The relationship between the business rescue practitioner and the directors of the company

by

NEO MOKOKA

(16108974)

Submitted in partial fulfilment of the requirements for the degree
LLM (Insolvency Law)

In the Faculty of Law
University of Pretoria

November 2024
Supervisor: Dr J Van Wyk

ABSTRACT

This dissertation on the relationship between the business rescue practitioner and the directors of the company under business rescue. In essence, this dissertation investigates whether a conflict arises between the duties, roles and powers of the business rescue practitioner and those of directors of the financially distressed company. The aim of this dissertation is to study what are the limitation on duties, roles and powers of directors of the company as a result of the appointment of the business rescue practitioner and the extent thereof.

In achieving the above objective, this dissertation commences with setting out the background of business rescue proceedings in South Africa by analysing provisions of Chapter 6 of the Companies Act 71 of 2008 which has introduced “a new corporate rescue procedure” in South Africa, being business rescue. The focus is on provisions dealing with duties, roles and powers of directors in the ordinary course as set out in section 66, 75 to 77 of the Act. The focus then shifts to the provisions dealing with the commencement of business rescue proceedings, the appointment of the business rescue practitioner and his duties, roles and powers.

In order to establish whether a conflict truly exists between the duties, roles and powers, various sources dealing with this issue are considered.

In order to assess whether there are solutions in dealing with the conflict and/or limitation that arises, this dissertation includes a comparative study on selected foreign jurisdictions dealing with the interaction between the board of directors and business rescue practitioner are considered. In particular, this dissertation considers corporate rescue mechanisms in the Commonwealth of Australia, the United Kingdom and the United States of America.

The purpose of the comparative study is to determine which lessons can be learned from the practices in the aforementioned jurisdictions. The overall objective of this study is to determine how the South African legal framework pertaining to the interaction between directors and business rescue practitioners can be enhanced.

DECLARATION OF ORIGINALITY

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this research output is my own original work. Where other people's work has been used (either in the form of a printed source, internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION

1.1. Introduction

Chapter 6 of the Companies Act 71 of 2008 (the 2008 Act)[1] brought about a "new corporate rescue procedure".[2] The concept of "business rescue" was introduced into the South African debt restructuring regime. Section 7(k) makes it clear that one of the purposes of the 2008 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". Section 128(1)(b) of the 2008 Act defines business rescue 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) a temporary moratorium on the rights of claimants against the company or in respect of the 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".[3]

A financially distressed company is described as a company that "appears to be reasonably unlikely … to pay all of its debts as they become due and payable within the immediately ensuing six months".[4] Alternatively, it is described as a company that is apparently "reasonably likely [… to] become insolvent within the immediately ensuing

[1] In this dissertation, all references to sections are references to the 2008 Act unless specifically indicated otherwise.
[2] Boraine *et al Meskin's Insolvency Law* (last updated June 2024 – service issue 62) 18-1.
[3] Section 128(1)(b).
[4] Section 128(1)(f)(i).

six months".[5] With reference to various case law, Meskin demonstrates that the term "financially distressed" triggers questions of "factual" or "commercial insolvency".[6] However, a distinction between the two terms is not necessary as none of them serves "as a bar" for launching an application for business rescue.

Business rescue proceedings may be commenced with either by way of company resolution in terms of section 129 or by way of a court order in terms of section 131 of the 2008 Act. According to Osode,[7] regardless of the manner in which the proceedings are launched, there are two major consequences.[8] The first one being that "the business and affairs [of the company] are placed under supervision and control of a 'business rescue practitioner'".[9] The second major effect "is the moratorium on legal proceedings, executions, and claims (secured and unsecured) against the company."[10] The company is protected from any litigious claims against it.[11] This section 128(1)(b)(ii) moratorium takes effect "immediately and automatically" once the rescue proceedings have commenced.[12] The moratorium "freezes" existing rights of creditors.[13]

As alluded to above, a major intervention that a financially distressed company experiences once business rescue proceedings have commenced either voluntarily or by way of a court order is that a business rescue practitioner is appointed to the company, taking over the management and control of a company in substitution for its board as well as pre-existing management.[14] The practitioner has a duty to prepare and implement a business rescue plan for the company after having investigated its affairs.[15] The object of business rescue is to rehabilitate financially distressed companies.[16] The envisaged outcome is for the company to enjoy temporary protection from its creditors

[5] Section 128(1)(f)(ii)
[6] Boraine *et al Meskin's Insolvency Law* 18.3.5.
[7] Osode "Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment" 2015 *Penn State Journal of Law & International Affairs* Volume 4 No.1.
[8] Osode *Penn State Journal of Law & International Affairs* 2015.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Section 140(1)(a).
[15] Section 140(1)(d).
[16] Hockly's Law of Insolvency, tenth edition. Page 318.

while its problems are attended to by an independent business rescue practitioner who will, as indicated above, propose a plan to rescue the business.[17] As indicated in section 7(k) of the Companies Act, the ultimate goal of business rescue is the efficient rescue and recovery of distressed companies in a way that balances the rights and interests of stakeholders.[18] Business rescue proceedings unlike liquidation, are not focused on protecting interests of creditors but are focused on the resuscitation of the financially distressed company.[19] Hockly explains, that "the underlying philosophy is that putting companies into liquidation often causes more collateral damage, economically and socially, destroying wealth and livelihoods."[20] Hockly, rightly points out that "[t]his socio economic damage should be prevented if reasonably possible in the public interest".[21] Hockly further explains that "[u]nlike liquidation, which prioritizes the interests of creditors, business rescue aims to balance the diverging interests of creditors, shareholders and employees."[22] This principle Hockly, explains "points to a legislative preference for business rescue over the liquidation of viable businesses, but only where there is a genuine attempt to achieve the aims of the Act."[23]

It is common cause that, at all material times prior to the initiation of business rescue, the board of directors of a company are in charge of the full management and control of the company.[24] However, once the business rescue practitioner is appointed, subsections 137(2)-(4) determine the following:

> "(2) During a company's business rescue proceedings, each director of the company
> (a) must continue to exercise the functions of director, subject to the authority of the practitioner;
> (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

[17] Hockly, page 318 to 319.
[18] Hockly, page 319.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Section 66(1).

(c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and

(d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77 (3) (a), (b) and (c).

(3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.

(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner."

In addition, section 140(1)(a) determines that "[d]uring a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter … has full management control of the company in substitution for its board and pre-existing management".

In the premises, there is an interaction between the duties and powers of the business rescue practitioner and those of the finally distressed company's board of directors. The question that arises is the scope of, and challenges that arise from, the interaction between these authorities and functions of the practitioner and the board.

1.2. Background to the study

As indicated above, business rescue proceedings can be commenced with by way of a company resolution.[25] This is a voluntary process wherein the board of a company may take a resolution to commence with the business rescue proceedings and place the company under supervision.[26] This is done if board has reasonable grounds to believe that "the company is financially distressed" and "there appears to be a reasonable prospect of rescuing the company".[27] Therefore, business rescue proceedings are not

[25] Section 129.
[26] Section 129(1).
[27] Section 129(1)(a)(b).

commenced with merely because the board of a company desires to do so: the board must actually believe that there are reasonable prospects of rescuing the company. A *caveat* has been placed on the resolution contemplated in section 129(1), in that the resolution in favour of business rescue ought not to be adopted in the event that liquidation proceedings have already been launched in relation to the company and the resolution is not binding until its filing with the Companies and Intellectual Property Commission (CIPC).[28]

Before proceeding any further with the commencement process of business rescue proceedings, it is important to consider what does it mean to 'rescue the company'. Section 128(h) of the Companies Act is helpful in this regard. This section explains that 'rescuing the company', means reaching the objectives articulated in the definition of "business rescue" in section 128(1)(b).[29] The provisions of section 128(1)(b) have already been set out above. Business rescue entails a process of facilitating the resuscitation of a financially distressed company by focusing on three (3) objectives. The first objective is to provide for, "the temporary supervision of the company, and of the management of its affairs, business and property."[30] The second objective is to provide for "a temporary moratorium on the rights of claimants against the company or in respect property in its possession."[31]The third and last objective, is to develop and implement a plan aimed at rescuing the company through a restructure of its affairs to assist the company to continue existing on a solvent basis alternatively ensuring that creditors or shareholders are not in a weaker position than would eventuate in a situation of immediate liquidation.[32]

A 'financially distressed company' is described in section 128(f) of the Companies Act as a company that:

[28] Section 129(2).
[29] Section 128(1)(b).
[30] Section 128(1)(b)(i).
[31] Section 128(1)(b)(ii).
[32] Section 128(1)(b)(iii)

> "(i) … appears to be reasonably unlikely … to pay all of its debts as they become due and payable within the immediately ensuing six months; or
>
> (ii) … appears to be reasonably likely [to]become insolvent within the immediately ensuing six months."[33]

In the case of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*,[34] the Court dealt with the meaning of 'rescuing the company' in the context of an order to be made in terms of section 131(4)(a) of the Companies Act. The Court explained that this debate emanates from the definition of the expression rescuing the company in section 128(1)(h), read with section 128(1)(b)(iii).[35] . The Court expressed that the reading of the two sections contemplates that business rescue has two objectives or outcomes in mind. The first objective being the primary goal, is to facilitate the continued existence of the company in a state of solvency.[36] The second objective, i.e. the secondary goal which serves as an alternative in the event that the achievement of the primary goal proves not to be viable, is the facilitation of a better return for the creditors or shareholders of the company than would be the outcome in immediate liquidation.[37]

According to Osode, the SCA essentially made a determination that achieving "either one of the two goals referred to in section 128(1)(b)" meets the jurisdictional requirements of the meaning of "business rescue" in Chapter 6.[38] Osode further adds that the Court in *Oakdene* should be praised for adopting a broad interpretation in interpreting "business rescue" as opposed to "a narrow interpretation" notwithstanding that "liquidation is inevitable".[39] Restricting the use of the business rescue process only to a situation of a likelihood of a better return for creditors and shareholders than in a process of liquidation is an undesirable interpretation of the law.[40] On the other hand,

---

[33] Section 128(f)(i)(ii).
[34] 2013 (4) SA 539. Hereinafter the "Oakdene case".
[35] Oakdene, para 22.
[36] Oakdene, para 23.
[37] Oakdene, para 23.
[38] Osode *Penn State Journal of Law & International Affairs* 475.
[39] Osode *Penn State Journal of Law & International Affairs* 476 to 477.
[40] Osode *Penn State Journal of Law & International Affairs* 477.

"a narrow interpretation seeking to limit the availability of business rescue to cases where there is a reasonable prospect of restoring the debtor company to financial health as a going concern" is also undesirable.[41]

In the case of *Limbouris and others v Du Toit and others*,[42] explained that having regard to section 128(1)(b)(iii) of the Act, "the primary purpose of business rescue is to enable the business rescue practitioner to prepare and implement a plan."[43] In this case, the Court was dealing with the issues of successful implementation of the business rescue plan and the filing of a certificate of substantial compliance by the business rescue practitioner.[44] With reference to Henochsberg, the Court set out three (3) key principles relating to business rescue. The first principle is that the purpose of business rescue is the resuscitation of the company alternatively, "if that is not possible, achieve a better return for creditors and shareholders than would be the case in liquidation."[45] The second principle is that there must be a consideration of "[t]he interests of creditors, amongst others factors".[46] The third and last principle is that, "[b]usiness rescue should be concluded expeditiously and should not result in creditors being left in a state of uncertainty for a long or indefinite period of time."[47]

Turning back to the commencement process, the next step following the adoption and filing of a resolution, is the publishing of the notice of business rescue and its effective date within five business days.[48] The notice ought to be transmitted to all affected persons accompanied by a statement under oath recording grounds upon which the board resolution was adopted. .[49]

The next step that a company must undertake is the appointment of a business rescue practitioner satisfying the requirements in section 138, and who provided consent to

[41] Osode *Penn State Journal of Law & International Affairs* 478.
[42] [2024] JOL 66238 (WCC). Hereinafter "Limbouris case".
[43] Limbouris, para 72.
[44] Limbouris, para 1.2.
[45] Limbouris, para 74.1.
[46] Limbouris, para 74.2.
[47] Limbouris, para 74.3.
[48] Section 129(3)(a).
[49] Section 129(3)(a).

such appointment in writing.[50] Following the appointment of a business rescue practitioner, the company is required, within two business days, to file a notice of appointment of the practitioner.[51] A copy of the notice of appointment of the practitioner must also be published to affected persons within five days following the filing of the notice of business rescue. .[52]

In terms of section 130 of the 2008 Companies Act, at any juncture following the adoption of the resolution in favour of voluntary business rescue proceedings and until the adoption of the plan, affected persons may apply to court seeking various orders.[53] Orders may be sought seeking the setting aside of the resolution, setting aside the practitioner's appointment alternatively requesting the practitioner to furnish security to the extent that the court deems appropriate. .[54]

Section 131 of the 2008 Companies Act makes provision for the commencement of business rescue proceedings by way of a court order. If a company has not adopted a resolution in terms of section 129, affected persons may launch applications to court seeking an order that the company be placed under supervision and business rescue proceedings be commenced with.[55] In launching the proceedings, the applicant must ensure that service of the application is effected on the company and the CIPC.[56] The applicant also has a duty of notifying affected persons regarding the application.[57] Following considering the application, an order may be made by the court "placing the company under supervision and commencing business rescue proceedings" alternatively "dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation".[58]

In the event that the court makes an order placing the company under supervision and commencing business rescue, an interim practitioner satisfying the requirements in

[50] Section 129(3)(b).
[51] Section 129(4)(a).
[52] Section 129(4)(b).
[53] Section 130(1).
[54] Section 130(1).
[55] Section 131(1).
[56] Section 131(2)(a).
[57] Section 131(2)(b).
[58] Section 131(4).

section 138 and "who has been nominated by the affected person" who made the application may also be appointed.[59]

Having regard to the above and the impact of business rescue practitioners on companies, it is prudent to consider their functions and terms of appointment. A person may only be appointed as a business rescue practitioner of a company if the person:

> "is a member in good standing of a legal, accounting or business management profession accredited by the Commission",[60]
> "has been licensed as such by the Commission in terms of subsection (2)",[61]
> "is not subject to an order of probation in terms of section 162(7)",[62]
> "would not be disqualified from acting as a director of the company in terms of section 69(8)",[63]
> "does not have any other relationship with the company as such would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is comprised by that relationship",[64] and
> "is not related to a person who has a relationship contemplated in paragraph (d)".[65]

In terms of section 139, a practitioner may be removed only by way of a court order in terms of section 130.[66] Alternatively, a practitioner may be removed as set out in section 139.[67] Moreover, upon request of an affected person or of its own accord, a practitioner may be removed by the court from office on the basis of any of the grounds set out below:

> "Incompetence or failure to perform the duties of a business rescue practitioner of the particular company",[68]
> "failure to exercise the proper degree of care in the performance of the practitioner's functions",[69]

[59] Section 131(5).
[60] Section 138 (1)(a).
[61] Section 138(1)(b).
[62] Section 138(1)(c).
[63] Section 138(1)(d).
[64] Section 138(1)(e).
[65] Section 138(1)(f).
[66] Section 139(1)(a).
[67] Section 139(1)(b).
[68] Section 139(2)(a).
[69] Section 139(2)(b).

"engaging in illegal acts or conduct",[70]
"if the practitioner no longer satisfies the requirements set out in section 138(1)",[71]
"conflict of interest or lack of independence"[72] or
"the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time".[73]

Section 140 of the 2008 Companies Act deals with the general powers and duties of practitioners. This section is critical for purposes of this study as it clothes the business rescue practitioner with full managerial control of the company in substitution for its board and pre-existing management.

Section 140(1A) places a duty on the practitioner to immediately after his appointment, inform all relevant statutory regulatory bodies having authority in respect of the activities of the company that of the company is under business rescue and he is the appointed business rescue practitioner. Also, once appointed, the business rescue practitioner must investigate the affairs of the company and thereafter examine the likelihood of reasonable prospects of rescue of the company.[74]

If, at any stage during business rescue proceedings, the practitioner makes a determination that, there is no reasonable prospect of the company being rescued, the practitioner ought to "inform the court, the company, and all affected persons in the prescribed manner"[75] and make an application to court seeking an order placing the business rescue proceedings to a halt and pursuing liquidation. .[76] The relevant court in this regard may grant the order sought or an alternative order it deems appropriate. .[77]

The business rescue practitioner may also find that reasonable grounds no longer exist to support the assertion that the company is in financial distress.[78]. In this case, he or she must "inform the court, the company, and all affected persons in the prescribed

[70] Section 139(2)(c).
[71] Section 139(2)(d).
[72] Section 139(2)(e).
[73] Section 139(2)(f).
[74] Section 141.
[75] Section 141(2)(a)(i).
[76] Section 141(2)(a)(ii).
[77] Section 141(3).
[78] Section 141(2)(b).

manner".[79] In addition, if the business rescue process was pursued in line with section 130, or initiated in terms of section 131, the practitioner must make an application to court requesting an order for the termination of the proceedings. [80] Alternatively, the business rescue practitioner may "file a notice of termination of the business rescue proceedings".[81]

In the event that the practitioner establishes that there is evidence that, prior to commencement of the business rescue proceedings, "voidable transactions" took place or there was "failure by the company or any director to perform any material obligation relating to the company",[82] the practitioner is required to take any necessary steps, and may instruct management, to take remedial action.[83] Moreover, in the event of reckless trading, fraud or other contraventions of any law pertaining to the company, the practitioner has a duty to present the evidence to the relevant body for investigation purposes as well as potential prosecution, "[84] and instruct management to take appropriate remedial action which may include the recovery of "misappropriated assets of the company".[85]

Section 142 of the 2008 Companies Act requires the directors of the company to co-operate with, and be of assistance to the practitioner. Section 142(1) places a duty on the directors to provide the practitioner with all books and records relating to the affairs of the company and are in their possession once the proceedings commence.[86] In addition, any director with knowledge on the whereabouts of other books and record of the company, ought to advise the practitioner accordingly on the whereabouts of such books and record. .[87] Within five business days following commencement of the business rescue proceedings , or such longer period as permitted by the practitioner , the directors of a company are required to furnish the practitioner with a statement of

[79] Section 141(2)(b).
[80] Section 141(2)(b)(i).
[81] Section 141(2)(b)(ii).
[82] Section 141(2)(c)(i).
[83] Section 141(2)(2)(c)(i).
[84] Section 141(2)(c)((ii)(aa).
[85] Section 141(2)(c)(ii)(bb).
[86] Section 142(1).
[87] Section 142(2).

affairs.[88] The particulars to be contained in the statement of affairs must include, for example, any material transactions involving the company or its assets.[89]

Within 10 business days following his or her appointment, the practitioner is required to "convene, and preside over, a first meeting of creditors".[90] At this meeting, the practitioner has a duty to inform the creditors whether he or she "believes that there is a reasonable prospect of rescuing the company" and may be furnished with proof of claims from creditors.[91]

The practitioner, following consultation with creditors, other persons affected by the business rescue, and the company's management, is required to prepare a business rescue plan which will be considered and possibly adopted at a meeting held in terms of section 151 of the 2008 Companies Act.[92] The business rescue plan ought to make provision for "all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan", and must contain the information prescribed by legislation.[93]

The business rescue practitioner must within 10 business days following the publishing the business rescue plan in line with section 150, "must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan".[94] At this meeting, the practitioner is required to "introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders".[95] In addition, the practitioner is required to explain whether he or she is of the view that reasonable prospects exist for the rescue of the company..[96] Amongst other things, the practitioner must "call for a vote for the preliminary approval of the proposed plan".[97] In this vote, "the proposed business rescue plan will be approved on

[88] Section 142(3).
[89] Section 142(3).
[90] Section 147(1).
[91] Section 147(1)(a).
[92] Section 150(1).
[93] Section 150(2).
[94] Section 151(1).
[95] Section 152(1)(a).
[96] Section 152(1)(b).
[97] Section 152(1)(e).

a preliminary basis" in the event that "it was supported by the holders of more than 75% of the creditors' voting interests that were voted".[98] The votes supporting the proposed plan must have included at least 50% of the independent creditor's voting interests that participated.[99]

In the event that the proposed business rescue plan does not pass the requisite approval hurdles on a preliminary basis, the plan is considered to have been rejected.[100] The plan may be reviewed further only in terms of section 153 of the 2008 Companies Act.[101] In terms of section 152(4), "a business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities."[102] This notwithstanding that such persons were "present at the meeting, voted in favour of the adoption of the plan, or in the case of creditors, had proven their claims against the company".[103] As part of the important roles and responsibilities of the practitioner, the development of the plan[104] must be followed by its implementation..[105]

It is important to note that the practitioner is constrained to act in accordance with the provisions of the 2008 Companies Act. For example, section 140(2) makes it clear that the practitioner must obtain court approval in instances where he or she desires to appoint any person to assume a management or advisory role in the company, if the relationship between such appointee and the company may lead a to a *prima facie* view of bias.

During a company's business rescue proceedings, the practitioner not only owes duties and responsibilities to the company but "is an officer of the court, and must report to the court in accordance with the applicable rules of, or orders made by, the court".[106]

[98] Section 152(2)(a).
[99] Section 152(2)(b).
[100] Section 152(3)(a).
[101] Section 152(3)(a).
[102] Section 152(4).
[103] Section 152(4).
[104] Section 140(1)(d)(i).
[105] Section 140(1)(d)(ii).
[106] Section 140(3)(a).

Notably, the practitioner "has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77".[107]

1.3. Research problem

This dissertation studies the interactions between the business rescue practitioner and the board of directors insofar as their duties and roles are concerned. The aim is to investigate the limitations that are imposed on directors of a company by the new corporate rescue procedure.

At the core of this study, is the role of business rescue and its effects on the financially distressed company. To deal with this issue, it is prudent to consider section 128 of the 2008 Companies Act. This section indicates that business rescue is a process whereby its aim is the facilitation of the rehabilitation of a financially distressed company by providing for its temporary supervision and of the management of its affairs, business and property.[108] As can be gleaned from the above, this process is undertaken by the business rescue practitioner, who is an officer of the court. The practitioner's appointment affects the roles and positions of the director. Notwithstanding that the practitioner is an officer of the court, a practitioner need not only be a member of the legal profession but can be a member of the accounting profession alternatively business management.[109] As such, a practitioner is not an officer of the court such as attorney and advocate in ordinary litigious cases.

A business rescue practitioner refers to "one or more persons" who have been appointed for purposes of managing "the affairs of a company in financial distress."[110] A person appointed as a business rescue practitioner must meet the eligibility requirements for being appointed as a director in accordance with section 69(8) of the

[107] Section 140(2)(b).
[108] Section 128(1)(b)(i) of 2008 Companies the Act.
[109] Section 138(1)(a).
[110] Mpofu "Exploring the role of the business rescue practitioner in rescuing a financially distressed company" 2018 *Corporate Board: Role, Duties & Composition* Volume 14, Issue 2 21.

2008 Companies Act.[111] This is a requirement in terms of section 138(1)(d) of the Companies Act.[112]

Prior to focusing on the business rescue practitioner's impact on the directors, it is crucial to consider the ordinary provisions relating to directors. In respect of the functions of directors of the company, section 66 stipulates that

> "the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that [the] Act or the company's Memorandum of Incorporation provides otherwise."[113]

With respect to the appointment and removal of directors, , a company's Memorandum of Incorporation will guide the company on such aspects.[114] Section 68 of the Companies Act deals with election of directors of profit companies. It provides that directors of a company are appointed by shareholders of the company as they are "persons entitled to exercise voting rights" in the election of directors.[115]

Section 71 deals with the removal of directors by the board of directors and shareholders. Section 71(1) determines that a director's removal may be effected by an ordinary resolution which was adopted during a meeting of shareholders by individuals vested with such voting rights.[116] This notwithstanding:

> "anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director."[117]

Section 71(3) of the Companies Act sets grounds for removal of a director through a resolution adopted by the board of directors. These grounds include *inter alia*:

---

[111] Mpofu *Corporate Board: Role, Duties & Composition* 21.
[112] Ibid.
[113] Section 66(1).
[114] Section 66(4)(a)(i).
[115] Section 68(1).
[116] Section 71(1).
[117] Ibid.

ineligibility, disqualification in terms of section 69, incapacitation, negligence and dereliction of duties. [118]

From the above, it is clear that a director will only be removed from his or her position by the board of directors on the grounds specified in section 71(3), or by way of an ordinary resolution adopted at a shareholder's meeting. In other instances, the director's ability to remain in office may be affected by the ineligibility and disqualification provisions of section 69.[119]

Section 140 of the 2008 Act deals with the general powers and duties of practitioners. Notably, during a company's business rescue proceedings, the practitioner takes "full management control of the company in substitution for its board and pre-existing management".[120] The practitioner is further empowered to effect changes to the management of the company. Section 140(1)(c) provides that the practitioner may effect the removal of any person forming part of the company's existing management[121] and conversely effect the appointment of an individual to form part of the company's management..[122]

The above provisions of section 140, make it clear that the business rescue practitioner assumes enormous powers as soon as he is appointed during the business rescue process. His powers extend to the removal of directors who are in effect the relevant individuals appointed to manage and control the company. Presenting the practitioner with such broad powers, presents a challenge in that directors of the company may feel that they have become obsolete and no longer see the need for saving the company. This is quite an undesirable outcome because directors of a company are best acquainted with the business of the company and in my view, are the most suitable individuals to resuscitate a company.

Instead of divesting directors of their powers and duties owed to the company altogether, it is prudent to balance them out with those of the practitioner for the benefit

[118] Section 73(1)(a)(b).
[119] Section 69(4).
[120] Section 140(1)(a).
[121] Section 140(1)(c)(i).
[122] Section 140(1)(ii).

of the company, its creditors, shareholders and employees. It is clear that the relationship between the business rescue practitioner and directors may be muddied with issues of conflict of powers and duties. There is an unequal relationship. Such a dilemma is in contravention of the purpose of the 2008 Companies Act as articulated in section 7, i.e. providing for the efficient rescue and recovery of financially distressed companies, by balancing the rights and interests of all relevant stakeholders.

1.4. Research questions

Against the background provided above, the following research questions are formulated:

1. What are the duties, roles and powers of the business rescue practitioner during business rescue proceedings?
2. What are the duties, roles and powers of the board of directors of the company during business rescue proceedings?
3. Is there a clash or conflict between the duties, roles and powers of the business rescue practitioner and those of the directors of the company?
4. As a result of the business rescue proceedings, what are the limitations on the duties, roles and powers of the board of directors of the company?
5. To what extent are the limitations on the duties, roles and powers of the board of directors and what is the impact of such limitations on the company and/or the economy?
6. How do selected foreign jurisdictions deal with the interaction between the board of directors and the business rescue practitioners, and which lessons may be learned from the practices in these jurisdictions?
7. How can the South African legal framework pertaining to the interaction between directors and business rescue practitioners be enhanced?

1.5. Methodology and choice of comparative jurisdiction

In this study, a desktop-based approach is undertaken for purposes of conducting the relevant research. It consists of an analysis of primary and second sources. Moreover, this study includes a comparative element by way of analyses of the following jurisdictions: Australia, the United Kingdom and the United States of America.

The above jurisdictions have provisions similar to the South African insolvency regime, i.e. the Commonwealth of Australia and the United Kingdom in particular. The United States of America is a very important jurisdiction for purposes of this study as it has a completely different system which might provide South Africa with a fresh perspective.

Australia's equivalent of a business rescue practitioner is an administrator. The United Kingdom also makes reference to an administrator. The United States of America, on the other hand, refers to a trustee or examiner.

Provisions of the Australian legislation governing the relationship between the administrator and the directors during administration proceedings are very clear in that, the administrator takes over management and control of the company whereas the directors become extinct. The directors no longer owe fiduciary duties to the company, therefore the administrator becomes the agent of the company without the assistance of the directors. The objective of Australia's corporate rescue model is similar to the objective of the South African model. In particular, the Corporations Act is similar to section 128(1)(b)(iii) of the South African Companies in that distressed companies is permitted to continue in existence with a view that there will be a better return for all stakeholders. Even in the ordinary course, South Africa and Australia share similarities. Section 198A(1) of the Corporations Act is similar to section 66 of the South African Companies Act. Directors of the company have full management control of the company / corporation subject to any limitations by the Acts, the constitutions or memorandums of incorporation.

The United Kingdom had provisions similar to those of Australia in that an administrator was appointed assuming full management and control of the company. Since the inception of the COVID-19 pandemic in late 2019, the United Kingdom has introduced and adopted laws aimed at rescuing struggling companies. As a result of these new laws, directors of companies under administration, do not become obsolete but work together with the administrator to save the company. This is similar to the United States Bankruptcy Code which endorses a Debtor-In-Possession model. The United States allows directors to remain 'debtors in possession', i.e. they remain in full management and control of the company. The directors themselves are tasked with the resuscitation of the company. A third party, examiner is appointed merely for purposes of supervising

the process. A trustee is only appointed in limited circumstances where the debtors are failing in their task of saving the company.

Australia does not create room for directors to participate in administration proceedings, the law is clear in that directors become redundant. Perhaps, a lesson to be learned by South Africa is that legislation must clearly express that directors do not participate in saving even though it is for purposes of assisting the practitioner. This is true, if one argues that, the conflict that arises is because legislation currently (section 137 and 140) make room for it. For example, directors still owing fiduciary duties to the company in business rescue although there is a practitioner appointed might create a situation where there are a lot of back and forths between directors and the practitioner on the most suitable solutions in saving the company. Directors will be operating from a fear of being held accountable in terms of section 77. As indicated above, this may also deter directors from giving their best in saving the company leaving the practitioner with a huge task of acquainting himself with the business of the company without the necessary assistance. The case of Van Tonder where this issue arose is dealt with in Chapter 2 of this dissertation.

This is where the lessons from the United Kingdom and the United States of America come in. South Africa can adopt more flexible approaches as followed in these jurisdictions by allowing directors to remain ‘debtors in possession’. Directors of the company are experts of the business and operations of the company, as such they are best suited to devise plans to save the company. They must remain in full management and control of the company. Similar to the Debtor-In-Possession model in the United States of America, a third party can be appointed to supervise the process.

1.6. Structure of the dissertation

This dissertation compromises of chapters one to four with each chapter dealing with a particular theme or issue.

Chapter 1 deals with the background to the study, the basic legal framework that underscores the research problem and which have necessitated the study, the research problem, research questions and methodology. It also introduces the reader to the foreign jurisdictions selected for the comparative part of the study.

Chapter 2 sets out the legislative framework relating to the duties, roles and powers of the business rescue practitioner during business rescue proceedings. It deals with the duties, roles and powers of the directors of the company during business rescue proceedings. Case law wherein these duties, roles and powers were considered is discussed for purposes of articulating the conflict or challenges that arise during the interactions between the practitioner and directors. The ordinary duties and roles of directors outside of business rescue are also briefly traversed.

Chapter 3 constitutes a comparative analysis of selected foreign jurisdictions: Australia, the United Kingdom and the United States of America. The purpose of this chapter is to provide a snapshot of the business rescue or similar proceedings in these foreign jurisdictions and provide an overview of how these jurisdictions deal with the relationship between the board of directors and the business rescue practitioner when it comes to the roles, duties and powers of the respective role-players. The aim of this chapter is also to identify lessons to be learned by South Africa from the three jurisdictions explored. The ordinary duties / roles of directors outside of business rescue or administration are also traversed in this chapter. However, it is only the most salient duties, roles and powers that are discussed for purposes of this study.

Chapter 4 contains the conclusions and recommendations. This chapter revisits the research problem and the research questions for purposes of articulating the conflict or challenges triggered by the relationship between the duties, roles and powers of the board of directors and those of the business rescue practitioner. This chapter also delineates the positive aspects of the South African corporate rescue regime and the lessons to be learned from the three foreign jurisdictions explored.

CHAPTER 2: THE SOUTH AFRICAN FRAMEWORK

2.1. Introduction

This chapter deals with the current legal position in South Africa. The aim is to explore the South African legislative framework for the duties, roles and powers of the business rescue practitioner during business rescue proceedings and contrast these with those of the directors of the company. The focus is also on the directors' ordinary roles and duties prior to business rescue as articulated in section 66 of the 2008 Companies Act.

This chapter is critical for the study as it sets out the foundation of the research. This chapter informs the reader of aspects to consider when comparing South Africa with the selected foreign jurisdictions for purposes of determining shortcomings in the law. Case law is also discussed in this chapter for purposes of identifying challenges within the legal framework.

The aim of this chapter is to study the relationship between the business rescue practitioner and directors, determine whether there is a clash or conflict between the duties, roles and powers of the business rescue practitioner and those of the directors of the company. It further aims to determine whether business rescue proceedings place a limitation on the duties, roles and powers of the board of directors of the company and what the extent and impact of this limitation is.

To achieve the above aim, this chapter commences with a discussion on the roles and duties of directors outside of business rescue. Followed by a discussion on the roles, duties and powers of the business rescue practitioner. To highlight the issues which necessitated this dissertation , the relationship between obligations of directors during business rescue proceedings and their obligations ordinarily executed are then discussed.

2.2. The legislative framework

2.2.1. The role and duties of directors outside of business rescue

Section 66 of the 2008 Companies Act sets out the roles, powers and duties of the board, its directors and prescribed officers. Section 66(1) stipulates that the company's

board of directors is responsible for its management. .[123] This include to exercise any powers and perform any function relating to the company except to the extent that there is a limitation in the Companies Act or the Memorandum of Incorporation. [124]

The managerial function of the board of directors is founded in the duties of the directors. The fiduciary duties of directors were previously regulated by common law. Through section 75 and 76, the 2008 Companies Act codified directors' fiduciary duties to a certain extent. Section 75 deals with the directors' personal financial interests, whereas section 76 deals with standards of directors' conduct.

Section 75(5) places a duty of disclosure on a director of a company with a personal financial interest in a matter to be considered at a meeting of the board of directors, , or who is aware that a related person has a financial interest in such amatter.[125] The disclosure ought to be prior to the said meeting..[126] Moreover, section 75(5)(b) also places a duty on the director to disclose "any material information" which he or she is privy to.[127] Section 75(5)(c) provides that the director "may disclose any observations or pertinent insights relating to the matter if required to do so by the other directors".[128] In the event that the director is in attendance at the meeting, he or she is required to excuse him or herself from the meeting immediately following the disclosure.[129]

Section 75 of the Act essentially deals with the directors' duty to avoid conflicts of interest and to act in the best interests of the company. This was evident in the case of *Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV (Markus Johannes Jooste and another as third parties)*.[130] The Court was called upon to deal with an application in terms of rule 7 of the Uniform Rules of Court[131] wherein Steinhoff challenged a resolution adopted by the applicant, Lancaster 101 purporting to grant its director Mr. Jayendra

[123] Section 66(1).
[124] Section 66(1).
[125] Section 75(5)(a).
[126] Section 75(5)(a).
[127] Section 75(5)(b).
[128] Section 75(5)(c).
[129] Section 75(5)(d).
[130] [2021] 4 All SA 810 (WCC). Hereinafter "Lancaster v Steinhoff".
[131] GNR. 48 of 12 January 1965: Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (as amended from 12 April 2024).

Naidoo (“Mr Naidoo”) authorization in instituting legal proceedings against Steinhoff and its associates.[132] Steinhoff challenged the resolution on the basis that it does not comply with rule 7 and on the basis that it does not meet the requirements laid out in section 75 of the Companies Act relating to disclosures of personal interests by directors and/or related persons.[133]

The court accepted Steinhoff's proposition that Mr Naidoo had a personal financial interest in the matter subject to a resolution in light of his directorship in Lancaster 101 and the benefits he derived as sole shareholder and director of the Lancaster Group following conclusion of the subscription agreement.[134] The Court then proceeded to deal with the resolution and whether Lancaster 101 had submitted sufficient evidence to show that it had duly resolved to institute the proceedings and that the proceedings were instituted at its instance.[135] The court found that if one considers the wording of the resolution subject to the litigation, paragraph 2.2 did not specifically state that Mr Naidoo disclosed his personal financial interest as required.[136] The Court further found that there was no indication that the personal interest was in fact disclosed as to meet the requirements in section 75(7)(a) alternatively section 75(7)(b)(i) which makes provision for subsequent ratification by an ordinary resolution of the shareholders following disclosure of that interest.[137] Ultimately, the Court found that the resolution is invalid and the inevitable result that follows is that there's no proof before the Court that Mr Naidoo satisfied that he has authorisation to act on behalf of the company.[138] Consequently, it was also found that Mr Naidoo does not have authority to act and any instruction given to legal representatives to act on behalf of Lancaster 101 in the proceedings is also invalid.[139]

[132] Lancaster v Steinhoff, para 2.
[133] Lancaster v Steinhoff, para 16.
[134] Lancaster v Steinhoff, para 70.
[135] Lancaster v Steinhoff, para 71.
[136] Lancaster v Steinhoff, para 72.
[137] Lancaster v Steinhoff, para 73.
[138] Ibid.
[139] Ibid.

The Court in the above case essentially made it clear that it is undesirable for a director of a company to use his position for own personal financial gain, i.e. placing his interest before those of the company.

The Court then proceeded to deal with the question whether under section 75(7)(b)(ii) stipulating that such a decision relating to personal financial interest may be valid only if it has been declared to be valid by a Court as articulated in section 75(8).[140] in dealing with this question, the Court recorded that "[d]irectors act beyond their authority when they act in breach of their duty to perform with good faith and in the interest of the company."[141] it was further recorded that Mr Naidoo serves as a director at Lancaster 101.[142] Mr Naidoo "had a direct interest of a financial monetary or economic nature in the Relevant Decision that was significant in the determination whether to institute a claim against Steinhoff."[143] in this regard, the Court found that the decision that Mr Naidoo exercised "was not exercised in good faith and in the best interest of the company."[144] It was found that Mr Naidoo's conduct breached and violated his fiduciary duty.[145] The motivation he provided "was purely self-serving and devious."[146] This is evidenced by the failure to make provision for or mention the subscription commission he derived as a shareholder of the Lancaster group.[147] The Court found no compelling reason to declare the resolution valid in terms of section 75(7) read with 75(8) of the Companies Act.[148] The principle to be adopted in this regard is that in addition to acting in the best interest of the company, the director must act in good faith and not in a "self-serving" manner.

Section 76(2) of the 2008 Companies Act places a duty on directors:

> "(a) not to use the position of director, or any information obtained while acting in the capacity of a director –
>
> (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

[140] Lancaster v Steinhoff, para 74.
[141] Lancaster v Steinhoff, para 96.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Lancaster v Steinhoff, para 97.
[146] Ibid.
[147] Ibid.
[148] Lancaster v Steinhoff, para 99.

(ii) to knowingly cause harm to the company to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director –

(i) reasonably believes that the information is

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors;

or

(iii) is bound not to disclose that information by a legal or ethical obligation of confidentiality."

Section 76(2) evidently prohibits directors of a company from using their positions to enrich themselves at the detriment of the company. In essence, the directors of a company have a duty of loyalty to the company they serve. Acting in the contrary can lead to a director being declared a delinquent director in line with the provisions of the Companies Act. The section 76(2) duty was predominantly featured in the case of *Organisation Undoing Tax Abuse and another v Myeni and others*.[149] The Organisation Undoing Tax Abuse ("OUTA") and the South African Airways Pilot Association ("SAAPA") launched action proceedings against Ms Duduzile Myeni ("Ms Myeni"), South African Airways Soc Ltd ("SAA"), Air chefs Soc Ltd ("Air Chefs") and the South African Minister of Finance.[150] The order sought was primarily to declare Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.[151] The case related to four transactions which occurred during Ms Myeni's turner at SAA.[152] These transactions include "the Emirates deal, the Airbus deal, the BNP Capital (Pty) Ltd deal and the Ernest and Young report."[153]

The action proceedings were based on section 162(5) of the Companies which provides the following in relevant parts thereof:

[149] [2020] 3 All SA 578 (GP). Hereinafter the "Myeni case".
[150] Myeni, para 1.
[151] Myeni, para 2.
[152] Myeni, para 5.
[153] Ibid.

"(5) A court must make an order declaring a person to be a delinquent director if the person –

(c) while a director –

(i) grossly abused the position of director.
(ii) took personal advantage of information or an opportunity, contrary to section 76(2)(a);
(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company contrary to section 76(2)(a);
(iv) acted in a manner –
(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or
(bb) contemplated in section 77 (3)(a)(b) or (c)."

After having considered the evidence presented in the proceedings, the Court was required to determine whether declaring Ms Myeni delinquent was appropriate under section 162(5) and the duration thereof.[154] With regard to the Emirates deal, the Court expressed the view that Ms Myeni's conduct met multiple grounds of delinquency under section 162(5)(c) of the Companies Act.[155] The Court explained that, "[n]ot only did she deliberately or through gross negligence inflict substantial harm on SA but her belated attempts to justify her conduct show that she acted dishonestly, in bad faith and not in the best interests of SAA and the country."[156]

With regard to the Airbus deal, it appears that Ms Myeni made a claim that she was merely acting on behalf of a "collective".[157] On this issue, the Court made reference to section 66(1) of the Companies Act and highlighted that management of the company is the responsibility of the board as a collective. [158] The Court explained that, "this collective responsibility is operationalised by converting it into individualised responsibility and

[154] Myeni, para 231.
[155] Myeni, 238.
[156] Myeni, para 238.
[157] Myeni, para 239 to 240.
[158] Myeni, para 242.

liability for each of the board members."[159] Reference was made to section 76(2)(a) and 76(3) of the Companies Act and the fact that they establish "the fiduciary duties of directors and the duties of care, skill and diligence."[160] The Court explained that, Minister Nene warned Ms Myeni in his correspondence that the board was not executing its fiduciary duty, however, Ms Myeni failed to appreciate this as can be gleaned from her actions.[161]

The Court made reference to Ms Myeni's letter of 29 September 2015 to Airbus and found that Ms Myeni was deliberately dishonest and grossly abused her power as articulated in section 162(5)(c)(i)..[162] it was also found that the letter to Airbus constituted a further breach of section 77(3)(a) of the Companies Act read with section 162(5)(c)(iv)(bb) as Ms Myeni acted in the name of the company and signed onthe company's behalf despite being aware that she lacked the necessary authority for such action.[163]

Moreover, Ms Myeni's dishonesty and failure to disclose material facts relating to the section 54(2) application to the Minister for approval was a further ground supporting her declaration of delinquency. "[164]

Finally, the Court found that the evidence in the case conclusively showed that Ms Myeni's conduct was delinquent as articulated in section 162(5)(c) of the Companies Act.[165] As such, the Court found that it ought to declare Ms Myeni a delinquent director.[166]

To show the gravity of such flagrant failure to uphold fiduciary duties, the Court stated the following, "Ms Myeni's actions as chairperson of the board caused SAA immense harm. She was a director gone rogue, she did not have the slightest consideration of her fiduciary duty to SAA. She was not a credible witness … Her actions did not constitute mere negligence but were reckless and wilful."[167]

---

[159] Myeni, para 243.
[160] Myeni, para 243.
[161] Ibid.
[162] Myeni, para 244 to 246.
[163] Myeni, para 247.
[164] Myeni, para 252.
[165] Myeni, para 270.
[166] Ibid.
[167] Myeni, para 272.

Section 76(3) requires directors of a company, when acting in that capacity, to exercise the powers and perform the functions of director,

- "in good faith and for a proper purpose"[168],
- "in the best interests of the company"[169] and
- "with the degree of care, skill and diligence that may reasonably be expected of a person – (i) carrying out the same functions in relation to the company as those carried out by that director; and (ii) having the general knowledge, skill and experience of that director."[170]

Similar to the other sections discussed above, section 76(3) of the Act requires directors to act in the best interests of the company. Section 76(3) further places a duty of reasonableness on directors in that they must carry out their functions with the skill and diligence that may be reasonably expected of a person in their position possessing the general knowledge, skill and experience of that director.

The Court in Myeni dealt with this section. In dealing with Ms Myeni's transgression, the Court explained that Ms Myeni did not act as a reasonable director considering her vast experience in occupying position of directorship.[171] The Court found that, "Ms Myeni failed to give any reasonable explanation for her numerous failures, misrepresentations and actions."[172] The Court found that Ms Myeni failed terribly in executing her fiduciary duty.[173] A lifelong delinquency was found to be appropriate as Ms Myeni was "not a fit and proper person to be appointed as a director of any company, let alone a board member of an SOE."[174]Section 76(4) stipulates that, in the exercise of their powers or in the performance of their functions, directors will have satisfied their obligations in section 76(3)(b) and (c)if they have taken reasonably diligent steps to acquaint themselves with the matter.[175] Alternatively "material personal financial interest" could not be established including a "reasonable basis" to become aware of "any related person who had a

[168] Section 76(3)(a).
[169] Section 76(3)(b).
[170] Section 76(3)(c).
[171] Myeni, para 273.
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Section 76(4)(a)(i).

personal financial interest in the matter, or complied … with the requirements [in] section 75". [176] The director will also have satisfied the obligations in section 76(3)(b) and (c), if "the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe that the decision was in the best interests of the company."[177]

Section 77(2) of the 2008 Companies Act highlights that a director of a company may be held liable "in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3) (a) or (b)".[178] It is important to consider the circumstances which may lead to a director being held liable for loss, damages or costs sustained by the company as a consequence of breaches of their fiduciary duties. This is a general provision.

Section 77(3) provides specific instances where a director of a company is liable for the losses, damages or costs sustained by the company as a direct or indirect consequence of the action. The issue of liability of directors particularly for damages or losses suffered by the company as a result of their failure to uphold fiduciary was considered in the Myeni case. To emphasise the Court's displeasure with My Myeni's conduct, costs on a punitive scale were ordered against Ms Myeni. The Court found that Ms Myeni's dishonesty, breach of fiduciary duty, recklessness and gross negligence constituted reprehensible conduct and justify the granting of such a costs order.[179] It was highlighted that Ms Myeni's "actions caused SAA and the country immense harm and it was of the utmost importance that she be brought before a court to answer for her deeds."[180]

Section is crucial for purposes of this study as it places an onerous obligation on directors of a company to ensure that they do not breach a number of specific duties that may fall under the broad term "fiduciary duties". For example, directors of a company may be held liable if they perform any act relating to the company despite being aware that they lacked

[176] Section 76(4)(ii).
[177] Section 76(4)(iii)
[178] Section 76(2)(a).
[179] Myeni, para 278.
[180] Ibid.

the authority to do so and acted in acquiescence in the carrying on of the company's business despite being aware that it was being conducted in a manner prohibited by section 22(1), which relates to reckless trading.[181] In light of this, it is prudent to consider how the roles, duties and powers of directors are affected in the event that business rescue practitioner is appointed. The aim is to determine whether there is a conflict that arises.

2.2.2. The roles, duties and powers of the business rescue practitioner

Business rescue proceedings may be commenced with in terms of section 129 or 130 of the 2008 Companies Act whereafter the business rescue practitioner may be appointed in terms of section 129(3)(b) alternatively in terms of section 131(5) for proceedings by way of a court order. Having established how the business rescue practitioner is appointed, the ensuing segments below deal with the relevant roles, duties and powers. Section 140 of the 2008 Companies Act deals with the general powers and duties of practitioners. These powers are investigative and managerial in nature. During business rescue proceedings, the practitioner takes full management control of the company in substitution for its board and pre-existing management.[182] In addition to the above, the practitioner may have his or her powers or functions delegated to individuals who sat on the board of the company or who were responsible for its management..[183] The practitioner also has the power remove any person who forms part of the pre-existing management of the company from his or her position; or have an individual appointed to assist with the management of the company.[184]

The above provisions of the Companies Act raise the question whether a limitation exists on which powers and/or functions the business rescue practitioner may delegate. This was question was dealt with in the case of *Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and others*.[185] Although the focus in this case was on the general moratorium set out in section 133 of the Companies Act when a company is under business rescue, in its concluding remarks the Court considered the extent to which the

[181] Section 77(3) (a) and (b).
[182] Section 140(1)(a).
[183] Section 140(1)(b).
[184] Section 140(1)(c).
[185] [2017] 1 All SA 862 (WCC).

business rescue practitioner may delegate his or her powers.[186] The Court explained that notwithstanding the fact that a practitioner is permitted to delegate his or her power or functions, the legislature envisaged that "the practitioner should be more than a nominal figurehead responsible for the rehabilitation of the company."[187] The responsibilities, duties as well as liabilities of directors of the company are assumed by the practitioner upon his appointment.[188] The Court cautioned that in instances where the practitioner delegates some of his or her powers to erstwhile directors of the company, or authorises the directors to continue in their roles as directors or any other capacity in relation to the company, any actions undertaken by such directors require his approval failing which they are void.[189]

The Court found that there was a lack of evidence to demonstrate that the business rescue practitioner delegated any of his powers or functions to former directors of the company in line with provisions of the Companies Act.[190] Moreover, there were no attempts at explaining the manner in which the former directors remained in full management control of the company whilst it was in a state of business rescue.[191] The Court was particularly concerned with the directors' powers to the extent that they made a decision not to pay the claim of the applicant notwithstanding that the claim was acknowledged by the practitioner and adopted in his plan.[192] The court highlighted that the business rescue plan itself clearly indicated that the "company's day-to day affairs" were in the hands of the practitioner and not the directors.[193]

The Court further expressed its concern regarding the business rescue practitioner and the directors of the company in business rescue carried out their duties and functions in accordance with the provisions of the Companies Act.[194] The court pointed out that the attorneys representing the business rescue practitioner at some point indicated that they

[186][186] Booysen, para 12.
[187] Booysen, para 68.
[188] Ibid.
[189] Ibid.
[190] Booysen, para 69.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Booysen, para 70.

were instructed by the directors of the financially distressed company.[195] After considering the pleadings in the matter especially the answering affidavit of the directors, the Court expressed that it is the directors of the company who are determining the affairs of the company especially in relation to the applicant's claim.[196] Once again the Court highlighted its concerns in light of the fact that the business rescue plan determined otherwise, i.e. the applicant ought to be renumerated.

Having regard to the provision of section 140 of the Companies Act, the above case makes it clear that it is undesirable for a business rescue practitioner to abdicate his duties and powers under the guise of a delegation of duties as articulated in section 140(1)(b). The Court emphasized numerous times that determined that the business rescue practitioner is responsible for the management of the company, as such it is quite peculiar that directors of the company have assumed control even to the extent of acting contrary to the terms of the plan. It is clear that the are certain powers and duties that the practitioner may not delegate especially those relating to the plan to rescue the company. As such, it would be contrary to the provisions of section 140 for a practitioner to delegate the preparation and implementation of the business rescue plan. Besides, section 140(1)(a) gives the practitioner an outright power in the control and management of the company.

On the issue of the practitioner taking over full management control of the company and delegation of powers to existing management, Rushworth correctly points that this power of the practitioner contrast with the director's powers / functions to continue exercising their functions albeit under the authorisation of the practitioner.[197] Rushworth calls these "residuary functions and duties".[198] However, he notes that these functions "would not include any management control, unless the practitioner has delegated such powers to them."[199] This is precisely why the relationship between the rescue practitioner and the directors is not a seamless one. There is a conflation of duties which generally leads to conflicts and clashes.

[195] Ibid.
[196] Ibid.
[197] Rushworth "A critical analysis of the business rescue regime in the Companies Act 71 of 2008" 2010 *Acta Juridica* 375 393.
[198] Rushworth *Acta Juridica* 393.
[199] Ibid.

Section 140 presents a clear and direct conflict with section 66, which stipulates that the business and affairs of a company must be managed by or under the direction of its board. The case law that deals with the conflict that arises is discussed below.

2.2.3. The relationship between obligations of directors during business rescue proceedings and their obligations ordinarily executed

Section 137(2) and 137(3) of the 2008 Companies Act deal with what is expected of directors of the company during business rescue proceedings. Section 137(2) stipulates that each director of the company:

- "must continue to exercise the functions of director, subject to the authority of the practitioner",
- "has a duty to the company to exercise any management within the company in accordance with the express instructions or directions of the practitioner, to the extent that it is reasonable to do so",
- "remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person"; and
- "to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c)".[200]

Section 137(3) determines places a duty on directors of the financially distressed company to ensure that requests of the practitioner are attended to coupled with a duty to "provide the practitioner with any information about the company's affairs as may be reasonably required".[201]

As can be gleaned from the above, the directors of a company under business rescue still have to carry out their statutory duties and may only carry out certain duties upon instructions and approval by the practitioner. They are also bound to provide the business rescue practitioner with all the information or documentation that he or she may require from time to time. The challenge that may arise with the amount of powers

[200] Section 137(2).
[201] Section 137(3).

vested upon the business rescue practitioner is a clash with the duties and roles of directors hindering the easy flow of the business rescue procedure.

Sections 137(2) and 137(3) present some challenges for directors upholding their fiduciary duties set out in section 75, 76 and by extension section 77 of the 2008 Companies Act. Interestingly section 137(2) determines that, should directors of a company act according to the instructions of the business rescue practitioner in the event that it is reasonable to do so, they may be relieved from upholding their fiduciary duties as contemplated in section 76 and the liabilities set out in section 77 excluding section 77(3) (a) and (b). Section 137(2) places a proviso that directors of a company are only relived of their fiduciary duties and liabilities in the event that it was reasonable to do so. Therefore, in my view, it is inconceivable that the legislature meant that directors must follow the instructions of the practitioner without applying their own minds. It appears that the legislature intended that even during business rescue proceedings, directors are required to act in the best interests of the company. Ultimately, this means that directors can never fully be relived of their fiduciary duties which is concerning as the practitioner is bestowed with wide powers conflicting with those of directors of the company ordinarily. During business rescue proceedings, directors are actually prohibited from adopting a passive stance or becoming dormant as they have the onerous duty of ensuring that actions they undertake under the supervision of the practitioner do not breach their fiduciary duties. In the case of *Van Den Heerden N.O and Others v Van Tonder*,[202] the Court dealt with a situation where a director of a financially distressed company adopted a passive approach during the business rescue proceedings and the issue of liability as set out in section 77 of the Companies Act was triggered. Albeit in this regard, it was the business rescue practitioner that was faced with a case of liability for the manner in which the company's affairs were handled during business rescue.

The Court was called to hear an appeal by joint liquidators a group of companies who had instituted a claim against the companies' erstwhile business rescue practitioner in

[202] [2021] ZAGPJHC 486 (20 April 2021). Hereinafter the "Boabab Case".

his personal capacity in the sum of R24 228 315.61.[203] The claim was for an alleged loss suffered by one of the companies in the group, Boabab Holdings (Pty) Ltd ("Boabab") whilst the practitioner was carrying out and performing his functions.[204]

The issue at the heart of the matter was centered on the practitioner's utilization of Boabab's funds to expunge the debts incurred by the Group.[205] On evidence presented during the proceedings, it was established that the practitioner collected from debtors of Boabab, Kudumane and Black Magic Logistics monies owed to the sum of R24 228 315.61 and used those funds for purposes of extinguishing obligations of the companies in the Group ("the disposal").[206]

The appellants contended that the disposal was executed without compliance with section 45 and section 134 of the Act.[207] It was argued that the practitioner breached his fiduciary duties set out in section 76(3) of the Act.[208] The appellants sought relief in that the practitioner be held liable for losses suffered in terms of section 218(2), in the alternative section 77 of the Act.[209] The practitioner denied liability and pleaded that should the court find him liable for losses suffered by Boabab, "he acted in good faith in the course of the exercise of the powers and performance of his functions as a business rescue practitioner and was thus excused from liability in terms of section 140(3)(c)(i) of the Act".[210] In addition, the practitioner pleaded that, should it be founded that his action were in breach of his fiduciary duties, "he acted honestly and reasonably and should therefore [should] be excused from any liability in terms of section 77(9) of the Act."

The Court considered the relationship between the practitioner and the directors of the company. It was established that when the company went into business rescue, the Group had one director left, Mr Driscoll who was not even in the country at the time.[211] It was further established that the practitioner did not delegate any of his powers or

[203] Boabab Case, para 2.
[204] Ibid.
[205] Boabab Case, para 9.
[206] Ibid.
[207] Boabab Case, para 10.
[208] Ibid.
[209] Ibid.
[210] Boabab Case, para 11.
[211] Boabab Case, para 12.

functions to Mr Driscoll nor did Mr Driscoll participate in any of the decisions subject to the court proceedings.[212] Instead the practitioner took over the day-to-day management of the Group and assumed the same duties, responsibilities and liabilities of an ordinary director of the Group.[213] The Court highlighted though, that the practitioner did assume the position of director.[214] It was explained that the practitioner "took full management control of the company in substitution of its board. He did so in the performance of his duties as a business rescue practitioner."[215]

In dealing with the issues in the matter, the Court posed the question whether it was "the intention of the legislature to differentiate between a business rescue practitioner being liable as *ex officio* director of the company on the one hand and being liable as business rescue practitioner in the performance and exercise of his duties on the other hand."[216] In dealing with this question the court explained that it ought to "examine what is meant by the "duties, responsibilities and liabilities" of a director in terms of section 75 to 77 of the Act and determine if it differ from that of a business rescue practitioner."[217]

The Court explained that the legislature intended for the business rescue practitioner to be protected as he ascends to his role in a company that is financially distressed with lack of directorship and assistance.[218] The Court further explained that the practitioner will suffer from liability "for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of a business rescue practitioner, except if the act or omission amounts to gross negligence."[219] It was explained that this kind of protection is not applicable to liabilities incurred by the practitioner "in terms of section 77, including the protection the court may afford to the business practitioner in terms of section 77(9)."[220]

---

[212] Ibid.
[213] Boabab Case, para 16.
[214] Ibid.
[215] Ibid.
[216] Boabab Case, para 20.
[217] Ibid.
[218] Boabab Case, para 21.
[219] Boabab Case, para 22.
[220] Boabab.

Ultimately, the court found one cannot conclude that the practitioner committed wilful misconduct alternatively that he acted in wilful breach of trust as the practitioner was reasonable, honest and *bona fide* in his attempts to rescue the companies, likewise his mandate.[221] The Court also found that based on the evidence presented, it was impossible for the practitioner to treat Boabab and the remaining companies as separate companies as the companies were interdependent on one another.[222] The practitioner was excused from liability on the basis of section 77(9) alternatively on the principle of fairness.[223] No personal liability was ordered against the practitioner.[224]

The appellants in the matter also argued that the practitioner was in breach of his fiduciary duties owed to Boabab and or alternatively in breach of provisions of section 76(3) of the Act.[225]The Court explained that, there is a distinction "the duty of 'good faith and for a proper purpose' and the duty to act for the benefit or best interests of the company".[226] According to the Court, "[t]he "proper purpose" duty entails in the first instance that the director must not exceed the limitations of his own authority and must not exceed the limitations of the company. In the second instance a director must exercise the duties only for the purpose for which they were conferred and not for an 'improper' purpose."[227] With regard to the duty of "care, skill and diligence", the Court determined that "an objective test is applied to determine what the reasonable director would have done in the same situation as well as a subjective test which takes into account the general knowledge, skill and experience of the specific director."[228]

On the basis of the above analysis, the Court agreed with the *court a quo*'s determination that if the transactions concluded by the practitioner in relation to the ceded assets were in relation to "expenses incurred by the other five companies to service contracts located in Boabab, they were made in good faith, for a proper purpose

[221] Boabab Case, para 61.
[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Boabab Case, para 62.
[226] Boabab Case, para 66.
[227] Ibid.
[228] Boabab Case, para 66.

and in the best interest of Boabab."[229] It was found that the practitioner conducted himself in a manner that "a reasonable director, acting with care, skill and diligence would do in the circumstances to ensure that there is still business."[230]

The Boabab case is important as it shows the undesirable consequences of directors adopting a passive attitude during business rescue proceedings. Albeit in this instance, it was the practitioner who was faced with liability, directors may also find themselves in such a situation if they blindly follow the instructions of the practitioner without applying their minds and acting reasonably with the necessary level of care, skill and duty. The Boabab case also exposes the risk of having a practitioner usurping such broad powers relating to the company. A director in the shoes of Mr Driscoll might have adopted a passive approach due to the fact that section 140 divests directors of their powers and out of fear of facing liability similar that faced by the practitioner in the Boabab Case.

The Boabab case is also important as it raised the question whether business rescue practitioner may be held liable while performing their functions. Mpofu submits that, in the execution or implementation of the business rescue plan, "the practitioner is expected to conduct the company's affairs in accordance with the responsibilities, duties and liabilities of a director of the company as provided in sections 75 to 77 of the Act."[231] Mpofu considers the aspect of whether business rescue practitioners have a duty to disclose personal financial interests similarly to directors in terms of 75 of the Companies Act.[232] He explains that whilst practitioner do owe this fiduciary duty of disclosure, it is unclear from the Companies Act to whom must the disclosure be.[233] This is so because a business rescue practitioner may be appointed by the board of directors through a resolution or the court through a court order following nominations by affected persons.[234] Mpofu simplifies the issues by explaining that the Companies Act is clear in that regardless of the appointment procedure undertaken, the business rescue practitioner is a offer of the court.[235] As such, the disclosure of personal financial interest

[229] Boabab Case, para 70.
[230] Ibid.
[231] Mpofu *Corporate Board: Role, Duties & Composition* 24.
[232] Mpofu *Corporate Board: Role, Duties & Composition* 25.
[233] Ibid.
[234] Ibid.
[235] Ibid.

must "be made to the court and an absolution of conflict of interest can only be granted by the court."[236]

In the High Court case of *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others*,[237] the Court deal with various issues relating to the powers of directors in business rescue and those of the business rescue practitioner. At the outset, the Court stated that "Where the Companies Act does not draw a bright line between powers of the directors sitting on the company board and the powers and ambit of business rescue (BRPs), it is left to the courts to develop the jurisprudence and lend greater clarity and certainty if necessary."[238] The applicants in the case, being the directors of the company in business rescue,[239] contended that section 137 and section 140 of the Companies Act present some challenge.[240] The challenge identified was that, while the practitioner takes full management control of the company in the place of the board and previous management, the board retains its functions.[241] This is also the period during which the practitioner is tasked with developing and implementing the business rescue plan.[242]

A declaratory order was sought by the applicants being directors of Tegeta in that they have voting rights on behalf of one of their associate companies at any meeting of creditors convened in terms of section 151(1) of the Companies Act.[243] Another order sought was to the effect that the directors of Tegeta may only exercise their voting rights "upon receipt of a mandate in terms of an adopted business rescue plan of Tegeta; alternatively that the practitioners of Tegeta may only exercise a vote at any [section] 151(1) creditors' meeting in respect of OCT upon receipt of an adopted business plan of Tegeta."[244]

It appears that initially the practitioners and the applicants, had reached agreement that the directors of Tegeta have voting rights at the meeting of creditors in relation to

[236] Ibid.
[237] 2022 (3) SA 512 (GJ). Hereinafter "Ragavan High Court case".
[238] Ragavan High Court case para 1.
[239] Tegeta Exploration and Resources (Pty) Ltd ("Tegeta").
[240] Ragavan High Court case para 3.
[241] Ibid.
[242] Ibid.
[243] Ragavan High Court case para 7.1.
[244] Ragavan High Court case 7.2.

OCT.[245] However, the agreement collapsed when the practitioners were provided with a legal opinion that the agreement is contrary to the provisions of the Companies Act.[246] The advice received was that only the practitioners had voting rights on behalf of Tegeta during the meeting of creditors of OCT.[247] This is what has led to the present dispute about the right to vote.[248]

Due to the issues in the case, the Court undertook an "interpretative exercise of the Companies Act relating to the powers and duties of the board and the full management role of the BRPs".[249] The Court noted that "It is clear that there are overlapping areas between managing the business of the company and the affairs of the company in the ordinary course."[250] Whereas "there are no exacting statutory definitions within the context of business rescue detailing the minutiae of the different roles."[251] However, the Court found that "the provisions of [chapter] 6 are clear and there is not much overlap. The respective roles are clear."[252] The court proceeded with the interpretative exercise nonetheless.

On section 140 of the Companies Act, the Court found that the section is clear.[253] The practitioner takes full management control of the company, substitutes its board and previous management and is vested with the power of implementing the business rescue plan.[254] According to the Court, "[t]he Companies Act [has introduced] a very clear limitation on the role of directors in clear terms".[255]

It was also found that section 142 is a further clear limitation of director's powers as a requirement is placed upon directors to "cooperate with and assist" the practitioner.[256]

[245] Ragavan High Court case para 12.
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ragavan High Court case para 20.
[250] Ragavan High Court case para 29.
[251] Ibid.
[252] Ibid.
[253] Ragavan High Court case para 32.
[254] Ibid.
[255] Ibid.
[256] Ragavan High Court case para 33.

Obligations are also imposed on directors "to comply with providing the necessary information to the core of the core office of the company to the practitioner."[257]

Section 137 of the Companies Act was also found to be unproblematic as it clearly stipulates the effects of business rescue on shareholders and directors of the company.[258] Functions of directors under business rescue are subject to authorisation by the business rescue practitioner.[259] Sections 137(3), 137(4) and 137(5) were referenced by the Court to provide further examples of the roles and authority of the business rescue practitioner.[260] The court explained that section 137(3) is peremptory as it provides "that directors must attend to the requests of the BRP at all times."[261] With regard to section 137(4), the Court found that the practitioner is even vested with the power void transactions executed by directors without his approval.[262] The practitioner's power to apply to court for the removal of a director on various grounds including the hindering of the business rescue process was emphasised.[263] The court concluded that the powers of directors during business rescue "are significantly limited within the framework of [chapter 6]."[264]

The Court also explained that, although the general principle clearly makes provision for directors to remain part of management as envisaged in section 66, section 137(2) makes a distinction that, "whilst the director performs the functions qua director, the management powers and functions are transferred in law to the practitioner".[265] Reference was made to Henochsberg's distinction "between internal functions, which directors continue with, such as calling board meetings and company meetings, whilst the management power of the directors are externally based."[266] The Court explained that it is Henochsberg's view that "it is the management powers that allow for interaction

[257] Ragavan High Court case para 34.
[258] Ragavan High Court case para 35.
[259] Ragavan High Court case para 36.
[260] Ragavan High Court case para 37 to 39.
[261] Ragavan High Court case para 37.
[262] Ragavan High Court case para 38.
[263] Ragavan High Court case para 39.
[264] Ragavan High Court case 40.
[265] Ragavan High Court case para 41.
[266] Ibid.

with the outside world, and that would be the role of the BRPs."[267] Therefore, the implication is that "if the internal acts are subject to restrictions or conditions in respect of directors, then the powers exercised by the BRPs in terms of [section] 141(1) are exclusive powers for the BRPs."[268] Therefore, "all actions to the outside must be conducted by the BRP. This includes debt-collecting and voting at meeting in terms of [section] 151(1)."[269] The respondents made the submission that any interpretation to the contrary would lead to confusion "with directors countermanding the acts of the BRPs and vice versa."[270] The Court agreed with the above approach if one considers the import of chapter 6.[271] The Court found that "[t]he decision on whether to adopt a business plan is an external function where the BRPs interact with creditors at the [section 151] meeting."[272]

According to the Court, the purpose of the section 151 meeting is the consideration of the business rescue plan which includes debt collection.[273] The Court concluded that, "it is clear that the BRPs play a lead role in the business rescue proceedings, with substantial restrictions on the directors at this time in the life of the company."[274] The role played by the practitioner includes decision making on who has voting rights at the section 151 meeting.[275] The Court highlighted that "directors retain governance functions, which on a proper interpretation of the Act will not be impeded during business rescue, and these includes presenting annual financial statements, issuing of shares, scheduling of shareholders' meetings, proposing resolutions and holding of board meetings."[276] According to the Court, these are internal functions.[277]

Ultimately the Court determined that, "[u]pon a proper interpretation of the [chapter] 6 rights and duties of the BRPs, it is clear that this chapter introduced significant limitations

[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] Ragavan High Court case para 43.
[275] Ibid.
[276] Ibid.
[277] Ibid.

on the rights of directors."[278] The Court empahsised that full management control lies with the practitioner.[279] According to the Court, "[t]he distinction then of internal and external functions of a company facilitates the proper interpretation of the different functions directors and BRPs have when a company is in business rescue."[280] Directors are not divested of governance functions, they retain these.[281]

At this juncture, it is crucial to point out that the relationship between the practitioner and the directors of the company in business rescue does not appear to be a seamless one. Rights of directors are limited under business rescue and this appears to present clashes and conflicts between the directors and the practitioner. The fact that there are numerous differing views on this issue shows that indeed there may be some challenges. More sources are discussed below on the relationship between the directors in business rescue and the practitioner.

In the case of *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd (In Business Rescue) and Others*,[282] the Supreme Court of Appeal (SCA) dealt with the important question of what happens when a company in business rescue is a creditor of another company in business rescue and the other company is a wholly-owned subsidiary of the company in business rescue.[283] The primary question was whether the board of directors of the parent company is afforded the right to cast a vote on any matter contemplated under section 151 and 152 of the Companies Act or whether the right lies with the business rescue practitioners.[284] This matter emanated from the Johannesburg High Court where the Court *a quo* found that the right to vote in such circumstances lay with the business rescue practitioners who were granted full managerial control under Chapter 6 of the Act.[285] In dealing with the question in the appeal court, the SCA remarked that although section 66(1) of the Companies Act bestows management and control powers in a company's board of directors, Chapter 6 places a limitation on this

[278] Ragavan High Court case para 47.
[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] 2023 (4) SA 78 (SCA). Hereinafter "Ragavan SCA case".
[283] Ragavan SCA case para 1.
[284] Ragavan SCA case para 1.
[285] Ragavan SCA case para 5.

section 66(1).[286] The management and control power shifts to the business rescue practitioner during business rescue proceedings.[287]

The SCA found that impairing the business rescue practitioner's ability to have voting rights on a plan of debtor company under the circumstances would hinder his or her ability to assess "the company's prospects of rescue and/or the state of financial distress.[288] This would lead to the undermining of the objectives set out in chapter 6.[289] Ultimately the SCA found that, "the words 'full management control' found in s 140(1)(a) must be interpreted as including the power to vote for or against a plan for a debtor company. To give this power to the directors would be subversive of the purpose of the 'full management control' conferred to the practitioner by the Act."[290]

On the question of whether or not the board retains any power on strategic matters of the company during business, the Court indicated that this is was not a matter it had to decide on. According to the C ourt, it has already explained that the practitioner enjoys the power to vote as a creditor on the debtor's plan.[291] As can be gleaned above, the SCA confirmed the position that during business rescue proceedings, the practitioner has more powers than directors during business rescue. The Court arrived at this conclusion on the basis that Chapter 6 of the Companies Act limits the powers vested upon directors of the company by section 66(1). The Ragavan case is about directors of a parent company in business rescue (creditor) wanting to assert their rights to vote in a business rescue plan of their subsidiary companies.[292] According to the Court allowing directors in such a situation voting rights is against the provision of Chapter 6 of the Companies Act and hinders the practitioner in the performance of his or her duties. The SCA in the Ragavan case further confirmed that the practitioner is vested with quite broad powers to the extent that he participates in the affairs of subsidiary companies. This is a power which ordinary lies with a parent company's board of directors.

[286] Ragavan SCA case para 14.
[287] Ibid.
[288] Ragavan SCA case para 25.
[289] Ibid.
[290] Ragavan SCA case para 25.
[291] Ragavan SCA case para 26.
[292] Ragavan SCA case para 1.

This undoubtedly raises the question whether the SCA came to the correct conclusion in Ragavan, i.e. are the business rescue practitioner's power so broad that he even assumes voting rights ordinarily vested with directors of the company. Such a dilemma is core basis of this dissertation. That is, the interaction between the duties, powers and roles of the business practitioner in contrast to those of directors and the limitation thereof. It appears that there exists a great limitation on the powers, roles and duties of directors during business rescue which may lead to a clash or conflict.

The clash between the powers of directors and those of the business rescue practitioner was also dealt with in the case of *Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc and Another*,[293] where the directors of the company under business rescue issued summons without the authority and instructions of the business rescue practitioner.[294] For context purposes, it is prudent to note here that, in terms of section 137(4) of the Act, "[i]f, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner".

In light of the applicable legal framework and the issues before the Court, it was found that allowing retrospective approval of the director's action is contradictory to the purpose of the Companies Act.[295] This is in respect of the powers granted to the practitioners regarding the decisions taken after they have been appointed aand the companies are already placed under business rescue.[296] Consequently, the Court also found that such interpretation would undermine the practitioners and bears the potential to defeat the whole purpose of business rescue proceedings.[297]

In arriving at the above conclusions, the Court highlighted that section 137(2) envisages a situation where directors of the company may continue with the exercise of their

[293] 2022 (4) SA 205 (ML). Hereinafter referred to as the "Firm-O-Seal case".
[294] Firm-O-Seal case para 1.
[295] Firm-O-Seal case para 15.
[296] Firm-O-Seal case para 15.
[297] Firm-O-Seal case para 15.

functions.[298] However this is subject to authorisation by the practitioner.[299] In addition, a director owes a duty to the company to exercise management functions in line with "the express instructions or direction of the practitioner, to the extent that it is reasonable to do so."[300]

The Court explained that section 137(4) and section 137(5) set out two types of sanctions for directors failing to perform their functions under the authorisation of the practitioner or his or her instructions.[301] The first sanction is that the practitioner may approach the court and make a request that the director be removed.[302] The second sanction provides that any action without the practitioner's approval is void unless if he or she decides to approve it.[303] The Court "concluded that it could not have been the intention of the legislature to allow the directors to run the show without the practitioner's knowledge, participation or approval, with the hope that he/she would ratify their deeds."[304]

The Firm-O-Seal case is yet another case which confirms the broadness of the powers, roles and duties of the business rescue practitioner during the business rescue process.

In the recent case of *Tegeta Exploration and Resources (Pty) Ltd and others v Knoop and others*,[305] the Court came to a conclusion that raises interesting questions relating to the roles of the business rescue practitioner when compared to those of the directors of the company. This case involved an application ("main application" / "removal application") by the applicants to remove the appointed business rescue practitioners based on various grounds – ranging from conflict of interest on their side due to their failure to exercise the proper degree of care in executing their functions.[306]

---

[298] Firm-O-Seal case para 13.
[299] Ibid.
[300] Ibid.
[301] Firm-O-Seal case para 14.
[302] Ibid.
[303] Ibid.
[304] Ibid.
[305] 2023 JDR 4728 (GP). Hereinafter referred to as "the Tegeta case".
[306] Tegeta case para 1.

The applicants in the Tegeta case contended that the business rescue practitioners had seriously breached their obligations, and they created intolerable conflicts of interest between the various Tegeta companies.[307] As a result the removal of the business rescue practitioners was sought in terms of section 139(2) of the Companies Act "based on their failure to perform the duties of a BRP, failure to exercise a proper degree of care in the performance of the functions of a BRP, or conflicts of interest or lack of independence".[308]

The Court considered the provisions of section 137 of the Act as well and referred to *Absa Bank Limited v Marotex (Pty) Ltd and Others*[309] and *NDPP v Sharma and Others*.[310] The Court then turned to the SCA case of *Tayob and Another v Shiva Uranium (Pty) Ltd and Others*.[311] It was remarked that, a closer observation of the ruling in the SCA Tayob Case "reveal[ed] that there is a distinction that needs to be drawn between the concepts of management and governance to fully appreciate the extent of the powers of the BRPs, and those of directors."[312] On this aspect, the Court in *Tayob* explained that the Companies Act does not define the term 'management'.[313]On this basis, the Court stated the term 'management' "must be ascribed its ordinary meaning."[314] The meaning being "to be in charge of or to run a company, particularly on a day-to-day basis."[315] Importantly, the Court stated that the appointment of "a substitute practitioner (who will then be in full management control of the company) is rather a function of governance and approval thereof is not … a management function".[316]

Moreover, the Court proceeded to explain that section 137(2)(a) read with the provisions of Chapter 6 of the Act and section 140, "circumscribe the ambit of the authority of the practitioner."[317] Therefore, any functions by directors falling outside this ambit "cannot

[307] Tegeta case para 19.
[308] Tegeta case para 19.
[309] [2016] ZAGPPHC 1190. Hereinafter referred to as "the Absa case".
[310] 2022 (1) SACR 289. Hereinafter referred to as "the NDPP case".
[311] [2020] ZASCA 162. Hereinafter referred to as "the Tayob case".
[312] Tegeta case para 31. See also the Tayob case para 24.
[313] Tegeta case para 33. See also the Tayob case para 25.
[314] Ibid.
[315] Ibid.
[316] Tegeta case para 33. See also the Tayob case para 25.
[317] Tegeta case para 34. See also the Tayob case para 25.

be subject to the approval of the practitioner".[318] Ultimately the decision of the SCA in Tayob was that "[section] 137(2) only affects the exercise of the functions of a director in respect of matter falling within the ambit of the authority of the practitioner… the appointment of a practitioner does not fall within the powers or authority of a practitioner".[319]

In analysing the *Tayob* decision, the Court in *Tegeta* remarked that the decision carries the implication that the practitioner has "exclusive powers and duties" only in relation to management of the company, i.e. "the day-to-day running of the business affairs."'[320] Importantly, the Court in Tegeta stated that then other functions falling outside the purview of management of the company, remain the functions of directors and are not subject to the practitioner's authorisation.[321]

In evaluating submissions made by parties in the Tegeta Case, the Court noted that the concepts of "management" and "governance" are interconnected and overlap.[322] In elaboration thereof, the court explained that distinction between the two concepts is not always explicit.[323] The interpretation of 'Governance' "Governance could be said to be 'higher level, future-orientated matters of strategy and policy' whereas management is more about the day-to-day affairs of the company".[324] The Court explained that the director and the practitioner "in one way or another need each other".[325] The Court further explained that, "If the directors were to appoint attorneys without the involvement of the BRPs, such a move would undermine the very essence of business rescue proceedings because it means that the BRPs would be caught off guard when presented with additional debts that were incurred without their knowledge and would be in contravention of the director's fiduciary duties".[326] Moreover, this would lead to the

[318] Ibid.
[319] Tegeta case para 34. See also the Tayob case para 25.
[320] Tegeta case para 35.
[321] Ibid.
[322] Tegeta case para 65.
[323] Ibid.
[324] Ibid.
[325] Ibid.
[326] Ibid.

undesirable outcome that of having "two managers of the company who are doing two different things at dissimilar times".[327]

Notwithstanding its above observations, the Court in *Tegeta* agreed with the Court in *Tayob* that "the powers of directors relating to governance functions (and not management) such as the appointment and/or removal of directors and BRPs are not subject to the authority of the BRP".[328] The Court found that section 139(3) provides a board of directors with unrestricted powers to appoint a substitute a business rescue practitioner.[329] As such, the approval of the business rescue practitioner is not sought in the event that the directors seek his removal.[330]

The Court further agreed with the applicant's submission that "it would make no sense for the directors to seek approval from the BRPs to remove them from office. In other words, the BRPs would have to approve a process that seeks to remove them. What if the BRP in question has died?"[331]

According to the Court, it would be illogical to suggest otherwise.[332] Consequently, it was found that the practitioner's removal or appointment falls within the powers of the board of directors and not the practitioner.[333] On this basis, "a BRP cannot veto a process that seeks their removal because it relates to governance function and not management function. All in all, the directors do not need the authority of the BRP to act in matters related to governance".[334]

Ultimately, the Court found that the authority of Van der Merwe and Van der Merwe Attorneys to act on behalf of some of the applicants in the matter had been established for the removal application of the BRPs. The *Tegeta* decision is extremely important as it shows that there is a conflict of powers and that there may be instances where the business rescue practitioner is vested with more powers than they should have during

[327] Ibid.
[328] Tegeta case para 68.
[329] Ibid.
[330] Ibid.
[331] Tegeta case para 69.
[332] Tegeta case para 70.
[333] Ibid.
[334] Ibid.

their appointment. The fact that the business rescue practitioner was contending that the directors of the company may take the necessary steps to remove him from office is one such example. In light of the current constructions of section 137 and 140 of the Companies Act, it is only inevitable that conflict will arise on whether the directors of the company may remove the business rescue practitioner. These sections and Chapter 6 generally clothe the practitioner with unfettered powers over the company. As illustrated in the Tegeta case, clothing the practitioner with such broad powers leads to a situation where the practitioner tempers even with the governance roles in the company. The Courts in Tegeta and Tayob cases have determined that the company's board of directors retains its governance roles.

Recently, in the case of *Monyela N.O and Others v Tayob N.O and Others*,[335] Labuschagne AJ heard an application for leave to appeal his judgment granted in urgent court on 1 December 2023. In his original judgment, Labuschagne AJ granted various orders. The order I highlight for purposes of this study is as follows:

> "Pending the final determination of the relief sought in Part B of the notice of motion the third to seventh respondents are restrained from exercising any function as a director of the second respondent, other than in accordance with the provisions of Chapter 6 of the Companies Act and in particular Sections 140(1)(a) and (b), Section 137(2)(b), Section 137(3), Section 137(4), Section 137(2)(d), read with Section 218(2)."[336]

In dealing with the parties' submissions during the leave to appeal application, Labuschagne AJ made a very crucial point for purposes of this study. The learned judge highlighted that "Section 66 of the Companies Act makes it clear that a company is governed by its board of directors unless the Act provides otherwise. Chapter 6 imposes limitations upon the board of directors, should the company be in business rescue."[337] It has been established above that, it is section 140 and by extension section 137 that limits the roles, power and duties of a company's board of directors during business rescue.

[335] (2023/117272) [2024] ZAGPPHC 86 (2 February 2024). Hereinafter "the Monyela case".
[336] Monyela Case, Para 1.
[337] Monyela Case, Para 16.

Henochsberg[338] submits that the general proposition in respect of section 137 read with section 140 should find its basis in general company law principles and on the SCA decision in the Tayob case.[339] The principles are as follows:

> "(a) management (powers in respect) of the (business of the) company and/or those powers of the directors (in terms of section 66(1)) vest in the business rescue practitioner (s 140 (1)(a)); (b) functions of directors (internally as organs or 'governance' matters) are subject to the authority of the business rescue practitioner but only if provided expressly and specifically or else 'logically' within the 'ambit of the (powers and) authority of the practitioner of Chapter 6 (s 137 (2)(a).'"[340]

With reference to the dictum in *Tayob*,[341] Henochsberg notes that there are indeed certain functions that can be exercised by the board without the need for authorisation by the business rescue practitioner.[342] This relates mainly to the *locus standi* of the board of directors of the company to defend the company against business rescue proceedings. Henochsberg refers to *Knoop NO and Another v Islandsite Investments 180 (Pty) Ltd and others*.[343] Cronje AJ was faced with an appeal of his judgement granted in the urgent court of 20 April 2023.[344] This was the case of *Islandsite Investments (Pty) Ltd and another v Knoop NO and others*.[345]

In the Knoop High Court case, Cronje AJ dealt with an urgent application requesting leave in terms of section 133(1)(b) of the Companies Act to launch the application.[346]

---

[338] Henochsberg *et al* on the Companies Act 71 of 2008: "137. Effect on shareholders and directors – (1) During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business is invalid expect to the extent". Accessible via LexisNexis Library South Africa.
[339] Henochsberg 526.
[340] Henochsberg 526.
[341] Tayob and Another v Shiva Uranium (Pty) Limited and Others [2020] JOL 49109 (SCA).
[342] Henochsberg 526.
[343] Ibid. This is the leave to appeal case with the following citation: 2023 JDR 4065 (FB). Hereinafter "Knoop SCA case".

[345] 2023 JDR 1443 (FB). Hereinafter "Knoop High Court case".
[346] Knoop High Court case para 2.

The application was against the business rescue practitioner and the Curator appointed to the company under business rescue.[347] The business rescue practitioner and the Curator contended that section 133 prohibits the applicants from launching the proceedings.[348] Essentially the argument was that the applicants lack the necessary locus standi. Cronje AJ posed the question "what would the position be if BRPs and a Curator perform functions that the Board view as inimical to the interests of the Company?".[349] Cronje AJ posed a follow up question of which platform or mechanism do directors or any other party with a material interest in the company's affairs have in laying complaints against practitioners and curators.[350] The learned judge rightfully pointed out that "[l]ogic dictates that the BRPs will never authorise a board to take steps against them".[351] Cronje expressed the view that section 133 is applicable to situations where litigation is harmful to the company.[352] He stated that it can be argued that the application in issue "is adverse to the company as it necessitates the BRPs, who are appointed for the management and control of the company, to expend costs".[353]

Cronje AJ considered the provisions of section 39 of the Companies Act which stipulate that the removal of the business rescue practitioner may be by affected persons upon request to the Court or it may be upon request by the practitioner him or herself.[354] It was explained that, the Court "may remove a practitioner from office on the ground that there is incompetence of failure to perform the duties of a business rescue practitioner of the particular company".[355] Cronje made a finding that, the Companies Act does "not provide for an absolute bar against the directors from taking any steps to protect the company against the BRPs".[356] As such, it was fact that the actions of the applicants to launch court proceedings against the business rescue practitioners are not void.[357] A very important principle articulated by Cronje AJ in the Knoop High Court case is that "

[347] Knoop High Court case para 36.
[348] Ibid.
[349] Ibid.
[350] Ibid.
[351] Ibid.
[352] Knoop High Court case para 37.
[353] Ibid,
[354] Knoop High Court case para 38.
[355] Ibid.
[356] Knoop High Court case para 39.
[357] Ibid.

there has to be a safeguard for the company to protect itself against BRPs that allegedly do not comply with their obligations".[358] Cronje AJ added that "[t]here is no reason for a company to sit idle and see how it is prejudiced merely because business rescuers took control and management".[359]

It is the above decision that the business rescue practitioners sought an appeal against. The argument on appeal was that Cronje AJ incorrectly found that the directors of the company had locus standi to bring and defend litigation on behalf of the company in business rescue and that they did not require the authorisation of the practitioners.[360] On appeal, Cronje AJ maintained "that the directors [were] entitled to approach the Court to ensure that there are checks and balances in place in respect of the way the BRP's deals with the company, they are not the company".[361] Thus, the decision on appeal was that "Section 137(2) does not relieve directors of their duties as directors. They therefore remain an integral part of the management of the company".[362]

My views are aligned are aligned with those of the learned Justice Cronje AJ. During business rescue proceedings, directors still owe fiduciary duties to the company. If directors adopt a passive attitude in the rescue of the company, they may be held liable in terms of section 77 of the Act. Directors cannot blindly follow the direction of the practitioner even in instances where it is clear that it is to the detriment of the company.

On the issue of powers of directors and the business rescue practitioner, Henochsberg's view is that the application of the above submissions and principles emanating from case law is merely that the act by the company to oppose the confirmation of the rule *nisi* is a function of the board/director as organ of the company (reference to section 66 dealing business and affairs of the company in respect of litigation) and not management of the company.[363]

[358] Knoop High Court case para 40.
[359] Ibid.
[360] Knoop SCA case para 3 and 4.
[361] Knoop SCA case para 8.
[362] Ibid.
[363] Ibid.

To emphasise the above submissions on the powers of directors / the board during business rescue, Henochsberg makes reference to the case of Ragavan High Court case.[364] Reference is made particularly to paragraph 41, where "the Court accepted that all actions to the outside must be conducted by the BRP but then said that this includes "debt collecting and voting at meetings convened in terms of s 151 (1)" and that the "decision on whether to the (sic) adopt or not a business plan is an external function where the BRPs interact with creditors at the s 151 (1) meeting."[365] Importantly, Henochsberg notes that, "While it may possibly be accepted that "debt collecting" is a management power ("to the outside") under the authority of the business rescue practitioner, voting in respect of a business is clearly not. It is, like voting on the shares of a (holding) company, clearly an internal function that must be exercised by the directors as organs of the company."[366] Henochsberg notes further that, voting on a business rescue plan proposed by the business rescue practitioner, and possibly in respect also on post-commencement financing obtained by the business rescue practitioner, cannot be purely management.[367] This view shows that there are various legal positions on the relationship between directors of a financially distressed company and the practitioner. As articulated by the applicants in the Ragavan High Court case, section 137 and 140 in particular may lead to confusion on who retains which functions during business rescue.

According to Naidoo,[368] business rescues rescue proceedings there is a crucial need for "a good working relationship between the practitioner and management."[369] This is important for a successfully assisting a financial distressed company.[370] What is required is "a relationship of trust and a cohesive vision shared by management and the practitioner."[371] Naidoo however cautions that this may not always be the case.

[364] Ibid.
[365] Ibid.
[366] Ibid.
[367] Ibid.
[368] Naidoo "Business rescue practices in South Africa: An explorative view" 2018 *Journal of Economic and Financial Sciences* Vol.11 No 1. (https://jefjournal.org.za/index.php/jef/article/view/188/293 Accessed on: 13 November 2024).
[369] Naidoo *Journal of Economic and Financial Sciences.*
[370] Ibid.
[371] Ibid.

Directors may experience issues with trusting the business rescue practitioner and perceive the practitioner as attempting to satisfy interests of the bank as opposed to saving the company.[372] This in my view, is quite a serious issue which emanates from the enormous powers bestowed upon the business rescue practitioner by section 140. However, if the South African corporate rescue was to allow for directors to fully participate in rescuing the company, trust would not be an issue. In my view, directors would be enthusiastic to work with the practitioner.

The issue of trust during the business rescue process has also been identified by Shem and Mupa.[373] trust plays a vital role with regard to "building and sustaining effective stakeholder relationships."[374] Transparency is equally important.[375] Shem and Mupa correctly point out that during business rescue, "management and employees serve as key internal stakeholders whose roles are essential in ensuring successful organization turnaround."[376] Management's fundamental role is to strategically implement turnaround plans and oversee the process of the restructuring.[377] As novel as these submissions are, in my view, it is impossible for management to fully participate in business rescue proceedings. Section 140 of the Companies Act is clear, the business recue practitioner takes over full management control of the company. Moreover, the case law discussed has confirmed this position. I agree with Shem and Mupa that management and employee are the key role player in resuscitating the company. However, the current construction of section 140 and by extension section 137 are an impediment to this.

The success of the business rescue process is informed by the effectiveness of its stakeholder engagements.[378] In most cases, business rescue proceedings do not prevail due to "poor stakeholder management".[379] Lack of communication and engagement as well as failing to "address the concerns of key stakeholders can severely

[372] Ibid.
[373] Shem and Mupa "The Role of Stakeholder Engagement in Business Rescue: A Legal and Strategic Perspective" 2024 *Iconic Research and Engineering Journals ("IRE Journals")* Volume 8 Issue 4.
[374] Shem and Mupa *IRE Journals* 43.
[375] Ibid.
[376] Shem and Mupa *IRE Journals* 45.
[377] Ibid.
[378] Shem and Mupa *IRE Journals* 46.
[379] Ibid.

undermine rescue efforts, leading to the eventual collapse of companies."[380] In my view, South Africa has a classic case of "poor stakeholder management". Management is excluded from key decision and there is a lack of proper engagement between the practitioner and pre-existing management of the company.

Shem and Mupa highlight the issue of conflicting stakeholder interests.[381] In my view this includes, directors of the company, i.e. management, the business rescue practitioner and creditors among others. This conflict arises when there are differing priorities and objectives on the future of the company.[382] Conflict is the inevitable result of prohibiting management from remaining in control of the company and work together with the practitioner. Of course each role player will have their own objectives.

Back on the lack of trust and transparency issue, Shem and Mupa point out that "[w]hen stakeholders feel excluded or misinformed, trust erodes quickly, leading to disengagement and opposition to rescue plans."[383] Moreover, "poor communication" has the effects of leading to "reduced staff loyalty and cooperation, ultimately weakening the company's internal cohesion."[384] In my view, these submissions are indeed some of the core issues of the current construction of the business rescue process in South Africa. Directors and/or management might feel that they are not part of the process of saving the company they have been working in for years. As such, they may no longer feel the need to owe any loyalty to the company nor work collaboratively to develop strategies to save the company. This is a very risky effect as the directors' section 77 liability is triggered by failure to uphold fiduciary duties owed to the company.

As it has already been demonstrated above, when business rescue commences, confusion may arise with regard to the division of functions and duties between a duly appointed business rescue practitioner and the distressed company's board of directors. Therefore, perhaps there is need for a balance between section 137 and 140 of the Act to promote the effectiveness of business rescue proceedings but also due to the fact

[380] Ibid.
[381] Shem and Mupa *IRE Journals* 48.
[382] Ibid.
[383] Ibid.
[384] Ibid.

that directors always remain liable for any loss or damage to the company on the basis of section 77(3)(a) and (b) of the 2008 Companies Act.

In South Africa, financial institutions as regulated by Financial Institutions (Protection of Funds) Act[385] have a mechanism whereby they can enter an agreement with the Financial Sector Conduct Authority ("FSCA") to have a statutory manager appointed for purposes of supervising the financial institution.[386] This mechanism in cases where the financial institutions faces solvency issues, i.e. "is likely to be in an unsound financial position".[387] This is also the case where it appears that "it is advisable to appoint a statutory manager in order to protect … the safety and soundness of financial institutions in general."[388] No provision in the Financial Institutions Act stipulates that the statutory manager takes full management control of the financial institution. Instead, section 5A(4)(b) provides that the statutory manager "must participate in the management of the affairs of the financial institution with its executive directors or managers".[389] This is with the qualification that the statutory manager makes the final decision in cases of disagreements between the statutory manager and the financial institution's directors.[390] Nonetheless, section 5A(5)(a) makes it clear that the statutory manager does not usurp management powers of the financial institution. Both the statutory manager and the financial institution are required to manage the affairs of the institution and report back to the FSCA on the way forward in assisting the financial institution with compliance issues which include financial soundness.[391]

Section 5A is clear in that in instances where a financial institution faces solvency issues, i.e. financial unsoundness, a statutory manager may be appointed to work in a collaborative effort to assist the financial institution in complying with statutory requirements including financial soundness. No provisions speaks about divesting the financial intuition's directors or management with their management powers, instead

[385] 28 of 2001. Hereinafter "the Financial Institutions Act".
[386] Financial Institutions Act, Section 5A(1).
[387] Financial Institutions Act, Section 5A(1)(a)(ii).
[388] Financial Institutions Act, Section 5A(1)(b)(ii).
[389] Financial Institutions Act, Section 5A(4)(b).
[390] Ibid.
[391] Section 5A(5)(a)(ii).

they must work together with the statutory manager to device plans to remedy defects hindering statutory compliance.

In my view, the above approach from the Financial Institutions Act may be borrowed by the Companies Act particularly in Chapter 6. This is the balancing act required with regard to section 137 and 140 of the 2008 Act. Focus should be on having the rescue practitioner and directors working on a collaborative effort to resuscitate the company. Both parties should be accountable to the courts in this regard in reporting on the necessary steps taken to try save the company.

2.3. Conclusion

It is evident that, during business rescue proceedings, directors do not become dormant or divested of the duties they owe to the company. However, they fulfil these duties under the authorisation and supervision of the business rescue practitioner. In the *Tegeta* case, an interesting distinction arose between “management” functions and “governance” functions. Section 66 and section 140 of the 2008 Companies Act conflict on a practical level as there is a limitation imposed on the role, functions and duties that directors ordinarily fulfil. This limitation may be difficult for some directors. The *Tegeta* case clearly demonstrated this aspect as the court had to distinguish between the various functions due to conflict that arose. The relevant sections of the Act also demonstrate that a business rescue practitioner is vested with quite broad powers during business rescue proceedings.

Section 137(2) and section 137(3) also present some challenges for directors especially with respect to the fiduciary duties they owe to a company and liability that may arise. Directors of a company are the experts of the business of a company, and whenever a company is in financial distress they may be the best suited persons to bring up strategies in resuscitating the company. Without taking away from the importance of appointing a business rescue practitioner, it is important to highlight that it may take the practitioner a prolonged duration to acquaint him or herself with the business of the company which may delay the company’s prospects of being resuscitated and which may eventually lead to its liquidation.

As can be gleaned from the above legislative framework explored in this chapter and the discussions herein, the key takeaways from this chapter are that notwithstanding that legislation clearly sets out the roles and duties of the business rescue practitioner and those of the directors, there is a clash in instances where decisions relating to the company are concerned. Also, the directors of the company may incur some liabilities as per section 77(3)(a) and (b) of the Companies Act.

Accepting the current South African legal position that directors of a financially distressed may only perform management functions under the authorisation and supervision of the business rescue practitioner, it is important to consider the manner in which powers, roles and duties of directors who are in similar situations are dealt with in foreign jurisdictions. This is done by also considering the business rescue procedures and processes in foreign jurisdictions such as Australia, the United Kingdom and the United States of America. These jurisdictions have some overlapping provisions in their insolvency regimes and some differences. For example, the United States of America presently has a system called “Debtors-in-Possession” which may provide some valuable lessons for South Africa in balancing the powers of directors and those of the business rescue practitioner. The following chapter comprises of comparative research based on the insolvency regimes in Australia, the United Kingdom and the United States of America.

CHAPTER 3: COMPARATIVE ANALYSIS OF FOREIGN JURISDICTIONS

3.1. Introduction

This chapter presents a comparative study of selected foreign jurisdictions. This is a crucial chapter as it provides the reader with a snapshot of business rescue or similar proceedings in foreign jurisdictions. It also presents an overview of the relationship between the roles, duties and powers of the business rescue practitioner or similar office holders *vis-à-vis* those of the board of directors. In this study, the focus is on three foreign jurisdictions: Australia, the United Kingdom and the United States of America. The main aim is to investigate how foreign jurisdictions deal with this relationship and the lessons to be learned from the respective jurisdictions.

3.2. The Commonwealth of Australia

3.2.1. Overview

The relevant statutory provision is Part 5.3A of the Australian Corporations Act.[392] This piece of legislation deals with the administration of a company's affairs with the view to draft a deed of company arrangement. The object of this Part is

> "to provide for the business, property and affairs of an insolvent company to be administered in a way that: (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or (b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding of the company".[393]

It appears that Australia's corporate rescue model has similar objectives to those in the South African model as set out in section 128(1)(b)(iii). This is the objective of allowing

[392] 50 of 2001. Hereinafter referred to as "the Corporations Act".
[393] Section 435A of the Corporations Act.

the financially distressed company to continue in existence in the hopes that there will be a better return for all stakeholders including creditors.

The administration proceedings[394] commence upon appointment of the administrator as set out section in 436A, 436B alternatively 436C of the Corporations Act.[395] Administration proceedings end on the basis of the two possible outcomes set out in section 435C(2) alternatively section 435C(3). Section 435C(2) makes reference to three (3) possible outcomes. The first outcome is that, "[the] deed of company arrangement is executed by both the company and the deed's administrator".[396] Alternatively, "the company's creditors resolve under paragraph 439C(b) that the administration should end".[397] Alternatively, "the company's creditors resolve under paragraph 439C(c) that the company be wound up".[398]

Australia makes reference to various mechanism to assist corporations under financial distress, the administration process set above is yet one of the mechanisms. Once the company reaches this stage it is said to be under 'external administration'. The administration proceedings at the instances of the directors of the company are referred to as a voluntary administration procedure.

The voluntary administration procedure is beneficial to the Australian corporate insolvency law as it provides for "a flexible procedure to allow the company either to trade out of its difficulties or to restructure the business to facilitate a better return to creditors than would result from an immediate winding."[399] This is through the "deed of company arrangement procedure" as introduced by Part 5.3A of the Corporations Act.[400]

---

[394] Section 435C(4) of the Corporations Act.
[395] Section 435C(1)(a) of the Corporations Act.
[396] Section 435C(2)(a) of the Corporations Act.
[397] Section 435C(2)(b) of the Corporations Act.
[398] Section 435C(2)(c) of the Corporations Act.
[399] Harris "Corporate group insolvencies: Charting the past, present and future of 'pooling' arrangement" 2007 *Insolvency Law Journal ("Insolv JL")* Vol.15 78

[400] Ibid.

3.2.2. The role and duties of directors outside of business rescue

Chapter 2D of the Corporations Act deals with the duties and powers of officers (which includes directors) and employees of the company generally. In Australia, directors of companies also have management and fiduciary duties. Section 180(1) of the Corporations Act determines that the directors have a duty of care and diligence. The section places a duty on directors to ensure that their powers are exercised and duties discharged "with the degree of care and diligence that a reasonable person" in their shoes who had the same responsibilities would exercise.[401]

The business judgent rule also features in the general duties of directors. Section 180(2) provides that directors who make a business judgment comply with their duty to exercise the degree of care and diligence of a reasonable person in certain instances.[402] Firstly, the director must "make the judgement in good faith for a proper purpose".[403] Secondly, the director ought not to have "material personal interest in the subject matter of the judgment".[404] Thirdly, the directors must "inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate". Lastly, the directors must "rationally believe that the judgment is in the best interests of the corporation".[405]

Section 181 deals with the duty of good faith of directors and other officers. This section stipulates that "[a] director or other officer of a corporation must exercise their powers and discharge their duties … in good faith in the best interests of the corporations; and … for a proper purpose."[406]

Division 4 of Chapter 2D of the Corporations Act deals with the powers of directors. Section 198A(1) provides that "[t]he business of a company is to be managed by or under the direction of directors".[407] However, section 189A(2) determines that "[t]he

[401] Section 180(1) of the Corporations Act.
[402] Section 180(2) of the Corporations Act.
[403] Ibid.
[404] Ibid.
[405] Ibid.
[406] Section 181(1) of the Corporations Act.
[407] Section 198A(1) of the Corporations Act.

directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting".[408] This is the equivalent of section 66 of the South African Companies Act.

Division 5 of Chapter 2D of the Corporations Act deals with the exercise of powers by officers while the company is under external administration. Section 198G in particular deals with this aspect. It provides that, while a company is under external administration, an officer of the company is prohibited from performing or exercising a function or power of that office and it is an offence for a director to purport to perform or exercise a function or power of that office while under administration.[409] There are however exceptions.

The provisions of section 198G set out above do not apply to the extent that the officer of the company is acting

> *"(*a) as the external administrator of the company, or (b) with the written approval of the external administrator of the company or the Court, or (c) in circumstances in which, despite the fact that the company is under external administration, the officer is permitted by this Act to act."[410] Also sections 198G(1) and (2) of the Corporations Act do not apply in instances where the company has executed a deed of company arrangement and the deed has not yet terminated."[411]

According to section 198G(5), if section 198G(3) applies and there is a conflict between a function or power of the external administrator of the company and a function or power of the officer in relation to the company, the external administrator's function or power prevails.[412] On the effects of section 198G, subsection (6) provides that the officers of a company are not removed from office. This mirrors the kind of challenge that arises form section 66 and section 140 of the 2008 Companies Act.

[408] Section 198A(2) of the Corporations Act.
[409] Section 198G(1) and (2) of the Corporations Act.
[410] Section 198G(3) of the Corporations Act.
[411] Section 198G(4) of the Corporations Act.
[412] Section 198G(5) of the Corporations Act.

3.2.3. The roles, duties and powers of the practitioner

Instead of a business rescue practitioner, Australia has what it calls an "administrator". The administrator may be appointed by the company if the board is of the view that the company is or will become insolvent.[413] It is provided that an administrator may be appointed by the company in writing if the company has adopted a resolution to that effect which includes that "the company is insolvent, or is likely to become insolvent at some future time".[414]

Section 437A deals with the role of the administrator. From the outset, it is clear that the administrator assumes control of the company's affairs. When a company is under administration, the administrator;

> "(a) has control of the company's business, property and affairs; and (b) may carry on that business and manage the property and those affairs; and (c) may terminate or dispose of all or part of that business; and (d) may perform any functions, and exercise any power, that the company or any of its officers could perform or exercise if the company were under administration".[415]

It is also important to note that, when performing a function, or exercising a power, as administrator of a company under administration, the administrator is essentially considered to be acting as an agent of the company.[416]

The administrator has additional powers to those articulated in section 437A of the Corporations Act. The additional powers of the administrator include the removal and appointment of directors for purposes of filling vacancies or not, executing documents and litigating on behalf of the company and any other necessary power.[417]

Similar to the South African Companies Act, section 438B of the Corporations Act makes it clear that the primary duty of directors of a company under administration is to assist the administrator. According to the section, as soon as possible following the

[413] Section 436A of the Corporations Act.
[414] Section 436A(1) of the Corporations Act.
[415] Section 437A(1) of the Corporations Act.
[416] Section 437B of the Corporations Act.
[417] Section 442A of the Corporations Act.

commencement of the administration of a company, each director must ensure the delivery of all books pertaining to the company to the administrator and if they have knowledge of the whereabouts of other books relating to the company, disclose such whereabouts to the administrator.[418]

Moreover, within 5 business days following the commencement of the administration of the company or such longer period as the administrator permits , the directors are required to provide the administrator with a report about the "company's business, property, affairs and financial circumstances".[419]

During the voluntary administration procedure, the administrator is effectively given total control over the company.[420] Anderson highlights that the "administrator has broad powers in terms of management as the power of other officers is suspended".[421]

During the administration proceedings, the administrator has a broader role – not only to run the company's business but also to acting fairly towards the creditors and, if possible, devise a plan for the company's future.[422]

In comparing the South African corporate rescue model with that of Australia, Anderson notes that the South African practitioner has the power to remove managers (this would be directors in the South African context) and appoint others.[423] This is similar to the position in Australia.[424] He notes, however, that in South Africa it appears that existing management will remain in place to allow for a cooperative model of management between the supervisor and the board.[425] In Australia, the administrator takes full control of the company.[426] This is the main difference between the South African corporate rescue model and that of Australia. The South African model creates room for existing management (i.e. the board of directors) to remain in place notwithstanding the fact that

[418] Section 438B(1) of the Corporations Act.

[419] Section 438B(2) of the Corporations Act.
[420] Anderson "Viewing the proposed South African business rescue provisions from an Australian perspective" *PELJ* 2008 1 at 21.
[421] Anderson *PELJ* 2008 21.
[422] Ibid.
[423] Anderson *PELJ* 2008 23.
[424] Ibid.
[425] Ibid.
[426] Ibid.

a business rescue practitioner has been appointed with the aim of resuscitating the business. However, it must be noted that through section 438B of the Corporations Act directors can still exercise some functions under the directions of the administrator. Section 438B places a primary duty on directors to assist the administrator. Thus, although the board of directors ceases to exists it may still be called up by the administrator to perform certain functions.

3.3. The United Kingdom

3.3.1. Overview

In light of the fact that South African law is derived from English law, it is important to consider the provisions of corporate insolvency law by the United Kingdom (UK). Focus in this regard will be on the Enterprises Act of 2002[427] and the Insolvency Act of 1986.[428] The Insolvency Act of 2000[429] will also be considered. This Act was adopted for purposes of making amendments in Part 1 of 1986 Insolvency Act.[430]

Similar to the Australian model, the UK model makes provision for an "administrator" and not a business rescue practitioner as is found in the South African business rescue context. In 2020, the UK introduced a Debtor-In-Possession ("DIP") model akin to the Chapter 11 Bankruptcy Code. This has been done through amplifying the process known as company voluntary arrangements. The Corporate Insolvency and Governance Act of 2020 was introduced to achieve this.

The company voluntary arrangements mechanism had been in existence for years providing debtors with some sort of a DIP model. However, it required some modifications following proposals for law reform. The old construct of the company voluntary arrangements allowed for debtors to voluntarily approach the Court for purposes of reorganising their affairs. However, this would not come with an automatic

[427] Hereinafter referred to as "the Enterprises Act".
[428] Hereinafter referred to as "the UK Insolvency Act".
[429] Hereinafter referred to as "the UK 2000 Insolvency Act".
[430] Edelman "The evolution of bankruptcy insolvency laws and the case of the deed of company arrangement" 2019 *Lloyd's Maritime and Commercial Law Quarterly* 578.

moratorium. The Corporate Insolvency and Governance Act of 2020 introduced "a new stand-alone moratorium".

Administration proceedings are similar to the South African business rescue procedure. An administrator is appointed, replaces the board of directors of the company and takes over full management control of the company. A 'scheme of arrangement' is also a mechanism that has always remained available to debtors in the UK.

3.3.2. The role and duties of directors outside of business rescue

The roles and general duties of directors in the normal course of business are set out in chapter 46 of the UK Companies Act of 2006. Section 171 of the UK Companies Act deals with the duty to act within the scope of the given powers and provides that "[a] director of a company must … act in accordance with the company's constitution, and … only exercise powers for the purpose for which they are conferred."[431]

Section 172 deals with the directors' duty to promote the success of the company:

> "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole".[432]

Section 173 of the UK Companies Act deals with the directors' duty to exercise independent judgment.[433] This duty is not infringed by the director acting in his capacity "in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or … in a way authorised by the company's constitution."[434]

[431] Section 171 of the UK Companies Act.
[432] Section 172(1) of the UK Companies Act.
[433] Section 173(1) of the UK Companies Act.
[434] Section 173(2) of the UK Companies Act.

The duty to exercise reasonable care, skill and diligence is dealt with in section 174 of the UK Companies Act. Section 174(1) stipulates that "[a] director of a company must exercise reasonable care, skill and diligence".[435] Section 174(2) proceeds to explain that

> "[t]his means the care, skill and diligence that would be exercised by a reasonably diligent person with – (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has".[436]

Section 175(1) determines that directors are required to avoid situations where their interests directly or indirectly conflict with those of the company. ector of a .[437] Section 176 places a duty on a director of a company not to accept benefits from third parties and section 177 places a duty on directors to declare interests in proposed transactions or arrangements.

Some of the roles, duties and powers of directors in the UK are similar to those in South Africa. For example, the duty of good faith and the duty to avoid a conflict of interest exist in both jurisdictions.

What is peculiar about the 2006 UK Companies Act is that it does not outright confer management powers on the board of directors of the company. Watson confirms this position.[438] She explains that the incorporators of the company, i.e. shareholders must reach agreement "on articles of association to be adopted by the company."[439] In the event that there is no registration of articles, "model articles are imposed on the company."[440] The Model Articles which are not binding on public and private companies.[441] Article 3 deals with the general authority of directors.[442] This Article

[435] Section 174(1) of the UK Companies Act.
[436] Section 174(2) of the UK Companies Act.
[437] Section 175(1) of the UK Companies Act.
[438] Watson "The Significance of the Source of the Powers of Boards of Directors in UK Company Law" 2010 *Journal of Business Law, Forthcoming* 2.
[439] Watson *Journal of Business Law, Forthcoming* 2.
[440] Ibid.
[441] Ibid.
[442] The Companies (Model Articles) Regulations 2008 (as promulgated through the UK 2006 Companies Act).

provides that "[s]ubject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company."[443] It appears that it is the shareholders through the company's articles of association that confer or delegate powers to the boards of directors in the UK.[444] To articulate the UK position further, Watson makes reference to the leading authorities in company law, Gower and Davies. These scholars explain that the authority of directors in the UK finds its source "from the shareholders through a process of delegation via the articles and not from a separate and free-standing grant of authority from the State."[445] It appears that UK company law is extremely driven by shareholders.[446]

The above position is similar to South Africa 1973 Companies Act.[447] Section 65(1) provides that "from date of incorporation" of the company as set out in its "certificate of incorporation", those who contributed to the preparation of the memorandum of incorporation "become members of the company, shall be a body corporate … capable of exercising all the functions of an incorporated company, and having perpetual succession …"[448] The "memorandum and articles" had a binding effect on the company as well as its members.[449] The presumption would be that the members each signed the memorandum and articles of association to acknowledge the terms thereof.[450] Morajane,[451] explains that the memorandum and articles of association are "constitutive documents of a company incorporated under the 1973 Companies Act."[452] She explains that these documents are deemed are considered to be statutory contracts emanating "from the Companies Act and common law".[453] Statutory contracts are onerous in nature as parties to these contracts are not bound by the reaching of consensus, but are bound by section 65(2) in this regard.[454] Essentially, by virtue of being "subscribers" to the

[443] Model Article 3.
[444] Watson *Journal of Business Law, Forthcoming* 2.
[445] Ibid. See also Gower: Principles of Modern Company Law, 11th Edition 2021.
[446] Ibid.
[447] Companies Act 61 of 1973.
[448] Section 65(1) 1973 Companies Act.
[449] Section 65(2) 1973 Companies Act.
[450] Ibid.
[451] Morajane "The binding effect of the constitutive documents of the 1973 and 2008 Companies Acts of South Africa" *Potchefstroom Electronic Journal ("PEJL")* PER Vol.3 n.1 Potchefstroom Jan 2010.
[452] Morajane *PEJL* 172/234.
[453] Morajane *PEJL* 173/234.
[454] Ibid.

constitutive documents, they are deemed to be bound by them "as if they had respectively signed" them.[455]

3.3.3. The roles, duties and powers of the practitioner

According to the Enterprises Act, the court may only grant an administration order in relation to a company if it is satisfied "(a) that the company is or is likely to become unable to pay its debts" and "(b) that the administration order is reasonably likely to achieve the purpose of administration".[456] The application for an administration order may be made by the company itself, the directors, or one or more creditors of the company.[457] This is similar to the provisions of section 129 and 131 of the South African Companies Act.

In terms of section 59(1) of the Enterprises Act, "[t]he administrator of a company may do anything necessary or expedient for the management of the affairs, business and property of the company". Moreover, the administrator of a company has the powers to remove or appoint a director of the company (whether or not to fill a vacancy).[458] Importantly, the Enterprises Act provides that "a company in administration or an officer of a company in administration may not exercise a management power without the consent of the administrator".[459]

Section 69 of the Enterprises Act makes it clear that, in the exercise of his or her functions, the administrator is acting as an agent of the company.[460] With respect to this role of the administrator, there is a clear alignment with the Australian model. As with the UK Model, in the exercise of his or her functions, the administrator acts as an agent of the company.

A huge difference nevertheless exists. Section 59(1) of the Enterprises Act provides that a company in administration or an officer of a company in administration may not exercise a management power without the consent of the administrator. This differs

[455] Ibid.
[456] Section 11 of the Enterprises Act.
[457] Section 12 of the Enterprises Act.
[458] Section 61 of the Enterprises Act.
[459] Underling added – own emphasis.
[460] See also schedule B1 paragraph 69 of the UK Insolvency Act.

from the Australian position but is similar to the South African corporate rescue model. In South Africa, section 137 of the Companies Act allows the board of directors to remain in place and act under the direction of the business rescue practitioner.

Kastrinou focuses on the role of directors in corporate rescue in France and the United Kingdom.[461] She makes reference to the United States' DIPmanagement process and rightfully notes that the US is a pioneer country that promotes entrepreneurship as a major component of the creation of wealth.[462] Quite different from the South African corporate rescue regime, Chapter 11 of the US Bankruptcy Code makes provision for the incumbent management to retain control of the company's management under the auspices of the bankruptcy court, "unless fraud or other misconduct has been committed by directors".[463]

In comparing the UK with the US, Kastrinuo writes that the UK has a long-standing tradition of apprehensiveness towards unfortunate debtors and DIP insolvency procedures. Notwithstanding this apprehension, UK provides for a DIP procedure alongside a procedure known as Company Voluntary Arrangements (CVAs).[464] In 2000, the UK introduced a DIP procedure which enables directors of a company to propose a voluntary arrangement and obtain an initial moratorium against legal proceedings involving the company.[465] According to Kastrinuo, this moratorium "is designed to facilitate the reorganisation of smaller companies".[466]

Chapter 2 of the 1986 UK Insolvency Act deals with the moratorium. It is provided that directors of the company may put a moratorium in place by filing the relevant documents in accordance with section A6.[467]

[461] Alexandra Kastrinuo "The Role of Directors in Corporate Rescue in France and the United Kingdom: An Overview'" 2015 NIBLeJ 25.
[462] Kastrinuo 2015 NIBLeJ 465.
[463] Kastrinuo 2015 NIBLeJ 465.
[464] Kastrinuo 2015 NIBLeJ 465.
[465] Section 1 of the 2000 UK Insolvency Act.
[466] See Kastrinuo 2015 NIBLeJ 465 footnote 13.
[467] Chapter 2, section A3 of the 1986 UK Insolvency Act.

Against the background of the UK discussion, a former member of the European Union (EU), I now turn to discuss the DIP model in the EU and its history prior to dealing with the United States of America (US).

3.3.4. The Debtor-in-Possession model in the European Union

Prior to law reforms, the UK had "3 possible statutory mechanisms available for corporate restructuring."[468] The three mechanisms are as follows, "a company voluntary arrangement (CVA), a scheme of arrangement and an administration."[469] It was recognised that there were limitations in the mechanisms of the "debt restructuring framework in the UK."[470]

In the UK corporate rescue framework, the CVA and scheme of arrangement mechanisms made provision for a DIP model.[471] These mechanisms ensure that management is not displaced so to be replaced by "an external insolvency practitioner (IP)."'[472] The pre-existing management prepares the restructuring plan which is then submitted to creditors.[473] CVAs have not been used often in the UK as they do not have a binding effect on "secured or preferential creditors".[474]

The administration procedure is "designed for ailing companies involving the appointment of an external administrator (IP) and the displacement of the board of directors and the existing management team in favour of the IP."[475] The administrator's mandate is the rescue of the business of the company, by "achieving a more advantageous realisation of the company's assets than could be achieved in a liquidation and making distributions to secured and potential creditors."[476]

---

[468] McCormack and Yee Wan "Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's restructuring and insolvency laws: opportunities and challenges" 2018 *Journal of Corporate Law Studies* 72.
[469] Ibid.
[470] Ibid.
[471] McCormack and Yee Wan 2018 *Journal of Corporate Law Studies* 73.
[472] Ibid.
[473] Ibid.
[474] Ibid.
[475] McCormack and Yee Wan 2018 *Journal of Corporate Law Studies* 75.
[476] Ibid.

McCormack and Yee Wan submit that the US Chapter 11 corporate restructure model is perceived "as pro-restructuring" for various reasons.[477] Firstly, the model is easily accessible to debtors who generally are required to "file a petition with the court disclosing certain financial and other information."[478] Moreover, a debtor need not obtain a "court order" to commence with the restructuring process nor is there are need for compliance with other burdensome requirements.[479] A noble aspect of the Chapter 11 model is that as soon as a petition is filed, there is "a worldwide moratorium on proceedings against the debtor or the debtor's assets."[480]

Secondly, a 'debtor in possession' system is made provision for which allows pre-existing management to "remain in control of the company's business rather than being displaced in favour of an external a manger or administrator."[481] It is only in limited instances that a trustee will be appointed by the Court to replace pre-existing management.[482] A third party called the 'examiner' may also be appointed through the Court for purposes of investigating and reporting on certain matters.[483]

Nsubuga[484] analysed the DIP model in EU insolvency and restructuring law, its evolution, and the latest iteration under Article 5 of Directive 2019/0123/EU.[485] The author also explored whether the DIP Model would be a good fit for the EU and a missed opportunity for the UK following Brexit.[486]

A key criticism of EU corporate insolvency and restructuring laws and procedures has been the lack of a DIP model, such as the one found in Chapter 11 of the US Bankruptcy Code.[487] This model provides for debtors (usually the current management/directors) to

[477] McCormack and Yee Wan 2018 *Journal of Corporate Law Studies* 79.
[478] Ibid.
[479] Ibid.
[480] Ibid.
[481] Ibid.
[482] Ibid.
[483] Ibid.
[484] Nsubuga "The Debtor-in-Possession model in the EU insolvency and restructuring framework – A domino effect?" 2022 *Journal of Business Law* 238-251 (accepted version of the paper) available at https://openaccess.city.ac.uk/id/eprint/31359/ (accessed 28 August 2024).
[485] Nsubuga 2022 *Journal of Business Law* 2.
[486] Ibid.
[487] Nsubuga 2022 *Journal of Business Law* 1.

be left in control of the debtor's business during insolvency restructuring proceedings.[488] The passing of Directive 2019/1023/EU on preventive restructuring frameworks (PRD) as a measure aimed to enhance the rescue culture within the EU, "has introduced a broader scope of the DIP model that may instigate a paradigm shift in the role and participation of the debtor in insolvency and restructuring proceedings across the EU".[489]

The DIP model bears several benefits. The key benefit is that "the debtor's existing management remain in control and running of the business".[490] Nsubuga adds that

> "[t]his comes with the benefit that existing directors' knowledge, expertise and network of business contracts concerning the debtor's business and financial affairs can continue without interruptions".[491]

When comparing efforts by member states in the harmonisation of the DIP model, Nsubuga observes that the UK 1986 Insolvency Act makes provision for debtors to "remain in possession of the business during corporate rescue processes, such as a scheme of arrangement and company voluntary agreements (CVAs)."[492] Nevertheless, the position differs "during administration proceedings".[493] Debtors "[do not] remain in possession as an external insolvency practitioner, such as an administrator, is appointed to replace the current management to oversee the management of the company's business and affairs."[494]

At the time of the drafting of Nsubuga's article, the UK had already introduced the Corporate Insolvency and Governance Bill ("CIGA Bill") for purposes of implementing further changes to the UK insolvency regime prior to Brexit on 31 December 2020:

> "Three permanent changes to UK insolvency and restructuring laws and processes were also introduced which include: (i) a new 'standalone' moratorium on creditor enforcement of claims against a company, (ii) a new flexible 'restructuring plan'

[488] Ibid.
[489] Ibid.
[490] Nsubuga 2022 *Journal of Business Law* 3.
[491] Ibid.
[492] Nsubuga 2022 *Journal of Business Law* 7.
[493] Ibid.
[494] Ibid.

> procedure and (iii) new restrictions on (Ipso facto) termination clauses on supply contracts."[495]

The CIGA Bill was actually published by the UK government on 20 May 2020, the purpose thereof being to provide businesses with increased flexibility and opportunities to continue trading during the COVID-19 pandemic.[496] This addresses the issues identified by Nsubuga. The CIGA Bill was passed into law on 25 June 2020,[497] and is referred to as the CIGA Act.[498] The CIGA Act implemented key insolvency and business measures aimed at supporting and steering businesses as well as the economy through the COVID-19 pandemic.[499]

A new "stand-alone moratorium procedure" has been introduced by the CIGA Act.[500] This procedure is available to companies facing financial distress.[501] The aim is to allow for attempts to "rescue … the company as a going concern."[502] This moratorium procedure epitomizes "a debtor-in-possession norm in that it is initiated by the current management/directors who, upon approval, remain in control and run the business with the moratorium offering protection from creditor enforcement actions."[503] As already alluded to by McCormack and Yee Wan. The old CVA model was not used often as it did not offer a moratorium against secured and preferent creditors.[504]

Directors of the financially distressed company may make applications to Court to utilise "for an initial period of 20 business days".[505] During this period, the directors "remain in charger and control of the business."[506] Albeit, the directors are required to work in collaboration with "a licensed IP" who monitors the process and "serves as an officer of the court."[507] The licensed IP monitors the affairs of the company with purpose of

---

[495] Ibid.
[496] Nsubuga 2022 *Journal of Business Law* 13.
[497] Corporate Insolvency and Governance Act 2020, Chapter 12.
[498] Nsubuga 2022 *Journal of Business Law* 14.
[499] Ibid.
[500] Ibid.
[501] Ibid.
[502] Ibid.
[503] Ibid.
[504] See footnote 425.
[505] Ibid.
[506] Ibid.
[507] Ibid.

formulating "a view as to whether, it remains likely that the moratorium will result in the rescue of the company as a going concern."[508] The licensed IP may approach the Court to seek guidance on various issues.[509] This includes ending the moratorium "once convinced that [it is] no longer likely to result in the rescue of the company as a going concern or, where the objectives of rescue have been achieved."[510]

According to Nsubuga, the new moratorium is advantageous as it is a process led by directors.[511] Moreover, "the initial period of 20 business days covered by [the moratorium] can be extended by directors for a further 20 business days with or without any creditor consent."[512] The extension may also be for a period of up to 12 months after having obtained "consent of pre-moratorium creditors or the court after 15 business days."[513]

Notwithstanding the fact that "the provisions of the new stand-alone moratorium" are not explicit in that they are "the new 'debtor-in-possession' model per se, they however, provide for the debtor to remain in control and in charge of the financially struggling company as rescue and restructuring attempts are undertaken by the debtor."[514] According to Nsubuga, once can argued that new moratorium is similar to "the provisions in Article 5(3) of the PRD" providing "for the DIP mechanism within EU insolvency and restructuring framework that the PRD seeks to implement across the EU."[515]

The CIGA Act further introduced Part 26A dealing with arrangements and reconstructions of companies in financial difficulties.[516] Section 901A(1) of the CIGA Act provides that Part 26A finds application in instances "where conditions A and B are met in relation to a company."[517] Condition A relates to an instance where "the company has

[508] Ibid.
[509] Ibid.
[510] Ibid.
[511] Nsubuga 2022 *Journal of Business Law* 15.
[512] Ibid.
[513] Ibid.
[514] Ibid.
[515] Ibid.
[516] Nsubuga 2022 *Journal of Business Law* 15.
[517] Section 190(A1) of the CIGA Act 2020.

encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern."[518] Condition B relates to a situation where "a compromise or arrangement is proposed between the company and its creditors or any class of them, or its members or any class of them and the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties [prevalent in condition A]."[519]

According to Nsubuga, CIGA 2020 has essentially introduced a 'new restructuring plan' "under part 26A of the Companies Act 2006, available to companies that have encountered or are likely to encounter financial difficulties that affect their ability to continue trading as a concern."[520] Nsubuga further explains that, the new Part 26A restructuring plan is to a certain extent similar to the scheme of arrangement that already exists under Part 26, however, there are two differences between the two procedures.[521]

Firstly, under the new Part 26A procedure, there exists no requirement on a debtor to demonstrate a state of insolvency, the requirement that exists is the presenting of evidence of actual or likely financial difficulties.[522] Secondly, the new Part 26A procedure introduces new provisions on creditor "cross-class cram down" which is a mechanism which was not previously available in the former Part 26 procedure.[523] The advantage of these provisions or this new mechanism is that the debtor is afforded an opportunity to hold in abeyance any issues or factors which may interfere with its restructuring plan.[524] Another advantage is that the debtor is afforded an opportunity to convince the court to sanction the approval of the proposed restructuring plan even in an instance where 75 percent of a voting creditor class has not voted in favour of the proposed plan as set out in section 901H.2 and section 901H.5. [525]

It is clear from the above that the UK did not miss the opportunity to incorporate the DIP model through a DRP following Brexit as it had already commenced with amending its

[518] CIGA Act 2020, section 901(2).
[519] Ibid.
[520] Nsubuga 2022 *Journal of Business Law* 15.
[521] Ibid.
[522] Ibid.
[523] Nsubuga 2022 *Journal of Business Law* 15 – 16.
[524] Nsubuga 2022 *Journal of Business Law* 16.
[525] Ibid.

laws prior to 31 December 2020. A concern noted by Nsubuga, which, in my view is prevalent in South African corporate insolvency law as well, is the following:

> "One of the key concerns over the EU and UK's insolvency model has been the reliance on the so-called 'practitioner-in-possession' model – where the current management is replaced by an IP in a formal insolvency setting … Yet once appointed, the IP, as an outsider, needs time to get acquainted with the debtor's business operations and state of affairs before making meaningful decisions."[526]

This includes decisions such as the best-suited rescue procedure when considering the debtor's restructuring needs or whether other rescue processes may be initiated alongside each other as viable exit routes.[527] As correctly pointed out by Nsubuga, it may take time to determine which route may lead to unnecessary costs and liquidations.[528] The scholar highlights that "[t]his is one of the concerns that the PRD under Article 5(2) seeks to address by giving the debtor, under a so-called 'debtor-in-possession' model, a chance to continue running the business as rescue attempts are undertaken".[529]

My views are aligned with those of Nsubuga, in that an over reliance on the "practitioner-in-possession" model may not be in the best interests of the company. Once an independent practitioner has been appointed, he or she may require some time to get acquainted with the business operations. As noted in my concern above, South Africa currently has a business rescue model endorsing a "practitioner-in-possession". This is counterproductive because the practitioner needs to acquaint him or herself with the business and operations of the company, this will require some time. Whereas if a DIP model is endorsed, the directors and existing management of the company can expeditiously device a plan to rescue the company and implement. This is so because they are well acquainted with the operations of the company. Debtors should be responsible for saving their own company. In my view, they will be more inclined to use all their skills and resources if they are presented with the opportunity. The practitioner

[526] Nsubuga 2022 *Journal of Business Law* 17.
[527] Ibid
[528] Ibid.
[529] Ibid.

can merely assume a supervisory role to ensure that directors / management (the debtors) are working toward resuscitating the company.

3.4. The United States of America

3.4.1. Overview

As mentioned, the US makes provision for a DIP model through the provisions found in Chapter 11 of the Bankruptcy Code. For purposes of understanding the US DIP model better and determining the lessons to be learned by South Africa, this part focuses on Chapter 11 of the Bankruptcy Code and related aspects such as the roles and duties of directors in the ordinary course of business and those of the business practitioner, which is called a trustee or examiner in the US.

The trustee is appointed by the Court in terms of section 1104(a)(2) of the US Bankruptcy Code. The trustee has investigative and managerial powers. The trustee's appointment is only in limited circumstances such as when the DIP seems incompetent and/or commits acts of misconduct. Once a trustee is appointed, he or she replaces the DIP by taking full management control of the company. The examiner on the other hand, is appointed in terms of section 1104(b) of the US Bankruptcy Code. Unlike the trustee, their appointment is not to replace the DIP in management of the company. Trustees are appointed to investigate the affairs of the company, prepare the requisite reports and disclose whatever necessary information to interested parties. The examiner essentially plays a supervisory role and ultimately assists in saving the company as a going concern. The examiner is appointed upon application to Court by interested parties. A similar procedure is followed for trustees.

The DIP model is envisaged through section 1107 of the US Bankruptcy Code which provides that debtors in possession will assume the rights and responsibilities of an appointed trustee. Essentially, debtors are permitted to remain in full management control of the company. This is one of the widely praised aspects of Chapter 11 of the US Bankruptcy Code.

3.4.2. The role and duties of directors outside of business rescue

In the US, the powers, roles and duties of directors are informed by various state laws, case law, and model rules drafted by the American Bar Association (ABA). The majority of public companies in the US are incorporated in the state of Delaware.[530] Various states found their legislation and interpretation on Delaware law, such as the Delaware General Corporation Law (DGCL).[531] In the guidance documents drafted by the ABA, it is recognised that States, in regulating corporations, find influence in "the Model Business Corporation Act and a model set of laws prepared by the American Bar Association."[532]

To set the atmosphere relating to directors of the company outside business rescue, State of Delaware Statutory Code[533] will first be discussed. This Code was "prepared by the Delaware Code Revisors and the editorial staff of Lexis Nexis in cooperation with the Division of Legislative Services of the General Assembly."[534]

Section 141(a) of the State of Delaware Statutory Code provides that "[t]he business and affairs of every corporation organised under [the] chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in [the] chapter or in its certificate of incorporation."[535]

In the Guide on Corporate Governance in the US, it is explained that the critical powers of directors are those relating to selecting the CEO as well as overseeing senior management's performance in executing the company's strategy and managing risk.[536]

---

[530] Gregory *et al* "Corporate governance and director's duties in the United States: Overview (Law stated as at 01 September 2021" 4 (https://law.stanford.edu/wp-content/uploads/2023/01/Corporate-Governance-and-Directors-Duties-in-the-United-States-Overview.pdf Accessed on: 28 August 2024). Hereinafter referred to as the "Guide".
[531] Ibid.
[532] Ibid.
[533] The Delaware Code Online. Title 8: Chapter 1. General Corporation Law (https://delcode.delaware.gov/title8/c001/sc04/ Accessed on: 10 November 2024).
[534] Ibid.
[535] Section 141 of the State of Delaware Statutory Code.
[536] Ibid.

The Model Business Corporation Act,[537] assists with setting out fiduciary duties / standards of liability for directors. In terms section 8.31 of the MBCA, directors may only be liable to the corporation or shareholders only if it is alleged that the director breached certain duties, which mirror fiduciary duties in the context of South Africa's corporate law.[538] The director will be held liable if he failed to act in good faith.[539] The director took a decision he "did not reasonably believe to be in the best interests of the corporation".[540] Alternatively, the director took a decision he or she "was not informed of to an extent [he or she] reasonably believed appropriate in the circumstances."[541] A director is also said to have acted in breach of his duties if he or she took a decision in which there was failure to exercise proper "objectivity" and "independence" and he should not have reasonably believed that his or her conduct was "in the best interests of the corporation" .[542] If a director failed to properly enquire into a matter and exercise proper oversight that "a reasonable attentive director" would exercise, he or she is said to have breached his duties.[543] It is a further breach of duty if a director received "financial benefit" which he or she was not entitled to or there was any other breach of his or her duties "to deal fairly with the corporation and its shareholders that is actionable under applicable law."[544]

The Guide on on Corporate Governance in the US summarises some of the director's fiduciary duties in the US. It provides that directors owe fiduciary duties of care and loyalty to the company and its shareholders.[545] Similar to many other jurisdictions, "[t]he duty of care requires directors to act with the degree of care that an ordinarily prudent person in a like position would use under similar circumstances".[546] The duty of care requires directors to act on an informed basis, following reasonable inquiry and

[537] 2019 Revision, 9 December 2016. (https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf Accessed on: 10 November 2024). Hereinafter "the MBCA".
[538] Section 8.31(a) of the MBCA.
[539] Section 8.31(2)(i) of the MBCA.
[540] Section 8.31(2)(ii))(A) of the MBCA.
[541] Section 8.31(2)(ii)(B) of the MBCA.
[542] Section 8.31(2)(iii) of the MBCA.
[543] Section 8.31(2)(iv) of the MBCA.
[544] Section 8.31(2)(v) of the MBCA.
[545] Guide 19.
[546] Guide 19.

deliberations.[547] It is also recognised that directors are allowed to rely on management and experts where it is reasonable to do so.[548]

In the US, directors owe a duly of loyalty to the company which requires them to act in good faith and in a manner that the director reasonably believes to be in the best interests of the company and its shareholders.[549] The duty to act in good faith constitutes a subsidiary element of the duty of loyalty.[550] Generally, the duty to act in good faith requires directors to act honestly and sincerely, in the best interest of the corporation, and in a manner that is not knowingly unlawful or contrary to public policy.[551]

3.4.3. The roles, duties and powers of the practitioner

Chapter 11 of the American Bankruptcy Code of 1978[552] deals with "reorganisation". Unlike the South African regime, Australia and the UK, nothing in the US Bankruptcy Code expressly points to the appointment of a practitioner or administrator during business rescue proceedings. Section 1104 of the US Bankruptcy Code nevertheless deals with the appointment of a trustee or examiner. It determines that following the commencement of the Chapter 11 case but prior to the plan being confirmed, an order shall be granted by the Court appointing a trustee upon request by interested parties.[553] The basis for granting such an order includes that "such appointment is in the interests of creditors, any security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor".[554]

In the event that the Court does not grant an order appointing a trustee, prior to confirmation of the plan, an order shall be granted by the Court appointing an examiner who will serve the purpose of investigating "any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the

[547] Ibid.
[548] Ibid.
[549] Ibid.
[550] Ibid.
[551] Ibid.
[552] Hereinafter referred to as "the US Bankruptcy Code".
[553] Section 1104(a)(2) of the US Bankruptcy Code.
[554] Section 1104(a)(2) of the US Bankruptcy Code.

affairs of the debtor of or by current or former management of the debtor."[555] Similar to the appointment of a trustee, the examiner is appointed upon request by interested parties.[556]

Section 1106 deals with the duties of trustees and examiners. Except where a court decides otherwise, the trustee has a duty to "investigate the acts, conduct, assets, liabilities, and financial conditions of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, any other matter relevant to the case or to the formulation of a plan".[557] As soon as possible thereafter, the trustee is required to file a statement on the investigation he or she has conducted.[558] Aspects to be covered in the statement include any fact ascertained pertaining to "fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the affairs of the debtors."[559] The statement may also include "cause[s] of action available to the estate." [560] The statement or its copy thereof may be transmitted to "any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates."[561] As soon as possible, the trustee must "file a plan" in line with section 1121, "file a report" explaining reasons for not filing a plan, alternatively "recommend conversion of the case to a case under chapter 7 or 13 of [the] title or dismissal of the case."[562]

Following confirmation of the plan, the trustee has a duty to file reports as and when necessary alternatively if ordered to do so by the Court.[563] The trustee has the power to operate the business of the debtor with the qualification that a Court may decide otherwise if someone with an interest in the matter requests such an order.[564]

[555] Section 1104(b) of the US Bankruptcy Code.
[556] Ibid.
[557] Section 1106(a)(3) of the US Bankruptcy Code.
[558] Section 1106(a)(4)(A) of the US Bankruptcy Code.
[559] Ibid.
[560] Ibid.
[561] Section 1106(a)(4)(B) of the US Bankruptcy Code.
[562] Section 1106(a)(5) of the US Bankruptcy Code.
[563] Section 1106(a)(7) of the US Bankruptcy Code.
[564] Section 1108 of the US Bankruptcy Code.

The examiner has the investigative powers of the trustee.[565] This includes the duty to file a statement of such investigation and thereafter transmit same to creditors and other interested parties.[566]

Section 1107 deals with rights, powers, and duties of DIPs. Section 1107(a) vests debtors in possession with all the rights of an appointed trustee.[567] However, there are limitations.[568] The debtors in possession do not usurp investigative powers as set out above and they do not have a right to compensation. The debtors in possession essentially retain the managerial powers of the business, i.e. they operate the business. This is the trustee's right / power as articulated in section 1108 of the US Bankruptcy Code. The debtors in possession also have a right to file a plan.[569] This may be done when filing the "petition commencing a voluntary case"' alternatively "at any time in a voluntary case or an involuntary case".[570] Debtors in possession in the US are even responsible for execution of the plan in compliance with "any orders of the court".[571]

The US position is different from the South Africa model in various aspects. Firstly, the US allows debtors to 'remain in control' of the company under business rescue as if they are the business rescue practitioner in the South African context. Secondly, the debtors in possession are permitted to file a plan to save the company. Thirdly, the debtors in possession have the powers to execute the plan. Section 140 of the Companies Act is clear in that such powers remain with the business rescue practitioner. Of course, section 140(1)(b) allows for the practitioner to delegate his powers. Management control of the company ought not to be delegated including aspects relating to the preparation and execution of the plan.

Miller[572] considers the fiduciary duties of directors of a corporation under Chapter 11 of the US Bankruptcy Code. Similar to the case of an insolvent corporation independent

[565] Section 1106(b) of the US Bankruptcy Code.
[566] Ibid.
[567] Section 1107(a) of the US Bankruptcy Code.
[568] Ibid.
[569] Section 1121 of the US Bankruptcy Code.
[570] Ibid.
[571] Section 1142(a) of the US Bankruptcy Code.
[572] Miller "Corporate Governance in Chapter 11: The Fiduciary Relationship between Directors and Stockholders of Solvent and Insolvent Corporations" 1993 *Seton Hall Law Review* 1467.

of bankruptcy, the directors of a Chapter 11 bankruptcy case owe fiduciary duties to a multitude of constituents usually involved in the case.[573] Miller explains that, "[u]pon filing of a chapter 11 case, the board of directors, through the management of the debtor corporation, continues to operate the business and manage the assets as a DIP".[574] Accordingly, the DIP acts as if it is a trustee under the US Bankruptcy Code.[575] Therefore, the DIP will have the primary responsibility to execute the administration process and protect the debtor's estate unless a trustee is appointed.[576] The DIP remains a debtor and, as such, is subject to the normal rules of corporate governance – limited by the provisions of the Bankruptcy Code.[577]

As indicated above, a trustee is appointed in terms of section 1104(a)(2) of the US Bankruptcy Code. A trustee is appointed "as an alternative to debtor-in-possession control in chapter 11."[578] Trustees report to the bankruptcy courts and serve as "neutral administrators".[579] In their roles, trustees deal with interests of various shareholders and stakeholders "without any disturbing influence".[580] The trustee's roles include the preparation of the reorganisation plan and the execution thereof.[581] The fact that the trustee is neutral during the reorganisation process is advantage they come with.[582] Recognising that the DIP model and trustee model both present advantages and disadvantages, Korch highlights that the US favours a DIP model as emphasis is placed on "the old management's familiarity with company and the relevant market."[583] In my view, this is the correct approach to rescue proceedings. The individuals with the requisite knowledge, skill and expertise in that company and industry should be responsible for resuscitating the company. Korch adds that the emphasis on the DIP model is also that there is no need for a transition which is crucial in rescue proceedings

[573] Miller 1993 *Seton Hall Law Review* 1485.
[574] Miller 1993 *Seton Hall Law Review* 1486.
[575] Ibid.
[576] Ibid.
[577] Ibid.
[578] Korch "Chapter 11, Corporate Governance and the role of Examiners" 2018 *Emory Bankruptcy Developments Journal* Vol. 34 427.
[579] Korch 2018 *Emory Bankruptcy Developments Journal* 427.
[580] Ibid.
[581] Ibid.
[582] Korch 2018 *Emory Bankruptcy Developments Journal* 428.
[583] Ibid.

as there is limited time.[584] Further to this, appointing a trustee appears leads to delays in "the filing for bankruptcy" and this has "adverse effects on the prospects of a successful reorganisation."[585] A unique feature about bankruptcy in the US generally is that, it is not viewed as "failure and inability of the management."[586] Hence, in my view, a DIP model is strongly endorsed in the US.

Primack recognises that with Chapter 11 cases, "a debtor is given a chance to reorganize his troubled estate rather than to liquidate it outright."[587] The debtors remain "in possession of the assets of the estate and continue… to operate the business."[588] Primack explains that the trustee is appointed by the court only in extraordinary situations "to take over the duties of the debtor and run the estate."[589] On the other hand, an alternative to appointing a trustee is "the appointment of an examiner".[590] Appointing an examiner does not "replace the debtor's management; rather, [examiners] investigate matters according to the court's decision on the scope of their mandate and report the findings to the court."[591] Prior to confirmation of a reorganisation plan, the Court can appoint the examiner "upon request of a party or the U.S. Trustee after notice and hearing."[592] The Court must be of the view that "an investigation is appropriate."[593] Examiners are appointed in situations where there is failure by management in running the company, alternatively there is non-compliance "with corporate governance standards in the bankruptcy procedure, namely in the case of fraud, dishonesty, misconduct, or other irregularities in the management."[594] The appointment of an examiner ought to be "in the interest of the creditors."[595]

---

584 Ibid.
585 Ibid.
586 Ibid.
587 Primack "Confusion and Solution: Chapter 11 Bankruptcy Trustee's standard of care for personal liability" 2002 *William and Mary Law Review* Vol. 43: 1297.
588 Primack *William and Mary Law Review* 1297.
589 Ibid.
590 Korch 2018 *Emory Bankruptcy Developments Journal* 428.
591 Korch 2018 *Emory Bankruptcy Developments Journal* 434.
592 Ibid.
593 Ibid.
594 Ibid.
595 Ibid.

In addition to the duties of the trustee set out above, they represent the estate, can institute proceeding to sue on behalf of the company and can be sued.[596] Operating the business of the debtor is the most important duty of the trustee.[597] However, the Bankruptcy Code does not set out aspects relating liabilities of the trustee.[598] The Courts have however considered the duties of corporate directors in setting the standard of liability for trustees.[599] Primack is of the view that the duties set out in the Code imply that the trustee has a role to "represent the estate for the benefit of the various parties in interest."[600] As a result, the trustee ought to carry out his investigative and disclosure role in such a manner that interested parties "will be able to protect their interests in the estate."[601] It appears that Primack is of the view that the standard of liability for trustees will mirror the standard for corporate directors as can be gleaned from their fiduciary duties.[602] These include the "duty of care, duty of loyalty … duty of disclosure" as well as "the duties of loyalty".[603] In my view, the corporate governance limitations of debtors in possession are the same as those faced by the trustee. That is, the general expectation of carrying out fiduciary duties owed to the company such as acting in good faith and with the necessary degree of care and loyalty.

Pottow calls the US Chapter 11 Bankruptcy Code remarkable for strongly endorsing the DIP model.[604] Pottow explains that "[u]nder the DIP model, no trustee is appointed, the debtor remains in control of its property and its estate, vesting in most – but importantly, not all – of the trustee's responsibilities."[605] According to Pottow it is rare in the US that a trustee will be appointing replacing the DIP.[606] The US model differs from other jurisdictions such as the UK where directors are divested of their management powers

[596] Primack *William and Mary Law Review* 1300.
[597] Ibid.
[598] Ibid.
[599] Ibid.
[600] Primack *William and Mary Law Review* 1301.
[601] Ibid.
[602] Ibid.
[603] Ibid.
[604] Pottow "Fiduciary Principles in Bankruptcy and Insolvency Law" 2019 The Oxford Handbook of Fiduciary Law. Accessible through the University of Michigan Law School Scholarship Repository: https://repository.law.umich.edu/book_chapters/194/ (Accessed on: 13 November 2024).
[605] Pottow 207.
[606] Ibid.

immediately upon filing a case for administration.[607] Of course, this submission is in relation to the old UK model. The current model supports a DIP model akin to the US.

Pottow confirms that ultimately Chapter 11 trustees are considered to be "fiduciaries" owing the "traditional obligations of care and loyalty to the estate and its creditors."[608] As indicated above, DIPs are also limited in their conduct during the restructuring process. Pottow has identified three (3) mechanisms within which DIPs can be limited. The first one touches on the corporate governance limitations and the triggering of the appointment of the trustee.[609] A DIP may be removed for "incompetence and misconduct."[610] This amounts to breaches of fiduciary duties of care and loyalty to interested parties and the company.[611] For example, failure to actively pursue a case of outstanding financial statements by the DIP will trigger the appointment of the trustee.[612] As such, the appointment of the trustee becomes necessary when the DIP fails in their role of saving the company as a going concern and ensuring a better return for all interested parties. The second mechanism to monitor the DIP is through "the Official Committee of Unsecured Creditors."[613] This Committee may at any time enquire into the affairs and records of the DIP.[614] The third and last mechanism is through the bankruptcy court.[615] This court is tasked with approving various transactions when a company is under a restructuring phase.[616]

In his comparative study on the Nigerian rescue model, OC-Chukwuocha considers the corporate rescue models in the UK and the US.[617] OC-Chukwuocha, explains that the US and the UK make provision for insolvency regimes supporting and encouraging the

---

[607] Ibid.
[608] Pottow 210 – 211.
[609] Pottow 218.
[610] Ibid.
[611] Ibid.
[612] Pottow 219.
[613] Ibid.
[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] OC-Chukwuocha "Corporate Rescue Models in the United Kingdom and the United States: A Comparative Study with Nigeria" International Journal of Comparative Law and Legal Philosophy (IJOCLLEP) Vol 2, No.3 (2020): https://www.nigerianjournalsonline.com/index.php/IJOCLLEP/article/view/978/962 (accessed on: 05 November 2024).

rescue of companies in financial difficulty in instances where the companies have viable businesses.[618] This is so because both the US and the UK have insolvency laws which place emphasis on financial rehabilitation for what we consider to be financially distressed companies in South Africa.[619] It is recorded that the US Chapter 11 solidifies the main objective of US bankruptcy law for corporate debtors which is the preservation and protection of struggling businesses by encouraging a financial restructuring which is binding on all parties.[620] Importantly, Chapter 11 provides distressed companies with the opportunity to remain in business with their existing management who can reassess the company's business plan and renegotiate a restructuring of the company's capital structure which will ultimately be binding on all existing creditors and shareholders.[621] Chapter 11 of the US bankruptcy code is a debtor friendly legislation as it allows existing management to continue running the affairs of the struggling company as opposed to the appointment of a third party by a court.[622] Moreover, the existing management is tasked with the preparation of a reorganisation plan and presents same to creditors and shareholders.[623]

OC-Chukwuocha rightfully explains that Chapter 11 of the US Bankruptcy Code is based on a DIP model.[624] He explains that DIP "refers to the status of a business that retains control of its assets and continues to operate while under the chapter 11 bankruptcy reorganization process."[625] The regime under chapter 11 is unique in that the business is actually filling for protection from creditors while it is in the process of reorganising its affairs.[626] The DIP manages the business in the ordinary course, however, it requires the approval of the court for the sale of substantial assets.[627] The supporting principles behind a DIP model is the view that the existing management of a company in financial distress are best suited to manage the process of rehabilitating the

[618] OC-Chukwuocha *IJOCLLEP* 16.
[619] Ibid.
[620] Ibid.
[621] Ibid.
[622] Ibid.
[623] Ibid.
[624] OC-Chukwuocha *IJOCLLEP* 17.
[625] Ibid.
[626] Ibid.
[627] Ibid.

company. [628] As already pointed by Nsubuga, "[t]he debtor in- possession is already familiar with the business, understands the intrigues of the business, it had been managing the company before the bankruptcy was filed, making it the best party to conduct its operations during the reorganization."[629] The DIP is a fiduciary of the creditors and assumes " to act in the best interest of the estate, and to refrain from acting in a manner which could damage the estate, or hinder a successful reorganization." The fiduciary duties that a debtor owes to the estate during a Chapter 11 process, are similar "to the duties that the officers and directors of a solvent corporation owe their shareholders outside bankruptcy."[630] An trustee is only be appointed for purposes of taking over the management of the company in cases of fraud, dishonesty alternatively gross mismanagement.[631] The position in the US is that "simple mismanagement is not a sufficient reason for an appointment."[632] A trustee's appointment should be considered "as an exception rather than the rule"[633].

Section 1104 of the US Bankruptcy Code provides that the alternative to the above process is the appointment of an examiner by a court who will have powers to investigate any allegation of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity pertaining to the management of the company's affairs as opposed to an outside trustee.[634] This process retains the existing management structures of the company and they continue to operate together with the functions that the court assigns to the examiner.[635]

The management aspect is where the UK administration procedure differs from the US DIP model. With regard to the UK, an administration procedure is followed wherein "the rescue of a company is achieved by placing its management in the hands of an external insolvency practitioner known as an 'administrator'.[636] The appointed administrator

[628] Ibid.
[629] Ibid.
[630] Ibid.
[631] Ibid.
[632] Ibid.
[633] Ibid.
[634] Ibid.
[635] Ibid.
[636] Ibid.

assumes full management control over the company in substitution for its board and pre-existing management.[637] Unlike the US model, the administrator's appointment displaces the existing management of the financially distressed company.[638] This is similar to the South African corporate rescue model and likewise the administration must be a suitably qualified person or insolvency practitioner.[639]

OC-Chukwuocha points out a disadvantage with the US DIP model. He explains that because existing management will seek to avoid losing their jobs, they will opt to have the company's business to continue notwithstanding the state of insolvency the company finds itself in.[640] OC-Chukwuocha explains that, "Chapter 11 appears to be anti-takeover; it is centred on ensuring the survival of the existing business unlike the provision under the UK where business rescue sometimes may take the form of take over. Under UK administration, one of the emphases of a business rescue regime is that even if the business cannot be restored to a solvent and profitable status, the return to creditors in the long-run will be much higher."[641]

As will be gleaned from my recommendations in Chapter 4 of this dissertation, my views are aligned with those of Nsubuga and OC-Chukwuocha in that the existing management of the financially distressed company is best suited to implement strategies to resuscitate the company. The US DIP model seems like a more attractive model to be adopted by the South African corporate rescue model. The UK administration procedure is similar to the current South African corporate rescue model. For example, the outcomes of both models is that even though the financially distressed company is not restored to a profitable position, there will be a better return for creditors. This is one of the outcomes of the South African business rescue model as articulated by Hockly.

[637] Ibid.
[638] Ibid.
[639] Ibid.
[640] OC-Chukwuocha *IJOCLLEP* 18.
[641] Ibid.

3.5. Discussion

3.5.1. General observations

The Australian corporate rescue model is more rigorous than the South African model as directors do not remain in place but still exercise management functions under the direction of the administrator. In Australia, the board directors essentially ceases to exist as soon as the company is placed under administration.

Most of the insolvency provisions in the UK are similar to those in South Africa. For example, directors can still exercise some control over the financially distressed company but under the instructions or upon the direction of the business rescue practitioner in South Africa or the administrator in the UK. However, the UK model has now significantly moved to a DIP model through the CIGA Act 2020. The CVA model is now akin to the US DIP model.

The US model differs significantly from the South African model and brings a fresh perspective on different ways in which an insolvency regime can operate. The US model has a strong DIP system as the debtor company remains in control of the management of the affairs of the company. An independent practitioner is not necessarily appointed as the debtor company is ultimately responsible for resuscitating itself.

3.5.2. The role and duties of directors outside of business rescue

The management roles and fiduciary roles for all three selected jurisdictions and South Africa are quite similar. In almost all jurisdictions the first role, power or duty set out is that the business and affairs of the company ought to be managed by or under the direction of the board of directors. In South Africa, this is confirmed in section 66 of the 2008 Companies Act. In Australia, the relevant section is section 189A(2) of the Corporations Act. In the UK, this role is not clearly set out. In the US, the authority is set out in section 141(a) of the Statutory Code of Delaware, which most states rely on.

The UK position is not clearly set out because the UK Companies Act does not provide directors with management powers. The shareholders of the company delegate

management powers to directors through articles of association.[642] In the absence of articles, Model Article 3 confers the management powers.[643] This is similar to the position in South Africa's 1973 Companies Act where the memorandum and articles would bind members.

The fiduciary duties of duty of care and skill, the duty to avoid a conflict of interest, and the duty to act in good faith, are prevalent in all three jurisdictions including South Africa.

3.5.3. The roles, duties and powers of the practitioner

Similar to sections 129 and 131 of the South African Companies Act, all three jurisdictions make provision for the appointment of a practitioner. In the US, reference is made to the appointment of a trustee or examiner in section 1104 of the US Bankruptcy Code. The manner in which business rescue proceedings commence in the UK and the appointment of the administrator is similar to the South African model, i.e. a court order or voluntary process. However, in the UK, an administrator is appointed. The Australian model also envisages a voluntary process or a court process.

The Australian model is firmer than the South African model. Section 198G(5) of the Corporations Act essentially provides that, if there is a conflict between the power of the external administrator and that of a director during administration, the external administrator's function or power prevails. In South Africa, the business rescue practitioner is clothed with broad powers, but the directors of the financially distressed company still have a say in the affairs of the company. The Australian model is firmer as it does not make room for a lot of role players when a company is under a restructuring process. This assists with avoiding issues of conflict between the directors of the company and the administrator. In South Africa however, our legislation does not have a similar provision to Australia's section 198G(5). Instead, our Companies Act conflates duties and powers of different role player in saving a company under business rescue. Issues of interpretation arise as to which powers does the practitioner have that directors of the company do not seem to have. Due to the open-endedness of rescue provisions in the Companies Act, directors of the company under business rescue

[642] See footnote 465. Watson *Journal of Business Law, Forthcoming* 2.
[643] See footnote 466. Watson *Journal of Business Law, Forthcoming* 2.

remain a vital organ of the company and are expected to keep the company running. Directors have a duty to assist the practitioner, provide him or her with the necessary information from time to time and may exercise functions if delegated to them by the practitioner.

Moreover, the case law discussed – such as the *Tegeta* case – has demonstrated that South African directors may still perform certain acts to protect the company, such as challenging the appointment of the business rescue practitioner. In fact, one may argue that, as an organ of the company, there are certain duties that they must execute independently. However, the South African model – unlike the US – does not provide directors with similar management and control over the company as South Africa does not have a DIP model in place. The UK model used to be similar to South Africa in this regard. However, it is now more like the US model as it has adopted a DIP model through the CIGA 2020 Act. seems to be working toward adopting a DIP model.

3.5.4. Advantages and disadvantages of a debtor-in-possession model

The various discussions above have provided some glimpses of advantages and disadvantages of a DIP model.

The first advantage as articulated in section 1107(a) of the US Bankruptcy Code is that debtors remain in control of management of the company under rescue.[644] The second advantage is that the debtors in possession are responsible preparing and executive the rescue plan. This is recognised in 1107(a) of the US Bankruptcy Code and section 901H.2 and 901H.5 of the CIGA Act 2020. The third advantage, which has recently been introduced in the UK corporate rescue model is the stand-alone moratorium which suspends claims by creditors against the company. This is largely endorsed by Nsuguba and OC-Chukwuocha The fourth advantage of a DIP model in my view is that, it allows those who are well acquainted with the operations of the company and who are actually experts in those industries to devices plans to resuscitate the company. These views are also shared by Nsubuga and OC-Chukwuocha.

[644] See footnote 612. Section 117(a) of the US Bankruptcy Code.

A disadvantage of the DIP model, in my view would arise from a situation identified by Pottow.[645] This is when the DIP becomes complacent to the extent that they can be deemed to be incompetent. Another disadvantage, is when there are acts of misconduct by DIPs leading to breaches of their fiduciaries such as the duty of care, loyalty and good faith. In this regard, it is prudent to also add the duty of disclosure of certain issues affecting the viability of the company as interested parties which include creditors, shareholders and stakeholders would be expecting a better return than in liquidation. As explained by Pottow, such misconduct and/or incompetence will trigger the appointment of a trustee.[646]

This advantage of a DIP model can however be managed through the appointment of the examiner as indicated by the .[647] The examiner will essentially monitor the actions of the DIP, investigate any irregularities and have them reported. The examiner will essentially play a supervisory role whilst allowing the debtors an opportunity still to have full management control of the company. In my view, this is the most sensible approach to dealing with rescue / restructuring processes. Allow debtors to 'identify their mistakes and fix them' whilst they are being supervised to ensure that their actions accord with their fiduciary duties and corporate governance requirements.

A DIP model not only provides directors with the benefit of remaining in full management control of the company. The model also provides some financing benefits. It is inevitable that creditors will be reluctant to extend credit to a company that is financially distressed.

Gurrea-Martinez[648] highlights that:

> "A situation of insolvency hinders a firm's ability to obtain external finance. As a result, viable but financial distressed firms might be unable to keep operating and pursuing

[645] See footnote 653. Pottow 210 – 211.
[646] See footnote 653. Pottow 210 – 211.
[647] See footnote 635. Korch 2018 *Emory Bankruptcy Developments Journal* 428.
[648] Gurrea-Martinez "Debtor-in-Possession financing in reorganisation procedures: Regulatory models and proposals for reform" 27 June 2023, available at https://doi.org/10.1007/s40804-023-00289-z (accessed on 03 August 2024).

> value-creating projects. Consequently, value can be destroyed for debtors, creditors, employees, suppliers and society as a whole."[649]

In order to address this issue, several jurisdictions have adopted a system of rescue or DIP financing which seeks to encourage lenders to extend credit to financially distressed firms.[650] This is done by providing DIP lenders with various forms of priority that typically ranges from a basic administrative expense priority to the possibility of becoming a junior alternatively, in some jurisdictions, even a senior secured creditor.[651]

Gurrea-Martinez makes policy recommendations for the adoption of DIP financing provisions. In his view, "[t]he inability of viable but insolvent firms to obtain new financing can destroy value for debtors, creditors and society as a whole".[652] He also recommends that "countries should ideally adopt a strong system of DIP financing that can provide DIP lenders with several forms of priority".[653]

Regarding the models relating to DIP financing, Australia, the UK and South Africa have been identified as not having DIP financing regimes, alternatively as having weak DIP financing regimes with hybrid procedures which include administrative expense priority and security interest over unencumbered property.[654] The US, on the other hand, has been identified as having a strong DIP financing regime.[655]

In my view, South Africa is a country that must adopt a strong system of DIP financing that can provide DIP lenders with several forms of priority. The South African insolvency regime currently does not provide sufficient avenues for financially distressed companies to resuscitate themselves. As emphasised with reference to scholarship, the inability of viable but insolvent firms to obtain new financing can destroy value for debtors, creditors and society as a whole.

---

649 Gurrea-Martinez 556.
650 Ibid.
651 Ibid.
652 Ibid.
653 Gurrea-Martinez 574.
654 Gurrea-Martinez 559.
655 Ibid.

3.5.5. Lessons to be learned by South Africa

The foreign jurisdictions discussed above have demonstrated how business rescue proceedings are dealt with elsewhere. Through the Corporations Act, Australia follows a riding regime similar to South Africa, i.e. the administrator takes full management control of the company under business rescue. However, as identified by Harris, Australia's voluntary administration procedure provides for "a flexible procedure" allowing the company to restructure and ensure a better return for creditors.[656]

The UK and US advocate for even more flexible approaches. As explained by Nsubuga, the UK CIGA Act 2020 has introduced "a new flexible 'restructuring plan'".[657] The provisions of the CIGA Act are similar to those of the US Bankruptcy Code Chapter 11. The US is well known for its liberalism especially in matters of bankruptcy. Unlike other countries globally, bankruptcy is not shunned upon.

The CIGA Act 2020 and the US Bankruptcy in particular, allow debtors to remain in full management control of the financially distressed company. The debtors are then tasked with working towards efforts to resuscitate the company. What is unique about these jurisdictions is that the debtors are in fact tasked with the duty of preparing the reorganisation plan which is ordinary called the 'business rescue plan' in South Africa.

Moreover, the UK and US corporate rescue regime are clear in that as soon as business rescue proceedings commence, a moratorium is automatically triggered in that creditors' claims against the company are suspended. This is by far one of the most applaudable aspects of the South African corporate rescue model, the 2008 Companies Act has introduced a similar moratorium to allow debtors companies a 'breathing space' to allow them to organise their affairs. However, there are lessons South Africa can borrow from the UK, the US and the UK.

The first lesson to be learned in my view is the adoption of a more flexible and liberal approach in dealing with issues of insolvency. Debtor companies should not necessary be 'passioned' for having 'failed'. Instead, the approach should be to assist them in

[656] See footnote 419. Harris *Isnolv JL* 88.
[657] See footnote 423. Nsubuga 2022 *Journal of Business Law* 7.

resuscitating the financially distressed company. This is a lesson to be learned from all three jurisdictions, more so, the UK and the US.

The second lesson to be learned by South Africa is allowing for the debtors / directors of the financially distressed company to remain in full management control of the company under business rescue. The US through the US Bankruptcy Code is a pioneer of this approach, which in my view is the most sensible and effective approach of dealing with insolvency issues. The UK CIGA Act 2020 has reaffirmed the UK's position in this regard. South Africa can limit the powers of the business rescue practitioner in sections 137 and 140 of the Companies by removing provisions which divest the directors and pre-existing management of their powers and functions.

The third and last lesson which South Africa can learn in my view is affording the directors and pre-existing management with the opportunity to prepare, adopt and execute the business rescue plan aimed at saving the company. This in my view, will make directors and pre-existing management enthusiastic about efforts to save the company they have served for years.

3.6. Conclusion

In respect of the Australian and South African rescue models, it is clear that there are some similarities and differences. Section 438B of the Corporations Act makes it clear that the primary duty of directors of a company under administration is to assist the administrator, a duty that also befalls South African directors.

However, the main difference in the two corporate rescue models is that, in Australia, the administrator takes full control of the company and there is little to no room for existing management or the board of directors to have any dealings with, and for, the company. In South Africa, existing management remain in place and are not necessarily replaced. This dilemma is what may lead to a conflict between the roles and duties of the business rescue practitioner and those of the directors of the company in distress.

Perhaps a lesson to be learned from the Australian model is that the South African business rescue practitioner ought to take full control of the company leaving no concerns or questions hanging in the air relating to the role and duties of the existing

board of directors. It is imperative to remember the envisaged outcome in appointing the business rescue practitioner in the first place, i.e. to resuscitate and rescue the business. In my view, the business rescue practitioner should be able to fulfil this enormous task without much interference from the directors of the financially distressed company.

Having considered the UK corporate rescue model, it is evident that it is to a certain extent similar to the Australian model in that it provides for a system where an administrator takes full control, which includes managerial control, of the company under administration. However, the UK framework differs from the administration system of Australia and the rescue process of South Africa as, akin to the US, it recognises DIPs. This system essentially makes provision for directors of the company to remain in control of the company and obtain a moratorium for the company where they propose a voluntary arrangement.

Nsubuga,Gurrea-Martinez and many other scholars show that there are some lessons that South Africa can learn from the DIP model as it assists with protecting the value of the company under business rescue. Directors retain management control of the company with the inevitable result that they can approach credit lenders and request for financing to assist in operating the company as a going concern. Moreover, there is a moratorium on claims of creditors against the company. The lesson to be learned from the UK is the value of adoption of a more flexible approach. This is the case also with the US.

Having considered the legislative prescripts explored above, it is clear that the US Model differs from the South African and Australian Model. The US Model makes provision for DIPs.

As indicated by Miller and akin to the South African position, directors of a company in chapter 11 proceedings have fiduciary duties owed to numerous persons usually involved in the case.[658] However, the difference is that, upon filing for a chapter 11, the board of directors, through the management of the debtor corporation, continues to

[658] See footnote 618. Miller 1993 *Seton Hall Law Review* 1486.

operate the business and manage the assets as a DIP. The DIP undertakes a role as if it is a trustee under the US Bankruptcy Code. As such, the DIP will have the primary responsibility pertaining to the administration and protection of the debtor's estate unless a trustee is appointed. As noted by Miller, the DIP remains a debtor and as such is subject to the normal rules of corporate governance as limited by the provisions of the Bankruptcy Code. The lessons to be learned by South Africa is allowing debtors to remain in control of the company and continue to owe fiduciary duties to the company.

Following the above discussions on the comparative research conducted, the next chapter that follows sets out the overall conclusions of this study and the recommendations for the South Africa insolvency law and corporate rescue model.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1. Overview

The aim of this dissertation was to identify the issues in the South African corporate rescue regime that may arise when considering the powers, duties and role of the business rescue practitioner versus those of the directors of the company. An objective was to determine whether there are lessons to be learned from foreign jurisdictions such as the Australia, the UK and the US.

The study considered the interactions between the role and duties of the business rescue practitioner and those of the board of directors of a company. The aim thereof was to investigate what limitations are imposed on directors of a company by the new corporate rescue procedure and to what extent. The case law, such as the *Tegeta* and *Ragavan* case, proved that this conflict exists. Section 66 read with sections 137 and 140 in particular present some challenges.

In reflecting on the above chapters and discussions therein, it is prudent to reflect on the contentious research questions posed above and determine if they persist, i.e. the conflict between the roles and duties of directors and those of the business rescue practitioner and the extent of the limitations of power of directors.

4.2. Summary of chapters

Having regard to chapter 1, it is clear that the management and control of a company lies with its board of directors. However, when a company is financially distressed and under business rescue, this changes. Essentially, a limitation is placed on section 66 by Chapter 6 of the 2008 Companies Act.

Chapter 2 demonstrated that a conflict exits and the business rescue practitioner is vested with broad powers. Section 140 in particular gives the business rescue practitioner full management and control of the company. Directors of the company are divested of their ordinary duties. However, can still perform some subject to delegation of duties by the business rescue practitioner. Any performance of duties must be authorised by the practitioner. To the extent that directors perform their duties in

accordance with the instructions of the practitioner, they are relived from their fiduciary duties.

Chapter 3 provided a comparative overview of the corporate rescue regimes of selected foreign jurisdictions. Some jurisdictions have similar provisions to the South African model, Australia in particular. The UK and the US have more flexible approaches which can be adopted to improve the South African process, such as the DIP model.

4.3. Discussion

The new South African corporate rescue regime brought about by the 2008 Companies Act introduced the position of the business rescue practitioner. In accordance with section 140 of the Act and case law discussed above, the business rescue practitioner takes over the full management control of the company whereas the governance functions related to the board as an organ of the financially distressed company remains with the board of directors of the company. With regard to South African insolvency law, as soon as the business rescue proceedings commence and to the extent that directors comply with their management functions to the company in accordance with the authorisation and supervision of the business rescue practitioner, the directors are relieved of their fiduciary duties (section 76) and liabilities (section 77).

As it became clear from the foreign jurisdictions discussed above, the South African position differs from these jurisdictions. In Australia for example, a business rescue practitioner is referred to as an administrator overseeing a voluntary administration procedure. In the US, there is a trustee but there is no provision dealing with the appointment of a practitioner or an administrator. It appears that the duties and powers of directors during administration or restructure proceedings are not necessarily an issue for Australia, the UK and the US. In Australia, management functions of “other officers” – directors in this regard – are suspended completely.

The US and the UK have DIP processes. With this process, the board of directors of the distressed company or corporation, through the management of the company, continue to operate the business and manage the assets of the company. The directors in this regard act as though they are trustees of the company and are responsible for the administration and protection of the debtor corporation’s estate. The DIP procedure

gained prominence through Chapter 11 of the US Bankruptcy Code. From research conducted by Miller, it has also been observed that directors of a corporation in a chapter 11 bankruptcy case still owe fiduciary duties to the various stakeholders with an interest in the corporation. This position differs from the South African regime as it provides that, if the directors are acting under authorisation and supervision of the business rescue practitioner, they may no longer owe their section 76 fiduciary duties to the financially distressed company.

The South African concept that directors may no longer owe fiduciary duties to a financially distressed company, is problematic especially as the conduct of the directors are linked to reasonableness. In my view, directors should at all material times owe fiduciary duties to a company – similar to how the US model deals with the issue of fiduciary duties. A question that arises with the current South African construct is what happens in situations where a reasonable person in such a director's shoes should not have exercised a certain management function as it is to the detriment of the company? This notwithstanding that such a director acted under the authorisation and supervision of the business rescue practitioner. This may raise difficulties in the future with the protection of creditors' interests and section 77 of the 2008 Companies Act will be triggered.

A concern that further arises with the above construct is that one can rightfully argue that perhaps directors of a financially distressed company under business rescue in South Africa are essentially redundant and no longer serve the company. Therefore, in balancing the duties, powers and/or roles of the business rescue practitioner and those of directors, a DIP sort of approach must be adopted. Directors in the South African context should have the opportunity to still manage and protect the assets of the debtor / financially distressed company. Perhaps as opposed to placing too strict of a limitation as to management functions of directors, a DIP approach can be adopted where directors work on a collaborative effort with the business rescue practitioner to resuscitate the company. In my view, the risk that South African companies currently face with the approach to business rescue proceedings as articulated in Chapter 6 of the 2008 Companies Act is that directors are most likely to adopt a relaxed approach to saving the company. This may be exacerbated by the fact that they have been divested of all their management control of the company and ultimately should they simply

cooperate with the business rescue practitioner they no longer owe fiduciary duties to the financially distressed company. Gurrea-Martinez correctly pointed out the risk with a much stricter corporate rescue approach, i.e. it may destroy value or the financially distressed company's ability to eventually be in a viable position again. This is an important consideration in a country such as South Africa, with a struggling economy.

Notwithstanding the above, it is prudent to point out that the South African model also possesses some good aspects which other jurisdictions can borrow from to improve their corporate rescue models. The South African model aims to create a balance between functions of various role players in resuscitating a company under business rescue. Section 137 in particular creates an opportunity for directors to at least participate in saving the company. However, one cannot ignore the conflict that arise from the provisions of section 66 and 140 of the 2008 Companies Act.

4.4. Conclusion

Although South African insolvency law does provide good provisions for companies under business rescue, I am of the considered view that there is a need for reform of our laws, i.e. amendment of the Companies Act 2008 to allow debtor companies to be more involved in resuscitating the financially distressed companies similarly to the DIP model made provision for in Chapter 11 of the US Bankruptcy Code. Essentially, the business rescue practitioner ought not to have such broad powers similarly to the US and the UK.

In light of the findings in this study, research conducted and discussions traversed, my recommendations are for the South African legislature to consider amending the Companies Act 2008 to allow for a DIP model similar to the one in the US and that envisaged in the UK. Section 140 of the 2008 Companies Act, can be amended to remove the provision stipulating that the business rescue practitioner "has full management control of the company in substitution of its board or pre-existing management." Section 140 can be amended to provide that debtor company remains in full management control of the company and the business rescue practitioner can assume an examiner role similar to the US by supervising the operations of the company under business rescue.

BIBLIOGRAPHY

Articles

Anderson "Viewing the proposed South African business rescue provisions from an Australian perspective" 2008 *PELJ* 1

Edelman "The evolution of bankruptcy insolvency laws and the case of the deed of company arrangement" 2019 *Lloyd's Maritime and Commercial Law Quarterly* 578

Gurrea-Martinez "Debtor-in-Possession financing in reorganisation procedures: regulatory models and proposals for reform" 27 June 2023, available at https://doi.org/ 10.1007/s40804-023-00289-z (accessed on 03 August 2024)

Harris "Corporate group insolvencies: Charting the past, present and future of 'pooling' arrangement" 2007 *Insolvency Law Journal ("Insolv JL")* Vol.15 78

Kastrinuo "The Role of Directors in Corporate Rescue in France and the United Kingdom: An Overview" 2015 Nottingham Insolvency and Business Law e-Journal ("*NIBLeJ")* 464

Korch "Chapter 11, Corporate Governance and the role of Examiners" 2018 *Emory Bankruptcy Developments Journal* Vol. 34

McCormack and Yee Wan "Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's restructuring and insolvency laws: opportunities and challenges" 2018 *Journal of Corporate Law Studies* 72

Miller "Corporate governance in chapter 11: The fiduciary relationship between directors and stockholders of solvent and insolvent corporations" 1993 *Seton Hall Law Review* 1467

Morajane "The binding effect of the constitutive documents of the 1973 and 2008 Companies Acts of South Africa" *Potchefstroom Electronic Journal ("PEJL*") PER Vol.3 n.1 Potchefstroom Jan 2010

Mpofu "Exploring the role of the business rescue practitioner in rescuing a financially distressed company" 2018 Corporate Board: Role, Duties & Composition Volume 14, Issue 2

Nsubuga "The Debtor-in-Possession model in the EU insolvency and restructuring framework – A domino effect?" 2022 *Journal of Business Law* 238, accepted version of the paper available at https://openaccess.city.ac.uk/id/eprint/31359/ (accessed on 28 August 2024)

OC-Chukwuocha "Corporate Rescue Models in the United Kingdom and the United States: A Comparative Study with Nigeria" International Journal of Comparative Law and Legal

Philosophy (IJOCLLEP) Vol 2, No.3 (2020): https://www.nigerianjournalsonline.com /index.php/IJOCLLEP/article/view/978/962 (accessed on: 05 November 2024)

Osode "Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment" 2015 Penn State Journal of Law & International Affairs Volume 4 No.1

Pottow "Fiduciary Principles in Bankruptcy and Insolvency Law" 2019 The Oxford Handbook of Fiduciary Law. Accessible through the University of Michigan Law School Scholarship Repository: https://repository.law.umich.edu/book_chapters/194/ (Accessed on: 13 November 2024)

Primack "Confusion and Solution: Chapter 11 Bankruptcy Trustee's standard of care for personal liability" 2002 *William and Mary Law Review* Vol. 43: 1297

Shem and Mupa "The Role of Stakeholder Engagement in Business Rescue: A Legal and Strategic Perspective" 2024 *Iconic Research and Engineering Journals ("IRE Journals")* Volume 8 Issue 4

Watson "The Significance of the Source of the Powers of Boards of Directors in UK Company Law" 2010 *Journal of Business Law, Forthcoming* 2

Books

Boraine *et al Meskin's Insolvency Law* (last updated June 2024 – service issue 62) LexisNexis: South Africa

Delport *Henochsberg on the Companies Act 71 of 2008* (last updated October 2024 – service issue 35) LexisNexis: South Africa

Gower *Principles of Modern Company Law*, 11th Edition 2001.

Case law

Absa Bank Limited v Marotex (Pty) Ltd and Others [2016] ZAGPPHC 1190

Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and other [2017] 1 All SA 862 (WCC)

Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc and Another 2022 (4) SA 205 (ML)

Islandsite Investments (Pty) Ltd and another v Knoop NO and others 2023 JDR 1443 (FB)

Knoop NO and Another v Islandsite Investments 180 (Pty) Ltd and others 2023 JDR 4065 (FB)

Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV (Markus Johannes Jooste and another as third parties) [2021] 4 All SA 810 (WCC)Limbouris and others v Du Toit and NO and others [2024] JOL 66238 (WCC).

Monyela N.O and Others v Tayob N.O and Others (2023/117272) [2024] ZAGPPHC 86 (2 February 2024)

NDPP v Sharma and Others 2022 (1) SACR 289

Organisation Undoing Tax Abuse and another v Myeni and others [2020] 3 All SA 578 (GP)

Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others 2022 (3) SA 512 (GJ).

Ragavan and Others v Optimum Coal Terminal (Pty) Ltd (In Business Rescue) and Others 2023 (4) SA 78 (SCA)

Tayob and Another v Shiva Uranium (Pty) Ltd and Others [2020] ZASCA 162

Tegeta Exploration and Resources (Pty) Ltd and Others v Knoop and Others 2023 JDR 478 (GP)

Van Den Heerden N.O and Others v Van Tonder [2021] ZAGP JHC 486 (20 April 2021).

Internet Sources

Naidoo "Business rescue practices in South Africa: An explorative view" 2018 *Journal of Economic and Financial Sciences* Vol.11 No 1. (https://jefjournal.org.za/index.php/jef/article/view/188/293 Accessed on: 13 November 2024)

Legislation

South Africa

Companies Act 61 of 1973

Companies Act 71 of 2008

Financial Institutions (Protection of Funds) Act 28 of 2001.

GNR. 48 of 12 January 1965: Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (as amended from 12 April 2024)

Australia

Corporations Act 50 of 2001

United Kingdom

Companies Act of 2006

Corporate Insolvency and Governance Act 2020, Chapter 12.

Enterprises Act of 2002

Enterprises Act of 2016

Insolvency Act of 1986

Insolvency Act of 2000

The Companies (Model Articles) Regulations 2008 (as promulgated through the UK 2006 Companies Act)

United States of America

Model Business Corporation Act 2019 Revision, 9 December 2016 (https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.authcheckdam.pdf Accessed on: 10 November 2024)

US Bankruptcy Code

Statutory Codes and Guides

Gregory et al "Corporate governance and director's duties in the United States: Overview (Law stated as at 01 September 2021" 4 (https://law.stanford.edu/wp-content/uploads/2023/01/Corporate-Governance-and-Directors-Duties-in-the-United-States-Overview.pdf Accessed on: 28 August 2024)

The Delaware Code Online. Title 8: Chapter 1. General Corporation Law (https://delcode.delaware.gov/title8/c001/sc04/ Accessed on: 10 November 2024)