or putting the company into winding-up while steps were being taken to put the company back on its feet.[357]

4.3.2 Procedure to initiate administration

The administration procedure starts with the appointment of an administrator for the company that requires an independent party to be involved that will assist in rescuing the company.[358] There are three ways in which an individual may be appointed as an administrator of a company:

1. by an administration order of the court;[359]
2. by the holder of a floating charge;[360] or
3. by the company or its directors.[361]

When appointment of an administrator under paragraph 22 (by the company or its directors) must give at least 5 (five) business days prior written notice to any person

354 Paragraph 3(1)(c) of Schedule B1 to the Insolvency Act of 1986.
355 Darko-Mamphey D (n 26) at 63.
356 Darko-Mamphey D (n 26) at 64.
357 *Ibid*.
358 Paragraph 1(2)(b) of Schedule B1 to the Insolvency Act of 1986.
359 Paragraph 10 of Schedule B1 to the Insolvency Act of 1986.
360 Paragraph 14 of Schedule B1 to the Insolvency Act of 1986.
361 Paragraph 22 of Schedule B1 to the Insolvency Act of 1986.

entitled to appoint an administrative receiver of the company and must further give notice to any holder of a floating charge who is or may be entitled to appoint an administrator under paragraph 14 (by the holder of a floating charge).[362] The notice of intention to appoint the administrator has to identify the proposed administrator and Form 2.8B is required to be utilized.[363] Evidence of the administrators appointment such as the company's resolution or a record of the decision of the directors, for example a resolution, to make such appointment must accompany the notice[364] and must be filed with the court as soon as it can be done.[365]

> "The notice contains a mandatory statutory declaration to be made by or behalf of the person who proposes to make the appointment in which it is declared that the company it or is likely to become unable to pay its debts, and that so far as the person making the statement can ascertain, the appointment is not prevented by paragraph 23 to 25[366] and that the company is not in liquidation".[367]

4.3.3 Powers and duties of the administrator

The administrator has the duties of care, skill, and efficiency as well as speed in pursuing the functions entrusted to him or her.[368] The administrator must be qualified and experienced enough to execute his or her duties with the due diligence and care and not depart from the duties entrusted to him or her.[369] Preceding the appointment of the administrator he or she must take control of all assets including those that are distributed throughout the globe.[370]

4.3.4 The moratorium

362 Paragraph 26(1) of Schedule B1 to the Insolvency Act of 1986.
363 Paragraph 26(3) of Schedule B1 to the Insolvency Act of 1986.
364 Rule 2.22 of the Insolvency Rules.
365 Paragraph 27(1) of Schedule B1 to the Insolvency Act of 1986.
366 Paragraphs 23 to 25 of Schedule B1 to the Insolvency Act of 1986.
367 Paragraph 27(2) and (3) of Schedule B1 to the Insolvency Act 1986 requires that this declaration must accompany the copy of the notice filed with the court, but it actually forms part of the notice itself as prescribed in Form 2.8B. In terms of Rule 2.21 of the Insolvency Rules this statutory declaration may not be made more than five business days before the notice is filed with the court.
368 Paragraph 4 of Schedule B1 to the Insolvency Act of 1986.
369 Paragraph 4 of Schedule B1 to the Insolvency Act of 1986.
370 Museta GM (n 56) at 60.

The moratorium commences only once the company is placed under administration and although the definition of the word suggests for breathing space for the company, it does not postpone the payment of a debt owed but only protects the company from the creditors and other parties alike from enforcing their legal rights.[371] Creditors are prevented from taking enforcement action against the company or its assets during the rehabilitation period without the consent of the court; but the administrator may give consent for the enforcement action to be taken, the moratorium aims to give the company breathing space to allow survival prospects to be assessed.[372] Paragraph 43(6) of Schedule B1 states that "no legal process including legal proceedings, execution, distress, and diligence may be instituted or continued against the company or property of a company in administration except with the consent of the administrator or with leave of the court".[373]

In *Hudson and Others v Gambling Commission (Re Frankice (Golder Green) Ltd and Others*,[374] the companies were subject to licence reviews by the Gambling Commission (which wanted to investigate the conduct of the management prior to the administrators' appointment but the administrators did not want the Commission to undertake a review prior to the sale of the companies. They argued that if the reviews were allowed and the licences were withdrawn, the companies would not be able to trade lawfully.[375] The Commission did not accept that the review was barred as a "legal process" under the moratorium within the meaning of paragraph 43 of the Insolvency Act.[376] The court after taking all interests into account refused to allow the Commission to continue the review until after completion of the contracts of sale, thereby allowing the companies to be rescued and thereby saving the employees' jobs.[377] Most importantly, the decision, in this case, demonstrates that the objectives of saving

371 Lightman and Moss et al (2015) *The Law of Administrators and Receivers of Companies* Sweet & Maxwell London at 40.
372 Darko-Mamphey (n 25) at 70.
373 Paragraph 43(6) of Schedule B1 of the Insolvency Act of 1986.
374 2010 ALL ER (D) 59.
375 See generally *Hudson and Others v Gambling Commission (Re Frankice (Golder Green) Ltd and Others* 2010 ALL ER (D) 59.
376 *Ibid.*
377 *Ibid*.

business and employment should not be compromised by the interest of one particular stakeholder.[378]

4.3.5 Termination of administration

Termination of the administrator shall cease to have effect at the end of the period of one year beginning from the date on which the appointment takes affect but on the application of the administrator the court may order to extend his term of office for a specified period not exceeding six months.[379] Termination of the administration can be filed in the court by the administrator if the purpose of the administration has been achieved.[380] Where an improper motive in placing the company under administration is alleged, a creditor can apply to the court to have the administration stopped and the company placed under a winding-up order on a public interest petition.[381] The main reason why the appointment is seen to lapse automatically over a year is that it is seen as a temporary course of action that should grant the company support while the essentials for the actual rescue strategies are laid out, rather than being the rescue measure itself.[382]

4.3.6 Creditor preference

Before distribution to the creditors can be made, the administrator must ensure that all claims have been met in respect of employee's salaries due under contracts of employment and that all outstanding expenses of the administration and any liquidation that immediately preceded it has been paid.[383] The choice to pay any floating charges before or after the administrator distributes to the creditors is up to the administrator to decide.[384] The administrator will have to separate funds, one from assets subject to the floating charge and the other fund from the company's remaining assets.[385]

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378 Darko-Mamphey D (n 26) at 71.
379 Paragraph 76(1) of Schedule B1 of the Insolvency Act of 1986.
380 Paragraph 80 of Schedule B1 of the Insolvency Act of 1986.
381 Paragraph 81 of Schedule B1 of the Insolvency Act of 1986.
382 Keay AR and Walton P (2017) *Insolvency Law: Corporate and Personal* LexisNexis Bristol at 95.
383 Page 31
384 *Ibid*.
385 *Ibid*.

"The order of priority in which the various payments should be paid is as follows:

1. any outstanding sums by way of wages or salary due to employees whose contracts of employment the administrator has adopted;
2. any outstanding expenses of liquidation or provisional liquidation that immediately preceded the administration;
3. any sums payable in respect of any former administrators' remuneration and expenses;
4. any sums payable in respect of his own remuneration and expenses and any debts and liabilities of the administration;
5. preferential debts;
6. debts secured by a floating charge;
7. ordinary debts;
8. statutory interest;
9. non-provable liabilities/ postponed debts;
10. any balance remains with the company for distribution among shareholders".[386]

4.3.7 Tax implications

The Inland Revenue will deal with every administration order and voluntary arrangement on its own merits taking into account all know features of the case.[387] When deciding to vote, the Revenue will give consideration to amongst other things the manner in which the taxpayer has attended to its tax obligations, the level of uncertainty over assets and liabilities and whether a voluntary arrangement is the appropriate course for the Revenue to approve as a creditor.[388]

Prior to 2003, the HM Revenue and customs[389] was a preferential creditor for certain taxes, however, this arrangement was abolished after a record number of smaller

386 *Ibid*.
387 Du Toit L *Tax implications for business rescue in South African law* (LLM 2012 University of Pretoria) at 31.

388 *Ibid*.
389 Hereinafter referred to as the HMRC.

corporate entities began winding-up in the late 1990's raising a concern that the HMRC was pushing such companies into liquidation through its tax recovery activities.[390] Currently the HMRC is a non-preferential creditor ranked alongside unsecured creditors, such as suppliers, trade creditors, contractors and customers who, on average, rarely recover more than 4% of debts owed.[391] However, as losses to the exchequer from insolvency have increased, the government has decided that certain tax debts should be protected in insolvency proceedings; in particular, where taxes have been paid by employees and customers and are, effectively, being held by the business on behalf of HMRC.[392] The proposals suggest that, the HMRC will rank third just after secured creditors, such as banks, and insolvency practitioners in order to recover additional outstanding tax from failing businesses.[393] "The taxman's new 'third place' position in respect to employment taxes and national insurance contributions means that its claims will jump ahead of floating charges from secured creditors, such as debt provided by financial institutions".[394]

4.4 Conclusion

In contrast to South Africa's business rescue procedure, both Australia's and UK's corporate rescue procedure has the aim to preserve the company value by maximising the likelihood of the company continuing to remain in existence and regaining the financial capacity to continue as per usual.[395] In all three corporate systems provision is made for an independent rescue practitioner to be appointed and investigate the affairs of the financially distressed company whereby such a practitioner supervises such process for a limited time, whilst under the protection of a temporary moratorium to implement a rescue plan.[396] The tax offices in each jurisdiction hold similar preferences as discussed.

390 George Hay HMRC to get higher priority as creditor when firms go bust https://www.georgehay.co.uk/latest-news/hmrc-to-get-higher-priority-as-creditor-when-firms-go-bust/ [Date of access 09/02/2020].
391 *Ibid*.
392 *Ibid*.
393 *Ibid*.
394 *Ibid*.
395 Magardie OMI (n 83) at 41.
396 *Ibid.*

Chapter five: Conclusion

5.1 Concluding remarks

5.5.1 Introduction

This mini dissertation focused on the development of business rescue in South Africa with the focus being on creditor preferences and where SARS ranks in business rescue proceedings, with the focus being on the rights and obligations SARS holds as a concurrent creditor in business rescue proceedings. This chapter will provide a summary of the findings discussed throughout the mini dissertation.

5.5.2 Summary on findings

South African corporate law has developed from judicial management being the primary form of corporate rescue to business rescue. Judicial management had the option whereby the company may initiate proceedings as opposed to winding-up the company. The function of judicial management was to assist companies undergoing financial difficulties to recover and become a successful concern once again.

Judicial management under the 1973 Act has been critically evaluated several shortcomings were discovered and same was unravelled which whereby led to the enactment of business rescue under the Act. A comparative analysis was conducted to determine how corporate rescue mechanisms in the South African legislative system has improved.

In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another*[397] the court carefully considered together with Section 135 of the Act the ranking of creditors whereby Kgomo J states unambiguously that creditors rank in the following order of preference during business rescue proceedings:

- Fees and expenses (including legal and other professional fees) of the business rescue practitioner incurred during business rescue proceedings;[398]
- Fees of employee which become due and payable after the commencement of business rescue;[399]
- Secured lenders or creditors for any loan or supply made after the commencement of business rescue;[400]

397 (13/12406) [2013] ZAGPJHC 109 (10 May 2013).
398 Section 135(3) of the Act.
399 Section 135(3)(a) of the Act.
400 Section 135(3)(a)(i) and section 135(3)(b) of the Act.

- Unsecured lenders or creditors for any loan or supply made after the commencement of business rescue;[401]
- Secured lenders or creditors for any loan or supply made before the commencement of business rescue;[402]
- Claims of employee (for instance remuneration) which became due and owing prior to the commencement of business rescue;[403] and
- Unsecured lenders or creditors for any loan or supply made before the commencement of business rescue.[404]

The Constitutional Court in *Diener N.O. v Minister of Justice and Others* established the principle that the remuneration of a business rescue practitioner does not enjoy preference over secured claims, in event where business rescue proceedings fail, and a company is placed under business rescue. The business rescue practitioner will be required to prove his/her claim against the insolvent estate like all other creditors in terms of section 44 of the Insolvency Act.[405] To hold security, the business rescue practitioner will be required to secure their claims by way of a guarantee or surety with the shareholders of a financially distressed company.[406]

Commissioner of SARS v Beginsel No and Others[407] noted that SARS has done everything in its power to get the same status as in liquidation with business rescue proceedings no success.[408] The court held SARS holds the status of a concurrent creditor in business rescue proceedings. [409]

A brief overview was conducted between the different corporate rescue systems in Australia and the United Kingdom with specific reference to the procedure being

401 Section 135(3)(a)(ii) of the Act.
402 *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013).
403 *Ibid*.
404 *Ibid*.
405 Kubhela N The ranking of the business rescue practitioner's claim in liquidation proceedings http://www.derebus.org.za/the-ranking-of-the-business-rescue-practitioners-claim-in-liquidation-proceedings/ [Date of access 09/02/2020].
406 *Ibid*.
407 WC HC 15080/12 October 2012.
408 *Ibid*; Pretorius AR (n 227) at 53.
409 *Ibid*.

utilized, the appointment of an administrator, the powers and duties of the administrator and the termination of the procedure. Both the ATO and SARS enjoy concurrent creditor status with regard to outstanding tax debt.

5.5.3 Conclusion

There are a few anomalies with the ranking of claims under business rescue proceedings. Levenstein and Barnett are of the opinion that whilst *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* clears out one of the major aspects that have arisen with the interpretation of the ranking of claims under business rescue, there are further issues which need to be determined by our judicial system. One of such issue relates to whether or not the ranking created by the business rescue provisions under Chapter 6 of the Act, which remains in full force and effect even if the company undergoing business rescue is subsequently liquidated, gives rise to a new order of preference to that delineated by the Insolvency Act.[410] If the latter question is yes, then further questions arise about the treatment of secured lenders (such as banks) in a subsequent liquidation.[411]

Levenstein and Barnett are of the opinion that on the one hand,

> "the protection afforded to creditors who are secured prior to the commencement of business rescue will be rendered nugatory in a liquidation; in that if their claims are not satisfied out of the security that they hold, they will receive payment of their claims only after the various creditors (i.e. post-commencement financiers, practitioners and employees) who rank ahead of them in the order of preference conferred by a business rescue. This would undermine the very reason why lenders take security; to protect them (or at least mitigate their exposure) from an eventuality such as liquidation. If the aforesaid is the consequence of the business rescue order of preference, time will tell whether or not lenders will apply stricter credit terms when lending money. The

410 Levenstein E & Barnett L In business rescue, where do you rank? http://www.werksmans.com/legal-briefs-view/in-business-rescue-wheredo-you-rank/ [Date of access 08/02/2020]

411 *Ibid*.

> difficulty that lenders will have is that the prospect of a business rescue, followed by liquidation, is difficult or even impossible to consider when funds are initially advanced. And on the other hand if the fees and costs of business rescue practitioners, the salaries of employees and the claims of post-commencement financiers are not preferred in business rescue (and in a subsequent liquidation), then there will be little incentive for practitioners, employees and new or current lenders to take appointments and to support the business rescue process, respectively. Business rescue practitioners will always face the risk that in a liquidation, their claims will not be satisfied once secured creditors' claims are paid. This is supported by the fact that the Act (and the economy) needs practitioners, employees and lenders to support the business rescue process in order to give effect to one of the objects of the Act; namely the efficient rescue of companies".[412]

This question has been dealt with to a certain extent in *Diener N.O. v Minister of Justice and Others* whereby the court answered that the business rescue practitioner will have to prove his claim against the estate as would all creditors in section 44 of the Insolvency Act. If the principle laid out in this case will be appliable to all creditors post-commencement? The Act, and the order of preference delineated by section 135, however, retains many anomalies which will require determination by our courts in time as business rescue practitioners, post-commencement financiers, employees and creditors will have a risk placed on them in which such individuals will be reluctant to engage in a company's business rescue process.

The role of SARS is one that is influential as its influence will determine the success of the business rescue regime.[413] SARS has the ability and potential to help save companies undergoing financial distress for them to regain their financial capabilities to be a success once again.[414] All companies in financial distress should inform SARS timeously of its financial position, in order to minimise additional penalties and interest on the outstanding tax debt.[415] Due to SARS being ranked as a concurrent creditor,

412 *Ibid*.
413 Pretorius AR (n 227) at 53.
414 *Ibid*.
415 *Ibid.*

informing them timeously will assist companies undergoing financial distress to regain the strength to become financially capable.[416]

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416 *Ibid*.

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