Business Rescue Practitioners' Remuneration after Institution of Liquidation Proceedings

by

Laurette van der Merwe

25035551

Submitted in fulfilment of the requirements for the degree

LLM (Insolvency Law)

In the Faculty of Law

University of Pretoria

November 2021

Supervisor: Dr J van Wyk

ABSTRACT

Business rescue is a relatively new concept in the South African debt restructuring and reform scene, which was introduced by the 2008 Companies Act. The business rescue practitioners incur costs and expenses *during* the said rescue procedure, and once it is established that business rescue did not succeed to change the financials of the financially distressed company to that of a viable and financially healthy company again, then liquidation proceedings are instituted. During business rescue procedures, the matter is regulated by law – specifically section 143, read in conjunction with regulation 128.

The main focus of this study is the remuneration of business rescue practitioners, during the business rescue process and after the order is granted to liquidate the company currently under business rescue. I consider the repercussions of conversion from business rescue to liquidation in respect of the fees claimed for services rendered prior to conversion but after the decision has been made to liquidate the company – whether business rescue was not a viable option right from the start or failed due to other factors such as low realisation proceeds for assets.

It is quite evident out of the definition that when a company is in financial distress, and unable to commit to or service its debt, a reasonable prospect must exist for such a company to be rescued. There is a disconnect when it comes to the test applied by the court (and the board of directors) to determine whether a company should be placed under supervision in business rescue. The finding by the court of a 'reasonable prospect' of rescue may differ from later findings by the business rescue practitioner that there are no prospects of rescuing the company irrespective of which outcome is considered.

The successful granting of a business rescue order by the court, the decision to file a resolution to commence business rescue, and even the adoption and implementation of a business rescue plan, are sometimes not enough to prevent the liquidation of the insolvent company. Throughout the process, all eyes are on the business rescue practitioner. During this time, the business rescue practitioner delivers professional services as can be seen from the licensing requirements and

duties, and the factors that the court considers to determine the remuneration that a business rescue practitioner is entitled to during business rescue proceedings.

Although this study deals with the remuneration of business rescue practitioners, it is important to understand that a clear link exists between the possibility to salvage a business with financial woes, to turn it into a financially sound business again or to obtain a better outcome for all stakeholders regarding a better dividend, and the remuneration of the business rescue practitioner.

Should this not be possible, the business rescue practitioner must have the integrity to acknowledge the dire financial straits the business is in – again, notwithstanding that the court may have come to a different conclusion (perhaps based on different facts in front of it). The reason is to rather refer this entity to be liquidated, and for the business rescue practitioner to lose money but to save his good reputation. This dilemma underlies the study.

A business rescue practitioner's remuneration is not included as costs in the list of section 97 of the Insolvency Act 24 of 1936, of those who render a service. The business rescue practitioner could not be included because of the distinction between business rescue proceedings and liquidation proceedings. A practitioner must prove a claim in terms of section 44 of the Insolvency Act. With this is it stated that a business rescue practitioner is an unsecured creditor of the estate in liquidation.

The concern is if there are not surplus funds in the free residue account, the business rescue practitioner's claim will not be paid and the business rescue practitioner stand a chance of being liable for contribution. Should there be funds available in the free residue account, there is a ranking of creditors who will receive their funds before a dividend may be paid to the practitioner who managed to successfully prove a claim for a 'reasonable' amount. This position prevails notwithstanding that the practitioner is entitled to remuneration in terms of the Companies Act 71 of 2008.

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CHAPTER 1: INTRODUCTION

1.1. Background to the study

Business rescue is a new concept that was introduced by chapter 6 of the Companies Act 71 of 2008 (the 2008 Act) to the South African debt restructuring and reform scene. Delport[1] describes the process in the context of section 7(k) of the 2008 Act as intending to 'provide for sufficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all relevant stakeholders'. Business rescue proceedings are aimed at rescuing financially distressed companies[2] and the concept is defined as follows in section 128(1)(b) of the 2008 Act:

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

Business rescue practitioners' remuneration during business rescue procedures is a fact and, the matter is regulated by law – specifically section 143,[3] read in conjunction with regulation 128.[4] However, after a liquidation order is granted, and remuneration is still due to the business rescue practitioner, this is where the controversy begins.

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[1] Delport *Henochsberg on the Companies Act 71 of 2008* (Last updated: August 2021 – SI 26) (hereinafter 'Henochsberg') section 128(b) Notes on Business Rescue.
[2] Van der Merwe 'The risky business of a business rescue practitioner' De Rebus (May 2018) 3, available at https://www.derebus.org.za/the-risky-business-of-a-business-rescue-practitioner/.
[3] *Idem* at 49.
[4] *Idem* at 52.

1.2. The initiation of business rescue, applicable standards and conversion to liquidation

It is clear from the definition of business rescue in section 128(1)(b) read with section 128(1)(h), that any of the two outcomes listed will constitute 'rescue': The company will return to trade as a financially sound entity again, after the business rescue plan was implemented; alternatively[5] the ultimate result will be a better return for the companies' stakeholders, where the dividend received is more than what would have been received had liquidation proceedings been pursued.[6]

It is evident from section 128(1)(b)'s definition that, when a company is in financial distress,[7] and unable to commit to or service its debt, a reasonable prospect must exist for such a company to be rescued. The term 'reasonable prospect' was first discussed in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) Pty Ltd.*[8] The court held that the decision must be based on a 'value judgment'.[9]

In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd,*[10] Eloff AJ identified the following aspects that needed to be dealt with in an application to prove to the court that a reasonable prospect exists regarding the company's ability to continue its existence on a solvent basis:[11]

- The likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;
- The likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed – if the company will be reliant on loan capital or

[5] Joubert '"Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?' 2013 *THRHR* 554. (hereinafter Joubert 2013 *THRHR)*
[6] *Ibid.*
[7] Section 128(1)(f): this 'means that — (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months**'.**
[8] 2013 [ZASCA] 68 (27 May 2013) (hereinafter 'Southern Palace') par 7.
[9] *Idem* at par 18.
[10] 2012 (2) SA 423 (WCC).
[11] Joubert 2013 *THRHR* 557.

other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

- The availability of any other necessary resource, such as raw materials and human capital;
- The reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.[12]

There have been various court cases heard where the courts have been requested to interpret and apply some of the provisions of section 131(4), which relates to the initiation of business rescue by way of an application to court. When applying for a company to be placed under business rescue there seems to be conflicting interpretations in determining whether there is a reasonable prospect for rescuing the company.[13] A number of questions arise:

- What constitutes a reasonable prospect – should this term be interpreted in a narrow sense or should it rather be viewed as a reasonable *possibility*?
- Is the broader interpretation of a reasonable possibility better suited to meet the outcomes set by the legislature?

In 2016, the Supreme Court of Appeal (SCA) in *FirstRand Bank v Normandie Restaurants*[14] laid some of the discrepancies relating to the recovery expectation to rest by articulating the principle that the recovery of a business in distress or insolvency must be based on fair and equitable reasons and on the reasonable prospects of the reorganisation of such a business.[15] 'Reasonable prospect' requires more than a *prima facie* case, possibility or suggestive speculation.[16] It must be a prospect based on reasonable grounds.[17]

Some factual examples from the *Normandie Restaurants*-case. The SCA pointed out that FirstRand Bank's unwillingness to grant Normandie Restaurants any further

[12] *Southern Palace* par 24.
[13] Rabilall 'Business Rescue as opposed to Liquidation' CIPC, available at http://www.cipc.co.za/files/3515/2688/8915/Buisness_Rescue_vs_Liquidation_Article_March_2018.pdf
[14] 189/2016 [2016] ZASCA 178 (hereinafter 'Normandie Restaurants').
[15] Nortje 'To liquidate or commence business rescue proceedings: Reasonable prospects of recovery or not?', available at https://www.polity.org.za/article/to-liquidate-or-commence-business-rescue-proce edings-reasonable-prospects-of-recovery-or-not-2017-02-23
[16] *Ibid.*
[17] *Ibid.*

leniency posed a fundamental problem.[18] The viability of the business rescue plan proposed by Normandie Restaurants was solely dependent on a continuity of the business relationship with a single tenant.[19] The SCA noted that the proposed business rescue plan did not provide the required information in terms of the Companies Act, as well as information on which an assessment of reasonable prospect could be made.[20]

It is clear that the 2008 Companies Act provides for mechanisms to facilitate achieving the objectives of business rescue as stated in section 128(1)(b) – provided that the merits of the case align with the interpretations of the courts regarding the viability of the process for a particular company. The oversight, knowledge and advice of a business rescue practitioner coupled with a proper business rescue plan,[21] should enable the company to operate to the extent that it becomes a healthy, solvent entity again.[22] The first aim of business rescue is to give the company a chance to turn its financially distressed situation into one characterised by *inter alia* a successful, solvent, healthy cash flow. The second aim becomes applicable where the first is not realisable. The secondary aim is to provide a better outcome or return than that of liquidation, meaning a better return for creditors and/or shareholders in the form of better dividends.[23]

Although not specifically mentioned in section 128(1)(b), it is apparent from reading section 141 that an application for liquidation 'must' be made where there is no reasonable prospect for the company to be rescued (considering that 'rescue' has more than one meaning), and it can be made 'at any time during business rescue proceedings'.[24] Section 141(2)(a)(ii) reads as follows:

> 'If, at any time during business rescue proceedings, the practitioner concludes that —
> (a) there is no reasonable prospect for the company to be rescued, the practitioner must — (i) so inform the court, the company, and all affected persons in the prescribed

[18] *Normandie Restaurants* par 23.
[19] *Normandie Restaurants* par 25.
[20] *Normandie Restaurants* par 25.
[21] Sections 140, and 138(1) of the 2008 Act.
[22] Joubert 2013 *THRHR 557.*
[23] Henochsberg 451.
[24] *Idem* at 526.

manner; and (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation.'

A business rescue practitioner may be in breach of his statutory obligation should he fail to apply to court for the liquidation of the company after concluding that there is no reasonable prospect of the company being rescued, which breach may have severe consequences. The truth of the above is that section 141(2)(a) of the Companies Act places a statutory obligation on a business rescue practitioner to apply for the liquidation of the company after concluding that there is no prospect of it being rescued (either by achieving objective one or objective two and notwithstanding that the board of directors or the court came to a different conclusion upon the initiation of business rescue).[25] As such, business rescue does not prevent a liquidation order.

The process set out above logically requires time, skills and expertise. However, the remuneration-related provisions of the 2008 Act as interpreted in the series of cases culminating in the Constitutional Court decision of *Diener NO v Minister of Justice and Correctional Services and Others*, do not offer encouragement to a business rescue practitioner when adhering to this obligation or protect the practitioner where he complies with his duty.[26] This case determined that the claims of the business rescue practitioner are not recoverable from any of the encumbered asset accounts and constitute unsecured claims in liquidation.[27]

The aim of business rescue is to be more accessible to all companies experiencing financial difficulty but who have the prospect of being traded into solvency again, or at least to be turned around to such an extent that there is a better dividend for creditors and/or shareholders.[28] However, while the business rescue practitioner is the person appointed to realise these outcomes, the court will only grant an order for business rescue once the potential to realise these outcomes is proven. It is clear that there are different role-players and different perspectives at play when the court is approached

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25 *Ibid.*
26 *Diener NO v Minister of Justice and others (South African Restructuring and Insolvency Association (SARIPA) and others as amici curiae)* [2018] 1 All SA 317 (SCA) (hereinafter 'Diener SCA')*; Diener NO v Minister of Justice and Correctional Services and Others* (CCT03/18) [2018] ZACC 48; 2019 (2) BCLR 214 (CC); 2019 (4) SA 374 CC (29 November 2018) (hereinafter 'Diener CC').
27 See the discussion in chapter 2 below.
28 Section 128(1)(b) of the 2008 Act.

to grant an order[29] (although the same could be said where the board of directors of a company files a resolution with the Companies and Intellectual Property Commission (CIPC) to commence business rescue).[30]

The court must be satisfied that the company is financially distressed, failed to pay over any amount in terms of an employment obligation, or it is just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company.[31] The 2008 Act does not refer to the wording 'successful concern', and it is also not a requirement for business rescue. The onus of showing that a company could be turned into a 'successful concern' with respect to judicial management was burdensome, and therefore omitted from the 2008 Act. It is therefore clear that the legislature wanted to increase access to the process, but this meant that it had to account for instances where the outcomes could not be achieved.

A case in point: In *Carroll, Michael Vincent and Vlakplaats 335 CC Re: Vlakplaats 335 CC (Under Supervision),*[32] the Close Corporation in business rescue intervened in the application for liquidation brought by the business rescue practitioner in terms of section 141(2)(a)(ii) of the 2008 Companies Act. The application for liquidation was opposed on the basis that the requirements as set out in section 141(2)(a)(ii) had not been met.[33]

The main concern was the business rescue practitioner's conclusion that there was no reasonable prospect for the corporation to be rescued.[34] However, it was held that Vlakplaats 335 CC had been rescued insofar as the business rescue plan had been voted and agreed upon.[35] In this regard, the plan had been accepted as per section

[29] In terms of section 131, 'an affected person can apply to court for an order placing a company under supervision and commence with business rescue proceedings.
[30] In terms of section 129, 'the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision'.
[31] Bagwandeen *A critical analysis of the effectiveness of the Business Rescue regime as a mechanism for corporate rescue* (2018, LLM dissertation University of KZN, available at https://researchspace.uk zn.ac.za/bitstream/handle/10413/16340/Bagwandeen_KK_2018_pdf.pdf?sequence=1&isAllowed=y (hereinafter 'Bagwandeen').
[32] *Carroll v Vlakplaats 335 CC In Re: In the application for the Liquidation of: Vlakplaats CC (under supervision) (2018/22810)* [2019] ZAGPPHC 75 (15 March 2019) (hereinafter 'Vlakplaats').
[33] *Idem* at par 4.
[34] *Idem* at par 7.
[35] *Idem* at par 27.

151 by all the relevant stakeholders; it was duly implemented; and the Close Corporation had complied with all the obligations in terms of the plan.[36]

The facts that underscore the dispute were the following: pursuant to this plan being adopted, the assets of the Corporation was sold but the sale of the assets did not result in proceeds which could settle the debts of the Corporation in full.[37] When the business rescue practitioner proceeded to sell the assets, the sale generated net proceeds of R8 427 634.21.[38] The only proved creditor was the Land Bank, which was left with a shortfall.[39] Based on this, the business rescue practitioner issued a notice in terms of section 141(2)(a)(ii)[40] advising all the affected parties that he had concluded that there was no longer a reasonable prospect for the applicant to be rescued, and that liquidation proceedings were to follow.[41] At this stage it must also be noted that, under the law relating to liquidation proceedings, liquidators have access to procedures that could improve the position of creditors and that are unavailable in business rescue, such as conducting investigations and enquiries and ascertaining the location of hidden movable assets.[42]

This particular business rescue plan noted the shortfall and was still approved in terms of section 150(2)(a)(iii) and (b)(vi) of the 2008 Act. The court held that the business rescue plan, once accepted, incorporated a compromise which was conditional upon the corporation meeting its obligations to the Land Bank.[43] The business rescue plan would come to an end once all payments were made in terms of the accepted plan.[44] Once the dividend sought to be achieved – 79 cents to the rand in respect of the Land Bank's claim – the business rescue plan would be realised.[45]

The court held that section 128(1)(h) of the 2008 Companies Act provides that rescuing the company means achieving the goals as set out in the definition of

[36] *Idem* at par 24.
[37] *Idem* at par 25.
[38] *Idem* at par 9.
[39] *Ibid.*
[40] Section 141(2)(a)(ii) of the 2008 Companies Act.
[41] *Vlakplaats* par 7.
[42] *Idem* at par 14.
[43] *Idem* at par 22.
[44] *Ibid.*
[45] *Idem* at par 23.

business rescue as per section 128(1)(b). In this case, the business rescue plan was accepted notwithstanding that it was not possible for the corporation to return to a solvent state and continue in existence.[46] This meant that the purpose of the business rescue proceedings was to achieve better returns for the creditors or shareholders than would result from immediate liquidation of the corporation.[47] The corporation would be 'rescued' as envisaged by section 128(1)(b)(iii) and (h) as a dividend better that that which would have been achieved in the case of liquidation.[48] The court found that 141(2)(a)(ii) was not applicable under these circumstances as the corporation had been rescued by the implementation of the approved and accepted business rescue plan.[49]

Against this intricate background, the business rescue practitioner, who is appointed after the order is granted, may have to decide that neither of the outcomes of business rescue is plausible, and convert the business rescue proceedings into liquidation proceedings – a decision that the court may not agree with as indicated in the case study above. There is no prospect of the company being turned into a financially viable entity again, or that there will be a better return for stakeholders,[50] and this will have implications for the recovery of remuneration.

1.3. Problem Statement

Although this study deals with the remuneration of business rescue practitioners, it is important to understand that a clear link exists between the possibility to salvage a business with financial woes, to turn it into a financially sound business again or to obtain a better outcome for all stakeholders regarding a better dividend, and the remuneration of the business rescue practitioner.

Should this not be possible, the business rescue practitioner must have the integrity to acknowledge the dire financial straits the business is in – again, notwithstanding that the court may have come to a different conclusion (perhaps based on different facts in front of it). The reason is to rather refer this entity to be liquidated, and for the

[46] *Idem* at par 25.
[47] Section 128(1)(b) of the 2008 Act.
[48] *Vlakplaat*s par 28.
[49] *Idem* at par 29.
[50] Section 128(1)(b) of the 2008 Act.

business rescue practitioner to lose money but to save his good reputation. This dilemma underlies the study.

With the abovementioned term to 'lose money' is meant that a business rescue practitioner is not included in the list of section 97 of the Insolvency Act, of those who render a service. The business rescue practitioner could not be included because of the distinction between business rescue proceedings and liquidation proceedings.[51] The business rescue practitioner becomes an unsecured creditor of the estate in liquidation.

The concern is if there are not surplus funds in the free residue account, the business rescue practitioner's claim will not be paid and the business rescue practitioner stand a chance of being liable for contribution because the practitioner has to prove a claim. Should there be funds available in the free residue account, there is a ranking of creditors[52] who will receive their funds before a dividend may be paid to the practitioner who managed to successfully prove a claim for a 'reasonable' amount.[53]

The main focus of this study is the remuneration of business rescue practitioners, *during* the business rescue process and after the order is granted to liquidate the company currently under business rescue. I consider the repercussions of conversion from business rescue to liquidation in respect of the fees claimed for services rendered prior to conversion but after the decision has been made to liquidate the company – whether business rescue was not a viable option right from the start or failed due to other factors such as low realisation proceeds for assets.

As indicated above, the successful granting of a business rescue order by the court, the decision to file a resolution to commence business rescue, and even the adoption and implementation of a business rescue plan, are sometimes not enough to prevent the liquidation of the insolvent company. Throughout the process, all eyes are on the business rescue practitioner.

[51] *Diener (SCA)* par 59-60.
[52] *Idem* at 51.
[53] *Idem* at 121.

1.4. Research Questions

Against this background, I consider the following research questions to deal with the research problem:

1. What is the role of the business rescue practitioner where business rescue proceedings are converted into liquidation proceedings?
2. What are the entitlements of the business rescue practitioner towards remuneration during business rescue proceedings and after commencement of liquidation proceedings?
3. How does the business rescue practitioner claim remuneration during business rescue proceedings and after commencement of liquidation proceedings?
4. What is the status of the business rescue practitioner's claims for remuneration during business rescue proceedings and after commencement of liquidation proceedings?
5. What are the implications of the law relating to claims for remuneration and should this position be amended?

1.5. Methodology

In this research study, a desktop-based approach was taken in respect of the research analyses of primary and secondary sources.

1.6. Chapter Overview

Chapter 1 introduces the reader to business rescue, and the business rescue practitioner. It provides background to the study by setting out the objectives of business rescue, and the challenges relating to the norms that apply when a company is placed under business rescue. It further notes the role of the business rescue practitioner before and after the initiation of the process, and illustrates the research problem in the context of remuneration with brief reference to case law. The chapter sets out the research questions that the study aims to answer, the methodology followed and provides an overview of the structure of the dissertation.

Chapter 2 deals with the question of the remuneration of a business rescue practitioner. It finds that, during business rescue procedures, the matter is fairly straightforward as the position is regulated by law – section 143, read in conjunction with regulation 128. I consider how a business rescue practitioner can claim remuneration, when remuneration is due and payable and the factors that determine whether the amount would be regarded as reasonable. The chapter then turns to the position where business rescue proceedings are converted into liquidation proceedings. The purpose is to determine when remuneration is in fact due to the business rescue practitioner after a liquidation order is granted, whether remuneration is confirmed by way of proving a claim, and the ranking of the practitioner's claim taking other creditors into account. This specific matter of fees and expenses and their status post-liquidation was dealt with by the Pretoria High Court, the Supreme Court of Appeal and the Constitutional Court yet there is still controversy that surrounds the matter.

Chapter 3 concludes the study by reflecting on the research outcomes and providing recommendations for reform.

CHAPTER 2: BUSINESS RESCUE PRACTITIONERS' CLAIMS FOR REMUNERATION AND REIMBURSEMENT

2.1. General introduction

This chapter deals with the manner in which a business rescue practitioner is paid. During business rescue procedures, the matter is regulated by law – specifically section 143, read in conjunction with Regulation 128.[54] However, after a liquidation order is granted, and remuneration is still due to the business rescue practitioner, the matter becomes technical and, arguably, controversial. The chapter considers how a business rescue practitioner can claim remuneration during business rescue and after business rescue proceedings have been converted into liquidation proceedings, when remuneration is due and payable and the factors that determine whether remuneration would be regarded as reasonable. The purpose is to determine whether remuneration is in fact due to the business rescue practitioner after a liquidation order is granted, whether the claim and amount (taking into account reasonability) must be confirmed by way of proving a claim, and the ranking of other creditors *vis-à-vis* the practitioner. This chapter forms the foundation of this study.

2.1.1. Introduction to section 143(1) and regulation 128: The business rescue practitioner's *entitlement* to charge for expenses and the recovery of disbursements and expenses

Business rescue practitioners incur costs and expenses during the rescue procedure. In *Murgatroyd v Van den Heever NO and Others*,[55] Meyer J held that, in addition to the business rescue practitioner's own remuneration, section 143(1) entitles a practitioner

[54] Government Gazette No 34239 28 April 2011 at 129, read with https://www.onlinemoi.co.za/Regulation?regulation=128.
[55] [2014] JOL 32250 (GJ) (hereinafter 'Murgatroyd') at 2.

to charge an amount for his expenses. Regulation 128(3) expressly provides for the recovery of disbursements and expenses.[56]

The remuneration for a business rescue practitioner can be dealt with *during* the business rescue proceedings and *after* the liquidation order is granted. Remuneration during business rescue proceedings is regulated by a scale of tariffs set out in Regulation 128(1):[57]

> 'The basic remuneration of a business rescue practitioner, as contemplated in section 143 (1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed –
>
> (a) R 1250 per hour, to a maximum of R 15 625 per day, (inclusive of VAT) in the case of a small company;
>
> (b) R 1500 per hour, to a maximum of R 18 750 per day, (inclusive of VAT) in the case of a medium company; or
>
> (c) R 2000 per hour, to a maximum of R 25 000 per day, (inclusive of VAT) in the case of a large company, or a state-owned company.
>
> (2) Sub-regulation (1) does not apply to, limit or restrict any "further remuneration" for a business rescue practitioner, as contemplated in section 143 (2) to (4).
>
> (3) In addition to the remuneration determined in accordance with section 143 (1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.'[58]

The latter, which could become being remuneration payable after the liquidation order is granted, is more complex, and dealt with below.

[56] *Idem* at 7, 11 and 13.
[57] Government Gazette No 34239 28 April 2011 at 129.
[58] https://www.onlinemoi.co.za/Regulation?regulation=128.

2.2. Business rescue practitioners and remuneration in general

Business rescue practitioners are professionals, appointed by the CIPC and granted specific rights and duties in the 2008 Companies Act. These practitioners are only appointed by the CIPC and is only appointable once the requirements of section 138(1)[59] of the 2008 Act are met. This subsection determines that a prospective practitioner must be:

- 'a member in good standing of a profession subject to regulation by a regulatory authority prescribed by the Minister in terms of subsection (2)';
- 'not subject to an order of probation in terms of section 162(7)';
- 'not … disqualified from acting as a director of the company in terms of section 69(8)'; 'not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship'; and
- 'not [be] related to a person who has a relationship contemplated in paragraph (d)'.

Although the 2008 Companies Act intended that the appointment of a business rescue practitioner as a member of a 'legal, accounting and business management professions' accredited by the CIPC,[60] the CIPC had been licensing practitioners on an individual basis in accordance with section 138(2) of the 2008 Act, without establishing that the practitioners were members of a professional body.[61] This was as a direct result of the CIPC not accrediting any professional bodies.

The CIPC issued licences if it was satisfied that the applicant had a good character and integrity; the applicant's education and experience were sufficient to perform the functions of a business rescue practitioner; and the applicant was not disqualified from

[59] Section 138(1) of the 2008 Act.
[60] Delport 452. In *Welman v Marcelle Props 193 CC and Another* [2012] JOL 28714 (GSJ) at par 28, Tsoka J famously stated that 'business rescue proceedings are not for the terminally ill … Nor are they for the chronically ill'.
[61] Voller 'Notice to Customers (Notice 30 of 2017) Transitional Period of Conditional Licences' (26 April 2017) CIPC, available at https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/Companies% 20Act/Notice_30_of_2017.pdf (hereafter 'Voller (2017) CIPC').

appointment in terms of section 138(1)(c) or (d).[62] This created ambiguity that tarnished the standard and quality of business rescue practitioners in practice.[63] The matter was addressed by the CIPC in 2017 when it issued a notice requiring practitioners and aspiring practitioners 'to belong to a legal, accounting or business management profession recognised by the South African Qualifications Authority'.[64]

Section 141's main purpose is to ensure that the business rescue practitioner undertakes a proper investigation of the affairs of the company in order to ensure that the company is in fact in financial distress; and, if it is in financial distress, that there is reasonable prospect of rescuing the company. This occurs notwithstanding that the court may already have come to this conclusion as discussed above. If the company is not in financial distress, the business rescue practitioner must take steps to immediately terminate the business rescue proceedings so that the company is no longer under supervision in terms of the provisions of Chapter 6.[65]

In addition, section 140 sets out the general powers and duties of business rescue practitioners, determining that the practitioner

> '(a) [h]as full management control of the company in substitution for its board and pre-existing management;
> (b) [m]ay delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;
> (c) may –
> (i) remove from office any person who forms part of the pre-existing management of the company; or
> (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and
> (d) is responsible to-
> (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

[62] See Bagwandeen at 72.
[63] *Ibid.*
[64] Voller (2017) CIPC.
[65] Delport section 141 Notes on Business Rescue.

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.'

The business rescue practitioner is entitled to remuneration for executing these duties in the course of business rescue and as informed by the provisions of the 2008 Act.

In *Murgatroyd*, Meyer J further stated that the test for a business rescue practitioner's entitlement to reimbursement for expenses and disbursements is 'whether they were reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings'.[66] This is based on 'the facts and circumstances of each case, taking various factors, such as the size of the company, the functionality of its management, the accuracy and currency of its financial and accounting data, the complexities involved and the scope of the work required to be undertaken by the business rescue practitioner, into account.'[67] The court determined the requirement of reasonableness found in regulation 128(3), in that a business rescue practitioner is not entitled to reimbursement where charges of the service providers are not market-related, or 'reasonable'.[68] In this particular case, the court found that the business rescue practitioner was entitled to full reimbursement for expenses incurred during the business rescue proceedings.

Once it is established that business rescue did not succeed to change the financials of the financially distressed company to that of a viable and financially healthy company again, then liquidation proceedings are instituted. This is the task of the practitioner to establish if the company can be rescued or not, and if the latter is the case, convert the business rescue proceedings into liquidation proceedings.[69] This would mean that the claims for remuneration and reimbursement of costs and disbursements which arose prior to the conversion, or even during the conversion process, would become claims in the liquidation process. It is necessary to note, that the business rescue practitioner may not

[66] *Murgatroyd* at 13.
[67] *Ibid.*
[68] *Idem* at 14.
[69] Section 141(2)(a)(ii) of the 2008 Act.

function in two capacities – that of the business rescue practitioner and later as appointed Liquidator in the same matter.

2.3. Remuneration and reimbursement for costs and expenses in liquidation proceedings

The business rescue practitioners' fees and expenses incurred during business rescue (not expenses incurred in lodging an application in terms of section 141(2)(a)(ii)) are dealt with in sections 135 and 143 of the 2008 Companies Act.[70]

This specific matter of fees and expenses and their status post-liquidation was taken to the Pretoria High Court in *Diener NO v Minister of Justice and Others.*[71] Diener was the business rescue practitioner appointed in the matter of JD Bester Labour Brokers CC but it transpired that the business rescue attempt was unsuccessful. The business rescue proceedings were converted into liquidation proceedings but in the course of the administration of the CC's estate, the acceptance of the first and final liquidation, distribution and contribution accounts by the Master of the High Court was challenged.[72] The Court was requested to guide the Master on the manner in which the challenged accounts should have provided for amounts due to 'a business rescue practitioner engaged in lawful business rescue proceedings'; 'service providers who provided services to a lawfully appointed business rescue practitioner in finalising business rescue proceedings'; and 'service providers who provided services to the close corporation after the commencement of the business rescue proceedings'.[73] In the alternative, the request was for the court-sanctioned amendment of the challenged accounts

> 'to make provision for the remuneration and expenses of the applicant in the business rescue proceedings of JD Bester Labour Brokers CC, which include the expenses of Cawood Attorneys for services rendered to the applicant and JD Bester Labour Brokers CC

[70] Van der Merwe 'The risky business of a business rescue practitioner' De Rebus (May 2018) 3.
[71] (30123/2015) [2016] ZAGPPHC 1251 (March 2016) (hereinafter 'Diener GPPHC').
[72] *Idem* at par 3.3.
[73] *Idem* at par 17.

in the business rescue proceedings, to be payable in order of preference after the costs of liquidation and before the claims of any secured or unsecured creditors'.[74]

This request was based on the wording of section 135 of the 2008 Act, which reads as follows:

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

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

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

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

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

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

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

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

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

(ii) all unsecured claims against the company; or

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

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

[74] *Idem* at par 3.3.

2.3.1. Discussion on section 135: Post-commencement finance during business rescue proceedings

This section provides that the fees and expenses incurred by the business rescue practitioners during business rescue will have a preference in the order in which they were incurred over all unsecured claims against a company.[75] The provisions of section 135(4), the only section concerned when business rescue proceedings have failed,[76] confirm that the said ranking continues to be applicable where business rescue proceedings are discontinued and the company is placed into liquidation in terms of section 141(2)(a)(ii) of the Companies Act.

The predicament is that section 135 does not distinguish a difference between the business rescue practitioner's expenses incurred *during* the business rescue proceedings and expenses incurred in lodging the liquidation application in terms of section 141(2)(a)(ii) of the Companies Act.[77] The preference created by section 135(4), when read with the applicable provisions of the Insolvency Act,[78] strongly indicates that these claims can only rank after the costs of sequestration.

2.3.2. Case law dealing with the ranking of creditors

In *Merchant West Working Capital Solutions (PTY) ltd v Advanced Technologies and Engineering Company (PTY) ltd and Another*,[79] Kgomo J held that section 135(4) of the 2008 Companies Act provides that, if business rescue proceedings are superseded by a liquidation order, the preference will remain in force except to the extent of any claims arising out of the costs of liquidation.

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[75] *Diener SCA* par 60.
[76] *Idem* at 42.
[77] Van der Merwe 'The risky business of a business rescue practitioner' De Rebus (May 2018) 4.
[78] 24 of 1936. This Act becomes applicable as item 9 of schedule 5 of the 2008 Companies Act determines that chapter 14 of the 1973 Companies Act remain relevant for the liquidation of insolvent companies, and section 339 of the 1973 Act refers to the application of the Insolvency Act to matters relating to liquidation in some instances (such as the ranking of creditor claims).
[79] (13/12406) [2013] ZAGPJHC 109 (10 May 2013) (hereinafter 'Merchant West') par 22.

In *Redpath Mining South Africa (PTY) ltd v Marsden No and Others*,[80] and in light of the *Diener CC* case, Kgomo J erred in his finding that, if business rescue proceedings are superseded by a liquidation order, the said preference as stated in section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation.

Taking the above two court cases of *Merchant West* and *Redpath*[81] judgments into consideration, one would come to the conclusion that section 135 was read independently. This according to the Diener SCA[82] decision which was upheld by the Constitutional Court, and which determined that there is no indication in the 2008 Companies Act that suggests that the legislature intended that the rights of secured creditors be diluted by ranking the business rescue practitioner's claim above that of secured creditors in liquidation.[83]

The fact that the SCA did not deal with the business rescue practitioner's ranking of expenses incurred in terms of section 141(2)(a)(ii) of the Companies Act, and the fact that such expenses were also dealt with as unsecured claims in the liquidation proceedings,[84] is unfortunate when compared to the position of the liquidation costs in winding-up proceedings.

The *Diener* matter was heard by the Pretoria High Court, the Supreme Court of Appeal and the Constitutional Court. The SCA held that sections 135(4) and 143(5), whether read separately or together, do not create a so-called 'super-preference' standing as contended for by the practitioners and service providers.[85] 'The court confirmed the view of the court *a quo* that the business rescue practitioner's fees are payable out of the free residue of the estate in liquidation, *after* the section 97 (liquidation) costs have been paid, but *before* payment of other preferential claims in terms of the Insolvency Act. Such

[80] (18486/2013) [2013] ZAGPJHC 148 (14 June 2013) (hereinafter 'Redpath') par 61.
[81] *Idem*.
[82] *Diener SCA* par 37.
[83] *Ibid.*
[84] *Diener SCA* par 42.
[85] *Diener SCA* par 37.

fees are not amounts that can be paid out of the proceeds of the assets of the secured creditors.'[86]

2.3.3. Section 79: Where does the business rescue practitioner rank as creditor in liquidation proceedings?

A business rescue practitioner is not included in section 97's list of those who render a service. The business rescue practitioner could not be included because of the distinction between business rescue proceedings and liquidation proceedings.[87] As a result Diener, in his capacity as BRP, was a creditor of JD Bester, and in respect of his remuneration and expenses he was required to prove a claim in terms of section 44 of the Insolvency Act.

The CC held that, unlike section 89(1) of the Insolvency Act, section 135(4) of the 2008 Companies Act makes no reference to the use of secured assets to pay the business rescue practitioner.[88] In contrast to section 135(4), section 89(1) creates a preference over secured assets for the costs of liquidation associated with those assets only.[89] The CC held that there was no provision in the 2008 Companies Act that suggested that the legislature had intended the rights of secured creditors to be diminished, and that the liquidation of the company after the business rescue proceedings allowed the business rescue practitioner's remuneration and expenses to rank preferentially above the claims of secured creditors.[90] The claims of the business rescue practitioner are thus not recoverable from any of the encumbered asset accounts.

Section 96 of the Insolvency Act is the first call on the free residue account of an insolvent estate – the account that deals with the proceeds of that portion of the estate assets that are not subject to any right of preference by reason of any special mortgage,

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[86] Jacobs and Burdette 'Queue Politely! South African Business Rescue Practitioners and their fees in Liquidation' (2019) *Wolverhampton Law Journal* 4.
[87] *Diener SCA PAR. 59-60.*
[88] Kubheka 'The ranking of the business rescue practitioner's claim in liquidation proceedings' De Rebus (April 2019) 1 and 2.
[89] *Ibid*.
[90] *Ibid.*

legal hypothec, pledge or right of retention, and in respect of funeral expenses and deathbed expenses of the insolvent and his or her family.

This is followed in section 97 of the Insolvency Act which deals with the order in which **costs** in sequestration are ranked:

> '(1) Thereafter any balance of the free residue shall be applied in defraying the costs of the sequestration of the estate in question with the exception of the costs mentioned in subsection 1 of section 89;
> (2) The costs of sequestration shall rank according to the following order of priority-
> (a) The sheriff's charges incurred since sequestration
> (b) Fees payable to the Master in connection with the sequestration
> (c) The following costs which shall rank pari passu and abate in equal proportions if necessary that is to say: the taxed costs of sequestration (as defined in subsection (3), the fee mentioned in section 16(5), the remuneration of the curator bonis and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, in so far as they are not payable by a particular creditor or in terms of section 89(1), any expenses incurred by the Master or by a presiding officer in terms of section 532(2) and the salary or wages of any person who was engaged by the curator bonis or the trustee in connection with the administration of the estate.'

2.3.4. Analysis of business rescue practitioner's ranking as creditor

A business rescue practitioner is not included in the section 97 list of those who render services during the liquidation process. As business rescue is governed by the 2008 Act, and there is no clear harmonisation with the Insolvency Act, the business rescue practitioner could not be included because of the distinction between business rescue proceedings and liquidation proceedings.[91] As a result, the business rescue practitioner in the *Diener*-case was required to prove a claim in terms of section 44 of the Insolvency

[91] *Diener SCA* par 16.

Act for remuneration for services rendered and recovery of expenses and disbursements.

2.4. Section 143(5): The business rescue practitioner is still owed remuneration after date of liquidation

Recently, and against the background of the outcome of the *Diener*-saga, the matter of *Montic Dairy v Mazars Recovery & Restructuring (Pty) Ltd and Others*[92] came before the Western Cape High Court. This matter dealt with section 143(5) of the 2008 Companies Act, which deals with the scenario where the practitioner's remuneration and expenses are not fully paid prior to liquidation proceedings commencing. The section determines that the practitioner's claim for those amounts will rank in priority before the claims of all secured and unsecured creditors: 'To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.'

2.4.1. Case law dealing with remuneration claimed after date of liquidation by the business rescue practitioner

The Montic Dairy company ran into financial difficulty and business rescue proceedings commenced in terms of section 132(1)(a) of the 2008 Act.[93] The business rescue plan was adopted and Montic Dairy was to be sold.[94] Unfortunately, the sale fell through and the creditors of Montic Diary applied for the liquidation of the company.[95] The business rescue practitioners intervened and brought their own application for liquidation in terms of section 141(2)(a) of the 2008 Act, based on the fact that there were no reasonable prospects of the company being rescued.[96] The business rescue practitioners' application was granted, and a final order for the liquidation of Montic Diary was

[92] *Montic Dairy (Pty) Ltd and Others v Mazars Recovery and Structuring (Pty) Ltd and Others* (7523/19) [2021] ZAWCHC 20 (10 February 2021) (hereinafter 'Montic Diary') par 25.
[93] *Idem* at par 2.
[94] *Idem* at par 4.
[95] *Ibid.*
[96] *Idem* at par 5.

granted.[97] However, prior to the order and while allegedly still in control of Monty Diary, the business rescue practitioners settled unpaid bills, paid for disbursements and remuneration for services rendered in the amount of R1.5 million.[98] The liquidators claimed that these payments were void in terms of section 341 of the 1973 Companies Act and sought repayment of the dispersed amount.[99]

Section 341(2) proscribes the disposition of a company's assets after lodging of an application to wind up, while section 143 only affords the business rescue practitioner a limited measure of priority when the claim for remuneration is considered by the liquidator in the winding up process.[100]

In the SCA's judgement in *Diener NO v Minister of Justice and Others*,[101] it was confirmed that section 143 of the 2008 Companies Act does not relate to liquidation proceedings while section 341(2) and section 348 of the 1973 Companies Act, read with section 81(4) of the 2008 Companies Act, do. Section 341(2) of the 1973 Act deals with the disposition of a company's assets after lodging of an application for winding-up and determines that 'every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders'.[102]

In *Montic Diary*, it was held that section 143 of the 2008 Act affords the business rescue practitioner a limited measure of priority when a claim for remuneration is considered.[103] It was further found that there is no clash between these two sections of the 1973 and 2008 Companies Acts.[104] The retention of the provisions of the 1973 Act to deal with the winding-up of companies means that the legislature intended these provisions to apply both to insolvent companies wound-up under the 1973 statutory dispensation, and to companies wound-up as a result of the provisions of the 2008 statutory dispensation

[97] *Idem* at par 6.
[98] *Idem* at par 7.
[99] *Idem* at par 8.
[100] *Idem* at par 29.
[101] Paras 54 and 55.
[102] *Ibid.*
[103] *Montic Dairy* par 27.
[104] *Ibid.*

where business rescue proceedings had not achieved the desired results and section 141(2)(ii) of the 2008 Act is implemented.[105]

Section 348 of the 1973 Act aims to establish the *concursus creditorum* at the time that the application for winding-up is lodged. In *Montic Diary*,[106] the court held that, should the business rescue practitioners demand payment after the establishment of the *concursus creditorum*, and ahead of secured creditors, the result may be that the asset value of the company is erased to the detriment of, for example, the holder of a first mortgage bond over the insolvent company's immovable property. The purpose and context of business rescue are obviously not intended to destroy the rights of secured creditors.[107] It may further have unintended consequences for credit extension in future if creditors are unable to rely, with some certainty, on the proceeds of securities to settle the debts owed to them.[108]

Permission has been granted to refer the matter to the SCA, taking the impact of the commercial functioning of business rescue practitioners into consideration.[109] At the time of concluding this study, the matter had not yet been heard.

The *Diener*-case has subsequently been applied, and further interpreted, by the judiciary. Apart from the *Montic Diary-case,* in *Nedbank Limited and Master of the High Court and Others*,[110] the initial account that provided for the business rescue practitioner's fee as part of the encumbered estate account was challenged on the basis that, in terms of the *Diener*-case, business rescue practitioners do not have 'super preferent'[111] claims against the estate's encumbered asset account, but rather have a claim against the free residue account.

[105] *Montic Dairy* par 28.
[106] *Idem* at par 28.
[107] *Idem* at par 31.
[108] *Diener SCA* par 44.
[109] *Idem* at par 36.
[110] *Diener SCA* par 37; Montic Dairy par 27; *Nedbank Limited v Master of the High Court and others* (43581/16) [2019] ZAGPJHC 393 (31 October 2019) (hereinafter 'Nedbank') par 9.
[111] *Henochsberg* section 143(5) Notes on Business Rescue.

The court noted that the reference to secured and unsecured creditors must refer back to section 135 of the 2008 Act and to those persons who have, or are deemed to have, provided a company with post-commencement finance. The preference operates within the limited context of post-commencement finance *vis-à-vis* secured and unsecured creditors, and regarding the companies' pre-business rescue creditors.[112]

2.5. Discussion

It was the view of the SCA in the *Diener*-case[113] that the argument that the business rescue practitioner's claim ranks in priority above those of the secured creditors (other than post-commencement finance creditors) stumbles on the wording of section 95 of the Insolvency Act.[114] This section provides that the proceeds of the property which is secure shall, after deduction in respect of costs for maintaining, conserving and realising the property, be 'applied in satisfying the claims secured by the said property, in their order of preference'.[115]

In the court's view,[116] allowing the business rescue practitioner's claim for remuneration to rank ahead of secured creditors, cannot be done 'without doing unjustifiable violence to the language of section 95.' The payment of remuneration to a business rescue practitioner from the proceeds of the property secured in favour of someone else, amounts to applying the proceeds of the property to the satisfaction of a claim secured by that property.[117] The argument that the business rescue practitioner holds a super preferent claim above all other secured creditors raises the following concern:[118]

> 'Where business rescue proceedings are converted to liquidation proceedings, and the free residue is not sufficient to meet the costs of liquidation, the argument has been advanced

[112] Nedbank par 12.
[113] *Diener SCA* par 47.
[114] *Ibid.*
[115] *Ibid*.
[116] *Idem* at par 48.
[117] *Idem* at par 47.
[118] Boraine et al *Meskin's Insolvency Law* (Last updated August 2021 – SI 56) (hereinafter 'Meskin') par 12.4.1.2.

about what the super-preference would mean, and this is in conflict with section 97 of the Insolvency Act, and section 135(4) of the Companies Act 2008.'

The business rescue practitioner would be remunerated from the realised secured property, while the costs of liquidation may not be covered in the event of a shortfall. In this example, the super preference would mean that the business rescue practitioner's claim would rank ahead of the costs of liquidation. This could not have been the intention of the legislature.[119]

Section 143(5) of the 2008 Act states that a business rescue practitioner claim for remuneration and expenses will rank in priority before the claims of all other secured and unsecured creditors. The purpose of this section is not clear.[120] 'Delport states that it seems unrealistic and impractical to expect a successful business rescue plan to be implemented in circumstances where there are insufficient funds to pay the business rescue practitioner's fees, but should this be the case, the amount of the business rescue practitioner's remuneration and expenses that remain unpaid will, according to the Act, be paid as a "super-preference" in priority to all the secured and unsecured claims against the company.'[121]

According to the *Diener*-case,[122] section 143 is not concerned with liquidation. It is rather concerned with a business rescue practitioner's right to remuneration *during* business rescue proceedings. This section 143 deals with the tariff in terms of which a business rescue practitioner is remunerated. A 'contingency-based remuneration that the business rescue practitioner may negotiate to safeguard the business rescue practitioner's claim for unpaid remuneration,'[123] which ranks in priority before the claims of all other secured and unsecured creditors could be negotiated.[124]

In the court's view, secured and unsecured creditors must be understood to refer back to section 135: '[T]hose persons who have, or have been deemed to have, provided the

[119] *Diener SCA* par 43.
[120] *Henochsberg* section 143(5) Notes on Business Rescue.
[121] *Ibid*.
[122] *Diener* SCA par 43.
[123] *Diener CC* par 60.
[124] Jacobs and Burdette (2019) *Wolverhampton Law Journal* 4.

company with post-commencement finance, both secured and unsecured, and not to the company's pre-business rescue creditors'. The fact that the SCA did not deal with the business rescue practitioner's ranking of expenses incurred in terms of section 141(2)(a)(ii) of the Companies Act, and the fact that such expenses were also dealt with as unsecured claims in the liquidation proceedings,[125] is unfortunate when compared to the position of the applicant in winding-up proceedings. Not to elaborate on the matter unnecessarily, but when the administration has been dealt with, the costs of the liquidation proceedings from an applicant's stance is dealt with directly as part of the administration costs. It could be argued that there is a definite double standard, alternatively the legislature failed the business rescue regime terribly. In the *Diener*-judgment[126] it was held that the significance of the business rescue practitioner's remuneration as a preference *during* business rescue proceedings should not be underplayed. 'While business rescue is ongoing, the business rescue practitioner gets first preference for fees. It is only when business rescue fails, or is followed by liquidation, that the business rescue practitioner faces the risk of not being paid.'[127]

The Constitutional Court held as follows:

> 'In *Panamo Properties* the Supreme Court of Appeal remarked that the "commendable goals are unfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted". It is clear that neither interpretation is without its faults. Nevertheless, taking into account the Chapter 6 context and the purpose of business rescue and the sections themselves, as well as the anomalies arising from each interpretation, I do not see any way that the interpretation contended for by Mr Diener is tenable.'[128]

In practice, the unsecured creditor who proved a claim will only share in the free residue according to rank and should there be funds available. This means that, should there not be sufficient funds in the free residue and the business rescue practitioner proves a claim, he might be liable for contribution as a proven creditor in the event that a

[125] *Diener SCA* par 42.
[126] *Diener CC* par 60.
[127] *Ibid.*
[128] *Ibid.* Footnotes omitted.

contribution becomes payable.[129] This is a very undesirable situation which the business rescue practitioner might find himself in. It would rather be wise to wait for the liquidation, distribution and/or contribution accounts to be drafted by the Liquidator before proving a claim. Although this can be done in practice, it delays the administration process and frustrates creditors.

Post commencement of liquidation proceedings, the business rescue practitioner must prove a claim in terms of section 44 of the Insolvency Act for any outstanding fees or expenses incurred, and this would constitute a unsecured claim. Meaning that, if there are not surplus funds in the free residue account, the business rescue practitioner's claim will not be paid and the business rescue practitioner stand a chance of being liable for contribution. Should there be funds available in the free residue account, there is a ranking of creditors who will receive their funds before a dividend may be paid to the practitioner who managed to successfully prove a claim for a 'reasonable' amount.[130]

In practice, this would entail that the business rescue practitioner is denied remuneration for actual work done. The aforementioned might lead to practitioners depleting any possible funds the business, which is already in financial dire straits, might have to ensure that they obtain any funds which might become due to them in future liquidation proceedings. Although not cast in stone, it refers to remuneration that could become due. The facts of the *Montic Diary* already indicate that practitioner consider payment of their fees in the face of liquidation. This is, of course, expecting the worst of business rescue practitioners and the industry, and not giving their bona fide intentions the benefit of the doubt.

2.6. Conclusion

This chapter dealt with the manner in which a business rescue practitioner is remunerated during business rescue procedures and as per the provisions of section 143, read in conjunction with regulation 128. However, after a liquidation order is granted

[129] See section 106 of the Insolvency Act.
[130] See par 2.2 above.

and remuneration is still due to the business rescue practitioner, the matter is technical and controversial.

Once it is established that business rescue did not succeed to change the financials of the financially distressed company to that of a viable and financially healthy company again, then liquidation proceedings are instituted. This is the task of the business rescue practitioner to establish whether the company can be rescued or not, and if the latter is the case, convert the business rescue proceedings into liquidation proceedings.[131] This would mean that the claims for remuneration and reimbursement of costs and disbursements which arose prior to the conversion, or even during the conversion process, would become claims in the liquidation process. The *Montic Diary*-case illustrated the strict application of insolvency principles to conversion.

In the next chapter, the problematic areas highlighted above will be addressed with possible remedies to be utilized, as well as amendments to the current shortcomings of the legislation currently in place. With shortcomings is meant the need to address matters properly with the help of legislation taking case law and academic scholarship into account.

[131] Section 130(50(c) of the 2008 Act.

CHAPTER 3: CONCLUSION

The business rescue practitioner's remuneration after the conversion of business rescue proceedings to liquidation proceedings was considered in this dissertation. The business rescue practitioner is appointed to restructure the affairs of a company that is financially viable, although distressed. Should the business rescue practitioner not be able to turn the financially distressed company around and return it to a solvent tradeable state, the process should at least end with a better return for creditors than immediate liquidation.

It is clear from the background discussion that there is a disconnect between the test applied by the court (and the board of directors) to determine whether a company should be placed under supervision in business rescue.[132] The finding by the court of a 'reasonable prospect' of rescue may differ from later findings by the business rescue practitioner that there are no prospects of rescuing the company irrespective of which outcome is considered.[133] During this time, the business rescue practitioner delivers professional services as can be seen from the licensing requirements and duties, and the factors that the court considered in *Murgatroyd* to determine the remuneration that a business rescue practitioner is entitled to during business rescue proceedings:

> 'This is based on the facts and circumstances of each case, taking various factors, such as the size of the company, the functionality of its management, the accuracy and currency of its financial and accounting data, the complexities involved and the scope of the work required to be undertaken by the business rescue practitioner, into account.'[134]

The questions regarding payment to business rescue practitioners in the form of remuneration after business rescue proceedings have come to an end, were addressed with reference to various cases. In the *Diener*-case, which was supported by the judgment in the *Nedbank*-case,[135] the SCA determined that sections 135(4) and 143(5) of the 2008 Companies Act do not create a claim with a 'super-preference' status.[136]

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[132] See par 1.1.
[133] *Ibid.*
[134] *Murgatroyd* at 13; see par 2.2.
[135] See par 2.3.
[136] See par 2.2.

The court confirmed that the business rescue practitioner's fees are payable out of the free residue of the estate in liquidation.[137] This will only occur after section 97-liquidation costs have been paid, and before other preferential claims in terms of the insolvency Act.[138] The Constitutional Court held that there is no indication in the 2008 Companies Act that suggests that the legislature intended that the rights of secured creditors be diluted by ranking the business rescue practitioner's claim above that of secured creditors.[139] Here we can only mention that Kgomo J's literal interpretation of sections 135 is incorrect, as stated by the Constitutional Court in the *Diener* matter.[140] In the *Montic Dairy*-case the court considered that, if the business rescue practitioner were to be entitled to payment after establishment of the *concursus creditorum* and ahead of secured creditors, it may eliminate the asset value of the estate to the detriment of secured (and unsecured) creditors.[141]

In the *Diener*-judgment,[142] it was held that the significance of the business rescue practitioner's remuneration as a preference *during* business rescue proceedings should not be underplayed. While business rescue is ongoing, the business rescue practitioner enjoys first preference for fees. The said fees that a business rescue practitioner is entitled to is as per Regulation 128.[143]

It is only when business rescue fails, or is followed by liquidation, that the business rescue practitioner faces the risk of not being paid.[144] The consequences of this judgment on practitioners' behaviour necessitates more research on this topic. In addition, it must be considered whether the treatment of business rescue practitioners' claims during business rescue proceedings and during liquidation proceedings should differ on a policy basis. If not, the position set by *Diener* should be amended.

[137] See par 2.3.
[138] See par 2.2.
[139] *Ibid.*
[140] *Idem* at par. 2.3.1
[141] *Ibid.*
[142] See par 2.3.
[143] See par 2.1.
[144] See par 2.2.

In liquidation, the business rescue practitioner must prove a claim in terms of section 44 of the Insolvency Act for any outstanding fees or expenses incurred.[145] This would constitute a unsecured claim, meaning that if there are not surplus funds in the free residue account after the higher ranking creditors have been paid, the business rescue practitioner's claim will not be paid – in the best case scenario, some creditors receive only a pro rata portion of their claims. There may also be a risk of contribution. In light of the services rendered, and when compared to the treatment of other professionals in insolvency, I indicated that this may constitute a double standard which needs to be corrected.[146]

'A contingency-based remuneration that the business rescue practitioner may negotiate to safeguard the business rescue practitioner's claim for unpaid remuneration,[147] which ranks in priority before the claims of all other secured and unsecured creditors could be negotiated.'[148] It remains to be seen how South African courts will treat these negotiations in liquidation proceedings and whether the consistent application and elaboration of the findings of *Diener* as seen from cases such as Nedbank, will continue in future.

The business rescue practitioner must carefully consider the business rescue plan as stated in the *Vlakplaats 335 CC*-case.[149] Where creditors understand that, by accepting a business rescue plan, they may have to accept a shortfall, and this will reflect in the plan. The business rescue practitioner cannot claim that he has done all that is possible, based on an adopted plan which was given effect to after acceptance, and then endeavour to liquidate the corporation or company when creditors' claims cannot be paid in full.[150] The adoption of a business rescue plan entails that the company under supervision is rescued – irrespective of whether the outcome is a company trading as a solvent concern again or a company being wound-down in business rescue in order to provide a better return for creditors and/or shareholders than if the company were to be

[145] See par 2.2.
[146] See par 2.4.
[147] *Diener CC* par 60.
[148] Jacobs and Burdette (2019) *Wolverhampton Law Journal* 4.
[149] See par 1.1.
[150] *Ibid.*

liquidated immediately in terms of the insolvency provisions of the 1973 Companies Act.[151] Once this happens, section 141(2)(a)(ii) of the Companies Act is no longer relevant.[152]

In conclusion, and on a policy level, the current framework is flawed due to the fact that South Africa has different insolvency-related Acts.[153] It does not seem as if the legislature properly considered all that would be affected by the conversion of a process governed by one Act (the 2008 Act) into another process governed by another Act (the 1973 Act, and through section 339, the 1936 Insolvency Act). This change of laws causes a contradiction in the application of legislation as mentioned above – particularly in respect of when, and how, a business rescue practitioner may claim for payment of remuneration and expenses incurred. In addition, the 1936 Insolvency Act and the 1973 Companies Act pre-date the concepts of business rescue and the business rescue practitioner, which were only introduced by the 2008 Companies Act.

I submit that the preferred manner of resolving the abovementioned confusing situation, is to resort to drafting legislation specifically adapted to companies in dire financial straits; including business rescue as well as liquidation into one concise piece of legislation; and to have the Unified Insolvency Bill implemented.[154] The specific requirements of such a law is a discussion for another paper.

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[151] *Ibid.*
[152] See par 2.2.
[153] Boraine and Roestoff 'Revisiting the State of Consumer Insolvency in South Africa after Twenty Years: The Courts' Approach, International Guidelines and an Appeal for Urgent Law Reform' (2014) THRHR 527.
[154] *Ibid* and South African Law Reform Commission Report on the review of the law of insolvency (Project 63) vol 1 (Explanatory Memorandum) and vol 2 (Draft Bill) (February 2000).

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