UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

BUSINESS RESCUE IN SOUTH AFRICA: AN ANALYSIS OF THE ATTITUDE OF KEY STAKEHOLDERS

by

MULAMULELI RAMABULANA

Student Number U10312685

Mini-dissertation submitted in partial fulfilment of the requirements for the degree

LLM

(MAGISTER LEGUM)

in the

FACULTY OF LAW

UNIVERSITY OF PRETORIA

SUPERVISOR: DR TRONEL JOUBERT

November 2019

Declaration

I, Mulamuleli Ramabulana declare the following:

1. I understand what plagiarism entails and am aware of the University's policy in this regard.

2. I declare that this assignment is my own, original work. Where someone else's work was used (whether from a printed source, the Internet or any other source) due acknowledgement was given and reference was made according to departmental requirements.

3. I did not copy and paste any information directly from an electronic source (e.g., a web page, electronic journal article or CD ROM) into this document.

4. I did not make use of another student's previous work and submit it as my own.

5. I did not allow and will not allow anyone to copy my work with the intention of presenting it as his/her own work.

Signature _____ Date _____

Acknowledgements

I thank God for the wisdom, guidance and the strength to carry me though the entire process. I humbly wish to express my utmost gratitude to my family for supporting me throughout this journey. I wish to thank my supervisor Tronel Joubert for assisting me with everything pertaining to this piece of work. Your input is invaluable, I would not have gone as far without your patience and guidance. I am thankful to my partner for the encouragement, the love and support on days where it all seemed impossible. I love and appreciate you.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION

1.1 Contextual background of the study

The culture of business rescue has finally found its feet in the South African legal system. This is after a long period of uncertainty as to what could and could not constitute a functional rescue regime. Chapter 6 of the Companies Act 71 of 2008[1] replaced judicial management, a rescue mechanism that was introduced under the Companies Act 61 of 1973.[2] The former supports the notion of rescue of corporate beings as opposed to the latter, which supports liquidation.[3] This consequence flows from the persistent change in modern industrial nations, where the protection of insolvent debtors is of paramount importance.[4]

Before the introduction of business rescue, South Africa had judicial management as its first rescue model. Judicial management facilitated the restructuring of debt in an attempt to save distressed companies.[5] Judicial management made its first appearance in 1926.[6] According to section 15 of the 1973 Act[7] its purpose was to provide an alternative to liquidation of companies that were on the verge of insolvency. Judicial management could be utilised by companies that were experiencing temporary setbacks as a result of mismanagement. This

[1] Companies Act 71 of 2008.
[2] Companies Act 61 of 1973.
[3] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 365 Ltd* 2012(2) SA 423 (WCC) para 2.
[4] Bradstreet "The new business rescue: Will creditors sink or swim?" 2010 *South African Law Journal* 354.
[5] Burdette "Some initial thoughts on the development of a modern and effective business rescue model for South Africa (part 1)" 2004 *South African Mercantile Law Journal* 241.
[6] Act 46 of 1926.
[7] *Supra* note 2.

was achieved by steering it back to being a successful concern.[8] In order to achieve this, the company would be placed in the hands of a judicial manager who would take over the company's business from the existing management for purposes of restoring it to profitability.[9] In terms of section 427(1)[10] of the 1973 Act, a company could be placed under judicial management if:

a) "it was unable to pay its debts or probably unable to meet its obligations; and
b) if it had not become or is prevented from becoming a successful concern; and
c) there was a reasonable probability, that if placed under judicial management, it will be meet its obligations and become a successful concern; and
d) it appeared just and equitable for the court to grant a judicial management order in respect of the company."

Judicial management was not well received as an effective corporate restructuring method.[11] In the case of *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd*[12] the court gave a brief summary of the kinds of problems that would arise when applying judicial management to cases where companies were in need of rescue. Although judicial management was a form of business rescue, it was seen as an extraordinary remedy that courts only granted in special circumstances.[13]

Apart from the fact that judicial management was only granted in special circumstances, it had numerous shortcomings. These shortcomings not only led to its failure but affected its sustainability in the long run. Although the list is not exhaustive, some of the dominant shortcomings that led to its failure were that it was a court driven process that only applied to companies; it could only be granted where there was a reasonable probability that the company could be rescued; the company had to show that it was not in a position to pay its debts; the just and equitability requirement applied as well as that there needed to be proof

---

[8] Loubser "Judicial Management as a business rescue procedure in South African corporate law" 2004 *South African Mercantile Law Journal* 142.
[9] Kloppers "Judicial Management – A corporate rescue mechanism in need of reform" 1999 *Stellenbosch Law Review* 419.
[10] *Supra* note 2.
[11] Levenstein *South African Business Rescue Procedure* (2017) 3.1.
[12] *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 (2) SA 727(C).
[13] *Ibid.*

of the company's ability to pay its debts and to become a successful concern. Judicial management never lived to fulfil its purpose as envisaged by section 15 of the 1973 Act,[14] instead it facilitated the process of liquidation and for that reason it was regarded as a dismal failure.[15]

Relevant judicial management stakeholders were not very pleased with the manner in which it functioned, the effects of which accelerated and contributed to its continuous deterioration.[16] There are questions about whether business rescue will be well received seeing that is it is fairly new. South Africa's business rescue regime is still in its introductory phase. With 11 years since the Companies Act came into effect, it sits in a very tenuous position where either failure or success is possible.

The mere fact that business rescue does not imply that all the stakeholders must be wholly protected is in itself daunting. Business rescue stakeholders are not entirely sold on the idea that it will be a successful rescue mechanism. However, with this said, it is encouraging to see a positive outlook where creditors, after seeing the possibilities of success, prefer it over liquidation.[17]

The failure of judicial management prompted the implementation of a somewhat functional rescue system. The development of rescue regimes in foreign jurisdictions set the tone for the development of rescue practices in South Africa.[18] After weighing its interests, South Africa saw it fit to create a modern business rescue model that shadowed similar systems that are applicable internationally. The aim, of course, is to save financially distressed companies, thereby preserving employment and maintaining a healthy economy.[19]

Apart from the fact that South Africa needed a rescue regime that cultivated a healthy economy, the 2008 Companies Act was created with the intention of infusing other regulatory structures governing companies with guidance on democratic values such as human dignity, equality and non-racialism, as enshrined in the Constitution.[20]

---

[14] *Supra* note 2.
[15] *Ibid*.
[16] *Supra* note 8.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid*.
[20] Osodo "Judicial Implementation of South Africa's New Business Rescue model: A preliminary assessment" 2015 *Penn State Journal of Law and International Affairs* 459-488.

According to Chapter 6 section 128(1)(b)[21] of the Companies Act business rescue attempts to rehabilitate businesses that are in financial distress and provide them with an alternative to liquidation by securing—

a) "a temporary supervision of the company and the management of its affairs, business and property by a business rescue practitioner.
b) a temporary moratorium on the rights of the claimants against the company or in respect of property in its possession; and
c) the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business property, debt, affairs, 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 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"

There are two possible ways to subject a company to rescue proceedings. The company can either adopt a resolution subjecting the company to business rescue, or an affected party can apply to court any time for an order placing the company under supervision.[22] For business rescue proceedings to commence, a business rescue practitioner is appointed to manage the operation of the company. He or she is tasked with various duties —the most important being the duty to draft a business rescue plan for the approval of all the relevant stakeholders.[23]

In *Maroos and Others v GCC Engineering Pty Ltd and Others*[24] the court held that the purpose of business rescue orders is to facilitate the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. It therefore makes sense to attempt to rescue a financially distressed company that is experiencing temporary financial difficulties where there is a possibility of recovery. Business rescue can only be invoked where insolvency is believed to be

[21] Companies Act 71 of 2008 s 128(1)(b).
[22] Companies Act 71 of 2008 s 131.
[23] Companies Act 71 of 2008 s 150(1) and (2).
[24] 2017 ZAGPPHC 297, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA 604 *Dawid Jacques Richter v ABSA Bank Ltd* 2015 ZASCA 100 para [15] and [16].

temporary and where there are prospects that the debtor can be assisted back to a commercial life as an active and successful entrepreneur.[25]

Section 7(*k)* of the Companies Act sets out the objectives of the Act in respect of Chapter 6 as intended to provide the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all the relevant stakeholders in business rescue.[26] One of the most significant provisions of the Act is section 5(1) which specifically invites our courts to interpret and apply the provisions of the Act in a manner that gives effect to its purposes. There is a clear indication that the legislature intended to draft this piece of legislation with a preference to rescue companies as opposed to opting for a harsher punishment of companies that experience a phase of financial difficulty. The main aim is not to rescue companies that are already insolvent but to rehabilitate those that have a chance of being restored to the *status quo* prior to encountering financial difficulties.[27]

There are many stakeholders involved in these proceedings, namely creditors, liquidators, shareholders, courts, directors and employees. This study will examine the attitude of key stakeholders to business rescue since its implementation, whether it works or not, as well as whether it lives up to its objectives as intended by the legislature. This paper will further highlight the strengths and weaknesses of the procedure including its ability to cultivate a friendly environment for its users.

1.2 Research questions and objectives

The key research questions to be explored in this research are as follows:

(a) Does business rescue adequately balance the rights and interests of all stakeholders?
(b) Will it succeed as a rescue mechanism, seeing that it is relatively new and that companies are still sceptical about its functionality?
(c) Are business rescues successful in general?

1.3 Significance of the study

[25] Rajak, Henning "Business Rescue for South Africa" 1999 *South African Law Journal* 262.
[26] Companies Act 71 of 2008 s 7(*k)*.
[27] *Ibid.*

Despite the positive shift from judicial management, a few problems still seem to be lingering. Given that business rescue is a fairly new and untested system that is yet to find solid ground, relevant stakeholders have divided opinions about its functionality. One of the concerns raised by "affected" persons is the success rate of business rescue applications thus far.

As shown by a plethora of case law, practical issues affecting the success rate of the current business rescue regime are many. It is further concerning that companies themselves contribute to its poor performance. This is because directors do not always exercise their duty to apply for business rescue timeously and at the first signs of distress. They apply for business rescue when in fact it is too late to save the company.

Courts often contradict each other when interpreting and applying the provisions of the Act to business rescue applications. With courts being the upper guardian, entrusted to monitor this procedure, these looming inconsistencies force one to wonder whether the system will live up to its promise. If courts adopt an approach similar to that in judicial management, there is a real likelihood that it too will fail at the judicial altar.[28] This study seeks to examine the attitude of key stakeholders towards the success rate and functionality of business rescue, the opinions of academics, the intervention by courts and the effect of business rescue on the economy.

1.4 Limitations of the study and literature review

Literature regarding the success rate of business rescue is somewhat limited, perhaps because we are trying to figure out and understand its channels since it is still relatively new. Taking into account the fact that it is in a phase of transition, there will be a complete reliance on legislation, journal articles, dissertations, opinions of academics, court judgments and internet sources.

1.5 Research methodology

This research will focus on analysing the attitude or opinions of key stakeholders to business rescue. The main focus will be whether or not the business rescue regime works. The research will further explore conflicting court judgments that have attempted to interpret and

[28] *Supra* note 20.

apply the provisions of Chapter 6 of the Companies Act, as well as opinions from academics and scholars. I will make use of journal articles, legislation, dissertations, and opinions from academics and court judgments.

A comparative analysis will be done with reference to the functionality and progress of corporate rescue in the Australia, the United States of America and the United Kingdom.

1.6 Overview of chapters/structures

(a) Chapter 1

The first chapter will serve as an introduction.

(b) Chapter 2

Chapter 2 will focus on judicial management and its failure as a rescue mechanism. This chapter will also focus on why there was an urgent need for a rescue regime.

(c) Chapter 3

Chapter 3 will focus on the introduction to Chapter 6 of the 2008 Companies Act which deals with the legal effects of business rescue on affected persons.

(d) Chapter 4

Chapter 4 will examine the attitude of key stakeholders to business rescue and the success rate thereof.

(e) Chapter 5

Chapter 5 will focus on a comparative analysis of the attitude of key stakeholders to business rescue and the success rates of South Africa, Australia, the United States of America and the United Kingdom.

(f) Chapter 6

Conclusion.

CHAPTER 2: JUDICIAL MANAGEMENT AND ITS FAILURE AS RESCUE MECHANISM

2.1 Introduction

Companies play a pivotal role in the economy and our communities. It is very important for a country to rescue companies that are suffering from financial distress instead of liquidating them. The setback could be temporary depending on whether or not a company has prospects of being saved. The result of a failing company has many consequences to relevant stakeholders, be it creditors, employees, suppliers, distributors and, through them, the community at large.[29]

Judicial management first laid its hands on the South African legal system in early 1926 under the Companies Act 42 of 1926.[30] There are numerous theories as to where it originated from, however there is no conclusive answer as to when it first made its entrance into South African company law. The bill for judicial management was introduced to parliament in 1923. The Minister at the time briefly explained, while making reference to England and the United States of America that:

> "the relevant measures were derived from English and American law which provided for the appointment of receivers in equity to assist an important concern when it was feared that it may go into liquidation."[31]

[29] *Supra* note 5.
[30] Companies Act 46 of 1926.
[31] *Supra* note 8.

The Minister emphasised the fact that a company that has a positive impact on the economy should not be left to perish simply because of its ill financial health but should be helped back to a solvent state.[32]

The origins of judicial management remain a mystery, with some saying it originated from the English case of *Moss Steamship Co Ltd* vs *Whinney*[33] where his Lordship Halsbury noted that:

> "When joint stock companies needed to obtain capital, they issued[SvdM1] debentures. In order to secure the rights of the debenture holders, the company used a form of application to court which removed the conduct and guidance of the company from its directors and placed it in the hands of the receiver and manager."

This concept required the services of a receiver who would then be appointed to manage a company with the objective of protecting the interests of the creditors. The manager would carry on the business when necessary. However, there is still no solid proof that judicial management emanated from the English procedure of receiver and manager.[34] Despite this speculation it is widely accepted that this whole concept started with the introduction of chapter 11 of the Bankruptcy Reform Act 1978 in the United States of America.[35]

2.2 Important amendments to judicial management

Before judicial management was embodied into the Companies Act[36] it went through a series of amendments in order to curb some of the practical issues that it was facing. One of the many issues that needed to be addressed was the predicament faced by courts in determining whether there was a reasonable probability that a company would overcome financial difficulty if placed under judicial management.[37]

A much needed amendment that every business rescue mechanism requires is a grace period (known as the moratorium). This amendment through section 196(1) of the

---

[32] *Ibid.*
[33] 1912 AC 254 at 260.
[34] Frederick *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African Law* (LLM dissertation 2014 University of Cape Town) 1.
[35] *Supra* note 20.
[36] Companies Act 61 of 1973.
[37] Final report of the Company Law Amendment Enquiry Commission UG 69 1948 93.

Companies Act 11 of 1932[38] (one of many and perhaps the most significant) allowed the courts to stay all actions and executions of all writs, summonses and other processes against the company with permission from the court for the duration of judicial management. The concept behind granting moratoriums is to allow the company to fix its affairs without claims from creditors.[39]

In 1939[40] a further amendment was made to allow a judicial manager to use money which became available to pay the costs of the judicial management and claims of creditors while the company was undergoing judicial management. Following this amendment, the Millan Commission introduced a further amendment in terms of the 1952[41] Amendment Act. This dealt with disposition of the debtors assets without the courts' approval as well as the granting of permission to the judicial manager to apply for winding-up if he foresees that the debtor will not be able to pay his debts in full.

Along with other amendments, the Companies Law Amendment[42] in terms of section 195, allowed the Master of the Supreme Court to compile a report after investigating and determining whether a company had a chance of being saved. This was done to eradicate the challenges that courts were facing in deciding judicial management matters. As discussed later in this chapter, this amendment did very little if anything at all to solve the problem.[43] The list of amendments in the Companies Act for purposes of judicial management is not exhaustive, but despite these amendments, around the 1970s the Master of the Supreme Court of Appeal called for the abolition of judicial management due to its low success rate.[44]

2.3 Commencement of judicial management

In terms of section 427(1) of 1973 Companies Act, a company could approach the court for a judicial management order when it was unable to pay its debts or meet its obligations due to reasons of mismanagement.[45]

---

[38] Companies Act 11 of 1932 s 196.
[39] *Ibid.*
[40] Companies Amendment Act 23 of 1939.
[41] Companies Amendment Act 46 of 1952.
[42] *Supra* note 33 s 195.
[43] *Supra* note 28.
[44] *Supra* note 5.
[45] *Ex Parte Onus (Edms) Bpk: Du Plooy v Onus (Edms) Bpk* 1980 (4) SA 63 (O) 66. Please correct. I did correct in the bibliography.

Any person with direct interest could apply for judicial management under section 346 (1) of the Companies Act,[46] be it the company itself, one or more of its members, the creditors, or any person referred to in section 103(3).

Before a judicial management order could be granted, a company had to satisfy the court that there was a reasonable probability that it would be able to pay its creditors.[47] In *Oelofse v Irvin and Johnson Ltd and Another*[48] it was held that in order to establish that there was a reasonable probability that a company would pay its debts and meet its obligations if placed under judicial management, the facts must show that such debts would be paid and such obligations would be met within a reasonable time. The court emphasized that each case had to be decided according to its facts, size of the company and the nature of the company's assets as well as its liabilities. The court went further to say that a reasonable probability also entails reasonable time frames to settle each case to avoid indefinite waiting periods for creditors.

The test for reasonable probability was applied at a stage when an order for provisional judicial management was sought. For a final order on the return day the court would determine whether if placed under judicial management, the company would become a successful concern and if it was just and equitable for it to be placed under judicial management.[49] When applying for a final order the test that had to be satisfied was more onerous than that of a provisional order.[50] However, the courts were permitted to grant judicial management orders with an exercise of discretion in terms of section 427(3).[51]

A provisional judicial manager would be appointed to take over the management of the company from the former managers when it was undergoing financial constraints.[52] The judicial manager would investigate the status of the company and run the business to the exclusion of the former management and report back to the creditors and members in meetings arranged by the Master. These meetings assisted members of the companies and

---

[46] Companies Act 61 of 1973 s 346(1).
[47] *Ibid.*
[48] 1954 (1) SA 231 E.
[49] *Tenowitz and Another v Tenny Investments Pty Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E).
[50] Loubser "Judicial Management as a Business Rescue Procedure in South African Corporate Law" 2004 *South African Mercantile Law Journal* 137.
[51] Companies Act 61 of 1973 s 427(3).
[52] Companies Act 61 of 1973 s 427(1).

the creditors in deciding whether or not it would be beneficial to place the company under final judicial management.[53]

2.4 The failure of judicial management

Judicial management was not much of a success in the end.[54] It follows that its requirements rendered it inoperable leading to its immediate death. Despite several amendments and adjustments to the legislation, it could not be saved. The requirements as well as the social and institutional framework within the Act led to its weaknesses. The two most important frameworks being the courts and the companies that had divided opinions about it. Courts treated it as an extra-ordinary measure and as soon as the company started limping creditors preferred the liquidation route and opted for it instead— after all it was the easiest and quickest way out.[55] At that point in time the South African insolvency laws were much aligned to the interests of creditors.[56]

It is evident from a comparative perspective that a business rescue regime is most likely to thrive in a debtor-friendly environment. South Africa, being one of the countries with an insolvency system that is programmed to benefit creditors, did not have a successful rescue technique that could resuscitate companies in debt. [57]

Burdette, in one of his articles, listed some of the shortcomings leading to the failure of judicial management as follows.[58]

2.4.1 The inability to pay debts requirements

For an application for judicial management to succeed, there had to be proof of inability to pay debts or commercial insolvency. The petitioner had to show that there was a probability that the company would not be able to meet its obligations.

---

[53] Companies Act 61 of 1973 s 430.
[54] *Supra* note 5 241.
[55] *Supra* note 28.
[56] Boraine, Evans, Roestoff, Steyn "The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution" 2015 3 *Nottingham Business and Insolvency Law e-Journal* 61.
[57] *Supra* note 3 at 244.
[58] *Supra* note 5 248-250.

2.4.2 Court-driven procedure

Court procedures are costly in nature. Judicial management relied heavily on court processes. Apart from cost-related issues the procedure was time consuming leading to drawbacks that lured creditors to opt for liquidation instead.

2.4.3 A reasonable probability that it will be enabled to pay debts or meet obligations and become a successful concern

This requirement placed a massive burden of proof on the applicant who had to prove with reasonable probability that the company would be able to meet its obligations. The fact that it was not a mere possibility but a probability meant that the applicant had to produce evidence to show the court that the company would again position itself in a state of solvency and be able to meet its obligations. The fate of the company was dependent on factors such as co-operation of creditors, employees and trade unions. As was the case, this made it even more difficult for the applicant to prove that he was able to overcome this requirement.

In the case of *Bahnemann v Fritzmore Exploration (Pty) Ltd*[59] the court mentioned that a heavy reliance is placed on the facts of the case to ensure that the applicant has proved the onus he bears. In this case the court was not satisfied that there was any probability that the company would be restored. The respondent's business was one that depended on contracts of sale for overseas products. The contract became non-operational, cutting off the sole life-support of the company. The Court went on to say that the evidence placed before the court was not sufficient for it to establish that the respondent would probably be able to pay its debts in full if it were allowed to continue trading under supervision. Precedents differed in the interpretation of this requirement, courts were not clear in whether this requirement was the same for provisional and final orders or whether the test should be stricter on the return date of the order.

2.4.4 Just and equitable

This is one requirement where the Act did not specify what circumstances would qualify it just and equitable. Bearing in mind that judicial management was an extra-ordinary remedy only granted in special circumstances, courts would often interpret it to apply in limited terms.

---

[59] 1963 (2) All SA 130 (T).

In *Silverman v Doornhoek Mines Ltd*[60] the court had to decide whether or not to grant an order liquidating a company or putting it under judicial management. The court was of the view that the procedure of judicial management was a special and extra-ordinary procedure that was granted when it was just and equitable that the granting of the order would postpone liquidation proceedings. In *Makhuvha v Lukoto Bus Service Pty Ltd*[61] it was held that the just and equitable requirement should also be interpreted to apply where there is no alternative or appropriate remedy available. This requirement created a veil wherein the courts had indeterminate powers that they could not exercise fairly.

2.4.5 Judicial Management was only available to companies

In a country that catered for a variety of businesses, only companies could be placed under judicial management. Businesses such as partnerships and close corporations were excluded from this type of rescue.

2.4.6 The "Company must become a successful concern"

The requirement that the company would become a successful concern implied that when the petitioner applied for judicial management, they would have to prove with certainty that the business would become successful in the end.

2.4.7 Attitude of court

The courts treated judicial management as an extra-ordinary remedy that was only available for large companies in very special circumstances, to the exclusion of smaller companies.

2.4.8 Absence of a moratorium

A moratorium allows a company breathing space while it rearranges its financial affairs. This process was not automatic under judicial management. The court had discretion, after consideration of other factors, to either grant it or not.

---

[60] 1935 TPD 349.
[61] 1987 (3) SA 376 (V).

2.4.9 The use of liquidators as judicial managers

David Burdett raised the issue that liquidators are trained in liquidating companies and not in rescuing them.[62] Over and above this there is always a conflict of interest if a liquidator is appointed to rescue a failing company because the two had different fee tariffs. Liquidation fees were far higher than fees for judicial management. Judicial managers did not have the necessary qualifications to rescue companies. As a matter of fact, none were required. The very manager who was tasked to oversee the success of the company would be the one to opt for an easy way out.[63]

2.4.10 Creditor-orientated approach

The objective of the old Companies Act was purely to protect the interest of creditors to the detriment of debtors and the economy. This approach overlooked the fact that there are other far-reaching benefits when a company is rescued. The idea was to balance both interests having weighed the benefits the practice could contribute to the society. Studies show that rescue mechanisms are likely to thrive in countries where rights of all stakeholders are taken into account when deciding whether a company should be liquidated or saved. Judicial management at the time focused mainly on protecting the rights of creditors. Less protection was afforded to debtors.

In *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd*[64] where the applicants sought an order that the respondent be placed under judicial management in terms of section 427 of the Companies Act[65] contending that the respondent would soon generate profit. The court concluded that the courts had always required applicants for judicial management orders to show a strong probability that by proper management the company would be able to overcome its financial difficulties and that these orders were only granted in very special circumstances and not against the wishes of major creditors. The court frowned upon this practice saying it amounted to a restrictive approach in the development of business rescue in South Africa.

---

[62] *Supra* note 5 250. I think I corrected this in the previous version as well.
[63] *Supra* note 5.
[64] 2001 (2) SA 727 (C).
[65] Companies Act 61 of 1973.

2.5 Conclusion

Although the list of factors that led to the failure of judicial management is not entirely exhaustive, several factors can be attributed to its short-comings. The legislation relating to this procedure had too many loopholes, rendering the whole process deficient There were numerous amendments made to the Companies Act to cure the discrepancies, however the issues were so vast that small adjustments could not fix the problems.

It being the root and the source upon which the process relied, not much could be done by the courts to solve the problem. The interpretations by the courts of what the legislature could have intended the objective of the Act to be exacerbated the problem, in that there were a series of contradictory precedents from different court divisions. As a result, Judge Josman in *Le Roux Hotel Management (Pty) Ltd and another v E Rand (Pty) Ltd*[66] stated that :

> "it was not for the courts to regenerate a system that barely worked since its inception and in doing so disregard the existing body of precedent."[67]

The Court went further to emphasise the need for reform on the legislation governing business rescue in South Africa.

So much can be pinned on the court's role in seeing to the success of judicial management but that would have done very little to change the perspective society had towards this mechanism. Perhaps a change in perception would have promoted the success of judicial management. Without such change judicial management was as good as nothing.

Judicial management was the first to introduce the concept of rescue into our legal system, although the procedure itself was not much of a success and aggravated the urgent need for reform, it was enough to plant a seed to start this practice in South Africa. The Companies Act was therefore repealed and a new rescue mechanism was introduced through the Companies Act 71 of 2008.

---

[66] *Ibid*.
[67] *Ibid.*

CHAPTER 3: INTRODUCTION TO CHAPTER 6 OF THE COMPANIES ACT 71 OF 2008 AND THE LEGAL EFFECTS OF BUSINESS RESCUE ON AFFECTED PERSONS MEASURE

3.1 Introduction

Business rescue enhances the viability of businesses and the economy as a whole.[68] It is notably vital for a country to have a functional business rescue procedure that benefits the rights of society. It is undeniable that businesses go through corporate cycles where periods of generating wealth are followed by periods of decline and low profit margins. This can be as a result of good and poor performance of the economy or mismanagement of the business itself.[69] After the failure of judicial management, Chapter 6 of the Companies Act 71 of 2008[70] introduced a new business rescue model to continue with the legacy of restructuring companies.[71]

Business rescue in terms of Chapter 6 introduces principles relating to company rescues which are in line with international trends.[72] The regime is designed to turn around a

[68]Kaulungome "*Business rescue for Zambia: Suggestions for legislative Reform"* (LLM dissertation 2012 University of Cape Town) 6.
[69] Bezuidenhout "*A review of business rescue in South Africa since implementation of the Act" (71/2008)* (MBA mini-dissertation 2012 North-West University) 17.
[70] Companies Act 71 of 2008.
[71] *Ibid.*
[72] Kloppers "Judicial management reform-steps to initiate business rescue" 2001 *South African Mercantile Law Journal* 13.

company's financial status by placing it in the hands of a qualified, independent person referred to as a business rescue practitioner. The business rescue practitioner takes full control of the company to the exclusion of its former directors and tries to steer it back to a solvent state.[73]

3.2 Definition and purpose of business rescue

Section 128 of the Company Act 71 of 2008 defines business rescue as "proceedings that facilitate the rehabilitation of a company that is financially distressed".[74] This section also provides for temporary supervision of the company and the management of its affairs, business and property; a temporary moratorium on the rights of the claimants or in respect of the property in its possession; and the development and implementation of an approved business 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 its existence.[75]

The main purpose of the Act, so far as section 7(k)[76] is concerned, is to "effect successful rescues in a manner that balances the rights and interest of relevant stakeholders".[77] Unlike the former judicial management approach, this provision of the business rescue mechanism is widely accessible and aims at striking a balance between the interests of the various stakeholders. Chapter 6 of the Act caters for a number of stakeholders who participate throughout the whole process. These stakeholders are creditors, shareholders, trade unions representing employees and, where any employees are not represented by a trade union, each employee personally or the employees' respective representatives.[78]

3.3 Commencement of business rescue

Business rescue proceedings are initiated either through a resolution adopted by the board of the company in terms of section 129(1)(a) or by an order of court in terms of section 131[79].The provisions of the Act also allow for an opportunity for third parties to initiate

---

[73] Pretorius, Rosslyn-Smith "Expectations of business rescue plan: International directives for Chapter 6 implementation" 2014 *Southern African Business Review* 113.
[74] Companies Act 71 of 2008 s 128
[75] Companies Act 71 of 2008 s 1(b)(iii).
[76] Companies Act 71 of 2008 s 7(k).
[77] *Ibid.*
[78] Companies Act 71 of 2008 s 128(1)(a).
[79] Companies Act 71 of 2008 s 129 and s 131.

business rescue proceedings. Any affected person such as a shareholder, creditor, union or employee may file for business rescue.[80] While different parties may initiate the proceedings the main requirements are essentially the same.[81] The moment business rescue proceedings commence whether by a company's resolution or court application, the initiation process leads to the appointment of a business rescue practitioner to supervise the company during its business rescue proceedings.[82]

3.3.1 Commencement of business rescue by directors' resolution

In terms of section 129(1)[83], a company's board of directors may resolve that the company begin business rescue proceedings by passing a resolution by a majority vote[84] unless this is contrary to a provision provided for in the memorandum of incorporation.[85] Section 73 of the Act, which facilitates the procedure of board meetings, should be complied with during the passing of the resolution.[86] For the board of directors to pass this resolution, they must have reasonable grounds to believe that a company is financially distressed and that there appears to be a reasonable prospect of rescuing it.[87] Such a resolution may not be adopted if liquidation proceedings have been initiated against the company.[88] Once the resolution is taken it only becomes effective when it is filed with the Companies and Intellectual Property Commission, Republic of South Africa (CIPC).[89] After the resolution has been filed with the CIPC, the company is obliged to take certain steps in terms of sections 129(3) and (4) of the Act.[90] If the company fails to comply with these requirements the business rescue resolution becomes null and void.

---

[80] *Ibid.*
[81] Wassman "Business Rescue: Getting it right" 2014 *De Rebus* 4.
[82] *Supra* note 8.
[83] Companies Act 71 of 2008
[84] *Ibid.*
[85] Ngwako "*The effect of business rescue and the section 133 moratorium on stakeholders*" (LLM dissertation 2017 University of Pretoria) 10.
[86] Companies Act 71 of 2008 s 73.
[87] Companies Act 71 of 2008 s 129(1)(a)(b).
[88] Companies Act 71 of 2008 s 129(2)(a).
[89] Companies Act Regulations 2011 Part A Regulation 123; Companies and Intellectual Property Commission, Republic of South Africa (hereafter referred to as the "CIPC").
[90] These provide as follows:

> "(3) Within five business days after a company has adopted and filed a resolution, as contemplated in sub-section (1), or such longer time as the Commission, on application by the company, may allow, the company must—
>
> (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
>
> (b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

In terms of section 130, an affected person may apply to court for an order setting aside the resolution or the business rescue practitioner at any time after the adoption of a board resolution, until a business rescue plan is adopted. Unfortunately the same cannot be said for directors who voted in favour of a resolution commencing the proceedings as they are barred from applying for a court order setting aside the resolution unless they satisfy the court that the person in support of the resolution acted in good faith, on the basis of information that has subsequently been found to be false or misleading.[91]

A copy of an application to set aside either the resolution or the appointment of the practitioner must be served by the applicant to the company and the commission.[92] In this instance the court will have discretion to set aside the resolution on grounds set out in the Act, or if it considers it just and equitable to do so.

When a court sets aside a resolution, the court is also in a position to make additional orders like placing the company under liquidation or ordering costs against any directors who voted in favour of the resolution if the court has found that there were reasonable grounds for believing that the company would be unlikely to pay all its debts as they become due and payable.[93] If a business rescue practitioner at any stage is of the view that there is no reasonable prospect for the company to be rescued, the practitioner must take prescribed action.[94]

3.3.2 Commencement of business rescue by court order

An affected person may apply to court at any time placing the company under supervision and commencing business rescue proceedings if the board does not pass a resolution.[95] An affected person, as defined in terms of section 128(1), includes shareholders, creditors and employees.

---

(4) After appointing a practitioner as required by subsection (3)(b), a company must—
(a) file a notice of the appointment of a practitioner within two business days after making after making the appointment and:
(b) publish a copy of the notice of appointment to each affected person within 5 days after the notice was filed."

[91] Companies Act 71 of 2008 s 130(2).
[92] Companies Act 71 of 2008 s 130(3)(a).
[93] Companies Act 71 of 2008 s 130(5)(c).
[94] Van Staden "Cutting the lifeline: The termination of business rescue proceedings" 2013 *De Rebus* 240.
[95] Companies Act 71 of 2008 s 131(1).

Section 131(1) of the Act reads as follows:

> "Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings." [96]

Section 131(4) of the Act reads as follows:

> "After considering an application in terms of subsection (1), the court may—
>
> (a) make an order placing the company under supervision and commencing business rescue proceedings if the court is satisfied that—
>
> (i) the company is financially distressed;
>
> (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract, with respect to employment-related matters; or;
>
> (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or
>
> (b) dismissing the application, together with any further necessary the application, together with any necessary and appropriate order, including an order placing the company under liquidation."[97]

The court may not grant an order for business rescue unless there is a reasonable prospect of rescuing the company, i.e. facilitating its rehabilitation so that it continues on a solvent basis or if possible, yields a better return for its creditors and shareholders than what they would receive through liquidation.[98]

3.4 Termination and duration of business rescue proceedings

The Act does not specifically state the time frames in which business rescue proceedings automatically lapse. Section 132(3) [99]states that if a business rescue has not ended within

---

[96] *Ibid.*
[97] Companies Act 71 of 2008 s 131(4).
[98] Companies Act 71 of 2008 s 128(b) and (h) and *Newcity Group (Pty) Limited v Allan David Pellow N.O* 2014 ZASCA 162.
[99] Companies Act 71 of 2008 s 132(3).

three months after the start of those proceedings, or such longer time frame as the court may allow on application by the practitioner; the practitioner must prepare a report on the progress of the business rescue proceedings. The practitioner is also required to update this report at the end of each subsequent month until the end of those proceedings and deliver the report and each update to the affected parties, the court and the commission.

As it stands this provision lacks a definite time clause regarding the life-span of rescue proceedings, leaving a gap for proceedings to continue indefinitely. It is a concern that a prolonged business rescue procedure allows a company to enjoy the benefit of the moratorium with no sanction for not paying debts at the expense of creditors, employees and shareholders.[100] *In Absa Bank Ltd v Caine NO, In re: Absa Bank Ltd v Caine NO and another*[101] the court held that business rescue proceedings cannot go on indefinitely and that the legislature did not intend that creditors be held to ransom and prevented from exercising their normal contractual rights for an extraordinarily long period of time.

Section 132(2)(a) has other methods to terminate business rescue. This includes setting aside a resolution or converting the proceedings into liquidation proceedings.[102] It is argued by some practitioners that the duration of business rescue proceedings must be subjective and tailored to suit the financial situation and potential of the particular company in question. The reason behind this line of thought being that it would be unjust to apply strict and narrow time frames within which business rescue proceedings should be implemented. Be that as it may, business rescue proceedings cannot be warranted unlimited time periods for the sake of all the parties' interests. [103]

Extensions of time periods are sometimes warranted. However, this may be done by either obtaining consent from affected parties or through application to court. In the matter of *AG Petzetakis International Holdings v Petzetakis Africa (Pty) Ltd and Others*[104] where the applicant requested a postponement of the business rescue proceedings, the court emphasised that the principle of reasonable prospect is material in helping the court decide whether it should grant an order or not.

---

[100] *Supra* note 69.
[101] 2014 ZAFSHC 46 (2 April 2014) para 48.
[102] Companies Act 71 of 2008 s 132(2)(a).
[103] Jameel "Termination and Duration of Business Rescue Proceedings in South Africa" (10 April 2012) (mondaq.com/southafrica/x/172156//Insolvency/Termination+And+Duration+Of+Business+Rescue+Proceedings).
[104] 2012 (5) SA 515 (GSJ).

After investigating the affairs of the company and the financial situation to determine whether there is a reasonable prospect of the company being rescued, business rescue proceedings must end if the practitioner decides that the company cannot be rescued, or if the business rescue plan is rejected, or if the company emerges from financial distress, or if the business rescue is implemented.[105]

In *Artio Investments (Pty) Ltd v Absa Bank Ltd*[106] and others, the applicant launched an application in terms of section 153 (1) (a) (ii) of the Act. The applicant applied for the vote of the first respondents who had disapproved of the final business rescue plan published, to be set aside and for the approval of the business rescue plan to be granted by the court. The court held that business rescue proceedings had come to an end in terms of section 132(2)(c)(1) when the bank voted against the business rescue plan. As a result, the court wound up the company.

The court in the matter of *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd*[107] held that there is a reason why the legislature used the term temporary supervision in section 128(1)(b)(i), namely, to ensure that business rescue proceedings do not end up being of an indeterminate duration.

3.5 The legal effects of business rescue

3.5.1 The moratorium

In the event that business rescue commences either by way of a resolution or by a court order, the general moratorium or a stay on legal proceedings against the company or its property automatically applies.[108] This principle is a fundamental feature in any business rescue system as it allows a company breathing space while it is being restructured in a way that allows it to continue operating as a successful concern.[109] The moratorium kicks in on the date of commencement of business rescue. Any claims against the company may only be enforced with the consent of the business rescue practitioner or with the leave of the court.[110]

---

[105] Companies Act 71 of 2008 s 141(1).
[106] (7562/2014) 2014 ZAGPPPHC 689.
[107] 2015 3 All SA 659 (WCC).
[108] Companies Act 71 of 2008 s 133.
[109] Meskin *Insolvency Law and its Operation in Winding-up* 2019 18-53.
[110] *Ibid.*

3.5.1.1 Moratorium on legal proceedings against the company

The Companies Act deals with the moratorium in section 133(1) in the following manner:[111]

During business rescue proceedings, no legal proceeding, including enforcement action against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

(i) "with the written consent of the practitioner;

(ii) with the leave of the Court and in accordance with any terms the Court considers suitable;

a) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

b) criminal proceedings against the company or any of its directors or officers;

c) proceedings concerning any property or right over which the company exercises the powers of the trustee; or

d) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."

3.5.1.2 Moratorium on property interest

When a company is undergoing business rescue its power to dispose of its property is subject to limitations. The company may only dispose, or agree to dispose of its property in the ordinary course of business; in a *bona fide* transaction at arm's length for fair value approved in advance in writing by the practitioner or in transactions contemplated within, and undertaken as part of the implementation of a business rescue plan that has been approved.[112]

---

[111] Companies Act 71 2008 s 133.
[112] Sharrock *et al Hockly's Insolvency Law* (2012) 281.

3.6 Effects of business rescue on various stakeholders

3.6.1 Employees and employment contracts

Employees of a company who are employed immediately before proceedings commence will continue to be employed on the same terms and conditions save to the extent that there are changes in the ordinary course of attrition or the employees and the company, subject to labour laws, agree on different terms and conditions.[113] Retrenchment of employees as contemplated in the business rescue plan is subject to certain provisions of the Labour Relations Act, 1995 and other relevant employment legislation.[114]

The business rescue practitioner may cancel or suspend any provision of an agreement to which the company is party when business rescue proceedings commence, entirely, partially or conditionally, despite any contrary provision in the agreement.[115] This right does not apply to an employment contract, as it is subject to certain provisions of the Insolvency Act, 1936.[116]

Employee's rights are specifically set out under section 144 of the Act.[117] Employees, for the purposes of Chapter 6, fall under the ambit of "affected persons". This affords employees a considerable amount of power in the company while business rescue proceedings are in force. Loubser[118] is of the view that the benefit employees have as warranted by business rescue may open the system to abuse by employees. It is further argued that there is an imbalance in the protection of the interest of employees and that of other affected persons, like creditors, during business rescue.[119] This is evident from the provision made in section 135(1)(3)(a)[120] wherein employees have preference for remuneration over creditors.

---

[113] Companies Act 2008 s 136(1)(a).
[114] Companies Act 2008 s 136(1)(b).
[115] Companies Act 2008 s 136(2).
[116] Companies Act 2008 s 136(2).
[117] Companies Act 2008 s 144.
[118] Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions" (Part 1)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 509.
[119] Joubert, Van Eck, Burdette, *et al* "Impact of labour law on South Africa's new corporate rescue mechanism" 2011 *The International Journal of Comparative Labour Law and Industrial Relations* 16-17.
[120] Companies Act 2008 s 135(1)(3)(a).

3.6.2 Shareholders and directors

The definition of "affected" persons" when business rescue commences includes shareholders. Shareholders, as part of the company, are entitled to notifications of court proceedings and any other relevant issues concerning the business rescue proceedings as well as participating in any hearing of the business rescue proceedings.[121] During business rescue proceedings the classification or status of any issued securities of a company may not be altered. Such alterations would be deemed invalid unless specified in an approved business rescue plan or if the court directs otherwise. Securities may only be transferred in the ordinary course of business, which will enable normal share trading to continue.[122]

As soon as business rescue proceedings commence, the directors of the company are required to hand over the company to the business rescue practitioner. What this means is that all the records, books and statements of affairs are to be provided to the practitioner within five business days to enable him to take over the company.[123] Directors may continue to exercise their functions as directors subject to the business rescue practitioner's instructions.[124] They also have a duty and are required to perform management functions in the company subject to the instruction of the business rescue practitioner to the extent that it is reasonable to do so.[125]

Although directors are given permission to exercise managerial functions, they are exempted from having to comply with general standards required from directors regarding conduct and certain liabilities.[126] Each and every director must comply and attend to the requests of the business rescue practitioner at all times during these proceedings.[127]

3.6.3 Creditors

Creditors are allowed to participate formally and informally in court proceedings involving business rescue in terms of section 145.[128] Section 145(1)(a)[129] provides that each and

---

[121] Companies Act 2008 s 129(3)(a) and s 130(4).
[122] Companies Act 2008 s 137.
[123] Companies Act 2008 s 142(1).
[124] Companies Act 2008 s 137(2)(a).
[125] Companies Act 2008 s 137(2)(b).
[126] Companies Act 2008 s 137(2)(d).
[127] Companies Act 2008 s 137(3).
[128] Companies Act 2008 s 145.
[129] Companies Act 2008 s 145(1)(a).

every creditor is entitled to receive notice of all court proceedings, decisions, meetings or any other relevant event concerning business rescue proceedings. Creditors participate in the voting of the business rescue plan — either to approve, reject or amend it.[130] Section 153 affords creditors the right to buy out rights of creditors who vote against the plan.[131]

Section 145(3) allows creditors to form a committee, through which they are entitled to be consulted by the business rescue practitioner during the development of a business rescue plan. However, creditors are not permitted to make proposals to the practitioner and may not direct him or her to perform his duties in a certain way.[132] When business rescue proceedings are underway, creditors who have an interest in the outcome are expected to attend the first meeting of creditors. In this meeting the practitioner must brief the creditors as to whether they believe that there is a reasonable prospect of rescuing the company.[133] In order to assist the business rescue practitioner to determine the extent of liabilities the company has, the creditors are required to submit their claims at their first meeting.[134]

Creditor interests are to be adequately protected if business rescue is intended to succeed.[135] When a company goes insolvent, the aim of business rescue is to return the company to a solvent state or, alternatively, to secure better returns for creditors and shareholders.[136] *In Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein Kayalami (Pty) Ltd and Others*[137] the court's illustration of how creditor's rights are to be protected goes to show how important their interests are in business rescue proceedings. It was therefore held that, where appropriate, a creditor should be entitled to liquidation of the debtor company as a means of obtaining repayment of debts owed when the company finds itself in financial distress. The court did not find the creditors unreasonable for rejecting a business rescue plan and asking for the company to be liquidated on the basis that there was no reasonable prospect that the company would survive.[138]

---

[130] Companies Act 2008 s 152.
[131] Companies Act 2008 s 153.
[132] Companies Act 2008 s 145(3).
[133] Companies Act 2008 s 147(1)(a).
[134] Companies Act 2008 s 147(1)(a)(ii).
[135] *Supra* note 65 at 37.
[136] Companies Act 2008 s 7(k).
[137] 2012 (13) SA 273 (GSJ).
[138] *Ibid*.

3.7 Post-commencement finance

After business rescue the most important feature of a successful and complete rehabilitation of a business, is the provision of post-commencement finance.[139] South Africa has had some case law where courts have emphasised the importance of the availability of post-commencement financing in order to meet the requirement that the court must be satisfied that there is a reasonable prospect of rescuing the business as contained in section 131(4) of the Companies Act.[140]

The concept of post-commencement finance comes about when a company struggles to secure funding when it is under business rescue. This is because lenders fear that they may not be able to recover their money if they provide funding.[141] However, to try and eliminate this fear, section 135(2) provides a solution to this predicament by allowing the company to use its assets as security for such loans. It states that these creditors, irrespective of whether they were given security for their claims or not, must be repaid before any other unsecured creditors.[142]

Post-commencement finance is a very crucial aspect of business and without it a company could be forced to go into liquidation.[143] The World Bank Report points out the following under principle C9:

> "business should have access to commercially sound forms of financing, including on terms that afford a repayment priority under exceptional circumstances, to enable the debtor to meet its ongoing business needs"[144]

---

[139] Calitz "Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act" 2016 *De Jure* 266.
[140] Loubser "Post-commencement financings and the ranking of claims — a South African perspective" in Perry (ed), 2014 *European Insolvency Law: Current Issues and Prospects of Reform* 31.
[141] Davis, Geach (eds) *Companies and other business structures in South Africa* (2009) 170.
[142] Companies Act 2008 s 135(2).
[143] McCormack "Super priority new financing and corporate rescue" 2007 *Journal of Business Law* 1.
[144] World Bank "Insolvency and Creditors rights" 2005 *The World Bank Group: Reports on the Observances of Standards and Codes* http://www.worldbank.org/ifa/rosc (accessed 8 September 2015).

3.8 Business rescue practitioner

3.8.1 Appointment and removal

The business rescue practitioner is the most important party in business rescue proceedings. He occupies a supervisory role in terms of the Companies Act. The business rescue practitioner has ranging duties and obligations to the company as imposed by the Act.[145]

There are two ways in which a business rescue practitioner is appointed, either by a company on adopting a business rescue resolution in terms of section 129(3)(b)[146] or by the court on granting a business rescue application in terms of section 131(5).[147] A court appointment may also be made where the court upholds objection against a practitioner appointed by the company in terms of section 130(6)(a)[148]. In terms of section 131(5),[149] court appointments must be ratified by an independent creditor vote at the first meeting of creditors.

The court may remove a business rescue practitioner from office following an objection to his appointment in the case of a business rescue resolution or on any of the following grounds:

a) "Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;[150]
b) Failure to exercise the proper degree of care in the performance of the practitioner's functions;[151]
c) Engaging in illegal acts or conducts;[152]
d) If the practitioner no longer satisfies the requirements set out in section 138 (1);[153]
e) Conflict of interest or lack of independence;[154] or

---

[145] Van der Walt "A turnaround practitioner's view of new business rescue legislation" in Harvey (ed) (2011) *Turnaround Management and Corporate Renewal: A South African Perspective* 148-10.
[146] Companies Act 2008 s 129(3)(b).
[147] Companies Act 2008 s 131(5).
[148] Companies Act 2008 s 130(6)(a).
[149] *Supra* note 132.
[150] Companies Act 2008 s 139(a).
[151] Companies Act 2008 s 139(b).
[152] Companies Act 2008 s 139(c).
[153] Companies Act 2008 s 139(d).
[154] Companies Act 2008 s 139(e).

f) The practitioner is incapacitated and unable to perform the functions of that office and is unlikely to regain that capacity within a reasonable time."[155]

In the event that a business rescue practitioner dies, resigns or is removed from office, the company or the creditor who nominated him must appoint a new practitioner in terms of section 139(3).[156] An affected person can make a court application to set aside the new appointment.

3.8.2 Qualifications of business rescue practitioners

A business rescue practitioner may be appointed in terms of section 138 (1) if he or she meets the following requirements;

" a) Is a member in good standing of a legal, accounting or business management profession accredited by the commission;[157]

b) Has been licensed as such by the commission in terms of subsection (2);[158]

c) Is not subject to an order of probation in terms of section 162(7)[159]

d) Would not be disqualified from acting as a director of a company in terms of section 69 (8);[160]

e) Does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by the relationship; and[161]

f) Is not related to a person who has a relationship contemplated in paragraph (d)"[162]

Business rescue is the deciding factor of whether a company will continue to exist or cease operations. Given its valuable importance, the skills of business rescue practitioners are essential to its success. A factor leading to failing business rescues is the fact that, at present, there are no clear requirements in South Africa for qualifications of a business

[155] Companies Act 2008 s 139(f).
[156] Companies Act 2008 s 139(3).
[157] Companies Act 2008 s 138(a).
[158] Companies Act 2008 s 138(b).
[159] Companies Act 2008 s 138(c).
[160] Companies Act 2008 s 138(d).
[161] Companies Act 2008 s 138(e).
[162] Companies Act 2008 s 138(f).

rescue practitioner.[163] The risk is that practitioners do not know the reason for business failure and the warning signs thereof, hence they do not respond to the issues appropriately in the business rescue plan.[164] The low success rate of business rescue can also be attributed to the lack of clear frameworks within which they perform their duties.[165]

3.9 Conclusion

Unlike judicial management, business rescue does not only require a company to be restored to solvency. It also allows for exploration of other avenues that could save the business. A company experiencing financial distress and undergoing business rescue can be sold to a third party as an ongoing concern, in order to give creditors and shareholders a better return than would have resulted from liquidation, or it can also continue operating until such time that the company can get back on its feet.

Business rescue has a clear objective to restructure companies for the benefit of all the "affected persons". It therefore provides for efficient rescue and recovery of financially distressed companies in a manner which balances the rights and interests of all relevant stakeholders as envisaged in section 7(*k)*. All the "affected persons" are afforded an opportunity to participate in business rescue proceedings until finalisation of the process. Affected parties are involved in the drafting of the business rescue plan, appointing a business rescue practitioner and voting on the business rescue plan.

Business rescue is pretty much a self-administered remedy by the company, under independent supervision. Unlike judicial management, business rescue is not entirely court-driven, but there is still sufficient oversight to provide protection to all "affected persons" where they may become vulnerable.[166]

---

[163] Pretorius Holtzhauzen , "Business rescue decision-making through verifier determinants — ask the specialists" 2013 *South African Journal of Economic and Management Sciences* 16(4) at 468-485. https://doi.org/10.4102/sajems.v16i4.450.
[164] *Ibid.*
[165] *Ibid.*
[166] *Supra*.

CHAPTER 4: THE OPINIONS OF KEY STAKEHOLDERS TO BUSINESS RESCUE

4.1 Introduction

One of the main objectives of Chapter 6 is to balance the rights and interests of all the relevant business rescue stakeholders.[167] The rights and interests of all the stakeholders are ranked differently, therefore the effects of business rescue do not affect these stakeholders in the same way. While some seem to enjoy more benefits than others, it would appear that all affected persons have different views about the functionality of Chapter 6 and the success thereof.

It is an accepted view that corporate rescue is only successful if the business itself is saved. The concept of a successful business rescue, however, is dependent on many factors.[168]

Perhaps by way of definition, a successful business rescue can be seen in light of three different approaches as follows:[169]

a) Firstly, it could be one that involves the sale of the entire business to a third party, thereby preserving the ongoing enterprise;
b) Secondly, it could be one that results in creditors recovering more than what they would have received under liquidation; or

[167] Companies Act 2008 s 7(k).
[168] Anthony "Corporate Administration: A proposed Model" 1999 *De Jure* 84.
[169] Moss "Comparative Bankruptcy Cultures: Rescue or Liquidation? Comparison of Trends in National Law-England" 1999 *Brooklyn Journal of International Law* 121-122.

c) Lastly, it could be one that allows the continuation of the business enterprise and the preservation of jobs, with little emphasis on creditor recovery.

In the end, what defines a successful rescue will be determined by policymakers, and this will vary from country to country. It is important for policymakers include the right incentives in insolvency laws, in order to make sure that successful rescues are facilitated.[170] Looking back, South Africa only had two options as alternatives to liquidation, those being, judicial management in terms of section 427 and compromise in terms of section 311 of the Companies Act.[171] These procedures did not prove to be very successful hence Chapter 6 came into operation.[172]

4.2 Perceptions on creditors

Creditors have the power to intervene in decisions made concerning the handling of company affairs once it is placed under business rescue. Creditors also have the right to appoint independent creditors as members of the creditors committee, which may collaborate with the business rescue practitioner about matters relating to the rescue.[173] In order for creditors to secure fair representation in the whole process, they are afforded an opportunity to request reports and to consider any relevant information relating to the structures formulated for the procedure. This is to make sure that their interests are protected.[174]

It follows that creditors have a right to intervene in business rescue proceedings by way of a court application should they conclude that their interests are not being looked after. They can either seek a winding up order, request the removal of a business rescue practitioner or address any other relevant issue as permitted by the Act.[175]

Despite these benefits, there are some pressing issues pertaining to the treatment of creditors during business rescue. The first of many is the duration of business rescue in conjunction with section 133[176] of the Companies Act that deals with the concept of a

---

[170] *Supra* note 148.
[171] Companies Act 1973 ss 427 and 311.
[172] Osodo 2015 *Penn State Journal of Law and International Affairs* 459.
[173] *Supra* note 116.
[174] Companies Act 2008 s 149(a)-(b).
[175] *Ibid.*
[176] *Supra* note 133.

moratorium. It is widely accepted that the moratorium is a key ingredient for the success of any business rescue, however, we should be cognisant of the fact that creditors are prevented from enforcing their claims in this period and as a result stand to suffer the most prejudice compared to other affected parties.[177] It is a fundamental principle of insolvency that creditors should not be permitted to seize assets belonging to the debtor in a piecemeal fashion for reasons of securing the equal treatment of other creditors.[178]

The duration for business rescue proceedings according to the Act is 3 months, however this can be extended if the court deems fit.[179] From a creditor's point of view this is problematic, as it perpetuates the period of the moratorium with no consequence to the debtor who is defaulting on payments of his debts. What this does is result in unhappy creditors who then feel the need to apply for liquidation of the company.[180] In *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*[181] the court held that business rescue applications are prone to abuse, in that they might be used by obstructive debtors with the intention of avoiding the inevitable as part of its ongoing strategy to hinder a creditor from pursuing its lawfully permissible goal. However, that being said, creditors are not without remedy, they can always bring an application opposing the extension of business rescue. It remains at the court's discretion to grant an extension after considering whether there is a reasonable prospect for the company to overcome its financial difficulties.[182]

Another major concern is that creditors are not always informed in time about the company being in distress. It is argued that effective communication is a key factor when a company is encountering financial difficulties.[183]

Given the inherent nature of business rescue proceedings, the competing interests of different affected parties can have a negative effect on the rescue process.[184] With the new legislation in place, creditors can now choose how they want to participate within the guidelines of the Act.[185] Cassim *et al* states that one of the consequences of business rescue

---

[177] *Supra* note 152.
[178] Wood *Principles of International Insolvency* 2007 31.
[179] Companies Act s 132.
[180] *Supra* note 69.
[181] 2013 (2) 540 (WCC) 22.
[182] Companies Act 71 of 2008 s 130(1).
[183] Le Roux, Duncan "The naked truth: creditor understanding of business rescue: A small business perspective" 2013 *Southern African Journal of Entrepreneurship and Small Business Management* 58-60.
[184] *Ibid*.
[185] Mckenzie-Skene "The Composition of the Debtors Estate on Insolvency: A comparative study of Exemptions" 2011 *INSOL International Insolvency Review* 29-55.

proceedings is that disposal of the company's assets is restricted.[186] This allows the possibilities of fraudulent collusion between the debtor and the creditor to strip the debtor of his estate when the interests of other creditors are at stake. This in turn tampers with the just and equitable treatment of all creditors involved.[187]

4.3 Perceptions on shareholders

Like any other affected party, shareholders have every right and reason to be involved in business rescue proceedings, owing to their financial interest in the outcome.[188] To shareholders a successful rescue means a revival of shares with at least an increase in their previous value.[189]

For the sole purpose of shareholders, section 146 of the Companies Act caters for holders of the Company's securities as follows:[190]
Holders of issued security of the company have certain rights in respect of the proceedings which are similar to those granted to employees, their representatives and creditors. They too are entitled to notices pertaining to court proceedings, decisions, meetings and other relevant events concerning business rescue proceedings.[191] They may participate in any court proceedings arising during the business rescue[192] as well as formally in the business rescue proceedings to the extent provided for in the new Act.[193] Shareholders may also vote to approve or reject a proposed business rescue plan but only if it alters the rights associated with the class of securities they hold.[194]

It is therefore clear from the above statement that shareholders are generally granted extensive rights to consultation and participation in business rescue proceedings.[195] However, when it comes to the adoption of the business rescue plan, shareholders are permitted to vote only when the plan purports to alter certain rights.[196] Shareholders are of

---

[186] Cassim, Jooste, Shev, Yeats *Companies and Other Business Structures in South Africa* (2012) 471.
[187] Rajack "Determining the Insolvent Estate – A comparative Analysis" 2011 *INSOL International Insolvency Review* 1-28.
[188] Loubser "The Roles of Shareholders during Corporate Rescue Proceedings: Always on the outside looking in" 2008 *South African Mercantile Law Journal* 372.
[189] *Ibid.*
[190] Companies Act 2008 s 146(a) to (d).
[191] Companies Act 2008 s 146(a).
[192] Companies Act 2008 s 146(b).
[193] Companies Act 2008 s 146(c).
[194] Companies Act 2008 s 146.
[195] *Ibid*.
[196] *Ibid.*

course entitled to vote as creditors in instances where they have made loans to the company, but they still will not be rated as independent creditors. Therefore, where the rescue plan has no effect on shareholders rights they would be precluded from voting. Considering their financial interests, this appears to be a limitation on their rights.[197]

Another issue that shareholders have is the lack of shareholder committees to liaise with the business rescue practitioner in the same way that creditors and employees do. As much as the Act prescribes that the practitioner should hold meetings with each of the stakeholders in order to inform them about the state of the company. Unfortunately, shareholders do not have this privilege. We are merely left to speculate as to why shareholders are not afforded similar opportunities. To explain the reasons for this *Loubser* seems to suggest that the duty to liaise with shareholders remains with the board of the company. It is argued that perhaps the legislature thought it to be time-consuming, costly and administratively burdensome to arrange these meetings, taking into consideration the fact that there are large numbers of shareholders that are often scattered. Although there seems to have been a valid reason for excluding shareholders, they may stand to suffer prejudice.[198]

4.4 Perceptions on employees

When business rescue commences and for its duration, employees remain employed on their existing terms and conditions.[199] Employees are preferred unsecured creditors in respect of unpaid remuneration that was already due when business rescue commenced. This excludes medical scheme and pension scheme payments.[200]

Employees as "affected persons" hold a significant position in the company as permitted by the Act, hence their protection is undeniably important. However, it is debatable whether it was appropriate to include employees on the "affected persons" radar in the first place.[201] Loubser argues that the benefits that employees have may open business rescue to abuse by employees.[202] She is also of the view that an imbalance exists between the protection

---

[197] Loubser "Business rescue in South Africa: A procedure in search of a home?" 2007 *Comparative International Law Journal of Southern Africa* 152-171.
[198] *Supra* note 172.
[199] Joubert, Loubser "An executive director in business rescue: Employees or something else?" 2016 *De Jure* 95.
[200] Companies Act 2008 s 144(4).
[201] *Supra* note 158.
[202] Loubser "Judicial Management as a Business Rescue Procedure in South Africa" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 510.

afforded to employees and the interests of creditors.[203] This is because employees are given preference in claims for remuneration that become due and payable during the process of business rescue.[204]

One cannot question the rationale behind affording employees an active role in business rescue for they have a vested interest in the business rescue process and outcome. It is therefore justifiable for them be notified if the company is to undergo business rescue. The crucial question to be asked is whether the legislature went too far in protecting the rights of employees?[205]

Loubser argues that giving an employee the right to initiate business rescue proceedings was an error of which the legislature should have been cautious. The legislature not only erred but opened the process to abuse.[206] Further, she is of the opinion that the rights that accrue to employees during business rescue so far outweigh those that accrue in liquidation, that there is an incentive for employees in seeing that the company goes into business rescue, thus increasing the potential for abuse.[207] She further submits that this right may be used for unrelated grievances and may also be used as a bargaining tool by trade unions in wage negotiations. She goes on to state that other comparable jurisdictions do not harbour such rights for employees and that courts should grant punitive cost orders against rogue employees seeking to abuse the process.[208]

Joubert ,Van Eck and Burdette support the notion that employees have been given too much protection and that it is not only detrimental to creditors, but to the process of business rescue as a whole.[209] They note that the preferences outlined in section 135 continue to apply even when the business is on the brink of liquidation. This is unlike a situation where the company is liquidated where the employees are only entitled to 3 months salary in arrears and a maximum amount of R12 000. This kind of treatment of employees may deter funders from contributing towards post-commencement finance.[210]

---

[203] *Supra* note 104.
[204] Companies Act 2008 s 135(1) read with s 135(3)(a).
[205] *Ibid.*
[206] *Supra* note 196.
[207] *Ibid.*
[208] *Ibid.*
[209] Joubert, Van Eck, Burdette "The expected impact of labour law principles on South Africa new corporate rescue mechanism" (including a comparison with the position in the EU)" (8 April 2009) https://repsitory.up.ac.za (accessed 20 March 2015) 17-18.
[210] *Ibid.*

It was further concluded that the legislature went too far in the protection of employees and that this protection erodes the interests of creditors, especially those who provide for post-commencement finance.[211]

4.5 Courts and academics

Since 2011, when the Act came into operation, there has been no less than fifteen reported judicial decisions on business rescue applications. At that stage business rescue appeared to have been granted in only one of the cases that have come to court.[212] The courts have taken the opportunity to make decisions while addressing questions of interpretation, application and implementation of Chapter 6.

One of the first questions the court had to address was what the legislature meant by the words "reasonable prospect" in business rescue. Many applications for business rescue have failed due to satisfactory evidence having to be produced to prove this requirement.[213] Supreme Court of Appeal judgments have been the most discouraging as it appears that they are setting the bar too high for applicants and in the process unfairly denying access to the Chapter 6 remedy for ailing companies and their stakeholders.[214]

In *Southern Palace Investments (Pty) Ltd v Midnight Storm Investments 386 Ltd*[215] the court noted that the legislature in the 2008 Companies Act compared to the 1973 Companies Act intended to impose a lower threshold by requiring the debtor to prove reasonable prospect instead of reasonable probability. However, this was not until the court veered off course when it held that to satisfy the lower threshold the applicant must provide a business rescue plan that addresses the cause of the failure of the company as well as a remedy that has a reasonable prospect of being sustainable. The court also required that the applicant provide concrete and objectively ascertainable details of the likely costs of making the company able to resume its business; the availability of the necessary cash resources to enable the debtor company to meet its day-to-day expenses upon resumption of its operations and the reasons

---

[211] *Ibid*.
[212] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufactures (Pty) Ltd and* 2013 (6) SA 47.
[213] Joubert '"Reasonable possibility" versus "Reasonable prospect": Did business rescue succeed in creating a better test than Judicial Management?" 2013 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 550-552.
[214] *Ibid.*
[215] 2012 (2) SA 423 (WCC).

why the applicant suggests that the proposed business plan would have a reasonable prospect of success.[216]

The main objective in the first place was to set the bar lower than was the case in judicial management, however this case ended up setting the bar even higher. The court in *Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd & Others* [217] held that it was fair and realistic to require an applicant for business rescue to furnish a complete business rescue plan with the level of detail spelled out, in order to persuade a court to exercise its discretion when determining whether the business rescue practitioner will have a viable basis to undertake the task.

The above two judgments are concrete proof that the court's attitude towards business rescue does not encourage a progressive future for the Chapter 6 rescue mechanism.[218] It could well be that courts adopted and continue to adopt these severe restrictions to prevent abuse of the Chapter 6 provisions. However, this could lead to the failure of the procedure. as was the case with judicial management.

Academics submit that there is a high possibility that business rescue will succeed, provided it operates in a debtor-friendly fashion. One of the main reasons for the downfall of judicial management was that its primary emphasis was on creditors. Chapter 6 on the other hand strives to protect and balance the interest of all the stakeholders.[219] Nevertheless. to some extent this causes an indirect prejudice to those who do not receive the same financial benefits by virtue of the procedures made available to them in the Act. It is argued that lack of competency within business rescue practitioners may cause unhappiness to creditors thereby leading to a string of potential litigation. It is further argued that the legislature should have ensured that there is a provision setting out proper qualifications for practitioners thereby increasing their degree of competency.[220] There is no guarantee that the identified grey areas could one day be solved for the purposes of ensuring a higher success rate of businesses under rescue.

---

[216] *Ibid*.
[217] 2012 (2) SA 378 (WCC) para 17.
[218] *Supra* note 156.
[219] Bradstreet "The leak in the chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders" 2010 *SA Mercantile Law Journal* 195-213.
[220] *Ibid*.

4.6 Success rate of business rescue

Business rescue proceedings do not always succeed in rehabilitating the company despite the provisions made in the Act. Only 12% of businesses that entered into business rescue between May 2011 and March 2014 concluded these proceedings successfully. The success rate from June 2015 was 13.6%[221] and at the end of June 2016 it had increased to 15%.[222] The Companies and Intellectual Property Commission statistics analysis shows that from 2011 to 2017, 2867 business rescue proceedings commenced and 235 of the companies were declared a nullity, therefore only 8.2% of these commenced business rescue and ended up in a nullity.[223] Between the year 2018 and 2019, there has been an increase in new liquidation matters being reported, however it is also noted that more of these may be directly related to the increase of volume of court orders being received whereby business rescue proceedings are discontinued.[224] An analysis was conducted around March 2018, on the liquidation status of business rescue proceedings for which 11,5% of the entities went into liquidation and 44,43% is either in annual return deregistration or finally deregistered for non-compliance with annual returns. However, 40,77% has an in business record status.[225]

Although there is evidence of improvement as compared to judicial management, there is also evidence of a low success rates. As a result of financially distressed companies filing for business rescue, there has been a drop of liquidation applications. This is proof that the business rescue regime is helping to prevent unnecessary liquidations.[226]

There are several factors hindering the success of business rescue and contributing to its low success rate. These include the lack of availability of funding,[227] the relationship

---

[221] The Companies and Intellectual Property Commission "Annual report for license as business rescue practitioner" 2014 http://wwww.cipc.co.za/index.php/manage-your-business/manage-your-close-corporation/changing-status-your-company/application-licence-business-rescue-practitioner/ (accessed 24 May 2015).
[222] The Companies and Intellectual Property Commission "Status of business rescue proceedings in South Africa" June 2015 http://www.cipc.co.za/files/5914/4488/9277/Status_of_Business_Rescue_in_South_Africa_June_2015_version1_0.pdf (accessed 3 December 2015).
[223] The Companies and Intellectual Property Commission "Status of business rescue proceedings in South Africa March 2018" (also covers period between 1 May 2011 to 31 December 2018), http://www.cipc.co.za/files/3915/2639/0127/Business_Rescue_Status_Report_March_2018_v1.0.pdf.
[224] *Ibid* 20.
[225] *Ibid* 10.
[226] Hubbard "Business rescue: Why companies should do their homework" 2013 *Finweek* 22-23.
[227] Olivier "Business rescue: To rescue or not to rescue?" 13 November 2014 *Finweek* 30.

between the practitioner and management, the relevance of the qualifications and experience of the business rescue practitioner[228], the inconsistent court judgments, lack of prompt action, the impact of international provisions and the rights of affected persons.

4.7 Conclusion

It is necessary to establish whether the current business rescue regime addresses the intended objectives of the Companies Act and needs of distressed companies. Looking closely at the perceptions of different affected persons, the best conclusion to draw is that Chapter 6 has its pros and cons. It cannot be said with confidence that one party is favoured more than the other. Although the rights of stakeholders cannot necessarily be said to have been balanced, the legislature tried to meet all the affected parties halfway by allowing them direct involvement in business rescue proceedings. This is in comparison to the later regime that only concerned itself with the rights of creditors.

Having considered some of the perceptions of affected parties, it is safe to say that, to some extent, the legislature failed to strike a balance between competing interests. The interest of shareholders for example received less emphasis compared to employees. Creditors on the other hand are adequately protected although there is potential of discontentment, the legislature made satisfactory policy decisions to cater for that.[229]

[228] Levenstein *An Appraisal of the new South African Business Rescue Procedure* (LLD thesis 2015 University of Pretoria) 607-615.
[229] Zwane *Affected persons in business rescue proceedings: Has the balance been struck?* (LLM dissertation 2015 University of Cape Town) 69.

CHAPTER 5: COMPARATIVE ANALYSIS BETWEEN SOUTH AFRICA, AUSTRALIA, THE UNITED KINGDOM AND THE UNITED STATES

5.1 Introduction

South Africa was the first of the countries to enact a business rescue regime in the last 20 years and then other countries followed suit. The United Kingdom (UK), United States of America (USA) and Australia being some of them. The analogy of these regimes to South Africa is one that would amount to a thesis on its own if one covered its contents in full. However, this chapter will only give a brief overview of the basics and fundamental principles of rescue processes in other countries as compared to South Africa.

5.2 Australia

Business rescue proceedings in Australia are incorporated in chapter 5 of the Corporations Act 2001 (Cth).[230]In its general company law statute, the Australian system includes both corporate and insolvency provisions. It does not have a separate insolvency system.[231] In its early days Australia had official management as its first business regime. This procedure was enacted following South Africa's judicial management approach. As the case may be, official management shared a few common goals with judicial management but, although similarities existed, the differences were many.

[230] Corporations Act 2001 (Cth).
[231] Burdette "Comments on the Companies Bill Appendix 7 to submission by TMA-SA on Draft Companies Bill" 2007 *Turnaround Management Association South Africa* 4.

The Corporations Act made provisions for a company that was insolvent or nearing insolvency to operate under the Deed of Company Arrangement (DCA) approved by creditors. Although a deed is not regarded a tool for reconstruction but a means to maximise the benefits of the creditors, if it is accepted by creditors, it may be. This will then be seen as a reconstruction of the Company.[232]The deed of company arrangement provided for a composition of existing debts or for payments to be postponed while the company continued to trade and recover.[233] The deed of company arrangement was therefore a plan comprising of decisions that considered the present condition of the company and the ultimate goal of restoring the company to being a going concern.[234] During this period all the creditors of the debtor are bound by the terms of the deed and as long as the deed remains in force, no creditor can initiate or continue with bankruptcy proceedings in respect of provable debts.[235]

Provisions dealing with corporate rehabilitation in Australia are contained in Part 5.3 A of the Corporations Act.[236] The objectives of this Act are outlined in section 435A of the Act,[237] wherein the business property and affairs of the company are administered in such a way that it maximises the chances of the company surviving. If this possibility is unlikely the secondary objective is for creditors and members to obtain a better return than would have resulted from an immediate winding up.[238]The court in Australia occasionally sticks to these objectives when there is a need to interpret sections in Part 5.3 A.[239]

In Australia applicants may utilise the rescue procedure even when there is no possibility that the company will survive. However, the courts have been careful not to allow the Part 5.3A procedure to be abused, where it appears that there is an ulterior purpose behind the appointment of an administrator by directors.[240] An administrator can be appointed by three distinct parties. The first and most common manner of appointment is by way of a resolution by the board of directors, provided that the board is of the opinion that the company is insolvent or about to become insolvent.[241] Secondly, the appointment may be

---

[232] Keay *Insolvency law: Personal and Corporate and Practice* (1998) 3rd *ed* 327
[233] *Ibid.*
[234] Rosslyn-Smith "Stakeholder expectations of the business rescue plan from a South African perspective" 2015 *Southern African Journal of Entrepreneurship and Small Businesses Management* 1-35.
[235] Rose *Australian Bankruptcy Law (1994) 10th ed* 271.
[236] Corporations Act 2001 (Cth) Part 5.3A.
[237] Corporations Act 2001 (Cth) s 435A.
[238] *Ibid.*
[239] *Australasian Memory v Brien* (2000) 200 CLR 270.
[240] *Aloridge v Christiano* 1994 12 ACLC 237.
[241] Corporations Act 2001 (Cth) s 436 A(1).

made by a liquidator if he or she thinks that the company is insolvent or is about to become insolvent.[242] Lastly, an appointment may be made by a secured creditor who has a charge over the entire property of the company if the creditor is entitled to enforce the charge.[243] Where the winding up has already progressed the appointment may be made either by the board or the secured creditor.[244] The courts involvement in appointing an administrator is redundant. The limitation of the court's involvement is purely to avoid delayed and costly processes that might result in creditors receiving smaller dividends.[245]

However, the Harmer report recommended that the court be given power to appoint an administrator on application by a creditor as an alternative for winding up.[246] The administrator, acting as an agent, attains the power to deal with the company's assets immediately after appointment in terms of section 437D.[247] Consequently, after his appointment and just as the company enters into voluntary administration, the administrator is required to investigate the affairs of the company to see whether it would be in the best interests of creditors to execute a deed to facilitate company rescue for administration to end or for a company to be wound up.[248]The administrator becomes liable under section 443 A for any debts incurred in the ongoing trading of the business. The administrator, with the assistance of the directors, is required to report the findings to the company's creditors in terms of section 439A (4) so that the creditors can decide on the future of the company.[249]

The first meeting after such appointment, is held within five business days. This meeting deals with the adoption of a committee of creditors and consideration of whether or not the administrator should be replaced. It also initiates the general moratorium which comes to end once a rescue plan has been formulated. The Australian system, like any other, has a moratorium which provides for a breathing space during this period. The moratorium in this

---

[242] Corporations Act 2001 (Cth) s 436 B(1).
[243] Corporations Act 2001 (Cth) s 436C(1).
[244] Anderson "Viewing the proposed South African Business rescue provisions from an Australian perspective" 2008 *Potchefstroom Electronic Law Journal* 112.
[245] ALRC Harmer Report http://www.alrc.gov.au 11 December 1988
[246] Legal Committee of the CASAC "Corporate Voluntary Administration Final Report" June 1998 http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+1998/$file/corporate_voluntary_administration_final_report,_june_1998.pdf (accessed dd Month YYYY). This review made sixty recommendations but only some were subsequently adopted in the 2007 amendments.
[247] Corporations Act 2001 (Cth) s 437D.
[248] Corporations Act 2001 (Cth) s 438(A).
[249] Corporations Act 2001 (Cth) s 439A(4).

instance stays any court proceedings and executions or enforcement of judgments against the company with the consent of the courts or the administrator.[250]

The administration process comes to an end in several ways. Section 435C(2) sets out the outcome of administration of a company where a deed of company arrangement is executed by both the company and the deeds administrator. Alternatively, the company's creditors may end the administrative process by way of resolution under paragraph 439C(b). Another way to end the administration is to allow the convening process to end automatically in terms of section 447A.[251]

The success rate of the Australian system is not easily ascertainable, the reason being is that it is extremely difficult to do data collection, numerical analysis and presentation methods due to changing economic conditions and overlapping insolvency administrations.[252] The legal committee of the Companies and Securities Advisory Committee provided that voluntary administration procedures are well known and popular in Australia, however they do not make available evidence indicating their actual use and success rate.[253]

Be that as it may, it was found that for a particular month in 2007 only 33% of voluntary administrations resulted in Deed of Company Arrangements (DOCAs) with the rest probably being wound up under the second non Deed of Company Arrangement objectives.[254] This is in conjunction with Sellers findings which indicated that between 1994 to 2001, 25% and 50% of Voluntary Administrations were successfully converted into deeds of company arrangements with the bulk of the remainder proceeding to liquidation.[255]

The Australian approach to company restructuring is somewhat similar to the South African system, even though the differences are quite significant. The concept and layout of the Australian provisions intertwine with that of South Africa. All in all, both systems aim to offer support to ailing companies, thereby increasing the likelihood of saving them from the brink

---

[250] *Supra* note 224.
[251] Corporations Act 2001 (Cth) s 447A.
[252] *Supra* note 224.
[253] *Ibid.*
[254] *Ibid.*
[255] Sellars "Corporation Voluntary Administration in Australia" (2001) *Forum for Insolvency Reform in Asia* 1-12.

of collapse and at the same time producing a greater benefit to creditors and other stakeholders than would have resulted if the company had been liquidated.

5.3 United Kingdom

The United Kingdom has had the administration procedure as a business rescue regime for three decades under the Insolvency Act of 1986. The Insolvency Act was founded in the Cork Report in 1982.[256]

The Cork Committee influenced the implementation of the Insolvency Act of 1986 which brought together in one statute both personal bankruptcy and corporate insolvency and at the same time effected a radical construction of the law relating to all forms of insolvency. This included the introduction of corporate rescue through the use of two new procedures namely the Corporate Voluntary Arrangement (CVA) and Administration.[257]

In terms of the Insolvency Act of 1986, the United Kingdom restructuring procedure aims to:[258]

> "a) rescue a company as an ongoing concern.
>
> b) achieve a better result for creditors as a whole, than liquidation would.
>
> c) realise property to make distributions to one or more or preferential debts."

The concept of administration and corporate voluntary arrangements picked up a few issues following preferences of the concept of receivership by principal creditors. Potential concerns prompted adjustments in the rescue procedure in order to benefit on a broader scale, all kinds of debtors as well as unsecured creditors.[259] The reforms were therefore enacted through the Insolvency Act[260] and the Enterprise Act[261] which came into force in 2003.

---

[256] The Insolvency Act of 1986.
[257] Cork Report of the Review Committee on Insolvency Law and Practice 1982, (Cmnd.8558).
[258] Cork "Insolvency law and practice: Report of the Review Committee" (Cmnd.8558) (HMSO,1982) *Cork Report*.
[259] Omar, Gant "Corporate rescue in the United Kingdom: Past, present and future reforms" 2016 *Insolvency Law Journal* 17.
[260] The Insolvency Act of 2000.
[261] The Enterprise Act of 2002.

The receivership procedure was seen as a means whereby, a creditor benefiting from a debt secured under a floating charge could appoint a receiver to assume control over the assets subject to security, effectively taking control of the company. The receiver's primary objective was to realise his client's security by applying funds realised in the liquidation for an equivalent value of assets of the debtor company.[262] Once the task was completed, the directors retained control of the enterprise in whatever state it was in. Companies rarely survived this procedure because it only aimed to secure creditor's returns and not save the company.[263]

After a few setbacks, further amendments were made to Corporate Voluntary Arrangements and the Administration Procedure. A variation of Corporate Voluntary Arrangements was created for small and medium-sized enterprises to allow for a moratorium at the request of the company or its debtors. The administration procedure on the other hand was simplified with a new hierarchy of objectives as well as an out-of-court facility.[264]

The United Kingdom Insolvency therefore consists of three dimensions in which rescue of a company can be invoked, these are: voluntary winding up[265], compulsory winding up[266] and winding up through administration.[267] Voluntary winding up is initiated through the passing of a resolution and compulsory winding up by a court order upon petition presented by a creditor.[268]

A company in the United Kingdom is regarded insolvent if it is unable to pay its debts when they become due and payable. The distressed company undergoes either a cash-flow or a balance-sheet test.[269] In the judgment of *BNY Corporate Trustee Services Ltd v Eurosal - UK*[270] an important question that was considered was the application of the test in section 123(2) of the Insolvency Act[271] in determining whether a company was balance-sheet insolvent. Section 123(2) reads:

---

[262] Finch *Corporate Insolvency law: Perspectives and Principles* (2009) 20.
[263] *Ibid.*
[264] *Supra* note 235.
[265] The Insolvency Act of 2000 s 84.
[266] The Insolvency Act of 2000 s 73(1).
[267] Enterprise Act 0f 2002 Schedule 16.
[268] *Ibid.*
[269] Goode *Principles of Corporate Insolvency Law* (2005) para 4-01 83.
[270] 2007-BL PLC Court of Appeal (Civil Division) [2011] EWCA Civ 227.
[271] The Insolvency Act of 2000 s 123(2).

> "A company is deemed unable to pay its debts, if it is proven to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and perspective liabilities"

Whether or not the balance-sheet solvency test is satisfied depends on the availability of evidence to the circumstances of each and every case. In this particular case the court that the "point of no return" policy adopted by the court of appeal should be rejected.[272]

The process of administration commences by way of election by the company or the directors or one or more creditors. This process begins as soon as an administrator is appointed. An affidavit prepared by one of the directors should accompany the application made by the company.[273] Where creditors apply for the appointment of an administrator, they are required to authorise one of the directors to prepare an affidavit on their behalf.[274] Once this is done, the company can request a 28 days moratorium with a possibility of an extension of up to 2 months. Unlike the South African system, the moratorium does not postpone payment of the debt but merely protects the company from the enforcement of certain legal rights.[275]

When a company goes for administration, an administrator is appointed to investigate the affairs of the company with the aim of assessing the state of the company. The findings of the administrator's investigation are what the court relies on to reach a decision as to whether or not the company is experiencing difficulties. The administrator must therefore prepare a detailed report to show that liquidating the company would be inappropriate and to indicate how the administrative process should be dealt with.[276]

There is a detailed list of persons to whom the notice must be given. This does not include the general body of creditors or the employees of the company, but is limited to the company, the applicant and or the administrator.[277]

---

[272] *Supra* note 246.
[273] Tolmie *Corporate and Personal Insolvency Law* (2003) 3-15.
[274] *Ibid*.
[275] Lightman *et al The Law of Administration and Receivers of Companies* (2007) 40.
[276] Bailey, Groves, Smith *Corporate Insolvency* (2008) 549.
[277] The Insolvency Act of 2000 para 12 (2) of Schedule B1 to the Insolvency Act 1986 and Rule 2.6 of the Insolvency Rules.

Administration ends automatically after a year of the administrator's appointment.[278] This also means that the administrators services come to an end. Administration is not a rescue process in itself, hence the rationale behind the lapsing of the period after a year is that this process is a temporary cause of action that aims to grant a company support while the essentials for the actual rescue are being laid out.[279]

When compared to South Africa, the United Kingdom has had many successful business rescues over the past years going forward. The United Kingdom Department of Trade and Industry reported that at the end of 1999, a total of over 67% of Administration Orders and 75% of Corporate Voluntary Arrangements amounted to a rescue of companies.[280] In 2000 reforms [SvdM2]predominantly under the Enterprise Act [281] resulted in returns to secured and preferential creditors improving from 29,3% to 34,6%. However, returns for unsecured creditors had decreased from 6,7% to 2.8%. It should be noted that the corporate rescue success rate in the United Kingdom, unlike South Africa, is measured by returns that creditors receive.[282]

5.4 United States of America

The first federal law relating to bankruptcy in the United States of America was passed in 1800 under the Bankruptcy Act.[283] This was as a result of stakeholders developing a mechanism for financially distressed companies.[284] The Bankruptcy Act was very creditor-orientated and only permitted involuntary bankruptcies of merchant debtors. There was no provision for natural persons to file for bankruptcy on their own. [285]

Around 1873 the Bankruptcy Act of 1841 was enacted. This permitted debtors to file for bankruptcy voluntarily without the initiation of creditors. There was a sudden shift to what seemed to be a debtors repression system to a debtor protection system.[286] In about 1898

---

[278] The Insolvency Act of 2000 para 76 (1) of Schedule B1 to the Insolvency Act 1986.
[279] *Supra* note 245.
[280] Nyombi "An examination of the evolving approach to UK corporate rescue and the impact of subsequent legal reforms" (2011) available at *SSRN*: https://ssrn.com/abstract=1964840 5-16.
[281] Enterprise Act of 2002.
[282] *Ibid.*
[283] Bankruptcy Act of 1800.
[284] Rajak "The culture of bankruptcy" (2008) 14-17; Jackson *The Logic and Limits of Bankruptcy Law* (2001) 2-19; Ferriell, Janger *Understanding Bankruptcy* 3rd *ed* (2013) 2-6.
[285] Haynes "History of Bankruptcy in the United States" (2019) https://www.thebalance.com/history-of-bankruptcy-in-the-united-states-316225.
[286] *Supra* note 8.

and after consideration of a few issues that prevented the sustainability of the bankruptcy laws developed earlier, a nationwide comprehensive bankruptcy law was enacted.[287]

Currently, the Bankruptcy Reform Act of 1978 as amended, serves as the nation's bankruptcy law, catering for liquidations and reorganisations for individuals and companies as well as for municipalities.[288] This system was created with the idea that creditors, employees and equity holders would all benefit if business were given a chance to recuperate after experiencing financial setbacks.

Chapter 11 of the Bankruptcy code makes provision for reorganisation of corporations as an alternative to immediate liquidation of a business under Chapter 7 of the Bankruptcy Code of 1978.[289] In a nutshell, a Chapter 11 debtor proposes a plan subject to the majority votes of creditors and ultimately by the courts. The so-called plan is binding on all the relevant stakeholders including dissenting creditors. The purpose of reorganisation is to restructure a business in such a way that it continues to function and provide its employees with jobs, pay its creditors and produce a return for its shareholders.[290]

In order to launch a Chapter 11 case, a business has to file a petition with the bankruptcy court within its place of business, or residence.[291]The petition may be filed voluntarily by the debtor or involuntarily by the creditors. If the debtor files for a petition voluntarily, one of the requirements that have to be met is compliance with the format of Form 1 of the official forms prescribed by the Judicial Conference of the United States. The debtor must file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, if any, as well as a statement of financial affairs.[292]

Immediately from when a company files for a Chapter 11 reorganisation, the company will be afforded a 120 days moratorium against any enforcement of rights by creditors .[293] During this period a debtor remains in control of the company also referred to as a "debtor in possession" until such time that a trustee is appointed, or when the reorganisation plan is

---

[287] *Supra* note 267.
[288] Kerkman "The debtor in full control: A case for the trustee system" 1987 *Marq Law Review* 161.
[289] The Bankruptcy code of 1978, ch 11 & ch 7.
[290] Conradie, Lamprecht "Business rescue: How can its success be evaluated at company level?" 2015 *Southern African Business Review* 7.
[291] 2007-BL Plc Court of Appeal (Civil Division) [2011] EWCA Civ 227.
[292] *Ibid.*
[293] *Supra* note 261.

confirmed, or when the debtor's case has been dismissed or converted to liquidation in terms of Chapter 7.[294]

In the United States a reorganisation is deemed successful if a company emerged from bankruptcy with less debt or improved profitability.[295] A study conducted by the Administrative office of the United States shows that after the enactment of the Bankruptcy Code of 1978, 30% of Chapter 11 cases resulted in confirmed plans for reorganisation, with another 30% resulting in a piecemeal liquidation.[296]

The US bankruptcy system has been recognised as one of the most influential regimes worldwide. This is due to its approach towards a fresh start for companies and or debtors that experience financial difficulties.[297] In comparison with our system, the United States has had many successful corporate rescues. Although, relatively speaking, there are no figures to show it, one can gather from written texts that the system focuses mainly on its purpose of giving debtors a second chance in order to preserve jobs as well as the economy.[298]

5.5 Conclusion

It is not entirely clear which one of these regimes yield better results in rescuing companies. The United Kingdom and the United States seem to be taking the lead as per the highlighted percentages above. With different economic conditions and political factors, some countries more than others will show signs of disintegration for a continuous period of time, thereby achieving very minimal results. It is challenging to align the success rate of business rescues or determine which system is better at curing companies when faced with financial difficulties. Looking at South Africa, as compared to Australia, the United Kingdom and the United States, one can gather that the system is fairly new and that a few steep hills are to be expected along the way, and of course this leads us to come to the conclusion that the success rate of business rescue in South Africa is substantially low.

---

[294] *Ibid.*
[295] Rasmussen "The efficiency of Chapter 11", 1991 *Bankruptcy Developments Journal,* 8 (2) 319-334.
[296] *Ibid.*
[297] Flessner "Philosophies of business bankruptcy law,: An international overview" (1982) https://edisciplinas.usp.br>mod resource>content>Flessner.
[298] *Ibid.*

CHAPTER 6: CONCLUSION

The two primary goals of Chapter 6 are to help companies continue as a going concern, which in turn will help to grow our economy, and to eradicate unemployment issues by restoring the company to the position it was before experiencing financial difficulties. The secondary objective is for it to result in a better return for creditors than the case would have been if the company were liquidated. Chapter 6 is in line with the goals in international insolvency legislation, but with more emphasis on other stakeholders within a company.[299]

One of the reasons why judicial management failed was the overemphasis of creditor interests to the neglect or detriment of all other stakeholders.[300] Chapter 6 business rescue seems to have addressed this issue without trampling on creditor rights.[301] Unlike judicial management, business rescue does not rely heavily on expensive procedures like courts, although courts are still involved in some way it is not without a choice or remedy to the affected party[302]

Although business rescue is very debtor-orientated, sight is not all lost on creditor interest as it was for debtors under judicial management. [303] The fact that relevant stakeholders are also given a say under the umbrella of "affected persons" makes the Chapter 6 business rescue far more attractive than judicial management.[304]

The abolishment of judicial management was prompted by the need to introduce a system that would cater for the rights of all the relevant stakeholders to business as well as conform with international trends. Judicial management was unsuccessful in all material terms, it did not gain much popularity, hence it was deemed a dismal failure. Following this, it would not come as unnatural for people to feel jittery about whether business rescue under Chapter 6 is heading in the same direction or not. It could well be that society regards it to be an enemy to the economy, the employment sector and other relevant bodies.

---

[299] *Supra* note 270.
[300] *Supra* note 5.
[301] *Supra* note 152.
[302] *Supra* note 20.
[303] *Supra* note 152.
[304] Companies Act 2008 s 131.

Business rescue seems to be yielding better returns compared to judicial management. This is not to say that it does not have a few issues to be improved, however these issues can be forgiven and cured along the way. One of the biggest concerns and challenges faced by business rescue in South Africa is the lack of precedents on this piece of legislation.[305] The absence of awareness and understanding of the concept of corporate rescue is another factor contributing to the procedure of cultivating minimal rescues.[306]

The question that we ask is: “Are we headed to greener pastures or not?” However, we can only wait and observe until such time that the system matures.

WORD COUNT [17984]

[305] Pretorius “Constraints on decision making regarding post-commencement finance in business rescue” 2013 *Southern Africa Journal of Entrepreneurship and Small Business Management* 168-191.
[306] *Ibid.*

BIBLIOGRAPHY

1. Books

Bailey E, Groves H, Smith C (2007) *Corporate Insolvency: Law and Practice* 4th ed, London, Lexis Nexis.

Cassim F, Jooste R, Shev J, Yeats J (2012) *Companies and Other Business Structures in South Africa* 2nd ed, Cape Town, Oxford University Press.

Davis D, Geach W (eds) (2009) *Companies and other business structures in South Africa* 3rd ed, Oxford University Press.

Delport PA (ed) (2011) *Henochsberg on the Companies Act 61 of 1973* 3rd ed (loose-leaf, updated regularly) South Africa, Lexis Nexis.

Delport P (2011) *The New Companies Act Manual including Close Corporations and Partnerships South Afric*a 2nd ed, Lexis Nexis.

Finch V (2009) *Corporate Insolvency law: Perspectives and Principles* Cambridge University Press.

Ferriell JT, Janger EJ (2013) *Understanding Bankruptcy* 3rd ed.

Goode R (2005) *Principles of Corporate Insolvency Law* Student edition.

Jackson TH (2001) *The Logic and Limits of Bankruptcy Law,* Washington DC, Beard Books.

Keay A (1998) *Insolvency law: Corporate and Personal* 3rd ed Sweet and Maxwell ,

Levenstein E (2017) *South African Business Rescue Procedure* loose-leaf edition, South Africa Lexis Nexis.

Lightman G *et al* (2007)*The Law of Administration and Receivers of Companies* 4th ed, London, Sweet and Maxwell.

Meskin PM (2019) *Insolvency Law and its Operation in Winding-up edition,* South Africa, Lexis Nexis.

Rajak H (2008) "The culture of bankruptcy" In: Omar PJ (ed) *International Insolvency Law. Themes and Perspectives,* London and New York, Routledge.

Rose D (1994) *Australian Bankruptcy Law* 10th ed, Australia, The Law Book Company Limited.

Sharrock *et al (2012) Hockly's Insolvency Law* 9th ed, Cape Town, Juta & Co. Ltd .

Tolmie F (2003) *Corporate and Personal Insolvency law* 2nd ed, London, Cavendish Publishing Limited.

Wood PR (2007) *Principles of International Insolvency* 2nd ed, London, Sweet & Maxwell.

Van der Walt J (2011) “A turnaround practitioner’s view of new business rescue legislation” in Harvey N (ed) *Turnaround Management and Corporate Renewal: A South African Perspective,* Wits University Press.

2. Journals & Articles

Anderson C “Viewing the proposed South African business rescue provisions from an Australian perspective” (2008) 11.1 *Potchefstroomse Elektroniese Regsblad* 1.

Boraine A, Evans R, Roestoff M, Steyn L “The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution” (2015) 3 *Nottingham Business and Insolvency Law e-Journal NIBLeJ 5* 59-92.

Bradstreet R “The leak in the Chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders” (2010) 22 *South African Mercantile Law Journal* 195.

Bradstreet R “The New Business Rescue: Will Creditors Sink or Swim” (2010) South African Law Journal *SALJ* 352.

Burdette D “Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (part 1)” (2004) *SA Mercantile Law Journal*.

Burdette DA “Comments on the Companies Bill Appendix 7 to submission by TMA-SA on Draft Companies Bill” (2007) *Turnaround Management Association South Africa* (TMA-SA).

Calitz J “Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?” (2016) *De Jure* 265.

Conradie S & Lamprecht C. “Business rescue: How can its success be evaluated at company level?” (2015) 19 *Southern African Business Review* 1.

Hubbard J “Business rescue: Why companies should do their homework” (2013) *Finweek* 547.

Joubert T, Van Eck BPS, and Burdette A. *et al*. “Impact of labour law on South Africa’s new corporate rescue mechanism” (2011) 27(1) *The International Journal of Comparative Labour Law and Industrial Relations* 1.

Joubert E, Loubser A “An executive director in business rescue: employees or something else?” (2016) *De Jure* 95.

Kerkman JR “The debtor in full control: A case for the trustee system” (1987) 70 *Marq Law Review*.

Kloppers P “Judicial Management –A corporate rescue mechanism in need of reform” (1999) 10 *Stellenbosch Law Review* 417

Kloppers P Judicial Management Reform-Steps to initiate business rescue” (2001) *SA Mercantile Law Journal* 359.

Le Roux I, Duncan K "The naked truth: creditor understanding of business rescue: A small business perspective" (2013) 6 *Southern African Journal of Entrepreneurship and Small Businesses Management SAJESBM.* 167.

Loubser A "Judicial Management as a business rescue procedure in South African corporate law" (2004) 16 *South African Mercantile Law Journal SAMLJ* 137.

Loubser A "The business rescue proceedings in the Companies Act of 2008: Concerns and questions' (part 1)" (2010) 3 *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)* 501.

Loubser A "Post-commencement financings and the ranking of claims-A South African perspective" (2014) in Perry (ed) *European Insolvency Law: Current Issues and Prospects of Reform* 29.

Loubser A "The roles of shareholders during corporate rescue proceedings: Always on the outside looking in" (2008) 20 *SA Mercantile Law Journal* 326.

McCormack G "Super priority new financing and corporate rescue" (2007) *Journal of Business Law* 701.

McKenzie-Skene D "The composition of the debtors estate on insolvency: A comparative study of exemptions" (2011) 20 *International Insolvency Review (INSOL)* 29.

Moss G "Comparative Bankruptcy Cultures: Rescue or Liquidation? Comparison of Trends in National Law-England" (1999) Brooklyn Journal of International Law *(Brook J Int'l Law)* 115.

Omar PJ, Gant J "Corporate rescue in the United Kingdom: Past, present and future Reforms" (2016) *Insolvency Law Journal* 1 (accessed via *Nottingham Trent University Law School* http://irep.ntu.ac.uk/).

Olivier J "Business rescue: To rescue of not to rescue?" (13 November 2014) *Finweek* 30.

Osode P "Judicial Implementation of South Africa's New Business Rescue model: A preliminary assessment" (2015) 4(1) *Penn State Journal of Law and International Affairs 459.*

Pretorius M, Holtzhauzen G "Business rescue decisions making through verifier determinants-Ask the specialists" (2013) 16(4) *South African Journal of Economic and Management Sciences* 108 https://doi.org/10.4102/sajems.v16i4.450 .

Rajak H, Henning J "Business rescue for South Africa" (1999) *South African Law Journal* 262.

Rajack H "Determining the insolvent estate – A comparative Analysis" (2011) 20 *International Insolvency Review INSOL* 1.

Rasmussen RK "The efficiency of Chapter 11" (1991) 8(2) *Bankruptcy Developments Law Journal* 319.

Rosslyn-Smith W, Pretorius M “Stakeholder expectations of the business rescue plan from a South African perspective” (2015) 7 *South African Journal of Entrepreneurship and Small Business Management* (*SAJESBM)* 146*.*

Smith AJ “Corporate administration: A proposed model” (1999) 32 *De Jure .*

Van Staden J “Cutting the lifeline: The termination of business rescue proceedings” (2013) *De Rebus* 14.

Wassman B ”Business Rescue: Getting it right” *De Rebus* (2014).

3. Dissertations

Bezuidenhout PTJ (2012) *A review of business rescue in South Africa since implementation of the Act (71/2008)”,* MBA mini-dissertation, North-West University.

Frederick IO (2014) *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African Law,* LLM dissertation, University of Cape Town.

Levenstein E (2016) *An appraisal of the New South African business rescue procedure*, LLD thesis, University of Pretoria.

Kaulungome KG (2012) *Business rescue for Zambia: Suggestions for legislative Reform,* LLM dissertation, University of Cape Town.

Ngwako PS (2017) *The effect of business rescue and the section 133 moratorium on stakeholders* LLM dissertation, University of Pretoria.

Zwane *M (*2015) *Affected persons in business rescue proceedings: Has the balance been struck?* LLM dissertation, University of Cape Town.

4. Cases

Absa Bank Ltd v Caine NO, In re: Absa Bank Ltd v Caine NO and Another 2014 ZAFSHC 46 (2 April 2014).

AG Petzetakis International holdings v Petzetakis Africa (Pty) Ltd and Others 2012 (5) SA 515 (GSJ).

African Banking Corporation of Botswana Ltd v Kariba Furniture Manufactures (Pty) Ltd and Others 2013 (6) SA 47.

Aloridge v Christiano 1994 12 ACLC 237.

Artio Investments (Pty) Ltd v Absa Bank Ltd (7562/2014) 2014 ZAGPPPHC 689.

Australasian Memory v Brien (2000) 200 CLR 270.

Bahnemann v Fritzmore Exploration (Pty) Ltd 1963 (2) All SA 130 (T).

Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC 2013 (2) 540 (WCC) 22.

Ex Parte Onus (Edms) Bpk: Du Plooy v Onus (Edms) Bpk 1980 (4) SA 63 (O).

Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd 2001 (2) SA 727(C).

Makhuvha v Lukoto Bus Service Pty Ltd 1987 (3) SA 376 (V).

Maroos and Others v GCC Engineering Pty Ltd and Others 2017 ZAGPPHC 297.

Moss Steamship Co Ltd v Whinney 1912 AC 254.

Natal Joint Municipal Pension Fund v Edumeni Municipality 2012 (4) SA 593.

Newcity Group (Pty) Limited v Allan David Pellow NO 2014 ZASCA 162.

Oakdene Square properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2012 (13) SA 273 (GSJ).

Oelofse v Irvin and Johnson Ltd and Another 1954 (1) SA 231 E.

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 365 Ltd 2012(2) SA 423 (WCC).

Southern Palace investments and Koen v Wedgewood 2012 (2) SA 378 (WCC).

Silverman v Doornhoek Mines Ltd 1935 TPD 349.

Tenowitz and another v Tenny Investments Pty Ltd; *Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E).

Van der Merwe others v Zonnekus Mansion (Pty) Ltd 2015 3 All SA 659 (WCC).

5. Legislation

South Africa

Companies Act 11 of 1932

Companies Amendment Act 23 of 1939.

Companies Amendment Act 46 of 1952.

Companies Act 46 of 1926

Companies Act 71 of 2008.

Companies Act 61 of 1973.

United Kingdom

Insolvency Act of 1986.Insolvency Act of 2000.

Enterprise Act of 2002.

Australia

Corporations Act 50 of 2001.

United States of America
Bankruptcy Act of 1800.

The Bankruptcy code of 1978

2007-BL Plc Court of Appeal (Civil Division) [2011] EWCA Civ 227.

6. Reports and internet sources

ALRC Harmer Report http://www.alrc.gov.au/ 11 December 1988

Cork Report "Report of the Review Committee on Insolvency law and Practice" 1982, (Cmnd.8558).

Cork K (Chairman) "Insolvency Law and Practice: Report of the Review Committee" (Cmnd.8558) (HMSO,1982) *Cork Report*.

Company Law Amendment Enquiry Commission "Final report of the Company Law Amendment Enquiry Commission" UG 69 1948 93.

Flessner A "Philosophies of business bankruptcy law: An international overview" 1982 *International and Comparative Commercial Insolvency Law Conference* https://edisciplinas.usp.br>mod resource>content>Flessner

Haynes D "History of Bankruptcy in the United States" (2019) http://www.thebalance.com>Personal Finance>Bankruptcy (accessed ???)

Jameel P "Termination and Duration of Business Rescue Proceedings in South Africa" (10 April(2012) mondaq.com/southafrica/x/172156//Insolvency/Termination+And+Duration+Of+Business+Rescue+Proceedings.

Joubert T, Van Eck S, Burdette D "*The expected impact of labour law principles on South Africa new corporate rescue mechanism (including a comparison with the position in the EU)* (8 April 2009) available at http://repository.up.ac.za>bitstream>handle>Joubert (accessed 20 March 2015).

Legal Committee of the CASAC "Corporate Voluntary Administration Final Report" June 1998 http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+1998/$file/corporate_voluntary_administration_final_report,_june_1998.pdf

Nyombi C “An examination of the evolving approach to UK corporate rescue and the impact of subsequent legal reforms” (19 October 2011) *SSRN:* https://ssrn.com/abstract=1964840 or http://dx.doi.org/10.2139/ssrn.1964840

Sellars MA “Corporation Voluntary Administration in Australia” (2001) Paper presented at *Forum for Insolvency Reform Asia OECD* https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1873984.pdf.

World Bank “Insolvency and Creditors rights”.2005. *World Bank Group: Reports on the observances of standards and codes* http://www.worldbank.org/ifa/rosc (accessed on 8 September 2015)

The Companies and Intellectual Properties Commission (CIPC), 2014, “Annual report for license and business rescue practitioner” http://wwww.cipc.co.za/index.php/manage-your-business/manage-your-close-corporation/changing-status-your-company/application-licence-business-rescue-practitioner/ (accessed 24 May 2015)

The Companies and Intellectual Property Commission “Status of business rescue proceedings in South Africa” June 2015 http://www.cipc.co.za/files/5914/4488/9277/Status_of_Business_Rescue_in_South_Africa_June_2015_version1_0.pdf (accessed 3 December 2015).

The Companies and Intellectual Property Commission “Status of business rescue proceedings in South Africa March 2018” (also covers period between 1 May 2011 to 31 December 2018) http://www.cipc.co.za/files/3915/2639/0127/Business_Rescue_Status_Report_March_2018_v1.0.pdf 15.