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The effect of Business Rescue and the section 133 moratorium on stakeholders

by

Ngwako Pam-carol Serumula

98216075

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Supervisor: Mrs Tronel Joubert

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DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Mercantile Law at the University of Pretoria. It has not been submitted before for any degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

Student Name: Ngwako Pam-carol Serumula

Signature:

Date: 2017

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ABSTRACT

Direction: The business rescue proceedings kicks in with the general moratorium or stay on legal proceedings against the company or its property. Any claims against the company may only be enforced with the consent of the business rescue practitioner or the leave of the court.
Research purpose: The moratorium on the rights of claimants may be open to abuse. It gives companies temporary "immunity" to actions brought by creditors which would have been due and actionable. The process may be abused by companies who are not in distress but merely institute business rescue proceedings to stall payments of its debts and to evade its obligations towards its stakeholders. The purpose of the research is to highlight rights that may be affected and possible protection of those rights.
Motivation for the research: To investigate the research question: 'whether the avenues put in place by the chapter 6 business rescue proceedings can ensure that all stakeholders benefit and therefore remedy possible misuse?'
Research approach and method: The study will include a minimal comparison of processes of other insolvency laws, for example judicial management; liquidation and common law. The study will also compare other international countries such as the United Kingdom ("UK") to provide clarity on how they ensure protection of the rights and duties of all stakeholders involved without compromising the business rescue proceedings.
Main findings: Based on the research done, it is clear that the business rescue process is quite a litigious process and requires a lot of finance to effectively implement. The rescue itself is based on financial distress but the process of rescuing is a financial burden to the already distressed companies. Furthermore, the Business Rescue Practitioner is given discretionary powers in respect of the drafting of a plan which will ultimately affect stakeholder, whether they vote or not.

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CHAPTER 1. INTRODUCTION

1.1 Purpose of the study

The Companies Act, no. 71 of 2008 ("the Act") brought about insightful changes to the legislation governing companies in South Africa. Before the act came into effect, South Africa followed a system of called judicial management as a form of business rescue.[1] The judicial management system was often labelled as "an extraordinary remedy which infringed on the rights of creditors".[2] It is evident that judicial management has mostly been unsuccessful in aiding distress companies and consequently greatly affected the economy. [3]

The Act provides for a specific chapter which is entirely dedicated to the business rescue proceedings, and which is referred to as "Chapter 6: Business rescue and Compromise with Creditors". [4]The purpose of the business rescue procedure amongst others is to give distressed companies an opportunity to restructure, and therefore increase its opportunity to continue in business.[5] The purpose of this research is therefore to highlight the positive impact that business rescue may otherwise bring forth to both the company in distress and all stakeholders affected.

Business rescue proceedings should not be implemented with the sole aim of delaying other processes such as liquidation.[6] The main focus should be restoring distressed

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[1] Cilliers HS *et al Corporate Law* (2000) 479.
[2] Loubser A, *Some comparative aspects of corporate rescue in South African company law* (LLD thesis UNISA 2010) 43; Kloppers *"Judicial management – A corporate rescue mechanism in need of reform?"* 1999 *Stell* LR 426.
[3] Burdette DA *'Some Initial thoughts on the Development of a Modern and effective Business Rescue Model for South Africa* (Part 1)' (2004) 16 SA *Merc LJ* at 241. The author refers to the case of *Le Roux Hotel management (Pty) Ltd V E Rand (Pty) Ltd and another* 2001 (1) SA 223 (C) para 39 at 233 where the court gives a summary of the problems associated with judicial management and by implication reasons for its limited success.
[4] Chapter 6 of the Companies Act No. 71 of 2008 and Chapter 6 of the Companies Amendment Act No. 3 of 2011.
[5] du Preez W, *The status of post-commencement finance for business rescue in South Africa* at 3.
[6] *Panamo Properties (Pty) Ltd v Nel and Another NNO* (35/2014) 2015 ZASCA 76.

companies and ensuring that the rescue plan benefits both the ailing company and the affected person, such that the company is able to trade and affected are able to reasonably recover.[7] Consequently, to serve the best interests of all stakeholders as a collective.

1.1 Definition of topic or background discussion.

Business rescue[8] is defined as:

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

The expression "financially distressed"[9] takes the central point throughout the business rescue proceedings. It is therefore important that we define this concept "financially distressed" as is set out in the Act.

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[7] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* 2012 (2) SA 423 (WCC) 22.
[8] S 128(1)(b) of the Act.
[9] S 128 (1)(f) of the Act.

"Financially distressed" means that –

"(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediate ensuing six months; or it appears to be reasonably likely that the company will become insolvent within the immediate ensuing six months."

It is also necessary to define "affected persons" as the research focuses mainly the rights of affected person; and "affected persons"[10] are defined in the Act as "in relation to a company, means

(i) a shareholder or creditor of the company;

(ii) any registered trade union representing employees of the company; and

(iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives."

It can be deducted from the above definitions that a business rescue plan cannot be evoked where a company is already insolvent.

1.2 Context of the study

Business rescue is highlighted by section 7 (k) of the Act which provides that one of the purposes of the Act is 'to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'.[11] It is important that one takes into account the impact of business rescue on all relevant stakeholders to ensure that the rescue process achieves its purpose and further determines the success of all stakeholders seeking business rescue.[12]

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[10] S 128(1)(a) of the Act.
[11] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* 2012 (2) SA 423 (WCC) 22.
[12] Wassman B "*Business rescue: getting it right*" *De Rebus* (2014) 4.

Business rescue temporarily focus on protecting a company against the claims of creditors, such that the company is given time to deal with its affairs for purposes of giving creditors and shareholders a better return than they would have received had the company been liquidated.[13] Chapter 6 makes provisions for a general moratorium once the business rescue procedure has commenced. The moratorium effectively prevents creditors and other interested parties from taking any legal or enforcement action, including liquidation proceedings that could hinder the possible rescue of the company.[14] This allows the company enough time to reorganise and resolve its financial problems.[15]

The business rescue process results in the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity.[16]

1.3 Problem statement

1.3.1 To "balance the rights and interests of all relevant stakeholders"

Section 7(k) stresses upon the importance of the interests of creditors and all other affected person. This section states that one of the purposes of the Act is 'to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'.[17] Therefore, section 7 highlights that the rehabilitation of distresses companies must be done in such a way that it balances the rights of all stakeholders involved.[18]

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[13] *Redpath Mining South Africa (Pty) Ltd v Marsden No and Others* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013).
[14] Insolvency law and its operation in winding-up, Page 18-5, issue 41.
[15] *Ibid.*
[16] A Guide to Business Rescue Prepared by Werksmans Attorneys, http://www.werksmans.com/wp-content/uploads/2013/04/2011-06-Business-Rescue-FINAL-updated-electronic.pdf (accessed 22 April 2015).
[17] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA423 (WCC) (25November2011) http://uscdn.creamermedia.co.za/assets/articles/attachments/43759_business_rescue_in_terms_of_the_souther_palace_investments_case_march_20....doc.pdf (last accessed 22 April 2015).
[18] S 7(k) of the Act.

Creating a balance between the interest of the distressed company and those of affected person can be tricky and can lead to parties involved abusing the business rescue proceedings. Some may even go to an extent of sabotaging the process by disapproving the rescue plan, some may enter into business rescue as a delaying tactic knowing very well that liquidation is inevitable. The rights of all parties involved can be gravely affected and the rescue proceedings may end up in fights over rights and obligations in courts. The question is whose rights are protected? More specifically, the following research questions need to be addressed:

1.3.2 **Sub-problems**

A temporary stay of proceedings or enforcement action against the ailing company during the business rescue process is an important breathing space needed by ailing companies. A moratorium or stay on proceedings is meant to provide protection of the assets of the company while under rescue proceedings. One will require permission from the business rescue practitioner or a court order to be able to enforce their rights or institute legal action regarding such rights. This can pose a challenge as it leaves the decision to approve the business rescue practitioner's discretion or otherwise a costly and rather lengthy court processes.

The first sub-problem is: Does the section 133 moratorium benefit the rights of creditors/stakeholders and the rights of the company or close corporation.

The second sub-problem is: What rights are limited by the business rescue proceedings and how can the limitations of such rights benefit parties have concerned?

The third sub-problem is whether participation of all affected persons including all stakeholders in the business rescue plan is indeed assisting in the rescue of financially distressed companies and consequently providing better returns to affected persons as intended?

1.4 Significance of the study

The objective of the current study is to provide clarity on the rights and obligations of affected person during business rescue proceedings by mainly providing an analysis of literatures and case law relating to the chapter 6 of the Act. More specifically the section 133 moratorium, the rights and obligations of creditors and those affected by the business rescue proceedings and the effect of their ability to transact with the company in distress. The study will include a minimal comparison of processes of other insolvency laws, for example judicial management; liquidation and common law. The study will also compare South Africa with another international country, the United Kingdom ("UK")to provide clarity on how they ensure protection of the rights and duties of all stakeholders involved without compromising the business rescue proceedings.

The study mainly has the following purpose is too expose the rights and obligations provided by the business rescue proceedings as outlined in the Act and clarified by case law; To review current case law, legislation, discussions and researches with regards to chapter 6 of the Act; the rescue process and the effect thereof on affected persons; and to highlight benefits brought about by business rescue proceedings.

The research will be valuable to companies and creditors as well as related stakeholders who are looking for clarity on whether they have rights during the business rescue proceedings and how such rights should be interpreted, protected and applied.

1.5 Delimitations of the study

This research will not make any analysis on new/old Act as a whole or in part but rather focuses will be given to chapter 6 of the Act, namely business rescue proceedings.

1.6 Assumptions

The aim of business rescue proceedings is to restructure the distressed company in such a way that it will be able to continue as a going concern and therefore avoid liquidation. Business rescue does not bring about complete recovery of the business of a company, but rather the restructuring of its affairs in a manner which restores the company to profitability and therefore avoid litigation. Business rescue proceedings that balances the interests of the company and those of the affected persons, is most likely to produce better results. Participation of affected persons and the business rescue practitioner when drafting the business rescue plan is very important to having all parties satisfied.

1.7 Structure of the Thesis

The study will focus on the following:

(a) Chapter 1- Introduction. The research will outline the process of initiating the business rescue procedure. Under this chapter, the research will deal with persons who may initiate the procedure.[19]

(b) Chapter 2 – Commencement of business rescue. The research will focus on the process followed at the beginning of a business rescue procedure; the circumstances or conditions under which a business will qualify for the rescue procedure; the relationship between the commencement of business rescue and the ultimate outcome; focusing on whether the process yields positive results or not; and the rights and obligations thereof.

(c) Chapter 3 – The business rescue practitioner and the business rescue plan. The research will investigate the importance of participating in the rescue plan, participation in the voting for the plan, the consequences of a rejected plan and

[19]Loubser A *Some Comparative aspects of Corporate Rescue in South African Company Law* LLD University of Pretoria (2010) at pg 10.

its effect on creditors and affected person; and the effects of approval or adoption of the plan are also considered. The legal consequences of the commencement of business rescue;

(g) Chapter 4 - Comparative Study. The comparative study between South Africa and the United Kingdom; and how creditors are affected by the business rescue proceedings, including the rights which may be protected/affected.

(e) Chapter 5 – Conclusion and recommendations.

1.8 Procedure for data collection

Focus will be on applicable literature in respect of the legislation, journal articles, other reports and it will not take any quantitative data into consideration. Focus is placed on the analysis of literature and the effect that the Act and case law has had so far; including the interpretation of the rights and obligations of on affected persons and on companies.

1.9 Limitations of the study

This research proposal's intention is not to explore the Act but rather the certain aspects of Chapter 6 of the Act, and to focus on areas dealing with the rights of affected parties and the positive outcomes pertaining to a successful business rescue proceedings. Although the Act has been in existence for a few years, specific theoretical research and practical empirical evidence are available in the form of case law, to establish the success the legislation has had on the business environment with specific reference to affected persons.[20]

[20]Bezuidenhout PTJ, *A review of business rescue in South Africa since implementation of the Companies Act (71/2008)* BSc Acturial Science, BSc (Hons) North- West University (2012) at pg. 16.

CHAPTER 2. COMMENCEMENT OF BUSINESS RESCUE

2.1 Commencement by Director's Resolution

The Companies Act of 2008 provides for two ways of commencing business rescue proceedings, namely a resolution by the board of directors[21] or an order of court[22]. If it commences by a resolution of the Board, it must be preceded by a majority decision on the Board of directors unless the contrary is provided for in the memorandum of incorporation ("MOI"). It must also comply with all the requirements of section 73 of the Act, which deals with procedure for board meetings. The board may pass a resolution to begin business rescue proceedings if it has reasonable grounds to believe that the company is financially distressed; there appears to be a reasonable prospect of rescuing it.[23]

The resolution is not effective unless it is filed with the Companies and Intellectual Property Commission (herein referred to as "the commission") through the section 129(7)[24] notice. A business rescue resolution may not be adopted if liquidation proceedings have already been initiated.[25] Within five (5) business days, the company must notify every 'affected person' of the resolution for instance shareholders, creditors, registered trade unions and employees not represented by registered trade unions[26], furthermore the company must appoint a business rescue practitioner and notify the commission of the appointment within 2 (two) business days.[27] Affected

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[21] S 129 of the Act.
[22] S 131 of the Act.
[23] Wassman B, "*Business rescue – getting it right*" January/ February 2014 *De Rebus* at pg. 36. Further see *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC) in which the court held that cogent evidential foundation is required to support the existence of a reasonable prospect of business rescue.
[24] S 129(7) of the Act, provides that if the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1)(f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.
[25] S 129(2) of the Act.
[26] S 129(3)(a) of the Act.
[27] S 129(3)(b) of the Act.

persons must subsequent to the notice of the commission be notified within five (5) days after that.[28] Failure by the company to comply with these requirements renders the business rescue resolution null and void.

Section 131 of the Act, provides as follows:

> "131(1) Unless a company has adopted a resolution contemplated in section 129 [which provides for voluntary business rescue proceedings], an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings...
>
> (4) 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
>
> (c) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation."

With reference to section 131(1), the definition of 'affected person' in section 128(1) – which is in the definition section for purposes of chapter 6 includes a shareholder or creditor of the company. After the decision to rescue has been made, the primary concern for creditors will be the degree of influence that they will have in the decision

[28] S 129(4) of the Act.

about who should be appointed as business rescue practitioner.[29] As soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.[30] If, at any time during business rescue proceedings, the practitioner concludes that there is no reasonable prospect for the company to be rescued, the practitioner must take the prescribed action.[31]

Affected person may make an application to court to set aside the business rescue resolution, if there are no reasonable basis to believe that company is financially distressed and there is no reasonable prospect of rescuing company or if the company failed to satisfy procedural requirements; to set aside the appointment of the business rescue practitioner and/or ordering practitioner to provide security.[32]

2.2 Commencement of business rescue by court order

If the board does not pass a business rescue resolution, an affected person may apply to court for an order to commence business rescue.[33] All affected persons must be notified and have the right to participate in the hearing. The application suspends liquidation proceedings already commenced. The court may make the order if it is satisfied that:

(a) The company is financially distressed, or

(b) The company has failed to pay any employment related amount (under a public regulation, or contract); or

(c) It is otherwise just and equitable to do so for financial reasons; and

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[29] Bradstreet R, "*The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders 'Willingness and the Growth of the Economy*" 2010 95 SA *Merc LJ*.
[30] S 141(1) of the Act.
[31] van Staden J "*Cutting the lifeline: The termination of business rescue proceedings*" *De Rebus* (2013) 240.
[32] *Ibid* and also S 130 of the Act.
[33] S 131(1) of the Act.

(d) there is a reasonable prospect for rescuing the company.

2.3 Legal consequences of business rescue proceedings

2.3.1 *General moratorium*

Once business rescue commences, the general moratorium or stay on legal proceedings against the company or its property automatically applies.[34] Any claims against the company may only be enforced with the consent of the business rescue practitioner or the leave of the court.[35] The company's management will be under supervision and a moratorium on the rights of claimants against the company will therefore start to operate.[36]

The stay on the rights of claimants may be open to abuse.[37] It gives companies temporary "immunity" to actions brought by creditors which would have been due and actionable.[38] The process may be abused by companies who are not in distress but merely institute business rescue proceedings to stall payments of its debts and to evade its obligations.[39] The question arises as to whether the avenues put in place by the chapter 6 business rescue proceedings can ensure that all stakeholders benefit and therefore remedy possible misuse.

2.3.2 *Protection of property interests*

The power of the company to deal with or dispose of its property is restricted. The company may dispose, or agree to dispose, of property only in the ordinary course of

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[34] S 133 of the Act.
[35] *Ibid.*
[36] Bradstreet R "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders 'Willingness and the Growth of the Economy" 2010 SA *Merc* LJ 195.
[37] http://www.fin24.com/Entrepreneurs/Resources/Business-rescue-explained-20150119 (last accessed 2017/05/09).
[38] *Ibid.*
[39] *Ibid.*

its business; in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner; or in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved.[40]

2.3.3 *Post-commencement finance*

The company under business rescue may use its unencumbered assets as security.[41] Lenders who are secured or unsecured will have preference over any other unsecured creditors however not over employment-related payments that became due during business rescue.[42] Section 135 provides for the order of preference as follows:

- Remuneration and expenses of practitioner and claims arising out of costs of business rescue.[43]
- post-commencement payments due to employees during business rescue proceedings but not paid, post-commencement loans.[44]
- all unsecured claims against the company Pre-commencement secured claims are not affected by this section in a subsequent liquidation.[45]

2.3.4 *Employees and employment contracts*

Employees remain employed on their existing terms and conditions.[46] Employees are preferred unsecured creditors in respect of unpaid remuneration that was already due when business rescue commenced.[47] This excludes medical scheme, pension scheme.[48]

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[40] S 134(1) of the Act.
[41] S 135(2) of the Act.
[42] Calitz J & Freebody G 'Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?' 2016 *De Jure* 2657.
[43] S 135(3) of the Act.
[44] S 135(3)(a) of the Act.
[45] S 135(a)(i) & (ii) of the Act.
[46] Joubert EP & Loubser A '*Executive directors in business rescue: employees or something else?*' 2016 *De Jure* 95.
[47] S 144(4) of the Act.
[48] *Ibid.*

2.3.5 *Other contracts with the company*

One of the consequences of the commencement of business rescue is its effect on pre-commencement contracts. In these instance, the business rescue practitioner may suspend any obligation arising from a pre-commencement contract or he may apply to court to cancel, partially or entirely, such contractual obligation on terms that are just and reasonable in the circumstances.[49] The other party to the contract may claim damages only, but not specific performance.

Shareholders, have an obligation to participate when the business rescue plan is presented. Directors continue to hold office and to perform their functions, but they do so under the authority and instructions of the business rescue practitioner.[50] Directors must co-operate with the business rescue practitioner so that the rescue proceedings run smoothly. Directors are relieved from most duties and liabilities while operating under the instructions of the practitioner.[51] Directors may be removed from office through a court order if they fail to co-operate with or they hinder the business rescue practitioner.[52]

The legal consequences in respect to creditors are that creditors have the right to be notified of and participate in all stages of the rescue proceedings, including voting on the business rescue plan.[53] They have the right to form a creditors' committee to represent their interests and consult with the business rescue practitioner.[54] In respect of voting, they have a voting interest equal to the value of the creditor's claim against the company, whether the claim is secured or unsecured.[55]

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[49] S 136(2) of the Act.
[50] S 142 of the Act.
[51] S 76, and S 77 of the Act, other than section 77(3)(a), (b) and (c) of the Act.
[52] S 137(5) of the Act.
[53] S 145(1) & (2) of the Act.
[54] S 145(3) of the Act.
[55] S 145(4) of the Act.

2.4 The effect section 133 Moratorium[56]

The temporary moratorium against a company under business rescue is effective on commencement of business rescue proceedings.[57] There is an automatic and general moratorium on legal proceedings or executions against the company, its property, assets and on the exercise of the rights of creditors of the company.[58]
The act in section 133 of the Act states that:

"133. General moratorium on legal proceedings against company.

(1) During business rescue proceedings, no legal proceedings, 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 –

a. with the written consent of the practitioner;
b. with the leave of the court and in accordance with any terms the court considers suitable;
c. 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
d. criminal proceedings against the company or any of its directors or officers;
e. proceedings concerning any property or right over which the company exercises the powers of a trustee; or
f. proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."

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[56] S 133 of the Act.
[57] *Ibid.*
[58] http://www.derebus.org.za/business-rescue-moratorium-legal-proceedings/*De Rebus* 2012 (June) *DR* 34 (last accessed 29/09/2017).

The effect of the above section 133 is that the existence of a business rescue process temporarily prohibits all legal proceedings inclusive of enforcement actions against the company under business rescue.[59] It is generally accepted that a moratorium on legal proceedings against a company under business rescue, is of principal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs.[60] This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.[61]

The intention of a moratorium is to give a company the best possible chance to implement the Business Rescue Plan so as to allow a company sufficient time to restructure its affairs and particularly its liabilities so as to enable it to return to a sustainably solvent position.[62] This means that creditors will not be able to take action against a company for non-payment of debts during Business Rescue.[63] Although no definition of the terms "legal proceedings" or "enforcement action"[64] are provided in chapter 6 of the Act, the intention of the provision is to cast the net as wide as possible in order to include any conceivable type of action against the company.[65]

The interpretation of the extent and implications of this moratorium was dealt with in the following two cases. In *Cloete Murray NO & Another v First Rand Bank Ltd*[66] the court held that the cancellation of an instalment sale agreement and repossession of the goods sold did not amount to "enforcement action" as contemplated in section

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[59] *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) 8.
[60] *Cloete Murray NO & another v FirstRand Bank Ltd* (20104/2014) [2015] ZASCA 39 (26 March 2015).
[61] *Ibid.*
[62] http://www.ellerineholdings.co.za/Ellerine%20Furnishers%20(Pty)%20Ltd%20-%20Business%20Rescue%20Plan.pdf,business rescue plan on Ellerines furnitures (Pty) Ltd by LESLIE MATUSON & JAYANT DAJI PEMA: 67 (last accessed 29 March 2017).
[63] *Ibid.*
[64] *Murray No v First Rand Bank Ltd t/a Wesbank, unreported and undated (GSJ),* case no 37554/2013 at page 39, the Court held that the mere cancellation of a master instalment sale agreement does not amount to "enforcement action" that is subject to a moratorium in terms of s 133.
[65] Insolvency Law and its operation in winding-up, service issue 43(18-50(7).
[66] *Cloete Murray NO & another v FirstRand Bank Ltd* (20104/2014) [2015] ZASCA 39 (26 March 2015).

133(1) of the Companies Act. The liquidator of a company that had previously been in business rescue sought to overturn FirstRand Bank's cancellation of an instalment sale agreement while the company was in business rescue. The liquidators used the approach that cancellation of the agreement constituted "enforcement action" that could not occur without the consent of the court or the business rescue practitioner under section 133(1).[67]

In *Chetty t/a Nationwide Electrical v Hart NO and another*[68] it was held that arbitration proceedings are not legal proceedings for which the written consent of the business rescue practitioner or the leave of the Court is required in terms of section 133 of the Companies Act 71 of 2008 because it does not take place in "any forum". This judgment was also overturned by the SCA in *Chetty v Hart NO)*. The Supreme Court of Appeal held that in business rescue, the purpose of the moratorium is to give the practitioner an opportunity. Since arbitration is often used to settle commercial disputes, excluding to consider the nature and validity of claims against the company and how to deal with arbitration proceedings from the moratorium would prevent the practitioner from assessing the impact of these claims on the company's financial viability and how to deal with them. It is thus clear that arbitrations should be included in the meaning of legal proceedings. The court referred to the case of *Van Zyl v Euodia Trust*[69] in finding that the ordinary meaning of "legal proceedings" is a "lawsuit" or "*hofsaak*". Arbitration proceedings are therefore not subject to the moratorium in section 133(1). Enforcement of an arbitral award may however be hit by the section 133 moratorium.

There are however specific exceptions regarding the moratorium. Legal proceedings against a company may be commenced or proceeded with in the following circumstances: Section 134(1) (c) provides that, during business rescue proceedings,

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[67] http://www.financialinstitutionslegalsnapshot.com/2015/04/moratorium-in-business-rescue-what-does-it-cover/(Last accessed2017/04/29).
[68] *Chetty t/a Nationwide Electrical v Hart NO and another* [2015] JOL 32738 (KZD).
[69] *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 T.

despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing. One of the effects of this subsection is that if during business rescue proceedings the company wishes to dispose of any property over which another company or person has any security or title interest, the company under business rescue must obtain that person's prior consent unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest.[70]

In such circumstances, the company is expected to promptly pay the proceeds of such disposition or sale to that person holding security or title interest up to the amount of the company's indebtedness to that person or provide security for the amount of those proceeds, in any event, to the reasonable satisfaction of that person.[71] Although this seems to expose the owner of such assets to substantial risks, the Act provides some relief in section 134(2). In terms of this section the business rescue practitioner may not withhold his consent unreasonably, having regard to the purposes of Chapter 6, the circumstances of the company, and the nature of and rights claimed in the property. An owner could thus presumably approach the court for return of his property on the grounds that the practitioner is unreasonably withholding his consent, although it remains to be seen to what extent a court will interfere with a practitioner's decision based on these very vague guidelines.

Any person who is in lawful possession of company property in terms of an agreement entered into in the ordinary course of the company's business before business rescue proceedings, may continue to exercise his contractual rights subject to section 136 (s 134(1)(b)). Section 136(2) of the Act, provides that the practitioner may "cancel or

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[70] S 134(3)(a) of the Act.
[71] S 134(3)(b) of the Act.

suspend entirely, partially or conditionally, any provision of an agreement to which the company is a party at the commencement of the business rescue period", except for employment agreements.

The effect of section 136(2) of the Act is that a contract concluded prior to the commencement of business rescue proceedings, is not suspended or cancelled by virtue of the business rescue, but that the practitioner may suspend, or apply to court to cancel, any obligation of the company under the contract. Loan and overdraft facility agreements will be at risk if the practitioner is of the view that such agreement is prejudicial to the success of the business rescue plan.[72] However, this problem could be reduced due to the fact that any suggested suspension of such an agreement would first have to be included in the business rescue plan and then put to the vote by creditors.[73] If creditors believe that they are being unfairly dealt with in respect of such suspension of their agreements, they could simply vote against the adoption of the business rescue plan.[74] Employment contracts may not be suspended or cancelled and employees must be kept in place during the proceedings on the same terms and conditions as prior to the proceedings. This is without prejudice to the provisions of the business rescue plan which may provide for retrenchment on the terms allowed by the Labour Relations Act 66 of 1995.[75] According to a judgment of the Labour Court in *National Union of Mineworkers v Motheo Steel Engineering*[76] , the moratorium does not apply to applications brought to the Labour Court under the Labour Relations Act but the business rescue practitioner must be cited as a respondent.

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[72] http://www.werksmans.com/wp-content/uploads/2013/04/2011-06-Business-Rescue-FINAL-updated-electronic.pdf (last accessed 8 May 2017).
[73] *Ibid.*
[74] *Ibid.*
[75] Comparative analysis of chapter 6 of the South African Companies Act, 71 OF 2008 (Business Rescue Proceedings) Presentation to the Company Law Symposium organized by The South Africa Department of Trade and Industry & The Specialist Committee on Company Law Johannesburg, South Africa March 1, 2013 Philip Mindlin, slide 41.
[76] *National Union of Metal Workers of South Africa obo Members v Motheo Steel Engineering* (J271/2014) [2014] ZALCJHB 531 (7 February 2014).

In *Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Civils (Pty) Ltd*[77] it was held that the leave of the court to institute legal proceedings must be obtained before the proceedings are served on the respondent) and may not be sought as part of the relief in the main proceedings are commenced (which is when the Registrar issues the papers or the application is application.

"Legal proceedings" for purposes of the moratorium are interpreted very widely by the courts, and was held to include termination of a contract during business rescue proceedings in LA Sport 4 x 4 *Outdoor CC v Broadsword Trading 20 (Pty) Ltd.* [78] However, this judgment was overturned on appeal to the full bench on 26 February 2015. Shortly thereafter, the SCA confirmed the judgment in *Murray NO v First Rand Bank Ltd* (Case No 37554/2013, GNP) in which the exact opposite was held, namely that cancellation of a contract is not "the result of a pronouncement by any forum" and therefore allowed and not subject to the moratorium (*Murray NO v First Rand Bank Ltd* 2015 (3) SA 438 (SCA)).[79]

In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd & Another*[80] the court dealt with an application by Merchant West to attach a helicopter owned by Advanced Technologies. Advanced Technologies (now in business rescue) had previously ceded its rights to this helicopter as security to Merchant West. The court held that this was clearly covered by the moratorium in terms of 133 and the applicant should have applied for leave of the court to bring this application, which it had not done.

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[77] *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others* 2015 (4) SA 485 (KZD).
[78] *LA Sport 4 x 4 Outdoor CC v Broadsword Trading 20 (Pty) Ltd* (unreported case no 25680/2013, GNP).
[79] Loubser A *et al*, *The Companies and other Business Structures in South Africa* 3rd (2013) at Para 12.5.1 and Section 133 of the Act; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd & Another* [2013] ZAGPJHC 109 companies Act.
[80] *Ibid.*

The Act does not deal with the position during business rescue proceedings whereas person who is a surety for a debt owed by the company; as compared to section 155 that regulates the compromise with creditors, where it clearly provides who is a surety of the company.[81] Since the creditor may not take enforcement action ides in subsection (9) that a compromise does not affect the liability of a person against the company for a debt that is due during business rescue proceedings if the company fails to pay, the question is whether the surety is also protected by the moratorium.[82]

In *Investec Bank v Andre Bruyns*[83] it was held that this moratorium is a personal defence (a defence in personam) available only to the company, and a creditor will thus be able to enforce payment of the debt against a surety during business rescue proceedings. However, this only applies to the situation where no rescue plan has as yet been approved because the possibility that a business rescue plan could at a later stage be approved and implemented in terms of which the company would be wholly or partly released from its debts, was "mere conjecture" at this stage and did not affect the right of the creditor to claim payment of a debt that was due and payable from the surety.[84] In the case where payment of a debt owed by the company has been guaranteed by another person, this constitutes a separate obligation and the creditor will be able to take enforcement action against the guarantor before and after approval of a business rescue plan.[85]

Section 135 provides that any claims for remuneration or other payments that become due to employees during business rescue proceedings will enjoy preference above all other creditors' claims, even those of secured creditors who provide post commencement financing to the company. Only the business rescue practitioner's claims for remuneration and expenses, and other claims for costs of the business

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[81] Loubser A *et al*, The Companies and other Business Structures in South Africa 3 ed (2013) by at Para 12.5.1.
[82] S 155(9) of the Act.
[83] *Investec Bank Ltd v Bruyns* (19449/11) [2011] ZAWCHC 423; 2012 (5) SA 430 (WCC) (14 November 2011).
[84] Loubser A *et al*, The Companies and other Business Structures in South Africa 3 ed (2013) by at Para 12.5.1
[85] Loubser A *et al*, The Companies and other Business Structures in South Africa 3 ed (2013) by at Para 12.5.1 and section 133 of the Act.

rescue proceedings, rank higher than these claims of employees.[86] This is a very controversial provision because it will almost certainly make it even more difficult for a company to obtain financing during business rescue proceedings.[87]

2.5 Whose Interests are protected

The importance of considering the interests of creditors as well as all other stakeholders is emphasised in the Act, specifically in Section 7 (k). This states that one of the purposes of the Act is 'to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'.

In the judgment of *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others,*[88] the judge was tasked with deciding on competing applications for liquidation and business rescue. Newcity Group brought an application in terms of section 131 whereby any "affected person" may apply to a court to place the company under supervision. The judge observed that an application in terms of s 131 differs from one brought by special resolution in terms of section 129(1) given that there were other requirements in addition to financial distress.[89] These are that '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 it is otherwise just and equitable to do so for financial reasons'.[90] In light of the *Southern Palace* case[91], the rescue plan will surely not succeed if the rescue plan does not address the cause of

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[86] S 143(5) of the Act.
[87] S 135 of the Act.
[88] *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others (GSJ)* (unreported case no 12/45437, 16566/12, 28-3-2013) (Van Eeden J).
[89] http://www.saflii.org/za/journals/DEREBUS/2014/4.html (Last accessed 2017/04/29).
[90] *Ibid.*
[91] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC).

the demise or failure of the company's business and offers a remedy therefore that has a reasonable prospect of being sustainable'.

Van der Merwe J has also confirmed in *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another*[92] that a prospect of success must be evident and further that, while it is only an 'expectation', it should be one that rests on a ground that is objectively reasonable[93]. Business rescue should not be applied as a delaying tactic for the inevitable (for instance liquidation) but rather, be used to benefit all stakeholders and to serve the best their interests as a collective as reasonable as possible.[94]

2.6 Limitation of Rights affecting stakeholders

Creditors have the right to be notified of and to participate in all stages of the proceedings, including voting on the business rescue plan.[95] They have the right to form a creditors' committee to represent their interests and consult with the business rescue practitioner.[96] They have a right to vote and a voting interest equal to the value of the creditor's claim against the company, whether the claim is secured or unsecured.[97]

Section 136(2), provides that the practitioner may "cancel or suspend entirely, partially or conditionally, any provision of an agreement to which the company is a party at the commencement of the business rescue period", except for employment agreements. Employees are given the following rights during business rescue proceedings[98]:

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[92] *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB).
[93] http://www.saflii.org/za/journals/DEREBUS/2014/4.html (Last accessed 2017/04/29).
[94] http://www.schoemanlaw.co.za/wp-content/uploads/2012/11/website-article-november-2012-nicolene-schoeman.pdf(Last accessed 2017/04/29).
[95] S 145(1) of the Act.
[96] S 145(3) of the Act.
[97] S 145(4) of the Act.
[98] http://www.polity.org.za/article/business-rescue-and-employees-rights-2009-11-11 (last accessed 2017/05/08).

(a) an employee is a preferred unsecured creditor in respect of unpaid remuneration that was already due when business rescue commenced, excluding medical scheme, pension schemes[99];

(b) during business rescue proceedings, employees must continue to be employed on the same terms and conditions of employment except to the extent that (i) changes occur in the "ordinary course of attrition"; or (ii) the employees and the company agree different terms and conditions. Any retrenchment contemplated in the business rescue plan is subject to the provisions of the LRA[100];

(c) all trade unions and non-unionised employees are entitled to: (i) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings and such notice must be given to employees at their workplace and served at the head office of the relevant trade union; (ii) participate in any court proceedings arising during the business rescue proceedings; (iii) be consulted by the practitioner during the development of the business rescue plan and afforded an opportunity to review the plan and prepare submissions; (iv) vote with the creditors on a motion to approve the business rescue plan; and (v) if the business rescue plan is rejected, propose an alternative plan or present an offer to acquire the interests of any or all of the other creditors[101]; and

(d) a medical/pension/provident scheme for the benefit of the past/present employees of the company is an unsecured creditor of the company to the extent of (i) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and (ii) in the case of a defined benefit scheme, the present

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[99] S144(2) of the Act.
[100] http://www.polity.org.za/article/business-rescue-and-employees-rights-2009-11-11 (last accessed 2017/05/08).
[101] http://www.polity.org.za/article/business-rescue-and-employees-rights-2009-11-11(last accessed 8 May 2017) and S 144(3) of the Act.

value at the commencement of the business rescue proceedings of any unfunded liability under that scheme.[102]

These rights are in addition to any other rights arising from, inter alia, any law, contract, collective agreement.[103] The employees effectively have the same participation rights and rights to information as the creditors of the company.[104] Section 133(1) of the Act provides that during business rescue no legal proceedings, including enforcement action, may be taken against the company or in relation to its property or property lawfully in its possession, except with the consent of the business rescue practitioner or the leave of the court, or as a set-off of monetary claims. Section 133(2) provides that during business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

The case of *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and another [2014] 3 All SA 500 (WCC)* (herein referred to as "the Tuning Fork case") dealt with the fact that the Act does not address the issue of whether or not a creditor loses its claim against a surety if a duly adopted and implemented business rescue plan provides for the creditor's claim against the principal debtor to be compromised in full and final settlement of such claim. The court concluded that the creditor would lose its claim against the surety. [105]The decision on this case should change perceptions of all creditors, sureties and companies undergoing business rescue in comparison with what steps they should take to ensure that their individual interests are served.

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[102]S 144(4) of the Act.
[103] S 144(5) of the Act.
[104] See S 144 and 145 of the Act.
[105]http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21 (last accessed 2017/05/08).

In the Tuning Fork case, the financially distressed debtor company (referred to as "the company"), which had purchased audio and visual equipment on credit from the plaintiff (referred to as "the creditor"), was placed in business rescue and a business rescue plan (referred to as "the plan") was adopted by a meeting of the relevant stakeholders. The plan stipulated, inter alia, that the creditor (as a concurrent creditor) would receive a dividend in full and final settlement of its claims. After the adoption of the plan but prior to the plan being implemented, the creditor applied for summary judgment against the persons (referred to as "the sureties") who had signed unlimited, continuing suretyships for the company's debts, present or future, and bound themselves as sureties and co-principal debtors in favour of the creditor. The sureties opposed the application and argued that the creditor's compromise with the company as contemplated in the plan released them from liability. The judge agreed with the sureties and summary judgment against the sureties was refused.

The plan in this case provided for the "full and final settlement" of the claims of the concurrent creditors and contained no provisions addressing the position of the sureties for the company.[106] The judge accordingly construed the plan to be one by which the company, as principal debtor, had been discharged from its liability to the creditor, which thus discharged the sureties from their obligations to the creditor.[107] The judge stated in passing that although he had assumed that the creditor voted in favour of the plan, he did not think that there was any basis to distinguish between the position of a creditor who voted for the business rescue plan and the creditor who voted against it.[108]

In an analysis on the Polity website, Ricci Hackner, of Fluxmans Attorneys, looks at two judgments by Western Cape High Court Acting Judge Rogers - *Tuning Fork (Pty) Ltd t/a*

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[106] *Ibid.*
[107] http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21 (last accessed 2017/05/08).
[108] *Ibid.*

Balanced Audio v Greeff and Another; and *Investec Bank Ltd v Bruyns*[109] (herein referred to as "the Investec case").[110]The Investec case examined section 133 of the Act, which contemplates that once business rescue proceedings have commenced, the distressed company is protected from legal proceedings against it by way of a statutory moratorium.[111]

Similarly, to the Tuning Fork case, the judge concluded that there is a lacuna in the Act as there is no express provision therein which states whether the moratorium operates in favour of a surety for the distressed company.[112] Our common law of suretyship was thus applied having regard to the character of the statutory moratorium created by section 133 in favour of the company.[113] The judge concluded that on general principles of the law of suretyship the moratorium is a so-called defence in *personam* for the distressed company, which is the principal debtor, and thus does not also protect or operate in favour of a surety for such company.[114] A defence in *personam* provides a personal defence to the principal debtor while leaving the debt in existence.[115] The result was that at this stage of the business rescue proceedings the judge argued that the creditor could proceed against the surety of the debtor company undergoing business rescue notwithstanding the moratorium in favour of such debtor company.[116] However, this may not be the case should the express terms of a suretyship stipulate otherwise (see *Nedbank Ltd v Wedgewood Village Golf and Country Estate (Pty) Ltd & Others*[117]).[118]

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[109] *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC).
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113]http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21(last accessed 29 March 2017).
[114] *Ibid.*
[115] *Ibid.*
[116] http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21.
[117] *Nedbank Ltd v Wedgewood Village Golf and Country Estate (Pty) Ltd & Others* Case 20896/2010 (an unreported judgment delivered on 3 July 2013)).
[118]http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21(last accesed 29 March 2017).

The Tuning Fork case differs from the Investec case as it is not about the statutory moratorium in favour of the distressed company at the commencement of business rescue but is instead about the effect of an adopted and implemented business rescue plan by which the creditor has received a concurrent dividend in full and final settlement of its claim against the principal debtor.[119] In the Tuning Fork case the temporary statutory moratorium in favour of the company had, with the finalisation of the plan, been superseded by a release of the company from its debts against payment to the concurrent creditors of a specified dividend in full and final settlement of their claims.[120]

In summary, as a result of the Tuning Fork case and the Investec case:

"a creditor, unless the terms of the suretyship stipulate otherwise –

1) may proceed against a surety for the debtor company in business rescue at the commencement of the business rescue proceedings when the company is enjoying the protection of the personal moratorium as contemplated by the Act, which protection the surety cannot invoke;[121]
2) may not proceed against a surety for the debtor company in business rescue after the adoption of a business rescue plan which provides for the discharge of the debt by agreement between the principal debtor and the creditor or release of such debtor company's obligations to the creditor, where the business rescue plan is silent on the creditor's rights against such surety.[122]"

Should one be in the position of a creditor, then these judgments emphasize the importance of ensuring one's suretyships are drafted in such a way that the creditor's rights are preserved should the principal debt be discharged by agreement between

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[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*

the principal debtor and the creditor subsequent to a business rescue plan being adopted.[123] Creditors must also scrutinize the provisions of the business rescue plan prudently as a duly adopted business rescue plan is binding on the company and all of its creditors, whether or not the creditor was present at the meeting, voted for or against the business rescue plan or proved a claim.[124] The business rescue plan is not required to provide for the release of the company from the payment of its debts. It must simply spell out the extent of the proposed release, which envisages a range of possibilities.[125] Accordingly, it seems that it would be in the best interests of the creditor to enforce its claims as expeditiously as possible against the surety at the commencement of the business rescue proceedings, prior to the business rescue plan being adopted.[126]

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[123] http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21(last accessed 2017/05/08).
[124] *Ibid.*
[125] *Ibid.*
[126] http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21(last accessed 2017/05/08).

CHAPTER 3. THE BUSINESS RESCUE PRACTITIONER

3.1 Introduction

The business rescue practitioner is in the centre of business rescue proceedings appointed by the company once it is placed under business rescue. The business rescue practitioner has a number of powers[127]; in essence takes over full management and control of the company, but may delegate to a director or a manager.[128] The practitioner must investigate the affairs of the company and decide whether it has a reasonable prospect of being rescued.[129]The business rescue practitioner must meet with creditors and give them the opportunity to participate in preparing a business rescue plan which aims at restructuring the company's affairs, business, property, debt and other liabilities; and should the creditors of the company (which includes the employees of the company) vote in favour of the plan, it will be implemented and all the creditors will be bound by that plan.[130] The business rescue plan must contain the prescribed contents, and all other information required to assist affected persons to decide whether to accept or reject the plan.[131]

3.2 Appointment of the Business Rescue Practitioner

If business rescue proceedings are started by a resolution of the board of directors the board must appoint a business rescue practitioner within five business days after filing the resolution with the Commission.[132] Within two business days after appointing the business rescue practitioner, a notice of this appointment must be filed with the

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[127] S 140 of the Act.
[128] S 140(1) of the Act.
[129] S 141(1) of the Act.
[130] S 140(1)(d) and S 147 of the Act.
[131] S 150(2) of the Act.
[132] S 129(3)(b) of the Act.

Commission and each affected person must be notified within five business days thereafter .[133] If the court makes an order for business rescue proceedings to commence, in terms of section 131(4)(a), it "may" appoint an interim business rescue practitioner nominated by the applicant. This appointment will, however, be subject to approval by the majority in value of the independent creditors at the first meeting of creditors.[134] The relevant provision refers to the appointment of a "person" as business rescue practitioner which, according to the definition set out in section 1 of the Act of 2008, includes a juristic person. However, the qualifications contained in section 138(1) mostly do not seem to be capable of being applied to a juristic person.[135]

3.3 Business Rescue Plan

One of the most important part of the business rescue practitioner's duties is the drafting of the business plan, which will hopefully be accepted by creditors. The development, preparation and proposal of the business rescue plan is determined by the practitioner and not by the creditors of the company.[136] Thus, the practitioner will consult with the creditors, shareholders, employees and trade unions, but such practitioner is not obliged to follow the instructions of any such group, although these is advisable for purposes of acceptance by creditors.[137] The plan must detail how the practitioner intends rescuing the company and contain everything that is necessary to convince creditors to approve the plan.[138] These provides some form of reassurance to creditors that they could at least have a say in the approval or rejection of the plan.[139]

The business rescue plan must be published by the company within 25 business days after the date of the appointment of the business rescue practitioner unless additional

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[133] S 129(4) of the Act.
[134] S 131(5) of the Act.
[135] S 138 of the Act.
[136] S 131(5) of the Act.
[137] *Ibid.*
[138] S 150(2)(b) of the Act.
[139] S 150(2)(b) (vii) of the Act.

time is allowed by the court on application by the company, or the holders of the majority of creditors' voting rights consent to a longer period.[140] Within ten business days after publication of the business rescue plan, the business rescue practitioner must convene and preside over a meeting of the company's creditors and "any other holders of a voting interest" to consider the rescue plan and vote on its approval.[141] At the meeting the business rescue practitioner must introduce the plan for consideration by the creditors and, if applicable, by the shareholders.[142] He must also inform the meeting whether he continues to believe that there is a reasonable prospect that the company can be rescued.[143] This provision assumes that the practitioner had expressed a positive view on the company's prospects of being rescued when reporting to the first meeting of creditors, and that, if he did not hold that view, he would have terminated the procedure and applied for an order placing the company in liquidation.[144]

In respect of employee rights, employees have the right to be presented at, and make submissions to the abovementioned meeting before a vote is taken on the plan, but this right must be exercised through their trade union(s), except for employees who are not represented by a trade union, who may personally exercise their rights.[145]

A vote supported by the holders of more than 75% of the creditors' voting interests as well as at least 50% of the independent creditors' voting interests will indicate a preliminary approval of the proposed business rescue plan.[146] If a majority of the voting rights are exercised in opposition to the adoption of the plan, the plan is rejected and may only be considered further after the practitioner has sought a vote of approval to prepare and publish a revised plan, or has advised the meeting that the company

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[140] S 150(5) of the Act.
[141] S 151(1) of the Act.
[142] S 152(1)(a) of the Act.
[143] S 147(1)(a) of the Act.
[144] Loubser A, *Some comparative aspects of corporate rescue in South African company law* LLD University of Pretoria (2010).
[145] S 144(3)(e) of the Act.
[146] S 152(2) of the Act.

will apply to court to set aside the result of the vote.[147] An adopted business rescue plan is binding on the company, all of its creditors and every holder of securities, even if a person did not actively participate in the adoption of the business rescue plan.[148] It is therefore very important that creditors participate and influence the decision to adopt or oppose the adoption of the plan thereof, or otherwise find themselves bound by what disadvantages them.

Section 153(1)(b)(ii) of the Act provides that where there is a failure to adopt a business rescue plan, an affected person(s) can make a 'binding offer' to purchase the voting interest of any person(s) who opposed the adoption of the business rescue plan. In the case of *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others*[149] (referred to as "Kariba") the court considered the interpretation of the term 'binding offer' in section 153(1)(b)(ii) of the Act. The court explained that in order to determine the meaning of 'binding offer' it is necessary to consider the term within the statutory context that it appears.[150] Section 5(1) of the Act provides that the Act must be interpreted in a manner that gives effect to its purpose as set out in s 7 of the Act.[151] Section 7(k) provides that one purpose of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'. Chapter 6 of the Act, in which section 153(1)(b)(ii) occurs, creates a framework within which this purpose can be given effect.

The court held that while a normal contractual offer is made freely and can be withdrawn at any time, an offer made in terms of section 153(1)(b)(ii) creates a legal obligation that is binding on the offeror and the offeree and cannot be withdrawn at

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[147] http://www.werksmans.com/wp-content/uploads/2013/04/2011-06-Business-Rescue-FINAL-updated-electronic.pdf (last accessed 8 May 2017).
[148] *Ibid.*
[149] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP) 23 & 29.
[150] *Ibid.*
[151] *Ibid.*

the insistence of either party. The court held that this interpretation of 'binding offer' accords with the purpose of the Act and the provisions in Chapter 6 in that it facilitates the adoption of a business rescue plan.[152]

The court goes further and explains that the offeree still enjoys the protection of the Act after it has been bound by the offer. The offeree is protected by section 152(1)(b)(ii) which provides that the offeree cannot receive less than it would have for its claim at liquidation.[153] Furthermore, the business rescue plan cannot be implemented until the offeror has paid the offeree for its claim; however, it can be adopted prior to payment. If the offeror has failed to make payment then the business rescue plan will not be capable of implementation and the offeree will not be barred from enforcing its rights.[154]

The nature of a 'binding offer' was again considered in the case of *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others*[155] (referred as "DH Brothers"). The court in DH Brothers held that Kariba was wrong in its interpretation of the term 'binding offer' for a number of reasons.[156] Firstly, the Act does not refer to a set of rights and obligations. The court in DH Brothers explained that if the legislature had intended to create a set of statutory rights and obligations, it would have done so expressly in the provision.[157] If this was the legislature's intention it would have included a deeming provision in terms of which the offeree would be deemed to have accepted the offer once made by the offeror .[158]The court went on to say that the term 'binding offer' could not have the meaning ascribed to it by the court in the Kariba matter because the provision itself speaks only of the offeror and not the offeree. Furthermore, the ordinary meaning of the word 'offer' implies that it emanates from one party only and

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[152] *Ibid.*
[153] *Ibid*, see Kariba at para 32.
[154] *Ibid*, see Kariba at para 34.
[155] *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* (3878/2013) [2013] ZAKZPHC 56; 2014 (1) SA 103 (KZP); [2014] 1 All SA 173 (KZP) (21 October 2013).
[156] http://www.saflii.org/za/journals/DEREBUS/2014/168.html, (last accessed on 3 May 2016).
[157] *Ibid.*
[158] Fn. 126, See DH Brothers at para 40.

requires acceptance to give rise to legal obligations. The term 'offer' has a specific and settled legal meaning which the court presumes the legislature was aware of.[159]

Although the word 'offer' is qualified by the word 'binding', the court is of the opinion that this does not create a legal obligation on both the offeror and offeree, rather it places an obligation on the offeror only.[160] This is justified on the basis that the offer has to be binding on the offeror to avoid the situation where an offer can be tabled and retracted at every meeting of creditors with the aim of unduly delaying the business rescue proceedings. This interpretation accords with the time-bound nature of the business rescue procedure.[161] Secondly, the court in the DH Brothers matter held that the interpretation of the term 'binding offer' in the Kariba case is not correct because it contradicts certain provisions of the Act.[162] Thirdly, the purposive approach followed by the court in the Kariba matter does not justify interpreting the provisions of Chapter 6 of the Act in such a way that it leads to an acceptance of a business rescue plan at all costs.[163]On this issue, the court in DH Brothers concludes by making the following statement at para 60[164]:

'[I]t is my view that the "binding offer" of section 153(1)(b)(ii) is an offer which cannot be withdrawn by the offeror. It is open to acceptance or rejection by the opposing creditors to whom it is made. If accepted, it gives rise to an agreement of purchase and sale. ... The acceptance or rejection need only take place once the value has been finally determined. ... The voting interests are transferred on payment of the determined sum. Once this has taken place, the voting interests are settled and the vote on the plan can take place.'

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[159] Fn 126,See DH Brothers at para 41.
[160] *Ibid*, See DH Brothers para 42.
[161] *Ibid*, see DH Brothers at para 43.
[162] *Ibid*, See DH Brothers at para 46.
[163] *Ibid*, See DH Brothers at para 54.
[164] http://www.saflii.org/za/journals/DEREBUS/2014/168.html, (last accessed 3 May 2016).

If the decision in the DH Brothers case is correct then the position of the secured creditor, whether large or small in respect of voting interest, is protected since it cannot be deprived of its secured right simply by means of a 'binding offer'.[165] A secured creditor has to agree to the discharge in order for it to be valid.[166]

Creditors are advised to carefully consider the business rescue plan as it will bind them whether or not they have participated.[167] The possibility of an application to court being set aside as a result of the votes of creditors or shareholders who voted against adoption of the rescue plan is also followed by controversy.[168] In *Copper Sunset Trading 220 (Pty) Ltd v SPAR Group Ltd and Normandien Farms (Pty) Ltd*[169] the court set aside the votes of the first respondent (who held more than 50% of the total claims against the company) and the second respondent as inappropriate. The court referred to the attitude of first respondent in "gunning for liquidation" as "self-serving and unreasonable" because it would be the only creditor to be paid a dividend (of only R0.45) if the company was wound up. The vote against the plan by the second respondent, who would not have received anything in liquidation, was termed "irrational" by the court.[170]

Section 132(2)(a) refers to the conversion of business rescue proceedings to liquidation proceedings, however, the Act does not provide for such a conversion. In all three instances where a court may issue a liquidation order in respect of a company that is subject to business rescue proceedings, it is clear that the rescue proceedings are simultaneously terminated or have already ended.[171] These are:

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[165] *Ibid.*
[166] *Ibid.*
[167] *Ibid.*
[168] *Ibid.*
[169] *Copper Sunset Trading 220 (Pty) Ltd v SPAR Group Ltd and Normandien Farms (Pty) Ltd* 2014 (6) SA 214 (LP).
[170] Mongalo T, Butler D, Loubser A, Coetzee L and Burdette D *"Companies and other Business Structures in South Africa"* 3rd ed (oxford 2013).
[171] S 132(2)(a) of the Act.

- firstly, when an application is made by an affected person for the resolution of the board of directors to be set aside[172], or for the appointment of the business rescue practitioner to be set aside[173] ;
- secondly, where the business rescue practitioner is compelled to apply to court for termination of the rescue proceedings and placing the company in liquidation if he comes to the conclusion that there is no reasonable prospect for the company to be rescued[174]; and
- thirdly, when a creditor applies for the winding-up of the company because the business rescue proceedings have already ended as a result of a notice of termination filed by the business rescue practitioner.[175]

A business rescue practitioner must apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation if he or she comes to the conclusion that there is no reasonable prospect for the company to be rescued.[176] Although this would be the case if the company is obviously insolvent that liquidation is the only solution, the Act provides that this is one of the grounds for the winding-up of a solvent company by the court.[177] However, a company unable to pay its debts as and when due, qualifies for an insolvent liquidation[178] *(Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*).[179]

Liability of the business rescue practitioner is the same as the duties and liability of a director.[180] He incurs no other liability unless for anything done in his capacity as practitioner not in good faith or grossly negligent.[181] His remuneration will be in

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[172] S 130(1)(a) of the Act.
[173] S 130(1)(b) of the Act.
[174] S 141(2)(a)(ii) and S 81(1)(b) of the Act.
[175] S 81(1)(c)(i) read with s 132(2)(b) of the Act.
[176] S141(2)(a)(ii) of the Act.
[177] S 81 of the Act.
[178] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA).
[179] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA).
[180] S 140(3)(b) of the Act.
[181] S 140(3)(c) of the Act.

accordance with a tariff prescribed by the Minister.[182] An agreement may be made for additional remuneration for certain results. [183]

In order for the business rescue procedure to be effective, it should be able to provide an easy, time effective and inexpensive access to the rescue proceedings for the companies facing financial difficulty.[184] A delay in the commencement stages may result in difficulties to the initiation of rescue proceedings and accordingly the financially troubled companies may lose their optimal opportunities of being restructured because time was wasted.

There are also serious concerns that a company could choose to go into business rescue knowing that liquidation is inevitable; while deliberately using the business rescue period to destroy creditors' security before going into liquidation. The research attempts to find ways in which affected parties' interests in the business rescue proceedings can be reasonably protected.

3.4 Rights and limitations resulting from business rescue proceedings

As already indicated above, creditors are entitled to form a creditors' committee which will represent their interests and which will consult with the business rescue practitioner on any relevant issues of interest.[185] They have a right to vote and a voting interest that is equal to the value of the creditor's claim against the company, whether the claim is secured or unsecured.[186]

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[182] S 143(6) of the Act.
[183] S 143(2) of the Act.
[184]http://services.bowman.co.za/Brochures/NewCompaniesActeBook/files/1403%20bg%20new%20companies%20act%20fa%20hrss.pdf (last accessed 2017/04/29).
[185] S 145(3) of the Act.
[186] S 145(4)(a) of the Act.

A practitioner has a discretion to "cancel or suspend entirely, partially or conditionally, any provision of an agreement to which the company is a party at the commencement of the business rescue period", except for employment agreements.[187]

Employees are given the following rights during business rescue proceedings:[188]

- an employee is a preferred unsecured creditor in respect of unpaid remuneration;
- during business rescue proceedings, employees must continue employment on the same terms and conditions of employment;
- Any retrenchment contemplated in the business rescue plan is subject to the provisions of the LRA[189];
- All trade unions have the right to be notified.[190]

These are additional rights to any other rights stemming from, inter alia, any law, contract or collective agreement. The employees consequently have the same participation rights and rights to information as the creditors of the company.[191]
During business rescue no legal proceedings, including enforcement action, may be taken against the company or in relation to its property or property lawfully in its possession, except with the consent of the business rescue practitioner or the leave of the court, or as a set-off of monetary claims.[192]

Thirdly, "during business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company

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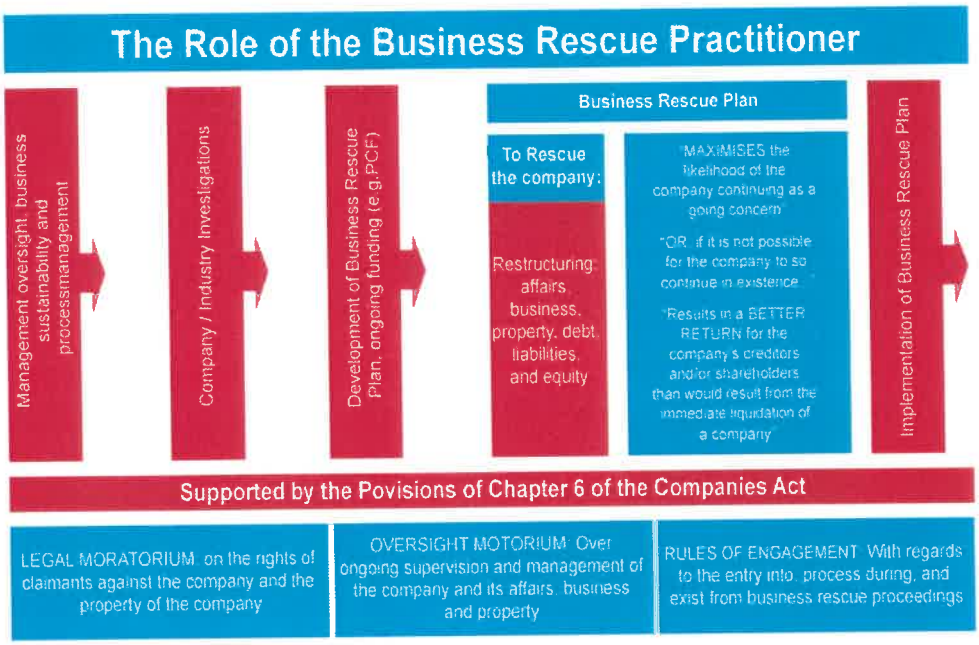
[187] http://www.pressreader.com/south-africa/business-day-business-law-and-tax-review/20100810/281668251272925 (last accessed 2017/04/29).
[188] http://www.polity.org.za/article/business-rescue-and-employees-rights-2009-11-11 (last accessed 30-06-2016).
[189] *Ibid.*
[190] Supra 171.
[191] *Ibid.*
[192] S 133(1) of the Act.

except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances".[193]

The table below demonstrates the wide range of powers of the business rescue practitioner.

Figure 1. The role of the Business Rescue Practitioner[194]



3.5 Termination of Business rescue proceedings

If a company's business rescue proceedings have not ended within three months (or such longer time as the court may allow), the practitioner must prepare a monthly progress report.[195] There are a number of ways of terminating the proceedings:

[193] S 133(2) of the Act.
[194] Figure 1 provided by http://businessrescuesouthafrica.co.za/what-is-business-rescue/the-business-rescue-practitioners-role/(Last accessed on 24/08/2017).
[195] S 132(3) of the Act

- A court order setting it aside where business rescue commenced by court order;[196]
- A court order "converting" the rescue into liquidation proceedings, where there is no prospect of rescue;[197]
- A notice of termination filed with the Commission where there was rejection of plan and no further action taken or where the entity is no longer financially distressed;[198] and
- A business rescue plan that has either been implemented as confirmed in a filed notice or rejected without any further steps taken.[199]

3.6 Compromise

Another option for companies is a compromise with its creditors.[200] In this instance a company need not be financially distressed.[201] A compromise may not be business rescue. A compromise involves an agreement with creditors for them to receive less than is otherwise owing to them.

The board of a company may propose a compromise to all its creditors or any class of creditors.[202] The proposal must contain all information reasonably required to assist creditors in deciding whether to accept or reject it.[203] The prescribed contents should almost be identical to ones in business rescue plan.[204] A proposal for a compromise is adopted if it is supported by a majority in number, representing at least 75% in value of the creditors (or class of creditors), present and voting.[205] The adopted proposal

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[196] S 132(2(a)(i) of the Act.
[197] S 132(2)(a)(i) of the Act.
[198] S 132(b) of the Act.
[199] S 132(c) of the Act.
[200] S 155(2) of the Act.
[201] See S 128(1)(f) of the Act.
[202] S 155(2) of the Act.
[203] S 155(3) of the Act.
[204] As demonstrated in S 155(3) of the Act.
[205] S 155(6) of the Act.

must be sanctioned by the High Court.[206] A sanctioned compromise is final and binding on all the relevant creditors as of the date of filing.[207] However, sureties not affected.[208]

Table 1: A rough comparison between section 155 and business rescue proceedings

Section 155, the compromise procedure between a company and its creditors.	Business rescue proceedings
• Section 155(9) of the Act expressly stipulates that such a compromise does not affect the liability of any person who is a surety of the company, and thus the rights of a creditor against a surety are preserved.[209] • The judge argued in the Tuning Fork case that there is no basis to imply such a term of the preservation of a creditor's rights against a surety into the business rescue provisions of the Act. Accordingly, the common law on suretyships must be applied in order to assess the liability of the surety on business rescue.[210]	• The Act contains no similar provision which safeguards the creditor's rights against a surety in relation to a business rescue plan.
• At common law, the obligation of a surety is accessory in nature, therefore the extinction of the principal obligation	• the business rescue plan must be carefully examined to determine in each case whether the principal obligation or debt has been

[206] S 155(8) of the Act.
[207] S 155(8)(c) of the Act.
[208] S 155(9) of the Act.
[209] http://www.polity.org.za/article/the-effect-of-business-rescue-proceedings-on-creditors-rights-against-sureties-2014-10-21 (last accessed 2017/05/08).
[210] *Ibid.*

extinguishes the obligation of the surety.[211] • It is generally accepted that, if the principal debt is discharged by an agreement between the principal debtor and the creditor or by the release of the principal debtor, the surety is released unless the deed of suretyship provides otherwise (the deeds of suretyship in the Tuning Fork case did not provide otherwise).[212]	extinguished in terms of the relevant business rescue plan. • The judge concluded in the Tuning Fork case that should a business rescue plan provide for the discharge of the principal debt by way of a release of the principal debtor then the surety is discharged, unless the claim against the surety is preserved by such stipulations contained in the business rescue plan as may be legally permissible.

[211] *Ibid.*
[212] *Ibid.*

CHAPTER 4. COMPARATIVE STUDY: UNITED KINGDOM; AND SOUTH AFRICA

4.1 Business Rescue in the United Kingdom

In the United Kingdom (UK), the modern law relating to both personal and corporate insolvency is currently contained in the Insolvency Act 1986.[213]The purposes of administration of corporate insolvency are specified in the Insolvency Act 1986 which highlights the purposes and objectives as (a) rescuing the company as a going concern, (b) achieving a better result for the creditors as a whole than would be possible in an immediate liquidation (c) realizing property to make distributions to one or more secured or preferential creditors.[214] The foundation of corporate insolvency is the Cork Report[215] which laid down the insolvency framework and its values when a company is faced with financial distress.

The enactment of the Insolvency Act,1986, which introduced more elaborate corporate rescue procedures. In particular it introduced alternative measures such as the Company Voluntary Arrangements (CVAs). The CVA with Moratorium was introduced for eligible companies in order to remedy a perceived weakness in the traditional CVA procedure. It was hoped that the availability of a moratorium during the period of formulating and presenting a CVA proposal to creditors and such proposal being approved would address this weakness and, as a result, increase the use of CVAs and the incidence of corporate rescue.

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[213] A portion of this introduction was taken from Chapter 4 of Jennifer Gant's PhD Thesis, titled "Rescue Before a Fall: an Anglo-French Analysis of the Balance between Business Rescue and Employment Protection in the UK and France", submitted at the Nottingham Law School in January 2016.
[214] Insolvency Act 1986, Schedule B1, paragraph 3.
[215] Cork Report (Report of the Review Committee on Insolvency Law and Practice) (1982).

In the UK, there are three rescues procedures, which are voluntary winding up[216], a compulsory winding up[217] and winding up through administration.[218]The main difference between the voluntary and compulsory procedures of winding up is the fact that the former is commenced with the passing of a resolution at a duly convened meeting while the latter is initiated by a court order upon a petition, often presented by a creditor. Two objectives focus on creditors namely[219]:

a) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up; and
b) Realising property of the company in order to make a distribution to one or more secured or preferential creditors.

The UK laws have been traditionally regarded as 'creditor friendly' because of the strong priority given to the protection of creditors' interests.[220]Previously the Insolvency Act 1986 provided for an automatic moratorium on most legal processes that commenced or continued against the company as soon as an administration order was presented to the court, the moratorium on insolvency proceedings and other legal processes against the company now only commences once the company is in administration, that is, from the moment when an administrator is appointed.[221]

The administrator is appointed either by the court as part of the administration order or by the company or its directors.[222] Only a person who is qualified to act as an insolvency practitioner in relation to the company may be appointed. The administrator of the company is responsible in performing his duties with the aim of rescuing the financially distressed company as a going concern, achieving a better

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[216] S 84 of the Insolvency Act 1986.
[217] S 73 (1) of the Insolvency Act 1986.
[218] Enterprise Act 2002, Schedule 16.
[219] Insolvency Act 1986, Schedule B1 as updated by the Enterprise Act 2002.
[220] Gilson S, Creating Value Through Corporate Restructuring: Case Studies in Bankruptcies, Buyouts and Break ups 2nd edition (John Wiley & Sons, New Jersey, 2010) pg.442.
[221] Loubser A, Some Comparative aspects of Corporate Rescue in South Africa Company Law 2010 195.
[222] Insolvency Act 1986, para 2 of Schedule B1.

return for the company's creditors or realising property in order to make a distribution to 1 (one) or more rescued and or preferential creditors.[223]

The moratorium does not like the South African system postpone the payment of debt, but only protects the company from the creditors and other parties alike from enforcing several legal rights.[224]There is an interim moratorium that protects the company before the appointment of the administrator and directly after the application has been lodged.[225]

Directors still have the right to exercise their powers including the power to dispose of property through alienation, leasing or mortgaging as well as accessing company accounts.[226] Management will however will still be required to carry out their statutory duties.[227] In terms of the Act business rescue in South Africa relieves directors of all their powers and places management under the full control of the business rescue practitioner.[228]

The final moratorium is automatic and wide in its application for the duration of the administration, but is however not absolute as both the administrator and the court have the discretion to allow specific legal processes against the company to be instituted or continued.[229]

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[223] Macrow A, *A Comparative Assessment of Employee Rights within South Africa, United Kingdom and Australian Corporate Rescue Legislation* LLM University of Pretoria (2014) at pg.33.
[224] Lightman G et al *The Law of Administrators and Recievers of Companies* (2007) 40.
[225] Loubser A Some Comparative aspects of Corporate Rescue in South Africa Company Law 2010 193, In terms of par 27(1) of the Schedule B1 to the Insolvency Act 1986.
[226] Pennington R *Corporate Insolvency Law* (1997) 2nd ed Butterworths London 361-362.
[227] Bailey E and Groves H *Corporate Insolvency* (2008) 3rd ed Oxford University Press 393 and Fletcher I.F *The Law of Insolvency* (1996) 2nd ed Sweet and Maxwell, London 549.
[228] S 137(2) of the Act.
[229] Louber A Some Comparative aspects of Corporate Rescue in South Africa Company Law 2010 195.

4.2 Business Rescue in South Africa

In comparison with business rescue proceedings in the UK, the Act provide third parties with an opportunity to initiate business rescue proceedings. Any "affected person," such as a shareholder, creditor, union or employee, may initiate filling.[230]

Although the "general moratorium" provisions of the Act do not explicitly provide a formal mechanism for obtaining relief from the company, for instance, an affected creditor who has leased property to the company or holds a security interest in company property could presumably seek relief under Section 134(2) of the Act, claiming that the practitioner's failure to consent to the creditor's proposed action is unreasonable.[231]

South Africa just like the UK provides that a Business Rescue Practitioner must be a qualified person.[232] The Business Rescue Practitioner must be licensed by the Companies and Intellectual Properties Commission.[233]

4.3 Difference between the South Africa and United Kingdom business rescue regimes:

The table below indicate some of the obvious differences between the business rescue regime in the United Kingdom ("UK") and in South Africa.

Table 2:

Business Rescue:	South Africa	United Kingdom
Commencement of business rescue	• The business rescue proceedings begin either when the company	• Voluntary procedures of winding up commence

[230] S 121 of the Act.
[231] Mongalo T, Butler D, Loubser A, Coetzee L and Burdette D *"Companies and other Business Structures in South Africa"* 3rd ed (oxford 2013).
[232] S 138 of the Act.
[233] Regulation 126 of the Companies Regulation, 2011.

	files resolution to place itself under supervision, or a person applies to the court for an order placing the company under supervision, or during the course of liquidation proceedings, or proceedings to enforce a security interest, a court makes an order placing the company under supervision as highlighted in the previous chapter.[234]	with the passing of a resolution at a duly convened meeting and compulsory procedures of winding up is initiated by a court order upon a petition, often presented by a creditor.
		• When an application is initiated by the company or the directors, an affidavit must be drafted by one of the directors or the secretary of the company.[235] • However, if the application is initiated by creditors, they must authorise one of them to make the affidavit on their behalf.[236]
The qualifications of a Business rescue practitioner	• The minister designates an individual with good standing in the profession, who is not subject to an order in terms of section 162(7) of the Act.	• The Cork Report recommended that there should be a minimum standard professional qualification as well as a

[234] S 132(1) (a)-(c) of the Act.
[235] Rule 2.2(2) of the Insolvency Rules.
[236] Rule 2.2(3) of the Insolvency Rules

	• The person must have an independent relationship with the company and therefore not be in a position to compromised in terms of his or her integrity and impartiality.[237] • He or she must be a member of a legal, accounting or business management profession accredited by the Commission.[238] • The Minister prescribes minimum qualifications for a person to practise as a business rescue practitioner, including different minimum qualifications for different categories of companies.[239] • The Minister has also imposed standards and procedures to be followed by the Commission in carrying outs its licensing functions and powers.[240]	control structure to ensure a high standard of competence and integrity to prevent abuse.[241] Acting without the required qualifications is an offence which may be sanctioned by imprisonment and the imposition of a fine.[242] • The administrator is deemed to be company`s agent[243] and anyone dealing with him in good faith for value need not be concerned whether or not administrator is acting beyond the power that he or she has given.[244]Preceding the appointment of the administrator he or she must take control of all the assets including those that are distributed throughout the globe.[245]

[237] S 138(1) of the Act.
[238] S 138(1) (a) of the Act.
[239] S 138(3) (b) of the Companies Amendment Act of 2011 Government Gazette 20 April 2011.
[240] S 138 (3)(a) of the Companies Amendment Act of 2011 Government Gazette 20 April 2011.
[241] Pennington R, *Corporate Insolvency Law* (1977) 4.
[242] S 390(2) of the Insolvency Act 1986.
[243] Insolvency Act 1986 Chapter 45 Part II S 14(5).
[244] Insolvency Act 1986 Chapter 45 Part II S 14(6).
[245] Grier N et al *United Kingdom Company Law* (1998) Cambridge University Press 628.

The Moratorium	• The moratorium will result in a stay on all legal proceedings, including enforcement actions, against the company, or in relation to any property belonging to the company, or lawfully in its possession.[246] • It is important to distinguish when exactly the proceedings commence as the moratorium will commence automatically from the beginning of the process. • Where the commencement of business rescue proceedings by way of a board resolution, the process would have started at the moment the company files with the Companies and Intellectual Property Commission the resolution to place itself under supervision.[247] In terms of the initiation by order of the court, this process is said to have begun when the affected person applies.[248]	• The moratorium now commences only once the company is in administration and although the definition of the word connotes an allowance or breathing space for the company, it does not like the South African system postpone the payment of debt, but only protects the company from the creditors and other parties alike from enforcing several legal rights.[249]

[246] S 133 of the Act.
[247] S 129(5) of the Act.
[248] Loubser A *Some Comparative Aspects of Corporate Rescue in South African Company Law* LLD Unisa 201026, also see S 128 of the Act.
[249] Lightman G *et al The Law of Administrators and Receivers of Companies* (20017) 40.

The business rescue plan	• In terms of section 150(1)[250]the business rescue practitioner must consult with all affected persons.[251] • In terms of the Act, the business rescue plan does not require a statement on the past, present or future financing of the company explaining its previous management.[252] In the *Swart v Beagles Run Investments 25*[253] case, an assessment of the past financial position of the company would prove to be beneficial as it would give an indication of how the business was run and if indeed there is any real chance of it being rescued. The court found that from the financial history of the company recovery would almost be impossible therefore the courts refused the application.	• The administrator is mandated to prepare a rescue plan which he must submit personally, but he is not however obliged to consult or negotiate with creditors in terms of that specific plan.[254] • The rescue plan must contain the statement of how the company has been managed and financed since the appointment of the administrator and how it will continue to be managed and financed.[255]
Post - commencement finance	• Employee wages and salaries have a preferential claim after the remuneration of the business	• Preferential debts rank equally among themselves after the expenses of the administration and shall

[250] Act 71 of 2008.
[251] S 150(1) of the Act.
[252] Loubser A *Some Comparative Aspects of Corporate Rescue in South African Company Law* LLD Unisa 2010 140.
[253] 2011 (5) SA 422(GNP).
[254] Goode R *Principles of Corporate Insolvency Law* (2008) 3rd Thomson, ed London 382.
[255]Supra 218 at 208, Rule 2.33(2) (o) of the Insolvency Rules.

	rescue practitioner has been paid out.[256]	be paid in full, unless the assets are insufficient to meet them, in which case they shall be distributed in equal proportion.[257]
Uncompleted contracts	• the business rescue practitioner must urgently apply to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company.	• the administrator of a company may dispose of or take action relating to property which is subject to a floating charge as if it were not subject to the charge.[258] The holder shall therefore have the same priority in respect of acquired property as he or she had in respect of the property disposed of. • The court may by order enable the administrator of a company to dispose of property which is subject to some form of security (other than a floating charge) as if it were not subject to the security.[259]
Duration of the business rescue proceedings	• If the company`s business rescue proceedings have not ended within three months after the	• The appointment of an administrator shall cease to have effect at the end of

[256] S 135 (3) of the Act 71.
[257] Paragraph 65(1) and (2) of Schedule B1 to the Insolvency Act 1986; Section 175 shall apply in relation to a distribution under this paragraph as it applies in relation to the winding-up of a company.
[258] Paragraph 70(1) of Schedule B1 to the Insolvency Act 1986.
[259] Paragraph 71 of Schedule B1 to the Insolvency Act 1986.

	start of those proceedings, or such longer time as the court may allow, on application by the practitioner, in which he or she must prepare a report on the progress of the business rescue proceedings and give an update at the end of each subsequent month until the proceedings have come to an end.[260] • He or she must deliver the reports and the updates to each affected person, court and the Commission.[261]	the period of one year beginning from the date on which it takes effect.[262] The administrator`s term of office may be extended through an application of the administrator by the court for a specified time, but not for a period exceeding six months.[263]

[260] S 132(2) of the Act.
[261] S 132(3) of the Act.
[262] Paragraph 76(1) of Schedule B1 to the Insolvency Act 1986.
[263] Paragraph 76(2)(a) –(b) of Schedule B1 to the Insolvency Act 1986.

CHAPTER 5. CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Business Rescue is now practiced by many countries and in as much as there are those who may attempt to abuse the business rescue process, it has clearly rescued a lot of companies from failing or worse liquidation. In terms of the comparative study, it is evident that business rescue in African countries although applied in terms of the English law in most of these countries, has started to take shape and an alignment with the best international practices in this regard has already commenced with South Africa being one of the leading countries.

5.2 Chapter Breakdown and Highlights

5.2.1 *The effect of section 133 Moratorium in terms of Employment Disputes*

South African courts are currently faced with a challenge of determining what constitutes a 'legal proceeding' in terms of section 133.[264] In most cases courts are burdened with determining whether proceedings relating to employment disputes, suretyship agreements and arbitrations, to name a few, fall within the ambit of excluded proceedings envisaged in section 133.[265]

In the matter of *National Union of Metalworkers of South Africa obo Members v Motheo Steel Engineering CC*[266], as a result of business rescue four employees were dismissed by their company. The company argued that the unfair dismissal application brought by the Trade Union was precluded by the section 133 moratorium. The Labour Court

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[264] *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[265] *Ibid.*
[266] [2014] JOL 32257 (LC).

held that section 133 of the Act did not apply to legal proceedings brought in respect of the provisions contained in the Labour Relations Act, No 66 of 1995 (LRA).[267]The Labour Court, relied on the provisions of section 210(1) of the Labour Relations Act ("LRA") which states that the provisions of the LRA prevail in the event of any conflict with other law save for the Constitution or any act expressly amending the LRA, and rejected the company's contention.[268] consequently, the Labour Court decided that section 133 of the Act did not expressly amend the LRA.[269] This judgment highlights another exception to the application of the moratorium, namely proceedings brought in respect of the provisions of the LRA.

5.2.2 *The effect of section 133 in terms of Suretyships*

In respect of suretyship, the courts are faced with a task to determine whether a creditor's claim against sureties is extinguished when a business rescue plan provides for a compromise in full and final settlement of a debt. The cases of *New Port Finance Company (Pty) Ltd v Nedbank Ltd*[270] and *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another*[271] addressed this lacuna in business rescue and reached interestingly conclusions.

In the *Tuning Fork* case, the court applied the common law, in the absence of statutory clarity and held that the obligations of sureties were accessory in nature. consequently, the extinction of the principal-debtor's obligation under business rescue resulted in extinguish the sureties' liability, except where the deed of surety contractually preserved the creditor's rights.[272]

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[267] *Ibid.*
[268] *Ibid.*
[269] *Ibid.*
[270] [2014] ZASCA 210.
[271] 2014 (4) SA 521 (WCC).
[272] *Ibid.*

In the *New Port Finance*[273] case, it was contended that because the principal-debtor's obligation was altered by the adopted business rescue plan, the sureties' respective liabilities were also altered, so as to render their liability extinguished by compromise or settlement reached under the business rescue plan.

These decisions are warnings that may aid creditors to look at the specific wording used in drafting their security documents, including deeds of suretyships or guarantees.

5.2.3 *The effect of section 133 in terms of Arbitration Proceedings*

In the matter of *Chetty t/a Nationwide Electrical v Hart and Another*[274] the question was whether an arbitration award made while the company was under business rescue was invalidated or voided by the general moratorium on legal proceedings in terms of section 133 of the Act.[275] The court considered the definitions attributed to 'legal proceedings' and held that arbitration proceedings are likely to be considered legal proceedings going forward and will thus fall within the moratorium created by section 133.[276] However, the Supreme Court of Appeal found that failure to obtain the business rescue practitioner's permission to institute proceedings did not mean the arbitration award was a nullity but noted that the Appellant's attempt to invalidate the arbitration award merely due to its dissatisfaction with the result would not be considered by the courts.[277]

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[273] *New Port Finance Company (Pty) Ltd and Another v Nedbank Limited* (30/2014) [2014] ZASCA 210; [2015] 2 All SA 1 (SCA); 2016 (5) SA 503 (SCA) (1 December 2014)

[274] 2015 (6) SA 424 (SCA).
[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.*

5.2.4 *The effect of section 133 in terms of Property unlawfully possessed by the Company*

The question that arose recently in courts is whether the section 133 Moratorium is absolute. The case of *Kaythera Court v Le Rendez-Vous Café CC and another*[278], dealt with the question whether and when a property owner may evict a tenant company which has instituted business rescue proceedings and is in arrears with rental.[279] It was held that the moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue.[280] It is intended to be of a temporary nature only and cannot be utilised to indefinitely delay satisfaction of the claims of creditors; or result in the extinguishment of the claims of creditors.[281] The court held that where a business rescue practitioner has not suspended the obligation of the tenant under a lease in terms of section 136(2)(a) of the Act, and the landlord has validly cancelled the lease due to non-payment, the landlord can bring ejectment proceedings to evict the tenant, despite being in business rescue; and the general moratorium contained in section 133(1) of the Act, does not include legal proceedings for ejectment, where the property is in possession of the tenant in business rescue unlawfully the lease having been lawfully cancelled).[282]

5.3 Recommendations

It is recommended that the regulator revise the powers and authority given to the business rescue practitioner to avoid abuse of the process by Practitioners and consequently failure to protect the rights of the very persons it aims to protect. Furthermore, that creditors be cautious of the process and take advantage of the

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[278] 2016 (6) SA 63 (GJ)
[279] *Ibid.*
[280] *Ibid.*
[281] *Ibid.*
[282] http://www.derebus.org.za/limiting-scope-moratorium-business-rescue-ejectment-unlawful-occupier-leased-property/(last visited 2 March 2017)

opportunity provided by section 150 and the rights set out in sections 144, 145, 146, 147, 148 and149 of the Act.

5.4 Conclusion

Business Rescue should not be applied as a delaying tactic for the inevitable. It should rather be applied by financially distressed companies that are genuinely able to make a real and positive difference to those affected. In other words: to serve the best interests of all stakeholders as a collective. It would seem that our Courts are not persuaded to grant business rescue applications so lightly. In terms of the provisions of Chapter 6 of the Act, the general areas of concern for creditors includes:

(a) Whether banks or financial institutions will be willing provide post-commencement finance[283] during the business rescue procedure and whether the company under business rescue will have the necessary security;
(b) the business rescue practitioner has a discretion to suspend or apply to the court for the cancellation of obligations arising from current contracts of the company[284];
(c) a guarantee or surety by a company in favour of a creditor during the business rescue process is prohibited[285];
(d) the development, preparation and proposal of the business rescue plan is driven by the practitioner and not by the creditors of the company, thereby giving the practioner discretionary powers.[286]

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[283] S 135(3) of the Act.
[284] S 141 (1) of the act.
[285] Loubser A *"The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1)"* 2010 *TSAR* 509.
[286] Snyman-Van Deventer E, Jacobs L, *"Corporate Rescue: The South African Business Plan Examined"* 2014 *NIBLeJ* 6 at para 3.

The main purpose of business rescue is to maximise the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[287] The interests of these affected persons[288] must be recognised and their participation in the development and approval of a business rescue plan is extensively provided for in the Act.[289]

The moratorium on legal proceedings by creditors is an important element of the success of the business rescue proceedings and allows the courts to have a say in giving effect to those transactions that may end up hindering the success of the company.[290] Business Rescue Proceedings provides the company with an opportunity to re-write is financial state and continue to trade and therefore contribute to economic growth of the Country.[291] It will be advisable for companies to realise this opportunity and make use of it before they face liquidation.

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[287] http://www.werksmans.com/legal-services-view/business-rescue-insolvency/ (last accessed 20/05/2017).
[288] S 150(1) of the Act. Also, S 150 of the Act.
[289] Snyman-Van Deventer E, Jacobs L, *"Corporate Rescue: The South African Business Plan Examined"* 2014 *NIBLeJ* 6 at para 3.
[290] Bradstreet R, *"The Leak in the Chapter 6 Lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy"* 2010 22 *SA Merc LJ* at pg. 195.
[291] S 7(k) of the Act.

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