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**BUSINESS RESCUE IN SOUTH AFRICA: AN EXPLORATION OF BUSINESS
RESCUE AND THE ROLE OF THE BUSINESS RESCUE PRACTITIONER**

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Declaration

I, Tasmiya Essop Patel, do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Durban on this 12th day of April 2018.

Signature: -----

Chapter 1: Introduction

1. Background and Introduction

Levenstein¹ aptly referred to the economic climate in the world and specifically in South Africa by explaining that “the downturn in world economies has placed businesses under severe pressure in the last few years. In South Africa, the knock-on effect has been felt, with several businesses going out of business, filing for liquidation and with many turning to South Africa’s business rescue procedure as a possible lifeline.”² Chapter 6 of the Companies Act 71 of 2008 (hereinafter referred to as the 2008 Act) introduced a new corporate rescue model to assist companies in South Africa who are suffering from financial difficulty. Section 128(1)(b)(i) to (iii) of the 2008 Act provides a definition for business rescue.³ From the reading of this section, the main aim of business rescue is to ensure that the company “...[continues] in existence on a solvent basis, or if it is not possible for the company to do 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;...”⁴

The reasoning underpinning the need for a corporate rescue regime that works is because of the role that companies play in the success of our economy.⁵ Business rescue provides companies who are in financial distress with an opportunity to be rescued which will contribute to the wellbeing of the communities that they operate in as well as the economy.⁶ This is important for South Africa which is known for having a high unemployment rate, which is further affected by the closure of companies and

¹ ‘South Africa’s Business Rescue Regime – Firing on all cylinders?’ available at <https://www.werksmans.com/wp-content/uploads/2016/12/061998-WERKSMANS-dec-insol-world.pdf>, accessed on 25 March 2017.

² Ibid.

³ Section 128(1)(b)(i) to (iii) of the 2008 Act.

⁴ See s 128(1)(b)(iii) of the 2008 Act and E Levenstein supra note 1.

⁵ A Loubser ‘Judicial management as a business rescue procedure in South African corporate law’ *SA Mercantile Law Journal* (2004) 16(2) 137.

⁶ A Loubser ‘Business Rescue in South Africa: A procedure in search of a home?’ *Comparative and International Law Journal of Southern Africa* (2007) 40(1) 152.

employees subsequently losing their jobs.⁷ In December 2016, the unemployment rate was 26.5%.⁸ This was a slight decrease from the unemployment rate in March 2016 which was 27.1%.⁹

The 2008 Act which came into effect on 1 May 2011, provides a 'lifeboat' to South African businesses. However, because of the liquidation culture in South Africa, many companies still find themselves being liquidated.¹⁰ In 2015, 1962 companies were liquidated.¹¹ This number decreased slightly in 2016, with 1934 companies liquidated.¹² As at the end of February 2017, the number of companies in liquidation was 24.4% lower than the number of companies that were in liquidation at the end of February 2016.¹³ These statistics shows a shift from a liquidation culture to companies' beginning to rely more on business rescue as a rescue method.¹⁴

Prior to the coming into force of the 2008 Act, companies could be rescued by judicial management.¹⁵ Judicial management was introduced into South African law in 1926 by the Companies Act 46 of 1926 and later regulated by the Companies Act 61 of 1973 (hereinafter referred to as the 1973 Act).¹⁶ For various reasons, which will be briefly explored in this dissertation, judicial management was unable to achieve the purpose that the legislators intended.¹⁷ The main purpose of judicial management was to assist companies who found themselves facing financial difficulty because of mismanagement or other difficulties continue to remain in existence¹⁸. This task would

⁷ A. Loubser *Some comparative aspects of corporate rescue in South African company law* (unpublished Doctor of Laws thesis, University of South Africa, 2010), 1.

⁸ Quarterly Labour Force Survey' available at <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2016.pdf>, accessed on 25 March 2017.

⁹ Ibid.

¹⁰ D.A. Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (part 1)' *SA Mercantile Law Journal* (2004) 16(2) 246.

¹¹ 'Statistics of liquidations and insolvencies (Preliminary) available at <http://www.statssa.gov.za/publications/P0043/P0043September2016.pdf> accessed on 14 October 2017.

¹² 'Statistics of liquidations and insolvencies (preliminary)' available at <http://www.statssa.gov.za/publications/P0043/P0043February2017.pdf>, accessed on 25 March 2017.

¹³ Ibid.

¹⁴ 'An explorative view of business rescue practitioner in SA', available at <http://mailimages.vibrantmedia.co.za/2016/unisa/meditaripapers/Patel.pdf>, accessed on 5 April 2017.

¹⁵ JJ Henning 'Judicial management and corporate rescues in South Africa' *Journal for Juridical Science* 1992 17(1) 91.

¹⁶ Ibid.

¹⁷ D.A. Burdette supra note 10 at 241

¹⁸ JJ Henning supra note 15 at 92.

be done by a judicial manager who would be appointed to run the company.¹⁹ Judicial management however was not received well amongst companies and is described as a dismal failure by many writers.²⁰ A few of the key reasons surrounding the failure of judicial management are the following: judicial management was an extraordinary remedy that was only available in certain circumstances²¹; the judicial management process focused on protecting the creditors of the business and ensuring that they get payment, as opposed to protecting the business itself²²; the lack of control and proper regulation over the appointment of judicial managers²³. a company could have only been placed under judicial management with by a court which led to expensive court proceedings²⁴; and the strict test that had be met in order for provisional and final judicial management orders to be granted, which made it difficult for companies to utilise this regime²⁵. All of these reasons, which will be discussed in this dissertation, contributed to judicial management failing and the need to for a replacement regime to be introduced.

On the other hand, business rescue has been well received, with many companies relying on business rescue proceedings to assist them continue as a successful concern.²⁶ Business rescue has provided companies with an opportunity to be placed under business rescue and to obtain the benefit of the *moratorium*,²⁷ which will help the company be rescued without having to worry about creditors and their claims.²⁸ A company can be placed into business rescue in the following two ways: by a resolution adopted by a companies' board of directors in terms of s 129 of the 2008 Act; or by a court application by affected persons (which is defined in s 128(a) of the 2008 Act) in

¹⁹ See s 430 and 432 of the 2008 Act.

²⁰ See JJ Henning *supra* note 15 at 92; A, Loubser *supra* note 7 at 42-43; GM, Museta *The Development of Business Rescue in South African Law* (unpublished LLM thesis, University of Pretoria, 2011) 16; D.A. Burdette *supra* note 10 at 241; R Bradstreet 'The new business rescue: will creditors sink or swim' *South African Law Journal* (2011) 128(2) 354.

²¹ D.A. Burdette *supra* note 10 at 248; A, Loubser *supra* note 7 at 42-43; GM, Museta *supra* note 20 at 16.

²² P, Kloppers 'Judicial Management - A Corporate Rescue Mechanism in Need of Reform' *Stellenbosch Law Review* (1999) 10(3) 426.

²³ *Ibid* 424.

²⁴ P, Kloppers 'Judicial Management Reform – Steps to Initiate a Business Rescue' *South African Mercantile Law Journal* (2001) 13(3) 370.

²⁵ GM, Museta *supra* note 20 at 17. See paragraph 2.2.4 above for a discussion on a "reasonable probability".

²⁶ D.A. Burdette *supra* note 10 at 246.

²⁷ Section 128(1)(b)(ii) of the 2008 Act.

²⁸ E Levenstein *supra* note 1.

terms of s 131 of the 2008 Act.²⁹ Once a company is placed into business rescue, either by a resolution or by a court order, an independent person will be appointed as a business rescue practitioner, either by the board of directors of the company or by a court, to oversee the process³⁰.

However, business rescue proceedings are not always successful in rescuing a company. As per the latest statistics released by the Companies and Intellectual Properties Commission (hereinafter referred to as CIPC), more than half the number of business rescue applications brought during the period of 1 May 2011 and 30 June 2016 were unsuccessful.³¹ Only 1119 out of a total of 2244 companies which brought business rescue applications during that period were still actively in business rescue.³² In light of these statistics, even though encouraging, it is important to consider why more than half the number of business rescue applications brought have been unsuccessful.

It has been identified that the success rate of business rescue as a rescue regime is largely dependent on the person administering it.³³ Business rescue practitioners need to be able to carry out their duties efficiently and effectively. The duties of business rescue practitioners are set out in s 140 of the 2008 Act.³⁴ The main duty of a business rescue practitioner is to take control of the management of the company,³⁵ which involves the business rescue practitioner investigating "...the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued."³⁶ of the company to determine whether or not there is reasonable prospect of the company being rescued.³⁷ The business rescue practitioner thereafter has the key task of ensuring

²⁹ Sections 129 and 131 of the 2008 Act.

³⁰ Section 129(3)(b) of the 2008 Act.

³¹ 'Status of Business Rescue Proceedings in South Africa, June 2016', available at [http://www.cipc.co.za/files/9214/7920/4187/Status of Business Rescue in South Africa June 2016 version1.0.pdf](http://www.cipc.co.za/files/9214/7920/4187/Status%20of%20Business%20Rescue%20in%20South%20Africa%20June%202016%20version1.0.pdf), accessed on 5 April 2017.

³² Ibid.

³³ R Bradstreet 'The leak in the chapter 6 lifeboat: inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' *SA Mercantile Law Journal* (2010) 22(2) 201.

³⁴ See s 140 of the 2008 Act.

³⁵ Section 140 of the 2008 Act.

³⁶ Section 141(1) of the 2008 Act.

³⁷ Section 141 of the 2008 Act.

that a sound business rescue plan is developed and implemented to rescue the company.³⁸

The 2008 Act and the Companies Regulations 2011 (hereinafter referred to as the Regulations) regulates business rescue practitioners and the qualifications required for a person to be appointed as a business rescue practitioner.³⁹ There has been debate on whether the appointment process provided for in s 138(1) of the 2008 Act sufficiently regulates the appointment of suitably qualified people.⁴⁰ It has been suggested that there is a need for a clearer regulation of business rescue practitioners, which appears to be lacking in both the 2008 Act the Regulations.⁴¹ As business rescue practitioners are essentially responsible for the rehabilitation of a company it is important that they are adequately qualified to undertake this important task. The role and regulation of business rescue practitioners need to be considered bearing in mind the pivotal role that they play in successfully rescuing companies.

2. Rationale

The rehabilitation of companies is essential for the socio-economic wellbeing of South Africa.⁴² Based on the statistics published by CIPC⁴³, it is evident that business rescue has not achieved what the legislature intended by the introduction of Chapter 6 of the 2008 Act, which is for companies to be rescued.⁴⁴ Due to the integral role that business rescue practitioners play in the success of business rescue proceedings, the failure of

³⁸ Section 140(1)(d)(i)-(ii) of the 2008 Act. It is important to bear in mind that in terms of s 128(1)(b)(iii) of the 2008 Act a company can be rescued by business rescue even if the main aim of the business rescue plan is not to ensure the continued existence of the company. As subsection (1)(b)(iii) of the 2008 Act makes provision for a business rescue plan that will either ensure that the business continues to exist or the rescue will provide "*a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company*";...". See s 128(1)(b)(iii) of the 2008 Act.

³⁹ See Regulation 126 and s 138(1)(a) to (f) of the 2008 Act. This aspect will be discussed in detail in chapter 4 of this dissertation.

⁴⁰ See M, Pretorius, 'Tasks and activities of the business rescue practitioner: a strategy as practice approach' *South African Business Review* (2013) 17(3) 2 and M, Vanderstraeten, 'Business Rescue: Feature' *Without Prejudice* (2016) 16(7) 14.

⁴¹ Section 138(1) of the 2008 Act and Regulation 126. See C, Dick, *The appointment and regulation of business rescue practitioners in South Africa: A comparative study* (unpublished LLM thesis, University of Johannesburg, 2015) 12 and P, J Veldhuizen, 'Regulation and control of business-rescue practitioners: is there a suitable legal framework' *Business Tax and Company Law Quarterly* (2014) 6(4) 29.

⁴² A Loubser supra note 6 at 152.

⁴³ Supra note 31.

⁴⁴ See paragraph 1 of chapter 1 of this dissertation.

many business rescue proceedings can be attributed to business rescue practitioners.⁴⁵ It is important for an appointed business rescue practitioner to be suitably qualified to carry out its duties and for suitable regulation processes to be in place to ensure that they carry out their duties accordingly.⁴⁶

In these circumstances, the purpose of this dissertation is to explore business rescue proceedings with specific focus on the regulation of the appointment of business rescue practitioners in terms of both the 2008 Act and the Regulations, as well as the new procedure introduced by CIPC in Notice 49 of 2017 titled “Transitional Period of Conditional Licenses” (hereinafter referred to as Notice 49).⁴⁷ This will provide insight into the regulatory control mechanisms over the appointment of business rescue practitioners which can affect the success of business rescue proceedings.

3. Research questions

In order to evaluate the research problem identified above, this dissertation will focus on the following research questions:

1. How did judicial management work and what led to the introduction of business rescue in South Africa?
2. What is business rescue and how can a company be placed into business rescue?
3. The role of the business rescue practitioner?
4. How is the business rescue practitioner appointed? Are the criteria adequate?

⁴⁵ T, Naidoo *Business Rescue in South Africa: an exploration of the views of business rescue practitioners* (unpublished research report for the Degree of Master of Commerce, 2016) 26.

⁴⁶ Section 138(1) of the 2008 Act provides some level of regulation over who can be appointed as a business rescue practitioner by empowering CIPC to accredit certain professional bodies as well as to license people as business rescue practitioners. This will be discussed in detail in chapter 4 of this dissertation.

⁴⁷ Notice 49 of 2017 *Transitional Period of Conditional Licenses* by CIPC.

4. Literature Review

The preservation of companies is key to the overall success of the communities that they are in as they are integral parts of the communities in which they operate.⁴⁸ The success of companies will also prevent job losses which is key in a developing country like South Africa.⁴⁹ Business rescue will also assist in achieving other goals that South Africa, as a developing country has set for itself.⁵⁰ One of these goals is Black Economic Empowerment ("BEE").⁵¹ BEE has resulted in many companies been run by people who are entering businesses for the first time and are without the proper skills.⁵² The effective rescue of such a company who finds itself facing financially difficulty will achieve the goals set by BEE and will also be advantageous to the economy of the community in which it operates.⁵³

A new corporate rescue regime was introduced in South Africa by Chapter 6 of the 2008 Act, to assist companies who are financially distressed.⁵⁴ Business rescue provides distressed companies with temporary relief to allow for their rehabilitation.⁵⁵ Business rescue was introduced to replace the previous regime of judicial management.⁵⁶ Judicial management is seen as a process that was more concerned with acting in the interest of creditors as opposed to acting in the interests of companies.⁵⁷ Judicial management is understood to have followed a "creditor-friendly insolvency system".⁵⁸ Due to this system used, many creditors opted for liquidation proceedings which would result in immediate payment for them, as opposed to preserving the company through the use of judicial management⁵⁹ This was identified by Bradstreet⁶⁰ as being one of the problems with judicial management.⁶¹ He referred

⁴⁸ A Loubser supra note 5 at 137.

⁴⁹ A Loubser supra note 6 at 152.

⁵⁰ Ibid.

⁵¹ Ibid 153.

⁵² Ibid 152.

⁵³ Ibid 153.

⁵⁴ S Conradie, C Lamprecht 'Business Rescue: How can its success be evaluated a company level?' *South African Business Review* 2015 19(3) 1.

⁵⁵ R Bradstreet supra note 33 at 198.

⁵⁶ R Bradstreet supra note 20 at 353.

⁵⁷ R Bradstreet supra note 33 at 197.

⁵⁸ A Loubser supra note 6 at 157.

⁵⁹ Ibid 157.

⁶⁰ R Bradstreet supra note 20 at 354.

⁶¹ Ibid.

to the words of Pierre Vernimmen who said that judicial management “sets the reimbursement of creditors as the main target of the bankruptcy process”.⁶² This resulted in the introduction of business rescue which follows a debtor friendly system.⁶³

This shift to a debtor friendly system attempts to balance the interests of all the stakeholders of a company, as well as the company itself.⁶⁴ With this shift in systems, business rescue proceedings are now utilised more by ailing companies.⁶⁵ Burdette⁶⁶ argued that because of the failure of judicial management, our government placed a lot of emphasis on protecting businesses and jobs, which ultimately led to the introduction of business rescue.⁶⁷ From the reading of s 128(1)(b)(iii) of the 2008 Act which defines business rescue, it is clear that there are two objectives of business rescue.⁶⁸ The first objective of business rescue is for the continuation of the company “...on a solvent basis,...”⁶⁹ and the second and alternative objective, is for business rescue to obtain “...a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;...”⁷⁰

Due to the impact that companies have on communities, employment and poverty levels, it is important to consider the effectiveness of the business rescue regime. It has been highlighted that there are no specific evaluation criteria against which the success of business rescue can be assessed against.⁷¹ Conradie and Lamprecht⁷² referred to the words of H. James Harrington to stress the importance of the need for a method to test the success of business rescue.⁷³ H. James Harrington said that “measurement is the first step that leads to control and eventually to improvement. If

⁶² Ibid.

⁶³ R Bradstreet supra note 33 at 198.

⁶⁴ Ibid.

⁶⁵ A Loubser supra note 6 at 157. See also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kylami) (Pty) Ltd and Others; Farm Bothasfontein (Kylami) (Pty) Ltd v Kylami Events and Exhibitions (Pty) Ltd and others* 2012 (3) SA 273 (GSJ) 438 at para 12.

⁶⁶ D.A. Burdette supra note 10 at 241.

⁶⁷ Ibid.

⁶⁸ Section 128(1)(b)(iii) of the 2008 Act. See E Levenstein, ‘Getting clever with business rescue’ *Without Prejudice* (2012) 12(7) 30.

⁶⁹ Section 128(1)(b)(iii) of the 2008 Act.

⁷⁰ Section 128(1)(b)(iii) of the 2008 Act.

⁷¹ S Conradie, C Lamprecht supra note 54 at 1.

⁷² Ibid.

⁷³ Ibid.

you can't measure something, you can't understand it. If you can't understand it, you can't control it. If you can't control it, you can't improve it".⁷⁴ This reflects the reason behind this dissertation, which is to explore business rescue and the persons who is essential to ensuring the success of business rescue proceedings, the business rescue practitioner.⁷⁵

The business rescue plan prepared and implemented by an appointed business rescue practitioner has to achieve either of the two purposes of business rescue.⁷⁶ From this, it is evident that the success of business rescue proceedings are largely dependent on the business rescue practitioners' ability to rescue the company.⁷⁷ The business rescue practitioner is given extensive powers in s 140 of the 2008 Act⁷⁸ and has been described as being "an overseer, a facilitator, supervisor and manager during the business rescue period."⁷⁹ It is therefore critical to the success of business rescue proceedings to ensure that the business rescue practitioners that are appointed to manage business rescue proceedings have the necessary qualifications to manage the process with integrity and skills.⁸⁰ The qualifications of a business rescue practitioner refers to their competency levels, which are their skills and ability to hold the office.⁸¹ An incompetent business rescue practitioner may lead to "maladministration, unnecessary over-servicing and the burdening of the increased compensation by the business rescue practitioner, to the detriment of affected persons".⁸² The lack of statutory regulation regulating the qualifications of judicial managers under judicial management was one of the problems with the old regime.⁸³ To avoid a similar situation, s 138 of the 2008 Act sets out the qualifications required for a person to be appointed as a business rescue practitioner⁸⁴, and Regulations 126 provides further guidelines on the appointment process.

Section 138(1)(a) of the 2008 Act requires a person to be "...a member in good

⁷⁴ Ibid.

⁷⁵ T, Naidoo supra note 45 at 4.

⁷⁶ Section 128(1)(b)(iii) of the 2008 Act.

⁷⁷ R Papaya supra note 77 at 29.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ R Bradstreet supra note 33 at 204.

⁸¹ Ibid.

⁸² P J Veldhuizen supra note 41 at 28.

⁸³ R Bradstreet supra note 33 at 204.

⁸⁴ Papaya, R supra note 77 at 30.

standing of a profession subject to regulation by a regulatory authority..."⁸⁵ that must be accredited by CIPC⁸⁶. In addition to this, CIPC is also empowered to license a person as a business rescue practitioner.⁸⁷ Section 138 of the 2008 Act thus deals with the qualifications required in a broad manner and ultimately only ascertains two aspects: the trustworthiness of the business rescue practitioner and the absence of a conflict of interest between the company and the business rescue practitioner.⁸⁸ Bradstreet⁸⁹ was of the view that that these two aspects will not guarantee that a business rescue practitioner will have the skills required to carry out its powers and functions.⁹⁰ The skills and abilities that are required of a member in a profession might not be the skills and abilities there are necessary or sufficient for a person undertaking to carry out the role of a business rescue practitioner.⁹¹

The Regulations however has provided further clarity on the qualifications that business rescue practitioners are required to meet.⁹² Section 126(1)(a) of the Regulations provides that CIPC must consider the qualifications and experience that are required for a person to be a member of a specific profession, as well as that professions ability to discipline its members.⁹³ However, what will happen in a situation when the member is no longer in good standing in their profession, and who will then bear the onus of informing CIPC of this information.⁹⁴ This can lead to incompetent business rescue practitioners managing business rescue proceedings.⁹⁵ In line with this, Veldhuizen⁹⁶ considered the role of CIPC in the regulation process and whether CIPC can be regarded as sufficient regulation.⁹⁷ Veldhuizen⁹⁸ referred to the words of Calitz J A who said that effective regulatory bodies need "adequate resources and requires members who are properly skilled and capable to perform their relevant duties."⁹⁹ and thus argued in favour of the need for additional oversight of the business

⁸⁵ Section 138(1)(a) of the 2008 Act.

⁸⁶ R Bradstreet supra note 33 at 204.

⁸⁷ Section 138(1)(b) of the 2008 Act.

⁸⁸ R Bradstreet supra note 33 at 205.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ T, Naidoo supra note 45 at 15 and R Bradstreet supra note 33 at 205.

⁹² R Bradstreet supra note 33 at 205.

⁹³ Ibid 204.

⁹⁴ Papaya, R supra note 77 at 30.

⁹⁵ P.J Veldhuizen supra note 41 at 29.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

rescue industry and the business rescue practitioner.¹⁰⁰ This raises the question of whether there is a need to establish a separate independent body to regulate business rescue practitioners.¹⁰¹ Papaya¹⁰² was of this view and said that there is a need for a clear accreditation body to be set up to regulate the business rescue profession.¹⁰³

Since May 2017, CIPC has introduced changes to the appointment process in Notice 30 of 2017 (hereinafter referred to as Notice 30) and later in Notice 49. The new appointment process which will be explored in this dissertation required compliance by "legal, accounting or business management"¹⁰⁴ professional bodies as well as members of "...juristic persons created by an Act of Parliament"¹⁰⁵ before 1 October 2017. This new appointment process can be seen as an attempt to have greater control over the appointment of business rescue practitioners, who will be licensed through their membership to a professional body or juristic person.¹⁰⁶ However, as this process is still new, its effectiveness will only be able to be determined once CIPC has accredited the relevant professional bodies and juristic persons.

5. Research Methodology

To answer the research questions identified above, this dissertation will make use of a qualitative method of research. This dissertation will be a purely desktop method of research. Business rescue was introduced in South Africa by law itself, being the 2008 Act, which governs business rescue proceedings. This dissertation will thus refer to the vast array of literature available which relates to the research questions. I will also refer to textbooks, journal articles, academic papers and case law. Considering the research method that will be used, this dissertation will not give rise to any ethical problems.

¹⁰⁰ Ibid.

¹⁰¹ Papaya, R supra note 77 at 30.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Supra note 47.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

6. Outline of chapters

This dissertation will be divided into 4 chapters. Chapter 1 is the present chapter which comprises of the background, the research questions, the rationale, the literature review, the research methodology, and the keys terms referred to.

Chapter 2 will provide a foundation to this dissertation by briefly exploring the reasons surrounding the failure of judicial management. Chapter 3 will introduce the new regime of business rescue by examining the business rescue process under Chapter 6 of the 2008 Act. Chapter 4 will explore the business rescue practitioners' role in business rescue proceedings and the regulation of the appointment of business rescue practitioners.

7. Key Terms:

Business rescue; business rescue practitioner; company, judicial management; liquidation; *moratorium*.

Chapter 2: Judicial management

1. Introduction and background

Before the model of business rescue was introduced in the 2008 Act, the only formal process available to assist distressed companies was judicial management¹⁰⁷. It has been said that South Africa's legal system was one of the first few legal systems to introduce the model of judicial management.¹⁰⁸ The process of judicial management was first introduced by the Companies Act 46 of 1926 (hereinafter referred to as the 1926 Act).¹⁰⁹ Judicial management was a process that could be used by a company that found itself experiencing financial difficulty as a result of mismanagement or any other cause.¹¹⁰ The name of the process, 'judicial management', is a good indicator of what the process entailed. In short, the aim of a company being placed under judicial management was to have a judicial manager, under supervision, steer the company to becoming a successful concern.¹¹¹

The successful existence of businesses are key to any countries economy, including South Africa's economy.¹¹² This is based on the fact that the existence of businesses in a country will contribute positively to their poverty and unemployment rates.¹¹³ Before judicial management was introduced, businesses tended to lean more towards liquidation, as opposed to attempting to find a way to save the business, which ultimately led to a large number of businesses being wound-up and dissolved.¹¹⁴ For these reasons, there was a clear need for a mechanism to assist businesses who had the potential to survive under clear guidance and management.¹¹⁵

¹⁰⁷ A Loubser supra note 5 at 138.

¹⁰⁸ D.A. Burdette supra note 10 at 245.

¹⁰⁹ JJ Henning supra note 15 at 91.

¹¹⁰ D.A. Burdette supra note 10 at 246.

¹¹¹ Ibid.

¹¹² Kunst, JA...et al. *Henochsberg on the Companies Act 61 of 1973* 5 ed Durban: LexisNexis South Africa, (2011). 195

¹¹³ A, Loubser supra note 5 at 1.

¹¹⁴ Kunst, JA...et al. supra note 112 at 195

¹¹⁵ A Loubser supra note 5 at 137.

However, from its inception in our law, there were many concerns as to its effectiveness and whether it should be retained.¹¹⁶ This chapter will briefly discuss judicial management in terms of the 1973 Act, by way of exploring the reasons surrounding the failure of judicial management.

2. Judicial management

Judicial management only applied to companies who met the requirements of the definition of a company¹¹⁷ in terms of the 1973 Act.¹¹⁸ It thus follows that no other entity had the option of being assisted by judicial management.¹¹⁹

Any person who had the *locus standi* to apply for a company to be wound-up in terms of s 346(1) of the 1973 Act had the *locus standi* to approach the court with a judicial management application.¹²⁰ This was problematic as s 346(1) of the 1973 Act did not provide directors with the necessary *locus standi*.¹²¹

3. The evaluation of judicial management as a successful method of corporate rescue

It is widely accepted that judicial management failed in South Africa for various reasons.¹²² A few key reasons surrounding the failure of judicial management will be briefly discussed below.

¹¹⁶ Ibid 139.

¹¹⁷ A 'company' is defined as a company incorporated under the 1973 Act which included "anybody which immediately prior to the commencement of the Act was a company in terms of any law repealed by this Act". See s 1(1) of the 1973 Act for the definition of a 'company'.

¹¹⁸ A Loubser supra note 5 at 142.

¹¹⁹ Ibid. Other entities such as close corporations, partnerships and partnership trusts did not have the option of making use of judicial mechanism. This position has not changed with the introduction of business rescue by the 2008 Act. See A, Loubser supra note 7 at 18.

¹²⁰ Section 427(2) of the 1973 Act.

¹²¹ A, Loubser supra note 7 at 19.

¹²² See, generally, D.A. Burdette supra note 10 at 241; A Loubser supra note 5 at 161; R Bradstreet supra note 20 at 354.

3.1. Extraordinary remedy

Judicial management was seen by the courts as being an extraordinary remedy which they only granted in exceptional circumstances.¹²³ This hindered the process of judicial management, as these exceptional circumstances would have only been met if, placing the company in judicial management, was in the interests of all of the creditors and stakeholders of the company.¹²⁴ Kloppers¹²⁵ was of the view that this attitude taken by the courts was problematic and that there was no legislative reasoning to support their view.¹²⁶ According to Burdette¹²⁷, judicial management should have been viewed by the courts as being an alternative to liquidation proceedings (in order to give effect to the objectives of judicial management) and not as an extraordinary remedy.¹²⁸

3.2. Creditor oriented process

The fact that judicial management was approached by the courts as being an extraordinary remedy links directly to the fact that judicial management was understood as being a process that focused on protecting the creditors of the company.¹²⁹ This meant that a judicial management order would not have been granted by the courts if it would have infringed on the rights of creditors.¹³⁰ This shows a clear lack of focus on the part of the courts who failed to act in accordance with the key objectives of judicial management, which was the protection and continued success of businesses, and whether granting a judicial management order would ensure this.¹³¹

¹²³ D.A. Burdette supra note 10 at 248; A, Loubser supra note 7 at 42-43; GM, Museta supra note 20 at 16.

¹²⁴ P, Kloppers supra note 22 at 426.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ D.A. Burdette supra note 10 at 248.

¹²⁸ Ibid.

¹²⁹ P, Kloppers supra note 22 at 426.

¹³⁰ A Loubser supra note 5 at 162.

¹³¹ Ibid.

3.3. Judicial managers

The Master was empowered to appoint any person to be a judicial manager, subject to certain exclusions which will be dealt with below.¹³² *Ramsbottom J* in the case of *Ex Parte Morley & Co*¹³³ considered the appointment of a judicial manager and held that:

“the Court, in appointing a judicial manager, should be sure, as far as it can be, that the person whom it appoints is competent to carry out the duties which he will have to perform.”¹³⁴

It was further held by *Ramsbottom J* that in order to be confident that the most suitable appointment was made, the court must:

“take heed of the wishes of creditors and shareholders and of the information which they supply me. This does not mean that the wishes of the majority must override those of the minority. In making its decision the Court will of course pay due regard to any information which is put before it by any body of creditors. In my opinion no general rules can be laid down in these matters. I do not think that it can be laid down that the judicial manager must necessarily have special knowledge of the industry or trade in which the business which he is called upon to manage is engaged. In certain cases that might be necessary . . . But I think that the Court should examine the circumstances of each case and decide on the facts before it whether in all the circumstances the judicial manager proposed will be able competently to perform his duties”.¹³⁵

Based on the above points by the court, the Master must have applied the same level of care and consideration that the court did when it was its responsibility to appoint a judicial manager.¹³⁶

¹³² See paragraphs 3.3.1 and 3.3.2 of chapter 2 of this dissertation.

¹³³ *Ex Parte Morley & Co* 1940 WLD 95 at 98-99.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Kunst, JA...et al. supra note 112 at 938.*

3.3.1. The provisional judicial manager

The duty of appointing a provisional judicial manager was vested with the Master¹³⁷ once a provisional judicial management order was granted.¹³⁸ The Master had the power to appoint any person to be a provisional judicial manager with the exclusion of two groups of persons:

1. The auditor of the company; and
2. Those persons who, in terms of s 370 of the 1973 Act, are disqualified from being appointed as a liquidator of the company.¹³⁹

The 1973 Act did not provide any specific guidance on how the Master is to make such an appointment which led to the Master following the same procedure that it would have used to appoint a provisional liquidator.¹⁴⁰ During the stage of a provisional judicial management order being granted, and the Master appointing a provisional judicial manager, the companies' property would have been deemed to be in the custody of the Master.¹⁴¹ Once the Master made an appointment and the provisional judicial manager paid the necessary security that was required by the Master, the provisional judicial manager would then assume office.¹⁴² The Master had the important duty of arranging for a special meeting to be convened.¹⁴³

Section 430 of the 1973 Act set out the duties of the provisional judicial manager.¹⁴⁴ Essentially, the provisional judicial manager had the following duties: taking over "the management of the company..."¹⁴⁵ taking possession of "all the assets of the

¹³⁷ See footnote 12 above.

¹³⁸ Section 429 of the 1973 Act.

¹³⁹ Section 429(b)(i) of the 1973 Act. The grounds for the disqualification of a person from being appointed as a liquidator in the winding-up of a company are set out in s 372 and 373 of the 1973 Act.

¹⁴⁰ See A, Loubser *supra* note 7 at 34-35 for a discussion on this aspect. The Judicial Matters Amendment Act 16 of 2003 later introduced the idea that the Master must have appointed provisional judicial managers and other functionaries in accordance with policies determined by the Minister of Justice and Correctional Development. However, by 2010, no policies were introduced yet.

¹⁴¹ Section 429(a) of the 1973 Act.

¹⁴² Section 429(b)(i) of the 1973 Act.

¹⁴³ Section 429(b)(ii) of the 1973 Act.

¹⁴⁴ Section 430 of the 1973 Act.

¹⁴⁵ Section 430(a) of the 1973 Act.

company";¹⁴⁶ lodging a copy of his letter of appointment with the Registrar;¹⁴⁷ and preparing a report containing certain information in respect of the company under judicial management.¹⁴⁸ The report had to include the following information regarding the company;¹⁴⁹ its affairs;¹⁵⁰ a list of the reasons explaining why the company was placed under judicial management;¹⁵¹ its assets and liabilities;¹⁵² its creditors, including details of the creditors' claims;¹⁵³ details of where money had been or would have been sourced to run the company¹⁵⁴ and their opinion on whether the company would become a successful concern once again and how that would be achieved.¹⁵⁵ This report had to be presented by the provisional judicial manager at the special meeting convened by the Master.¹⁵⁶

3.3.2. The final judicial manager

Once a final judicial management order was granted, a final judicial manager had to be appointed by the Master.¹⁵⁷ The same provisions that apply to the appointment of a liquidator equally applied to the appointment of a final judicial manager.¹⁵⁸ This meant that the Master had the power to refuse to appoint a person as a final judicial

¹⁴⁶ Ibid.

¹⁴⁷ This had to be done by the provisional judicial manager within seven days of his appointment. See s 430(b) of the 1973 Act.

¹⁴⁸ See s 430(c)(i) to (vi) of the 1973 Act.

¹⁴⁹ For an overview on the information mentioned above that had to be included in the report and of exactly what that entailed, see Kunst, JA...et al. supra note 112 at 938.

¹⁵⁰ Section 430(c)(i) of the 1973 Act.

¹⁵¹ See s 430(c)(ii) of the 1973 Act.

¹⁵² Section 430(c)(iii) of the 1973 Act.

¹⁵³ Reference to the companies' creditors included both "contingent and prospective creditors" and details of the creditors' claims included "the amount and the nature of the claim of each creditor". See s 430(c)(iv) of the 1973 Act.

¹⁵⁴ Section 430(c)(v) of the 1973 Act.

¹⁵⁵ Section 430(c)(iv) of the 1973 Act.

¹⁵⁶ Section 431 of the 1973 Act.

¹⁵⁷ Section 432(3)(a) of the 1973 Act.

¹⁵⁸ A Loubser supra note 5 at 155. See s 431(4) of the 1973 Act which states that "The provisions of this Act relating to the proof of claims against a company which is being wound up and to the nomination and appointment of a liquidator of any such company shall *mutatis mutandis* apply with reference to the proof of claims against a company which has been placed under judicial management and the nomination and appointment of a judicial manager of such a company." Emphasis is being placed on reference to the 'nomination and appointment' of a liquidator to that of a judicial manager.

manager based on s 370¹⁵⁹, 372¹⁶⁰ and 373¹⁶¹ of the 1973 Act.¹⁶² The final judicial manager, similarly to the provisional judicial manager, also had to provide security to the Master once appointed.¹⁶³

The duties of the final judicial manager are set out in s 433 of the 1973 Act.¹⁶⁴ The final judicial manager took over the management of the company from the provisional judicial manager and was responsible for following key areas: the wellbeing of the company; the financial control and integrity of the company; the wellbeing of the creditors of the company; and importantly, being continuously cognisant of whether the company would have been able to become a successful one again through judicial management or whether the company should have been wound-up instead¹⁶⁵.

From the above it is clear that judicial managers, being the main role players in the process, were not adequately equipped or controlled to successfully carry out their duties.¹⁶⁶ No clear and distinct qualifications were set out that had to be adhered to in order for a person to be appointed as a judicial manager, apart from being able to be appointed as a liquidator, and being able to furnish the Master with security.¹⁶⁷ According to Loubser¹⁶⁸, the fact that judicial managers were not required to have any specific professional training nor were they required to be members of a professional body, contributed to the failure of judicial management.¹⁶⁹

Kloppers¹⁷⁰ referred to the view of Olver,¹⁷¹ who submitted that the fact that a person

¹⁵⁹ See s 370 of the 1973 Act. This section sets out the circumstances in terms of which the Master could decline to appoint a person as a liquidator.

¹⁶⁰ See s 372 of the 1973 Act. This section sets out a list of those persons who are disqualified from being appointed as a liquidator.

¹⁶¹ See s 373 of the 1973 Act. This section sets out circumstances in terms of which the court can disqualify a person from acting or being appointed as a liquidator of a company.

¹⁶² Kunst, JA... et al. supra note 112 at 938.

¹⁶³ A Loubser supra note 5 at 155.

¹⁶⁴ See s 433(a) to (j) of the 1973 Act which sets out the duties of the final judicial manager.

¹⁶⁵ Ibid. For a detailed discussion on the duties of the final judicial manager see A Loubser supra note 5 at 158 - 160.

¹⁶⁶ P, Kloppers supra note 22 at 424.

¹⁶⁷ See paragraph 3.3 of chapter 2 of this dissertation.

¹⁶⁸ A Loubser supra note 7 at 37 and 43.

¹⁶⁹ A, Loubser supra note 7 at 37.

¹⁷⁰ P Kloppers supra note 22 at 424.

¹⁷¹ AH Olver's view is taken from the article by P, Kloppers supra note 22 at 424. I could not locate a copy of Olver's article or his doctoral thesis titled 'Judicial Management in South' (1980) which his article is based on.

could have been appointed as a judicial manager on the basis of being able to have been appointed as a liquidator, was one of the reasons which limited the success of judicial management.¹⁷² Olver¹⁷³ referred to the differences between the offices of a judicial manager and a liquidator, and submitted that the differences ultimately led to unsuitable people being appointed as judicial managers.¹⁷⁴ Rajak¹⁷⁵ was of the similar view, who said that the office of judicial managers lacked "...statutory regulation laying down suitable provisions for qualification, competence and suitability."¹⁷⁶

The issue of the lack of clear requirements and regulation in respect of the appointment of managers of corporate rescue mechanism is important for the purpose of this dissertation and will be considered in chapter 4.

3.4. **The strict test for a provisional and final judicial management order**

For a judicial management order to be granted, certain requirements, which will be discussed below, had to be met.

3.4.1. The requirements for a judicial management order

Section 427 of the 1973 Act set out the circumstances in terms of which a court could have granted a judicial management order.¹⁷⁷ A company could have been placed under judicial management if by "...mismanagement or for any other cause-..."¹⁷⁸ was "...unable to pay its debts or [was] probably unable to meet its obligations; and (b) has not become or [was] prevented from becoming a successful concern, and there [was] a reasonable probability that, if it [was] placed under judicial management, it [would] be enabled to pay its debts or meet its obligations and become a successful concern, the Court [could], if it appeared just and equitable, grant a judicial management order in respect of that company."¹⁷⁹

¹⁷² P, Kloppers supra note 22 at 424; GM, Museta supra note 20 at 18.

¹⁷³ See footnote 171 above.

¹⁷⁴ P, Kloppers supra note 22 at 424. In this article it was stated that a liquidators' aim was to sell the assets of the company and dissolve the company whilst a judicial managers' aim was to ensure that the company continued as a successful concern.

¹⁷⁵ H Rajak 'Business Rescue for South Africa' *South African Law Journal* (1999) 116(2) 268.

¹⁷⁶ Ibid.

¹⁷⁷ Section 427 of the 1973 Act.

¹⁷⁸ Section 427(1)(a) of the 1973 Act.

¹⁷⁹ Section 427(1)(a) and (b) of the 1973 Act.

It is important to understand at this stage of this chapter, that a provisional judicial management order first could have been granted, and only on the return date, the order could have been made final.¹⁸⁰ Section 427 of the 1973 Act sets out the requirements for a provisional order¹⁸¹ and s 432 of the 1973 Act sets out the requirements for a final order.¹⁸² There had been a lot of debate as to whether the requirements set out in s 427 of the 1973 Act applied to the granting of both provisional and final judicial management orders.¹⁸³

3.4.1.1. Mismanagement or for any other cause

The inclusion of the words 'mismanagement' in s 427(1) was unnecessary considering the words which follow it, being "...or for any other cause...".¹⁸⁴ The reading of the subsection thus clearly indicates that the companies distress could have been for any reason, which includes mismanagement.¹⁸⁵ The cause for the companies' distress could vary from poor management because of the lack of skills or the inability to borrow money to fund the company.¹⁸⁶ The cause for the companies distress would have been considered by the court when determining whether, based on the circumstances, there was a "...reasonable probability that, if it [was] placed under judicial management, it [would] be enabled to pay its debts or to meet its obligations and become a successful concern,..."¹⁸⁷

3.4.1.2. Inability to pay its debts or meet its obligations

This requirement is twofold. Firstly, the company must have been either "...unable to pay its debts..."¹⁸⁸ or "...probably unable to meet its obligations;..."¹⁸⁹ I will first look at the requirement of inability to pay debts. The 1973 Act does not define 'inability to pay debts' nor does it set out circumstances in terms of which a company would have been

¹⁸⁰ See s 428 and 432 of the 1973 Act.

¹⁸¹ Section 427 of the 1973 Act.

¹⁸² Section 432 of the 1973 Act.

¹⁸³ A Loubser supra note 5 at 144.

¹⁸⁴ Section 427(1) of the 1973 Act.

¹⁸⁵ A, Loubser supra note 7 at 22.

¹⁸⁶ Kunst, JA...et al. supra note 112 at 926.

¹⁸⁷ Ibid. See s 427(1)(b) of the 1973 Act.

¹⁸⁸ Section 427(1)(a) of the 1973 Act.

¹⁸⁹ Ibid.

deemed to be unable to pay its debts.¹⁹⁰ Simply put, it must be proved that the company is commercially insolvent.¹⁹¹ The alternative requirement that could have been proved by the applicant was the companies' inability to meet its obligations.¹⁹² Once again, no guidance was provided for this aspect in the 1973 Act. The 'obligations' of the company was understood to not only be restricted to financial obligations, but to also include any contractual obligations that the company undertook.¹⁹³

If either of the two requirements were met, the applicant would have satisfied the first requirement of s 427(1)(a) of the 1973 Act.

3.4.1.3. The company has not become or has been prevented from becoming a successful concern

The 1973 Act does not define the term 'successful concern' nor does it provide an explanation of what elements or characteristics a successful concern comprises of.¹⁹⁴ A successful concern has been understood as being a situation where a company was able "effectively to carry on its operations in accordance with its main object and yield a return to its shareholders."¹⁹⁵ The inclusion of this requirement is questioned, as a company that has met the first requirement already, either being inability to pay its debts or to meet its obligations¹⁹⁶, already is evidence of a company that is not a successful concern.¹⁹⁷

3.4.1.4. Reasonable probability

This is a key requirement for obtaining a judicial management order. There must have been a 'reasonable probability' that if a judicial management order is granted, the company would have been in a position to pay its debts, meet its obligations, or

¹⁹⁰ A Loubser supra note 5 at 143.

¹⁹¹ A, Loubser supra note 7 at 22.

¹⁹² Section 427(1)(b) of the 1973 Act.

¹⁹³ A, Loubser *Some comparative aspects of corporate rescue in South African company law* (unpublished supra note 7 at 22.

¹⁹⁴ Ibid.

¹⁹⁵ Kunst, JA...et al. supra note 112 at 926.

¹⁹⁶ Section 427(1)(a) of the 1973 Act.

¹⁹⁷ A Loubser supra note 5 at 144; GM, Museta supra note 20 at 9.

becoming a successful concern.¹⁹⁸ The use of the words "reasonable probability"¹⁹⁹ places a very heavy burden of proof on an applicant, as opposed to a mere 'possibility'.²⁰⁰ It has been argued that the requirements for a final judicial management order set out in s 432 of the 1973 Act, placed a heavier burden of proof on applicants.²⁰¹

Section 432(2)(e) of the 1973 Act states that a court had the power to grant a final judicial management order if it was certain that the company, if put under judicial management, would "...become a successful concern..."²⁰² The use of the word '**will**' in s 432(2)(e) of the 1973 Act implies that there must have been an absolute certainty that the company would have "...become a successful concern..."²⁰³, as opposed to the words '**a reasonable probability**' that is required for the granting of a provisional judicial management order.²⁰⁴ The difference in the wording for a provisional and final order was interpreted by the courts.²⁰⁵ In the case of the *Tenowitz v Tenny Investments (Pty) Ltd*,²⁰⁶ the court interpreted s 432 of the 1973 Act as having placed a heavier burden of proof on an applicant.²⁰⁷ The court was of the view that s 432 of the 1973 Act prescribed that a court could have only granted a final judicial management order if it believed that the company would definitely become a 'successful concern'.²⁰⁸

However, in the case of the *EX Parte Odus (Edms) Bpk*,²⁰⁹ the court was of a different view.²¹⁰ The court held that the burden of proof on an applicant for a final and provisional order was the same.²¹¹ It was further held that the requirements set out in s 427 of the 1973 Act applied to the granting of both provisional and final judicial

¹⁹⁸ Section 427(1)(b) of the 1973 Act.

¹⁹⁹ Ibid.

²⁰⁰ Kunst, JA...et al. supra note 112 at 926. In terms of s 195 of the 1926 Act, the burden of proof on an applicant was to prove a "strong probability". See s 195 of the 1926 Act.

²⁰¹ A Loubser supra note 5 at 144.

²⁰² See s 432(2)(e) and s 427(1)(b) of the 1973 Act.

²⁰³ Section 427(1)(b) of the 1973 Act.

²⁰⁴ A Loubser supra note 5 at 144.

²⁰⁵ Kunst, JA...et al. supra note 112 at 926.

²⁰⁶ 1979 (2) SA 680 (E) at para 683.

²⁰⁷ *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) at para 683.

²⁰⁸ Ibid.

²⁰⁹ 1980 (4) SA 63 (O) at para 66.

²¹⁰ *EX Parte Odus (Edms) Bpk* 1980 (4) SA 63 (O) at para 66;

²¹¹ Ibid.

management orders, and that s 432 of the 1973 Act merely empowered the courts to grant a final judicial management order.²¹²

3.4.1.5. Just and equitable

The final requirement was that the court granting a judicial management order had to be "...just and equitable..."²¹³ This requirement was included in the 1926 Act as well.²¹⁴ However, this requirement under the 1926 Act applied to a different set of circumstances from s 427(1)(b) of the 1973 Act.²¹⁵ A definition of what would be considered to be 'just and equitable' was not included in either of the two acts which led to the courts interpreting this requirement in many cases. In the case of *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd*²¹⁶ the court held that judicial management "must be regarded as a special or extraordinary remedy".²¹⁷

Therefore, a judicial management order must be appropriate to the set of circumstances before the court.²¹⁸ The court further was of the view that an "unpaid creditor has a right ex debito justitiae to have it placed in liquidation".²¹⁹ This meant that a creditor would usually be in support of the liquidation of a company, as opposed to the company being placed under judicial management, as immediate liquidation would guarantee the creditor immediate payment.²²⁰ However, it would have been 'just and equitable' for a judicial management order to be granted, if by doing so, it would be in the best interests of the creditors (including the creditor in support of a winding-up application) and its members.²²¹ Therefore, if a court was of the view that granting

²¹² Ibid. See Kunst, JA...et al. supra note 112 at 926.

²¹³ Section 427(1)(b) of the 1973 Act.

²¹⁴ Section 195(1) of the 1926 Act.

²¹⁵ See A Loubser supra note 5 at 148.

²¹⁶ [1979] 3 All SA 479 E, 480.

²¹⁷ *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* [1979] 3 All SA 479 E, para 683. See *Silverman v Doornhoek Mines Ltd* 1935 TPD 349 at para 353. In this case the court also was of the view that exceptional circumstances had to exist for a judicial management order to be granted.

²¹⁸ GM, Museta supra note 20 at 10.

²¹⁹ *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* [1979] 3 All SA 479 E, para 683.

²²⁰ A Loubser supra note 5 at 147. See *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T) at para 120.

²²¹ *EX Parte Odus (Edms) Bpk* 1980 (4) SA 63 (O) at para 66; Kunst, JA...et al. supra note 112 at 927.

a judicial management order would have been in the interests of the members and the creditors, it would have been regarded as being just and equitable.²²²

The fact that a provisional and final judicial management order could have only been granted if the court believed that there was a “reasonable probability” of the company being able to either pay its debts, meet its obligations or become a successful concern, placed a heavy and onerous burden on applicants who sought relief.²²³ This made it difficult for applicants to obtain a provisional judicial management order in the first place without getting to the point of the appointment of a judicial manager and a proper assessment and investigation been performed into the affairs of the company.²²⁴

It was suggested that this stricter approach should have only been followed by a court when deciding whether to grant a final judicial management order and not a provisional judicial management order.²²⁵ However, it can also be argued that such a strict level of consideration by the courts were necessary throughout process, due to the important consequences that a provisional judicial management order would yield, which included a *moratorium*.²²⁶

3.5. Heavy reliance on court proceedings

Once an application for judicial management was made either in terms of s 427(2)²²⁷ or (3)²²⁸ of the 1973 Act, and the requirements for a judicial management order had been met,²²⁹ courts had the power to grant a judicial management order.²³⁰ The order at this stage would have been merely provisional and was still subject to being confirmed and made final on the return date.²³¹ In addition to having this power, courts

²²² Kunst, JA...et al. supra note 112 at 927.

²²³ Section 427(1)(a) and (b) of the 1973 Act. See GM, Museta supra note 20 at 17. See paragraph 3.4.1.4 of chapter 2 of this dissertation for a discussion on a “reasonable probability”.

²²⁴ GM, Museta supra note 20 at 17.

²²⁵ Ibid.

²²⁶ The creation of a moratorium under judicial management is beyond the scope of this dissertation.

²²⁷ See s 427(2) of the 1973 Act. This section explains that a judicial management application may be brought by any person who has the locus standi to bring a winding-up application.

²²⁸ See s 427(3) of the 1973 Act. This section explains that a judicial management order may be granted by a court who is hearing an application for the winding-up of a company.

²²⁹ See s 427(1) of the 1973 Act. See also paragraph 3.4.1 of chapter 2 of this dissertation for an overview of the requirements.

²³⁰ See s 428(1) of the 1973 Act.

²³¹ Ibid.

also had the power to either dismiss the judicial management application or make any other order that the court deemed appropriate.²³²

In terms of s 428(2) of the 1973 Act, a provisional judicial management order would have included the following key elements:²³³

1. Directions for the company to be under the management of the provisional judicial manager, which would have still been under the supervision of the court²³⁴;
2. Divesting the existing management of the company with their powers, from the date of the provisional judicial management order²³⁵;
3. Any other directions in respect of "...the management of the company,..."²³⁶ including the provisional judicial managers' power to raise money (with or "...without the authority of the shareholders..."²³⁷ which will be subject to the rights of the creditors)²³⁸; and
4. Directions for the creation of a *moratorium* over the company.²³⁹

On the return date, which must not have been "...later than sixty days after the date of the provisional judicial management order..."²⁴⁰, the court had to consider whether to confirm the provisional order and grant a final order, whether to "...discharge the provisional order or [whether] to make any other order that it [deemed] just."²⁴¹

The court therefore had to consider the above factors in determining whether or not to grant a final judicial management order.²⁴² The list of factors that had to be considered

²³² Ibid.

²³³ See s 428(2)(a) to (e) of the 1973 Act.

²³⁴ Section 428(2)(a) of the 1973 Act.

²³⁵ Section 428(2)(a) of the 1973 Act.

²³⁶ Section 428(2)(c) of the 1973 Act.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Section 428(2)(c) of the 1973 Act.

²⁴⁰ This sixty day period may be extended by the court if they believe that there is good reason to do so. See s 432(1) of the 1973 Act.

²⁴¹ Section 432(2)(e) of the 1973 Act.

²⁴² Ibid.

by the court when making a decision was to assist the court to make an appropriate decision and the requirements as set out in s 427 of the 1973 Act, were also the requirements for the granting of a final judicial management order.²⁴³ Section 432 of the 1973 Act merely allowed the court, after considering the factors set out, to grant to a final judicial management order.²⁴⁴

The above discussion demonstrates how reliant the process of judicial management was on courts, as a company could have only been placed under judicial management provisionally and finally with a court order.²⁴⁵ This made the process extremely expensive and not a suitable avenue for small and medium size companies.²⁴⁶ Small and medium sized companies found themselves in positions where they could not afford the costs associated with judicial management.²⁴⁷ Costly court proceedings were a problem for companies who needed the relief provided by judicial management because they did not have the sufficient funds in the first place to comply with its debts or obligations, and the costs associated with judicial management would have only worsened their financial positions.²⁴⁸ This led to a situation where such companies, without ample funds, would not have had access to judicial management.

4. Conclusion

From the above discussion on judicial management, it is clear that it was introduced in the 1926 Act and carried forward in the 1973 Act, as a mechanism to assist companies in need by providing them with an opportunity to become a successful concern once again.²⁴⁹ However, judicial management did not live up to its potential and is widely understood to have failed as a corporate rescue mechanism.²⁵⁰ It is important to keep in mind that despite judicial managements overall failure as a

²⁴³ Kunst, JA...et al. supra note 112 at 926.

²⁴⁴ Ibid 940.

²⁴⁵ P, Kloppers supra note 22 at 370.

²⁴⁶ Ibid 425; P, Kloppers supra note 24 at 370; A, Loubser supra note 7 at 43.

²⁴⁷ P, Kloppers supra note 22 at 425.

²⁴⁸ P, Kloppers supra note 24 at 370.

²⁴⁹ See paragraph 1 of this chapter for a discussion on the introduction of judicial management in our legal system.

²⁵⁰ See JJ Henning supra note 15 at 92; A, Loubser supra note 7 at 42-43; GM, Museta supra note 20 at 16; D.A. Burdette supra note 10 at 241; R Bradstreet supra note 20 at 354.

mechanism, it did rescue many companies.²⁵¹

Many academic writers made proposals on the possible amendments that could have been made to the then current judicial management process²⁵² whilst others made proposals for the introduction of a new corporate rescue mechanism.²⁵³ Drawing from the weaknesses of judicial management, its strengths, and finally other countries legal systems, Chapter 6 of the 2008 Act introduced a new corporate rescue mechanism into our legal system, being business rescue. Chapter 3 will explore this still very new corporate rescue regime that came into effect on 1 May 2011.²⁵⁴

²⁵¹ A Loubser supra note 5 at 162.

²⁵² P, Kloppers supra note 24 at 377-378; P, Kloppers supra note 22 at 429-434; A Loubser 'Judicial management as a business rescue procedure in South African corporate law' *SA Mercantile Law Journal* (2004) 16(2) supra note 5 at 162-163.

²⁵³ D.A. Burdette supra note 10 at 252-253 and 257-260.

²⁵⁴ Chapter 6 of the 2008 Act.

Chapter 3: Business Rescue

1. Introduction

Business rescue was introduced in Chapter 6 of the 2008 Act as a new corporate rescue regime to replace the previous regime of judicial management.²⁵⁵ It is intended to provide companies with a better chance of being rescued by allowing it to restructure itself with the help of a business rescue practitioner.²⁵⁶ The inclusion of business rescue in the 2008 Act drew from various countries' legal systems in an attempt to help companies remain in existence and contribute positively to the countries' economy.²⁵⁷ As discussed in chapter 2, in respect of the introduction of judicial management, the continued successful existence of businesses are essential to the success of the community in which the business operates, as well as the employment levels and poverty levels in that community.²⁵⁸ These socio-economic reasons provided a basis for the introduction of a corporate rescue regime that will rescue businesses.²⁵⁹ Section 7 (k) provides that the purpose of the Act is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders."²⁶⁰

With the introduction of business rescue, there has been a noticeable shift from a creditor oriented system, which was the approach under judicial management, to a debtor friendly system.²⁶¹ From this, it is evident that business rescue attempts to take

²⁵⁵ R, Bradstreet supra note 33 at 196.

²⁵⁶ R, Bradstreet supra note 20 at 355.

²⁵⁷ A Loubser supra note 6 at 152.

²⁵⁸ See paragraph 1 of chapter 2 of this dissertation dealing with judicial management.

²⁵⁹ R, Bradstreet supra note 33 at 196.

²⁶⁰ Section 7 (k) of the 2008 Act

²⁶¹ GM, Museta supra note 20 at 23. Under the 1973 Act, as dealt with under chapter 2 of this dissertation, judicial management placed emphasis on protecting the creditors of the company and ensuring that they obtain payment, which often led to immediate liquidation of the company. See paragraph 3.2 of chapter 2 of this dissertation. This is understood as being one of the reasons which contributed to the failure of judicial management.

a more genuine approach to assisting companies that are financially distressed, as opposed to winding them up.²⁶²

This shift in systems was encapsulated well by *Classen J* in the case of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kylami) (Pty) Ltd and Others; Farm Bothasfontein (Kylami) (Pty) Ltd v Kylami Events and Exhibitions (Pty) Ltd and others*²⁶³ who said

“[t]he general philosophy permeating the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name “business rescue” and not “company rescue”. This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors’ interests to a broader range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employees, may, in the end prove to be a better option for creditors in securing full recovery from the debtor.”²⁶⁴

2. The definition of business rescue

Section 128(1)(b) of the 2008 Act defines business rescue as: “(i) the temporary supervision of the company, and of the management of its affairs, business and property; (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a plan to rescue the company by restricting 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 do continue in existence, results in a better return for the

²⁶² R, Bradstreet, supra note 20 at 353.

²⁶³ 2012 (3) SA 273 (GSJ) 438 at para 12.

²⁶⁴ *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kylami) (Pty) Ltd and Others; Farm Bothasfontein (Kylami) (Pty) Ltd v Kylami Events and Exhibitions (Pty) Ltd and others* 2012 (3) SA 273 (GSJ) 438 at para 12.

company's creditors or shareholders than would result from the immediate liquidation of the company;..."²⁶⁵

In terms of the above definition, if a company is placed under business rescue, an independent third party, being a business rescue practitioner, will supervise the company by taking over its management.²⁶⁶ An important effect of business rescue is the creation of a *moratorium*, which will protect the company from all claims against it while it is under business rescue.²⁶⁷ A business rescue plan, which has to be prepared and implemented by a business rescue practitioner, is pivotal to a successful rescue.²⁶⁸ The business rescue plan will either rescue the company which will continue "in existence on a solvent basis"²⁶⁹ or will provide "a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;..."²⁷⁰

From the reading of the section it is apparent that s 128(1)(b)(iii) of the Act provides for two possible outcomes.²⁷¹ It is important to note that either (emphasis) of the two possible outcomes can be achieved by a company. The latter outcome, which is obtaining a better outcome for creditors and stakeholders as opposed to liquidation proceedings, has been submitted by Levenstein²⁷² as being a "quasi liquidation process".²⁷³ If a company in question will not be able to achieve either of the two possible outcomes of business rescue as set out in s 128(1)(b)(iii) of the 2008 Act, it will be better for the company to be liquidated.²⁷⁴

Reliance by a company on the second outcome of business rescue requires a "reasoned factual basis" that the sale of the assets of the company under business

²⁶⁵ Section 128(1)(b)(i) to (iii) of the 2008 Act.

²⁶⁶ Section 128(1)(b)(i) of the 2008 Act

²⁶⁷ Section 128(1)(b)(ii) of the 2008 Act.

²⁶⁸ Section 128(1)(b)(iii) of the 2008 Act.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Levenstein, E *An appraisal of the new South African business rescue procedure* (unpublished LLD thesis, University of Pretoria, 2015) 286.

²⁷³ Ibid.

²⁷⁴ Ibid 287.

rescue will be better than under liquidation proceedings.²⁷⁵ In the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*,²⁷⁶ the court held that “in relation to the alternative aim referred to in section 128(b)(iii) of the new Act, being to procure a better return for the company’s creditors and shareholders than would result from the immediate liquidation thereof, one would expect an applicant for business rescue to provide concrete factual details of the course, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available. It is difficult to see how, without such details, a Court will be able to compare the scenario sketched in the application with that which would obtain in an immediate liquidation of the company. Mere speculative suggestions are unlikely to suffice.”²⁷⁷

Therefore, for a company to utilise the provisions of Chapter 6 of the 2008 Act, the business rescue plans of the company must demonstrate either a reasonable prospect of “the company continuing in existence on a solvent basis a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the companies’ creditors or shareholders...”²⁷⁸

3. Who may place a company into business rescue?

3.1. A companies’ board of directors

The board of directors of a company may adopt a resolution in terms of s 129 of the 2008 Act placing a company into business rescue.²⁷⁹ The adoption of a resolution by a company that is financially distressed means that the company voluntarily places itself into business rescue.²⁸⁰ The resolution passed by a board of directors should be by a simple majority.²⁸¹ The board of directors of a company may adopt a resolution

²⁷⁵ Ibid 286. See *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and Another, Investec Bank Ltd v Aslo Holdings (Pty) Ltd* (25051/11, 18112/2011) [2012] ZAWCHC 110

²⁷⁶ 86 (Pty) Ltd 2012 (2) SA 423 (WCC)

²⁷⁷ 86 (Pty) Ltd 2012 (2) SA 423 (WCC) at para 25.

²⁷⁸ See s 128(1)(b)(iii) of the 2008 Act and Levenstein, E supra note 272 at 292.

²⁷⁹ Section 129 of the 2008 Act.

²⁸⁰ Levenstein, E supra note 272 at 307.

²⁸¹ P, Delport ... et al. *Henochsberg on the Companies Act 71 of 2008* Durban: LexisNexis South Africa, (2011) 455.

without the support of the shareholders.²⁸² However, to do so, even though it is allowed, may be considered to be *mala fide* by the courts.²⁸³ If a resolution is adopted by the board of directors, and was not by the simple majority, or if the board of directors were not properly constituted, such a resolution will be null and void.²⁸⁴

The inclusion of this voluntary mechanism for a company to be placed into business rescue is a simpler and an inexpensive method as it does not involve the courts.²⁸⁵ This will lead to more money being available for creditors to be paid and to be used in the restructuring of the company.²⁸⁶ This places the board of directors of a company in a beneficial position of attempting to rescue the company without having to wait to make an application to court.²⁸⁷ This is a key improvement from the previous regime of judicial management in terms of which a company could have only been placed under judicial management by a court application, and because of the costs associated with court applications, many distressed companies were unable to pursue judicial management.²⁸⁸ This was one of the reasons which led to the failure of judicial management as a regime.²⁸⁹

3.2. A court application by affected persons

Section 131 of the 2008 Act provides 'affected persons' with an opportunity to apply to court for a company to be placed under business rescue.²⁹⁰ The term 'affected persons' is defined in s 128(1)(a) of the 2008 Act as: "(i) a shareholder or creditor of the company; (ii) any registered trade union representing employees of the company; and (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;..."²⁹¹

²⁸² Ibid.

²⁸³ Griesel and Another v Lizemore and Others [2015] 4 All SA 433. See P, Delport ...et al. supra note 281 at para 455.

²⁸⁴ P, Delport ...et al. supra note 281 at 455.

²⁸⁵ R, Bradstreet, supra note 20 at 360. The fact that judicial management will expensive and relied heavily on court proceedings was one of the reasons associated with its failure. See paragraph 3.4 of Chapter 2 of this dissertation.

²⁸⁶ Ibid.

²⁸⁷ A, Loubser supra note 6 at 50.

²⁸⁸ See paragraph 3.5 of chapter 2 of this dissertation.

²⁸⁹ Ibid.

²⁹⁰ Section 131 of the 2008 Act.

²⁹¹ Section 128(1)(a)(i) to (iii) of the Act.

The inclusion of these persons in the definition of 'affected persons' demonstrates the flexibility of Chapter 6 by allowing these persons to have control over ailing businesses that they have an interest in.²⁹² An application cannot be brought by an affected person if the board of directors of the company has already passed a resolution in terms of s 129 of the 2008 Act placing the company under business rescue.²⁹³ Once an application is made to court, and before the court grants any order, a copy of the application papers have to be served on CIPC and all affected persons must be notified of the application.²⁹⁴ Furthermore, and importantly, if at the time of an application to court, the company is already subject to liquidation proceedings which were commenced by or against the company, such liquidation proceedings will be immediately suspended.²⁹⁵ The liquidation application will be suspended until the court makes a decision in the business rescue application or until the business rescue proceedings end.²⁹⁶

In terms of s 131(4)(a), a court can only place a company under business rescue if it is satisfied that any of the following requirements are met: "(i) the company is financially distressed; (ii) that the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company;..."²⁹⁷

From the above reading of s 131(4)(a) of the 2008 Act is clear applicants in respect of a court application has a heavier burden of proof, as opposed to the board of directors who adopted a resolution.²⁹⁸ This is because of the wording of s 131(4)(a) of the 2008 Act which states that a court can only grant an order placing a company under business rescue if the court is satisfied that the abovementioned requirements are

²⁹² R, Bradstreet supra note 20 at 366.

²⁹³ Section 131(1) of the 2008 Act.

²⁹⁴ O M I, Magardie *Companies in financial distress during business rescue proceedings* (unpublished LLM thesis, University of Pretoria, 2015) 24. All affected persons must be notified of the application to commence business rescue proceedings as in terms of s 131(3), all affected persons have the right to partake in the court application.

²⁹⁵ Section 131(6) of the 2008 Act. O M I, Magardie supra note 294 at 25. See s 131(2)(a) and (b) of the 2008 Act.

²⁹⁶ Section 131(6)(a) and (b) of the 2008 Act. See A, Loubser supra note 7 at 79 – 80 for a discussion on business rescue brought during liquidation proceedings.

²⁹⁷ Section 131(4)(a)(i) to (iii) of the 2008 Act.

²⁹⁸ A, Loubser supra note 7 at 60.

met.²⁹⁹ Reasonable grounds, which is the burden of proof required for the adoption of a resolution, is thus not sufficient for a court application.³⁰⁰

Affected persons are provided with two further alternative requirements which they can rely on when bringing a business rescue application, which board of directors cannot rely on.³⁰¹ This being subsection (ii) and (iii) mentioned above which will be discussed in paragraph 4.2 below.³⁰² The inclusion of the two additional circumstances makes it easier and more accessible, for affected persons to make use of this mechanism.³⁰³

4. Requirements to commence business rescue proceedings

4.1. Requirements to be met in respect of the adoption of a resolution

A resolution may only be adopted by a board of directors if they have reasonable grounds to believe the following:³⁰⁴

1. "...is financially distressed; and
2. there appears to be a reasonable prospect of rescuing the company."³⁰⁵

The board of directors must prove that they have "reasonable grounds to believe that..."³⁰⁶ both requirements have been met.³⁰⁷ No clarity has been provided in Chapter 6 on what will entail 'reasonable grounds'.³⁰⁸ Writers believe that the term 'reasonable grounds' entails both objective and subjective elements that must be

²⁹⁹ Section 131(4)(a) of the 2008 Act.

³⁰⁰ A, Loubser supra note 7 at 60.

³⁰¹ Ibid.

³⁰² Section 131(4)(a)(ii) and (iii) of the 2008 Act.

³⁰³ It can be difficult for those persons who fall under the definition of 'affected persons' to demonstrate financial distress of the part of the company. This may be because affected persons such as employees and their trade unions are not privy to information that will either demonstrate the companies' factual or commercial insolvency. Thus, without the inclusion of the two further requirements under s 131(4) of the 2008 Act, this mechanism may not be easily accessible to all 'affected persons'.

³⁰⁴ Section 129(1)(a) and (b) of the 2008 Act.

³⁰⁵ Ibid.

³⁰⁶ Section 129(1) of the 2008 Act.

³⁰⁷ Section 128(1) of the 2008 Act.

³⁰⁸ Levenstein, E supra note 272 at 308.

considered.³⁰⁹ The subjective element is that the board of directors must, based on the specific circumstances of the company and the companies' financial position, meets the requirements of financial distress and of being rescued.³¹⁰ The objective element will be satisfied by considering the view of a reasonable director.³¹¹ Loubser³¹² is of the view that the test is as follows: "whether a reasonable person, with the knowledge, experience and insight (or lack of it) of the directors, would believe that these circumstances exist."³¹³

(i) Financially distressed

A definition for 'financially distressed' is provided for in s 128(1)(f)(i) and (ii) of the 2008 Act. A company will be regarded as being financially distressed if at any time: "(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;..."

It is essential to the process of business rescue that a company that is financially distressed, is identified as soon as possible. According to Smyth³¹⁴, a company will be able to be "nursed back to health if the warning signals and other 'red flags' are monitored and picked up early enough in the process".³¹⁵

The first part of the test refers to commercial insolvency.³¹⁶ Levenstien³¹⁷ referred to the inclusion of the test for commercial insolvency as a means of having the board of directors look at the affairs of the company with a "crystal ball gaze" into the next six months.³¹⁸ The question that must be asked by the board of directors is whether "the

³⁰⁹ Ibid 307-308; P, Delport ...et al. supra note 281 at 455; A, Loubser supra note 5 at 56.

³¹⁰ P, Delport ...et al. supra note 281 at 455; Levenstein, E supra note 272 at 308.

³¹¹ See Levenstein, E supra note 272 at 308 and A, Loubser supra note 7 at 56.

³¹² A, Loubser supra note 7 at 56.

³¹³ Ibid.

³¹⁴ Smyth, S 'Detecting 'red flags' early can help a business avoid severe financial distress: business rescue' *Tax Professional* (2012) 2012(4) 26.

³¹⁵ Ibid.

³¹⁶ Levenstein, E supra note 272 at 297; A, Loubser supra note 7 at 53.

³¹⁷ Levenstein, E supra note 272 at 297.

³¹⁸ Ibid.

company will be able to pay all of its debts...³¹⁹ in the next six months.³²⁰ If the company will not be able to, the company will then be regarded as being financially distressed. Auditors for KPMG had made a proposal to the Portfolio Committee on Trade and Industry (hereinafter referred to as the Portfolio Committee) that reference to 'six months' in s 128(1)(f)(i) of the 2008 Act should be changed to 'twelve months'.³²¹ However, this proposal was not accepted by the Portfolio Committee.³²²

The second part of the test refers to actual insolvency.³²³ The 2008 Act does not provide a definition for "insolvent"³²⁴, however, the term is widely accepted to mean circumstances where the companies' liabilities exceed their assets.³²⁵

(ii) A "reasonable prospect of rescuing the company."³²⁶

The fact that the definition of business rescue is twofold, should be borne in mind when determining whether there is a "...reasonable prospect of rescuing the company."³²⁷ The term 'reasonable prospect' is not defined in Chapter 6 of the 2008 Act. Loubser³²⁸ is of the view that it would have been better if the words 'reasonable possibility' was used throughout Chapter 6 to avoid uncertainty in satisfying the provisions.³²⁹ In the case of the *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd & Others*³³⁰ the court considered the term and held that 'reasonable prospect' means "something less is required than that the recovery should be a reasonable probability".³³¹

³¹⁹ Section 128(1)(f)(i) of the 2008 Act.

³²⁰ Ibid.

³²¹ A, Loubser supra note 7 at 58. The reasoning behind this proposal was that six months was too short a period to be judged as well as the fact that a Company will not be provided with adequate time to sort out their financial problems.

³²² Ibid.

³²³ Ibid.

³²⁴ Levenstein, E supra note 272 at 300.

³²⁵ Ibid. In the case of *Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48, the court defined the term 'insolvent' to mean a situation when the "liabilities of the debtor, fairly estimated, exceed the value of his assets, fairly valued."

³²⁶ Section 129(1)(b) of the 2008 Act.

³²⁷ Levenstein, E supra note 272 at 309. See s 128(1)(b)(iii) of the 2008 Act for the two outcomes of business rescue.

³²⁸ A, Loubser supra note 7 at 59.

³²⁹ Ibid.

³³⁰ 2012 (2) SA 421 (WCC).

³³¹ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd & Others* 2012 (2) SA 421 (WCC), paragraph 21.

Levenstein³³² referred to that fact that because many directors are not in a good position to decide whether placing the company into business rescue will be beneficial, many directors are now using a 'pre-assessment test' to make this decision.³³³ He described this pre-assessment test as a form of investigation into the affairs of the company, at the request of the company or the creditors, who, together with the prospective business rescue practitioner investigates into whether the company will be able to satisfy the requirements under which the company may be placed under business rescue.³³⁴

4.2. Requirements to be met in respect of a court application

(i) Non-payment of amounts "in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters"³³⁵

It has been submitted that this further requirement has been included to provide employees and trade unions with an opportunity to bring an application as they may not have the information to be able to prove that a company is financially distressed.³³⁶ Chapter 6 does not provide any clarity on what payments will satisfy this requirement.³³⁷ However, it has been submitted that for a company to satisfy this requirement, they must have failed to pay the following: salaries; contributions to medical aid funds, pension funds, unemployment insurance funds; payments for utility services; or payments to the South African Revenue Services.³³⁸

As s 131(4)(a)(ii) of the 2008 Act refers to a companies' failure to "*pay over any amount*",³³⁹ it has been submitted by Loubser³⁴⁰ that this does not consider modern day companies who depend on programmes, systems and banks to make necessary payments³⁴¹. I therefore agree with Loubser³⁴² in that this requirement should be

³³² Levenstein, E supra note 272 at 309.

³³³ Ibid.

³³⁴ Ibid 310.

³³⁵ Section 131(4)(a)(ii) of the 2008 Act.

³³⁶ P, Delport ... et al. supra note 281 at 455; Levenstein, E supra note 272 at 337 and 480.

³³⁷ A, Loubser supra note 7 at 60.

³³⁸ See Levenstein, E supra note 272 at 336-337 and A, Loubser supra note 7 at 60.

³³⁹ Section 131(4)(a)(ii) of the 2008 Act.

³⁴⁰ A, Loubser supra note 7 at 60.

³⁴¹ Ibid.

³⁴² Ibid.

amended to include “a stipulated minimum period or frequency before it constitutes a ground for rescue proceedings, and at least two consecutive payments should be missed.”³⁴³

(ii) It is “just and equitable”³⁴⁴ for financial reasons

No explanation is given of what circumstances will constitute this requirement.³⁴⁵ The term ‘just and equitable’ was considered in the case of *Kalahari Resources (Pty) Ltd v Arcelormittal SA*³⁴⁶ where the court held that it will be ‘just and equitable’ to for a company to be liquidated under the 1973 Act if the applicant came “to court with clean hands. In other words, it must not itself have been wrongfully responsible for, or have connived at bringing about the state of affairs, which it asserts results in it being just and equitable to wind up the company.”³⁴⁷ The court further stated that the same reasoning applies to business rescue proceedings and the fulfilment of this requirement.³⁴⁸

In the case of *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (KYALAMI) (Pty) Ltd & Others*³⁴⁹, C J Claassen J referred to the vagueness of this requirement and held the following:

“The immediate question arises: “for financial reasons” of whom, the company, the creditors, shareholders or the employees? Since the company cannot apply to Court for a business order, as it is not an “affected person”, one can immediately say that the financial reasons of the company are not referred to. However, that would render this provision absurd as it is primarily the financial health of the company which is at stake. I have little doubt that the Legislature never intended such absurdity. I would, therefore, hold that financial reasons relating to all the stakeholders, except that of the practitioner, contemplated in

³⁴³ Ibid 61. The subsection as it reads is too open-ended and fails to consider the modern day problems that can arise in the running of a business, which includes banks being offline and computer programmes malfunctioning.

³⁴⁴ Section 131(4)(a)(iii) of the 2008 Act.

³⁴⁵ A, Loubser supra note 7 at 61.

³⁴⁶ [2012] JOL 29174 (GSJ).

³⁴⁷ *Kalahari Resources (Pty) Ltd v Arcelormittal SA* [2012] JOL 29174 (GSJ) at para 72.

³⁴⁸ Ibid.

³⁴⁹ 2012 (3) SA 273 (GSJ)

the business rescue provisions, are to be considered by the Court when applying this provision.”³⁵⁰

From the above it is clear that the financial reasons of the company and all affected persons can satisfy this requirement. However, the meaning of financial reasons is still unclear. Affected persons are thus provided with the ability to place a company under business rescue for other financial reasons that do not fall within the ambit of financial distress.³⁵¹

(iii) There is a “reasonable prospect for rescuing the company;...”³⁵²

It is important to know that there is a difference in satisfying this requirement for a resolution and for a court order. It is simpler for a board of directors to satisfy this requirement as no application is made to court and there are no application papers which must contain concrete factual evidence.³⁵³ However, if an application is made in terms of s 130 of the 2008 Act to set aside the resolution which began the business rescue proceedings, the applicant will then have to provide concrete evidence of how this requirement will be met.³⁵⁴

An applicant must provide factual evidence of how placing a company under business rescue will achieve either of the two outcomes of business rescue.³⁵⁵ *Makgoba J*, in the case of *Swart v Beagles Run Investments 25 (Pty) Ltd (four creditors intervening)*,³⁵⁶ being the first reported case dealing with business rescue, held that: “what must be reasonably probable is that the company is viable and capable of ultimate solvency and that it will, within a reasonable time, become a successful

³⁵⁰ *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (KYALAMI) (Pty) Ltd & Others* 2012 (3) SA 273 (GSJ) at para 17.

³⁵¹ Loubser submitted that the term ‘financial reasons’ could mean anything, from mismanagement of the company or any other financial problems, such as the companies’ inability to pay its debts for a period longer than the six months which is one of the grounds for financial distress. See A, Loubser *supra* note 7 at 61.

³⁵² Section 131(4)(a)(iii) of the 2008 Act.

³⁵³ P, Delport ...et al. *supra* note 281 at 480.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid* 482.

³⁵⁶ 2011 (5) SA 422 (GNP).

concern.”³⁵⁷ Since this case, there has been numerous cases which considered this requirement. A few of these cases will be discussed below.

In the case of *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd*³⁵⁸ Eloff AJ held that, in order for this requirement to be satisfied, the information provided by the applicant must not be vague or undetailed and must support the prospect of the company being successfully rescued.³⁵⁹ This was confirmed by *Binns-Ward J* in the case of *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd*³⁶⁰ who concurred with the following which Eloff J said in the case of *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd*³⁶¹:

“supporting and cogent evidence that reflected that there was a reasonable prospect that the subject company could be rescued”.³⁶²

Binns-Ward J further held that even though the duty of preparing a business rescue plan is with the business rescue practitioner, detailed information must be provided by the applicant to enable the court make a decision of whether the business rescue practitioner will be able to prepare a business rescue plan that will rescue a company.³⁶³

In the case of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd*³⁶⁴ and others the court in considering this requirement

³⁵⁷ Swart v Beagles Run Investments 25 (Pty) Ltd (four creditors intervening) 2011 (5) SA 422 (GNP) at para 23.

³⁵⁸ 386 (Pty) Ltd 2012 (2) SA 423 (WCC).

³⁵⁹ *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) paras 21-22.

³⁶⁰ 2012 (2) SA 378 (WCC) 382–383.

³⁶¹ 386 (Pty) Ltd 2012 (2) SA 423 (WCC) at para 24.

³⁶² *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) 10 at para 18.

³⁶³ Levenstein, E supra note 272 at 342.

³⁶⁴ 2012 (3) SA 273 (GSJ). See Bradstreet, R Business rescue proves to be creditor-friendly : C J Claassen J's analysis of the new business rescue procedure in *Oakdene Square Properties* : notes *South African Law Journal* 130(1) 2013 44 – 52 for an analysis of this case. In this case the court held the following “The philosophy underlining the grant of a business rescue order contemplates that the Court cannot ‘second guess’ the rescue plan which will ultimately be approved by the creditors’

stated that the court should grant a business rescue order if the facts demonstrate that a reasonable possibility of the company being rescued.³⁶⁵ This case went on appeal to the Supreme Court of Appeal, in terms of which *Brand JA* held “that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b).”³⁶⁶

Gamble J, in the case of *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa & Another v Bestvest 153 (Pty) Ltd and Another (Companies and Intellectual Property Commission and Another intervening)*,³⁶⁷ held the following:

“that the Applicant must set out sufficient facts, if necessary augmented by documentary evidence, from which a Court would be able to assess the prospects before exercising its discretion.”³⁶⁸

5. The commencement of business rescue proceedings by a resolution

Business rescue proceedings cannot commence if a liquidation application has been instituted against or by the company.³⁶⁹ In addition to this, a resolution adopted will

meetings. It would seem to me that this conclusion is in line with the intention of the Legislature to prevent the negative impact on economic and social affairs by rescuing companies rather than liquidating companies. I would respectfully agree with Eloff AJ that the intention was to legislate for business rescue as a 'preferred' solution to companies in distress. Each case will, however, have to be adjudicated on its own facts.”. Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and others 2012 (3) SA 273 (GSJ) 441 at para 19.

³⁶⁵ Levenstein, E supra note 272 at 343.

³⁶⁶ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 at para 31.

³⁶⁷ [2012] 4 All SA 103 (WCC).

³⁶⁸ *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa & Another v Bestvest 153 (Pty) Ltd and Another (Companies and Intellectual Property Commission and Another intervening)* [2012] 4 All SA 103 (WCC) at para 40-41. The failure to satisfy this requirement is evident in the case of *AG Petzetakis International Holdings Limited v Petzetakis Africa and 5 Others (Marley Pipe Systems (Pty) Ltd, NUMSA intervening)* 2012 (5) SA 515 (GSJ). In this case the NUMSA, a trade union, intervened in an application for the liquidation of Petzetakis Africa (Pty) Ltd with an application in terms of s 131 of the 2008 Act. *Coetzee AJ*, when determining whether there was a reasonable prospect of rescuing the company, held that it was clear from the application papers that the company in question had no prospect of being rescued without financial help which from the application papers, would not have been forthcoming. See also Levenstein, E *An appraisal of the new South African business rescue procedure* (unpublished LLD thesis, University of Pretoria, 2015) 342.

³⁶⁹ Section 129(2)(a) of the 2008 Act.

not be of any force or effect unless the resolution has been filed with CIPC.³⁷⁰ These are two restrictions to the commencement of business rescue proceedings.³⁷¹ Only once a resolution has been adopted and has been filed with CIPC will business rescue proceedings commence.³⁷²

Once a resolution has been adopted and filed with CIPC, the companies' first task is to, within five days or a longer period that is provided to the company by CIPC³⁷³, "publish a notice of the resolution,..."³⁷⁴ with a sworn statement setting out the facts in respect of which the resolution was adopted, to all affected persons.³⁷⁵ The second task is to appoint an appropriate business rescue practitioner who has consented to being appointed in writing.³⁷⁶ Thirdly, the company has to, within two days of having made an appointment, "file a notice of the appointment..."³⁷⁷ with CIPC.³⁷⁸ Lastly, the company must publish the notice of appointment to all affected persons of the company "...within five business days after the notice was filed."³⁷⁹

If the abovementioned tasks are not carried out in respect of publications and appointments, the resolution adopted will become a nullity.³⁸⁰ This will result in the companies' board of directors not been able to file another resolution for three months from the date that the now void resolution was adopted on.³⁸¹ However, a court can, if an ex parte application is brought which shows good cause, allow a resolution to be filed within the three month period.³⁸²

³⁷⁰ Ibid.

³⁷¹ Section 129(2)(a) and (b) of the 2008 Act.

³⁷² A, Loubser supra note 7 at 63 and 64 and J, Rushworth 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008 : business rescue : part III' *Acta Juridica* (2010) 2010(1) 382.

³⁷³ CIPC can give the company a longer period of time if they apply for an extension to a court. See s 129(3)(a) of the 2008 Act.

³⁷⁴ Section 129(3)(a) of the 2008 Act.

³⁷⁵ Ibid.

³⁷⁶ Section 129(3)(b) of the 2008 Act.

³⁷⁷ Section 129(4)(a) of the 2008 Act.

³⁷⁸ Ibid.

³⁷⁹ Section 129(4)(b) of the 2008 Act.

³⁸⁰ Section 129(5)(a) of the 2008 Act. The meaning of the term "lapses and is a nullity" has been discussed by Loubser who said that depending on the interpretation taken by courts on the term 'nullity' it could either mean that a resolution will remain valid until the court orders it to be void and thus lapses or a resolution will become void and lapses once the publication and appointment requirements are not met within the provided time periods. Loubser was of the view that the legislature probably intended for the latter result to occur, as the Section reads "...lapses and is a nullity" which appears to be in favour of the latter result. See A, Loubser supra note 7 at 64.

³⁸¹ Section 129(5)(b) of the 2008 Act.

³⁸² Ibid.

Once a resolution has been adopted and the abovementioned requirements have been complied with, a companies' board of directors cannot pass a resolution placing the company under liquidation.³⁸³ However, if the resolution that placed the company under business rescue becomes void as discussed above, or the business rescue proceedings end in terms of s 132(2) of the 2008 Act, a resolution to place the company under liquidation can thereafter be passed.³⁸⁴ It is submitted that these strict procedural requirements, which if not complied with will lead to the nullity of a resolution passed, are necessary to ensure that the process of business rescue is not abused by companies' board of directors who merely pass a resolution to try to avoid liquidation.

5.1. Setting aside a resolution in terms of s 130 of the 2008 Act.

A resolution adopted may be set aside in terms of s 130(1)(a) of the 2008 Act by an affected person bringing an application to court any time before a business rescue plan is adopted.³⁸⁵ The grounds in respect of which an affected person may bring such an application is set out in s 130(1)(a)(i) to (iii) of the 2008 Act. These grounds are as follows: "(i) there is no reasonable basis for believing that the company is financially distressed; (ii) there is no reasonable prospect for rescuing the company; or (iii) the company has failed to satisfy the procedural requirements set out in Section 129".³⁸⁶

In addition to setting aside the resolution adopted, an application can also similarly be made to court to have the appointment of a business rescue practitioner set aside.³⁸⁷ The grounds for setting aside an appointment is as follows: the practitioner fails to satisfy the qualifications requirements set out in s 138 of the 2008; the practitioner "is not independent of the company or its management;..."³⁸⁸; or the practitioner "lacks

³⁸³ P, Delport ... et al. supra note 281 at 468.

³⁸⁴ Ibid.

³⁸⁵ Section 130(1)(a) of the 2008 Act.

³⁸⁶ Section 130(1)(a)(i) to (iii) of the 2008 Act. See A, Loubser supra note 7 at 69 to 73 for a discussion on setting aside a resolution and its effects.

³⁸⁷ Section 130(1)(b) of the 2008 Act.

³⁸⁸ Section 130(1)(b)(ii) of the 2008 Act.

the necessary skills..."³⁸⁹ An application may also be brought to court requesting the appointed business rescue practitioner to provide security.³⁹⁰

A director of a company who voted in favour of the adoption of the resolution in question may not bring an application to have the resolution or the appointment of a practitioner set aside, unless, they can prove that they were misled in making such a vote.³⁹¹ Once the application is served and notice is given to the respective parties as set out in s 130(3)(a) and (b) of the 2008 Act, the court has the discretion to make any order that is allowed in terms of s 130(5) and (6) of the 2008 Act, which includes an order setting aside the resolution³⁹², the appointment of a business rescue practitioner or providing the business rescue practitioner with time to give the court their opinion on whether the requirements for placing the company under business rescue has been met³⁹³. If a s 130 application is successful, the board of directors may be held personally liable for the costs.³⁹⁴

If a board of directors believes that the company is in financial distress, and does not adopt a resolution to place the company under business rescue, they are required to give written notice to all affected persons providing reasons why the company is in financial distress and why they do not want to adopt a resolution.³⁹⁵ This provision has been included in the 2008 Act to allow affected persons the opportunity to bring business rescue applications.³⁹⁶

³⁸⁹ Section 130(1)(b)(iii) of the 2008 Act.

³⁹⁰ Section 130(1)(c) of the 2008 Act.

³⁹¹ Section 130(2)(a) and (b) of the 2008 Act. See J, Rushworth *supra* note 372 at 379.

³⁹² See s 130(5)(a)(i) and (ii) of the 2008 Act.

³⁹³ Section 130(3)(a) and (b) of the 2008 Act. See J, Rushworth *supra* note 372 at 380. See s 130(5)(b)(i) and (ii) of the 2008 Act. Upon receiving the business rescue practitioners' report, the court may set aside the resolution, if from the report it is evident that the company is not financially distressed or that there is no reasonable prospect of rescuing the company.

³⁹⁴ R, Bradstreet *supra* note 20 at 368.

³⁹⁵ Section 129(7) of the 2008 Act. See P, Delport ...et al. *supra* note 281 at 464.

³⁹⁶ A, Loubser *supra* note 7 at 66. Bradstreet is of the view that this notification requirement further emphasises the protection that the business rescue provisions provide to affected persons. As once affected persons are notified they can then bring an application to court to place the company under business rescue, which has resulted in very few companies complying with this provision. See R, Bradstreet *supra* note 20 at 366. See also P, Delport ...et al. *supra* note 281 at 464.

6. The commencement of business rescue proceedings by a court application

Once an affected person brings a business rescue application, a copy of the application papers have to be served on both the company and CIPC.³⁹⁷ In addition to service, the affected person has to notify all affected persons of the business rescue application.³⁹⁸ The reasoning behind the service and notification requirements are so that all affected persons have an opportunity to partake in the proceedings before court.³⁹⁹ Loubser⁴⁰⁰ is of the view that the interference of affected persons at such an early stage is unnecessary and the courts should make a decision based on the facts before it.⁴⁰¹

Business rescue proceedings formally commences in terms of s 131(1) and 132(1)(b) of the 2008 Act when an affected person brings an application to court.⁴⁰² If a strict interpretation is taken to these sections, it will mean that business rescue proceedings will commence on the date that the application is brought to court.⁴⁰³ This will be the date that the application is lodged with the Registrar.⁴⁰⁴ According to Levenstein,⁴⁰⁵ this strict interpretation will result in the company not been attractive to prospective business deals, which can be investigated by a business rescue practitioner once appointed.⁴⁰⁶ He further submitted that business rescue proceedings should rather commence when a court order is granted which will ensure that the businesses remain attractive to possible deals and contracts.⁴⁰⁷ Loubser⁴⁰⁸ has the similar view as she said that *“one cannot avoid the impression that the drafters really had in mind the period after the court order had been issued...”*.⁴⁰⁹ It is submitted that both abovementioned views are with merit. However, in my view, business rescue rightly

³⁹⁷ Section 131(2)(a) of the 2008 Act. See *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) and *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others* 2013 (6) 141 (KZP) at para 10 in terms of which the courts dealt with the service of the application papers on CIPC and held that it must be served by the Sheriff to satisfy this requirement.

³⁹⁸ Section 131(2)(b) of the 2008 Act.

³⁹⁹ J, Rushworth supra note 372 at 380.

⁴⁰⁰ A, Loubser supra note 7 at 78.

⁴⁰¹ Ibid.

⁴⁰² Section 131(1) of the 2008 Act.

⁴⁰³ Levenstein, E supra note 272 at 367.

⁴⁰⁴ A, Loubser supra note 7 at 82.

⁴⁰⁵ Levenstein, E supra note 272 at 367.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ A, Loubser supra note 7 at 83.

⁴⁰⁹ Ibid.

commences when an application is made to court. The reasoning for this is that once business rescue commences, the *moratorium* is created.⁴¹⁰ If business rescue only commences once a court order is granted, this will mean that the *moratorium* will only protect a company from that later stage, and will leave a company vulnerable to actions and proceedings before that.

This issue of when business rescue proceedings commence have been dealt with by the courts in many cases.⁴¹¹ In the case of *Taboo Trading (Pty) Limited v Pro Wreck Scrap Metal CC and Others*⁴¹² the court held that business rescue proceedings will only commence once the application is lodged with the Registrar of the court, served on CIPC, and all affected persons have been notified in terms of s 131(2)(a) and (b) of the 2008 Act.⁴¹³ In the case of *Blue Star Holdings (Pty) Limited v West Coast Oyster Growers CC*⁴¹⁴ the court held that “a “functional approach” should be taken and that the lodging of the application with the Registrar for the issue thereof constituted the “making” of the application and the commencement of proceedings to place the company under business rescue...”.⁴¹⁵

In terms of s 132(2)(c) of the 2008 Act, business rescue proceedings will also commence when a court, during a liquidation application or proceedings enforcing a security interest, places the company under business rescue.⁴¹⁶

7. Ending of business rescue proceedings

Business rescue proceedings will end if: a resolution or court order that commenced the business rescue proceedings is set aside by a court;⁴¹⁷ if the court has converted

⁴¹⁰ See paragraph 8 of this chapter for a discussion on the *moratorium*.

⁴¹¹ See *FirstRand Bank Limited v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) and *Absa Bank Limited v Makunu Farm CC* (2012/28972) [2013] ZAGPJHC 318 (30 August 2013) which dealt with business rescue proceedings commencing during liquidation proceedings.

⁴¹² 2013 (6) SA 141 (KZP).

⁴¹³ *Taboo Trading (Pty) Limited v Pro Wreck Scrap Metal CC and Others* 2013 (6) SA 141 (KZP) at para 11.4. See A, Loubser *supra* note 7 at 82 and 83 for her view on the term ‘applies to court’.

⁴¹⁴ 2013 (6) SA 540 (WCC).

⁴¹⁵ Levenstein, E *supra* note 272 at 368. See also *Blue Star Holdings (Pty) Limited v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC).

⁴¹⁶ Section 132(2)(c) of the 2008 Act.

⁴¹⁷ Section 132(2)(a)(i) of the 2008 Act.

the application to a liquidation application;⁴¹⁸ if a business rescue practitioner has filed “a notice of the termination of business rescue proceedings;...”⁴¹⁹ with CIPC;⁴²⁰ if a business rescue plan was either rejected and no attempt was made by affected persons to extend the proceedings;⁴²¹ or if the business rescue plan was accepted, but the business rescue practitioner later filed a notice that the it was to be substantially implemented.⁴²²

8. The Moratorium

Once business rescue proceedings have commenced, either by a resolution or by a business rescue application, the company in question is afforded the protection of a *moratorium*.⁴²³ The creation of a *moratorium* means that no “*legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum...*”⁴²⁴

⁴¹⁸ Section 132(2)(a)(ii) of the 2008 Act.

⁴¹⁹ Section 132(2)(b) of the 2008 Act.

⁴²⁰ Ibid. A notice of termination can be filed by a business rescue practitioner under the following two circumstances: 1. If the business rescue proceedings commenced due to the adoption of a resolution in terms of s 129 of the 2008 Act, and the business rescue practitioner at the time does not believe that the company is financially distressed, they must terminate the proceedings; 2. If the business rescue plan which was proposed was rejected by the companies' creditors and shareholders, and any of the actions provided for in s 153(1) of the 2008 Act which deals with a situation when a business rescue plan was rejected were not taken, a notice of termination has to be filed. See Levenstein, E *supra* note 272 at 369-370.

⁴²¹ Section 132(2)(c)(i) of the 2008 Act. This refers to no attempts being made by affected persons to carry out any of the actions provided for in s 153(1) of the 2008 Act. See s 153(1) of the 2008 Act. See also *Artio Investments (Pty) Limited v Absa Bank Limited and Others* (7562/2014) [2014] ZAGPPHC 689 (8 September 2014) where the court held that business rescue proceedings will come to an end if the business rescue plan proposed by the business rescue practitioner was rejected.

⁴²² Section 132(2)(c)(ii) of the 2008 Act.

⁴²³ R, Bradstreet *supra* note 20 at 372. See A, Loubser *supra* note 7 at 84. See Section 131(2)(b) of the 2008 Act. See s 133(1) of the 2008 Act.

⁴²⁴ Section 133(1) of the 2008 Act. See the cases of *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies Embarquees SAS and 4 Others* Case No. 72522/11, North Gauteng High Court, Pretoria (June 2012) (unreported) 28 and *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T) which both explored the concept of 'legal proceedings'. See A, Potgieter 'The business rescue moratorium' *Without Prejudice* (2016) 16(2) 20. This article discussed the fact that arbitration proceedings constitute legal proceedings for s 133(1) of the 2008 Act. See A, Loubser *Some comparative aspects of corporate rescue in South African company law* (unpublished Doctor of Laws thesis, University of South Africa, 2010), 86 in which Loubser submitted that the automatic *moratorium* created under the 2008 Act under business rescue proceedings was a great improvement from the *moratorium* that had to be applied for under judicial management.

The *moratorium* does not offer complete protection to a company as the 2008 Act provides a list of exception in terms of which the *moratorium* may be breached.⁴²⁵ The list of exceptions are as follows: if the business rescue practitioner has given their written consent⁴²⁶ or if the court has given leave for legal proceedings to commence or continue⁴²⁷; if it is to set-off a claim that was "...made by the company in any legal proceedings irrespective whether those proceedings commenced before or after the business rescue proceedings began;..."⁴²⁸; criminal proceedings can be brought "...against the company or any of its directors or officers;..."⁴²⁹; any proceedings in respect of properties or rights over which the company has power over as trustees⁴³⁰; or proceedings by a regulatory authority after written notice was given to the business rescue practitioner.⁴³¹

Despite the existence of these exceptions, the reasoning behind the *moratorium* is to give companies breathing space to successfully rescue itself.⁴³² *Fourie AJA* held in the case of *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank*⁴³³ that a *moratorium* is "of cardinal importance since it provides the crucial breathing space or a period of respite to enable a company to restructure its affairs..."⁴³⁴

In addition, a surety or guarantee by a company that is under business rescue in favour of a person cannot be enforced without obtaining the leave of a court.⁴³⁵ However, it is important to note a creditor of the company can still assert their claims against the companies' sureties.⁴³⁶ Despite the *moratorium* being beneficial for a company

⁴²⁵ A, Loubser supra note 7 at 86.

⁴²⁶ Section 133(1)(a) of the 2008 Act.

⁴²⁷ Section 133(1)(b) of the 2008 Act.

⁴²⁸ Section 133(1)(c) of the 2008 Act.

⁴²⁹ Section 133(1)(d) of the 2008 Act.

⁴³⁰ Section 133(1)(e) of the 2008 Act.

⁴³¹ Section 133(1)(f) of the 2008 Act.

⁴³² R, Bradstreet supra note 20 at 372.

⁴³³ 2015 (3) SA 438 (SCA).

⁴³⁴ *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at para 14. See R, Tsusi 'Interpretation of s 133(1) of the Companies Act 71 of 2008 – the principle of moratorium re-defined under business rescue: case note' *De Rebus* (2015) 2015(554) 51 – 52.

⁴³⁵ Section 133(2) of the 2008 Act.

⁴³⁶ T, Fuhrmann, V Manko 'General moratorium on legal proceedings under attack : company law Without Prejudice' (2016) 16(10) 20-21 which looks at various cases that deal with the *moratorium* with specific emphasis on the case of *Business Partners Limited v Tsakiroglou and Others* 2016 (4) SA 390

undergoing business rescue proceedings, the section does protect third parties to some extent. In addition to the exceptions mentioned above, if a third parties' "...right to commence proceedings or otherwise assert a claim against a company is subject to a time limit..."⁴³⁷, the *moratorium* will lead to the time limit being suspended.⁴³⁸

9. The protection of property interests

During business rescue proceedings there are certain rules that apply to a companies' properties.⁴³⁹ Firstly, a company can dispose of its property or agree to dispose of its property provided that the following requirements have been met: the disposal is "...in the ordinary course of its business; in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner; or in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;..."⁴⁴⁰ Secondly, parties in possession of a companies' property as a result of an agreement concluded before the business rescue proceedings began, can retain their possession and rights over that property.⁴⁴¹ Thirdly, during business rescue proceedings, a person cannot exercise their rights over a property that is lawfully owned by a company, even if an agreement was concluded to the contrary.⁴⁴² However, a business rescue practitioner can consent to such a person exercising their rights.⁴⁴³

Rushworth⁴⁴⁴ submitted that there appears to be an overlap between this restriction and the *moratorium* created in respect of legal proceedings brought against property

(WCC) held that the distinction between juristic persons (a company under business rescue) and natural persons (a surety of a company under business rescue) was rational.

⁴³⁷ Section 133(3) of the 2008 Act.

⁴³⁸ Ibid.

⁴³⁹ Section 134(1)(a) of the 2008 Act.

⁴⁴⁰ Section 134(a)(i) to (iii) of the 2008 Act.

⁴⁴¹ Section 133(1)(b) of the 2008 Act.

⁴⁴² Section 133(1)(c) of the 2008 Act.

⁴⁴³ Ibid. This limitation will apply to a person or a company (the lessor) who had leased property to the company (the lessee) who is now under business rescue proceedings. The lessee who is under business rescue proceedings is in lawful possession of the property (due to the conclusion of a lease) and unless the business rescue practitioner gives the lessor consent, the lessor cannot exercise any of their rights over the property. See J, Rushworth *supra* note 272 at 384.

⁴⁴⁴ J, Rushworth *supra* note 372 at 385.

that was in the lawful possession of the company.⁴⁴⁵ If a company, whilst under business rescue proceedings chooses to dispose a property, which a third person has an interest or security in, the company has to do the following: obtain the consent of the person who has an interest or security in the property, unless the proceeds obtained from the sale of the property will discharge it fully⁴⁴⁶; and pay the person immediately the amount owed to them from the proceeds obtained or provide that person with security for that amount from the proceeds.⁴⁴⁷

10. Conclusion

From the above discussion, it is evident that the 2008 Act has attempted to introduce a corporate regime that has the primary role of assisting companies that are in financial distress. This is evident from the following examples. Companies can now, by way of a resolution, utilise this rescue regime, without having to resort to costly court applications.⁴⁴⁸ Companies can now also be placed under business rescue by court applications for reasons other than financial distress, which are either failing to make certain payments and for any other financial reasons.⁴⁴⁹ This makes the business rescue regime more accessible to companies that are facing different problems, even if financial, that do not fall within the definition of financial distress.⁴⁵⁰ Furthermore, the commencement of business rescue proceedings automatically leads to the creation of a *moratorium*,⁴⁵¹ which allows a business rescue practitioner to focus on preparing and implementing a business rescue plan that will provide for the successful rescue of the company.⁴⁵² The business rescue practitioner, which will be discussed in chapter 4, therefore has pivotal role to play in the process and success of the business rescue proceedings.

⁴⁴⁵ Ibid. See s 133(1) of the 2008 Act which states "During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—..."

⁴⁴⁶ Section 133(3)(a) of the 2008 Act. See J, Rushworth *supra* note 372 at 385 for a discussion on this provision.

⁴⁴⁷ Section 133(3)(b)(i) and (ii) of the 2008 Act.

⁴⁴⁸ See s 129 of the 2008 Act and paragraph 3.5 of this chapter. Costly court applications were one of the reasons for the failure of judicial management.

⁴⁴⁹ Section 131(4)(a)(ii) and (iii) of the 2008 Act.

⁴⁵⁰ The term 'financial reasons' is defined in s 128(1)(f) of the 2008 Act.

⁴⁵¹ See s 133 of the 2008 Act.

⁴⁵² Section 128(1)(b)(iii) of the 2008 Act.

Chapter 4: The business rescue practitioner

1. Introduction

The business rescue practitioner is an integral part of the business rescue proceedings.⁴⁵³ Once business rescue proceedings have commenced, either by the adoption of a resolution or a court order⁴⁵⁴, a business rescue practitioner must be appointed to manage the proceedings.⁴⁵⁵ A business rescue practitioner has been defined in s 128(1)(d) of the 2008 Act as "...a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and 'practitioner' has a corresponding meaning;..."⁴⁵⁶

Business rescue practitioners are given extensive powers and duties in terms of s 140 of the 2008 Act, which is to essentially take control of the company and manage the company "in substitution for its board and pre-existing management".⁴⁵⁷ In addition to this, one of the main duties of the business rescue practitioner, which is critical to the success of business rescue proceedings, is to prepare a business rescue plan that it will have to place before the companies' creditors and shareholders for approval.⁴⁵⁸ For these reasons, the person appointed as a business rescue practitioner must be suitably qualified to carry out their powers and duties to ensure the success of the business rescue proceedings.⁴⁵⁹ This chapter will explore the role of business rescue practitioners by considering their appointment, and whether these processes are sufficiently regulated to ensure that suitably qualified and skilled people are appointed. This chapter will also discuss the new changes introduced by CIPC in May 2017 that now must be followed for a person to practice as a business rescue practitioner.

⁴⁵³ Levenstein, E supra note 272 at 394.

⁴⁵⁴ See paragraphs 6 and 7 of chapter 3 of this dissertation for a discussion on the commencement of business rescue proceedings.

⁴⁵⁵ An explorative view of business rescue practitioner in SA' available at <http://mailimages.vibrantmedia.co.za/2016/unisa/meditaripapers/Patel.pdf>, accessed on 5 April 2017 4.

⁴⁵⁶ Section 128(1)(d) of the 2008 Act.

⁴⁵⁷ Section 140(1)(a) of the 2008 Act. The powers and duties of the business rescue practitioner is beyond the scope of this paper.

⁴⁵⁸ See s 140(1)(d)(i) of the 2008 Act. See also Levenstein, E supra note 272 at 394.

⁴⁵⁹ Supra note 455 at 5.

2. The appointment of a business rescue practitioner

From the reading of s 1 and s 138(1) of the 2008 Act, both natural persons and juristic persons can be appointed as business rescue practitioners.⁴⁶⁰ A business rescue practitioner can either be appointed by a companies' board of directors or by a court order. The qualifications required for a person to be appointed as a business rescue practitioner is dealt with in s 138 of the 2008 Act and will be discussed below.

2.1. By a companies' board of directors

If business rescue commenced by the adoption of a resolution, the companies' board of directors must, within five days of having adopted and filed the resolution, appoint a business rescue practitioner in accordance with the criteria set out in s 138 of the 2008 Act.⁴⁶¹ In addition thereto, the board of directors must carry out the following tasks: "(a) file a notice of the appointment of a practitioner within two business days after making the appointment⁴⁶²; and (b) publish a copy of the notice of appointment to each affected persons within five business days after the notice was filed."⁴⁶³

2.2. By a court order

Upon an application by an affected person⁴⁶⁴, and once a business rescue order is granted, a court is also further empowered to order an interim business rescue practitioner to be appointed.⁴⁶⁵ The interim business rescue practitioner appointed will be the person that has been nominated by the applicant provided that they meet the criteria set out in s 138 of the 2008 Act.⁴⁶⁶ It is important to note that this nomination is interim and is still "...subject to ratification by the holders of a majority of the

⁴⁶⁰ See the definition of 'a person' in s 1 of the 2008 Act. See also s 138(1)(a) of the 2008 Act.

⁴⁶¹ Section 129(3)(b) of the 2008 Act. CIPC may extend this period if an application is brought to do so.

⁴⁶² The notice of appointment has to be filed with CIPC.

⁴⁶³ Section 129(4)(a) and (b) of the 2008 Act.

⁴⁶⁴ Section 131 of the 2008 Act.

⁴⁶⁵ Section 131(5) of the 2008 Act.

⁴⁶⁶ Ibid.

independent creditors' voting interests at the first meeting of creditors..."⁴⁶⁷ and will only be made final upon such ratification.⁴⁶⁸

3. Qualifications

Before the 2008 Act came into effect, the idea of insolvency practitioners practicing as business rescue practitioners was considered.⁴⁶⁹ However, a new profession of business rescue practitioners was created instead which led to specific qualifications being set down to enable a person to be eligible to be appointed as a business rescue practitioner.⁴⁷⁰ Section 138 of the 2008 Act, which was amended by the *Companies Amendment Act 3 of 2011* sets out the qualifications required for a person to be appointed as a business rescue practitioner.⁴⁷¹

Section 138(1)(a) to (f) of the 2008 Act requires a person to be: "(a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission; (b) has been licensed as such by the Commission in terms of subsection (2); (c) is not subject to an order of probation in terms of section 162 (7); (d) would not be disqualified from acting as a director of the company in terms of section 69 (8); (e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and (f) is not related to a person who has a relationship contemplated in paragraph (d)." ⁴⁷²

The requirement that a person must be "...a member in good standing of a legal, accounting or business management profession accredited by the Commission..."⁴⁷³ and must be licensed by CIPC, are the two main qualifications that will be discussed below.

⁴⁶⁷ Section 131(5) of the 2008 Act.

⁴⁶⁸ Ibid. See C, Dick, *supra* note 41 at 9. The fact that the appointment will only be made final upon ratification by the creditors demonstrates the purpose of the 2008 Act, which is to balance the interests of all stakeholders, which includes the creditors of the company. See s 7(k) of the 2008 Act.

⁴⁶⁹ P, Delport ...et al. *supra* note 281 at 482.

⁴⁷⁰ Ibid.

⁴⁷¹ Section 138 of the 2008 Act.

⁴⁷² Section 138(1)(a) to (f) of the 2008 Act.

⁴⁷³ Ibid.

From the wording of s 138(1), it is clear that for a person to be qualified to act as a business rescue practitioner, they must be a member in good legal standing of a professional body and being licensed by CIPC.⁴⁷⁴ However, Levenstein⁴⁷⁵ has argued that there is a discrepancy between the English and the Afrikaans version of the 2008 Act.⁴⁷⁶ He submitted that the English version of the 2008 Act requires prospective business rescue practitioners to comply with both requirements, while the Afrikaans version does not.⁴⁷⁷ In his view, the Regulations, which is to be read together with s 138, concurs with the Afrikaans version, which in his view is correct.⁴⁷⁸ It is submitted that when Levenstein made that statement he may have been referring to Regulation 126(1)(b) which states that explicitly states that the provisions dealing with the licensing process, does not apply to people that can be "appointed as a business rescue practitioner in terms of section 138 (1) (a)."⁴⁷⁹ Therefore, upon interpretation, an 'either or' situation exists where a prospective business rescue practitioner only has to comply with being a member of a professional body or being licensed.⁴⁸⁰

However, until 21 October 2016, no professional bodies had been accredited by CIPC,⁴⁸¹ which made this situation easier, as prospective business rescue practitioners could only have been appointed if they were licensed by CIPC.⁴⁸²

⁴⁷⁴ Section 138(1)(a) and (b) of the 2008 Act.

⁴⁷⁵ Levenstein, E supra note 272 at 397.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Regulation 126(1)(b).

⁴⁸⁰ Ibid.

⁴⁸¹ Levenstein, E supra note 272 at 397.

⁴⁸² The issue of licensing by CIPC will be dealt with in paragraph 3.2 of this chapter.

3.1. A member in good standing of a "legal, accounting or business management professional body"⁴⁸³ that is accredited by CIPC

This requirement for qualification means that a person must be a member of either a "legal, accounting or business management professional body".⁴⁸⁴ The following bodies fall within these categories in South Africa: the Law Society of South Africa (LAWSA); the South African Institute of Chartered Accountants (SAICA); the Turnaround Management Association (TMA).⁴⁸⁵ This inclusion of only these three professions indicates the skills that the legislature believed are essential to a business rescue practitioner.

Naidoo⁴⁸⁶ has argued that from the wording of this provision, that the 2008 Act does not provide clear requirements in respect of qualifications.⁴⁸⁷ This provision has created a limitation on the kinds of people that can be appointed as business rescue practitioners.⁴⁸⁸ It has been submitted that one of the main factors linked to the failure of business rescue proceedings are that business rescue practitioners claim that they are "flying blind" when carrying out their duties.⁴⁸⁹ Their "flying blind" can be attributed to them only having certain skills such as legal skills or business acumen, without having any knowledge of accounting principles and methods, which are also necessary for a business rescue practitioner to possess. Papaya⁴⁹⁰ has explained this provision as having "presupposes membership to a pre-existing profession and thereafter adds the requirement of accreditation".⁴⁹¹ It is submitted that this has set a very low test against which people can be measured against to determine whether they are qualified to act as business rescue practitioners. This is further emphasised by the way CIPC has been empowered to accredit a legal, accounting or business management body.

⁴⁸³ Section 138(1)(a) of the 2008 Act.

⁴⁸⁴ Ibid.

⁴⁸⁵ P, Delport ...et al. supra note 281 at 484.

⁴⁸⁶ T, Naidoo supra note 45 at 26.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ R, Papaya supra note 77 at 29.

⁴⁹¹ Ibid.

3.1.1. Accreditation of a professional body by CIPC

The Regulations have provided clarity on how a professional body falling into either of the three professional categories may be accredited by CIPC.⁴⁹² It is important for CIPC to have guidance on this aspect, as once a professional body is accredited by CIPC, any member in good standing of that accredited body, provided that they comply with the other requirements set out in s 138(1)(c) to (f) of the 2008 Act, will be regarded as being suitably qualified to be appointed.⁴⁹³ Guidance is provided in terms of Regulation 126(1), which provides that CIPC must consider the following when deciding whether to accredit a body:

“the qualifications and experience that are set as conditions for membership of any such profession, and the ability of such profession to discipline its members and the Commission may revoke any such accreditation if it has reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members.”⁴⁹⁴

The qualifications and experience that a professional body requires for a person to become a member of that body is thus a key consideration by CIPC.⁴⁹⁵ This will provide CIPC with information on whether the qualifications and experience required for membership will be suitable for a business rescue practitioner to possess. However, it is submitted that this reasoning is flawed on the part of the legislature, as a member of a professional body will only have the qualifications required to be, for example, a lawyer or accountant. It is submitted that for a person to be qualified to act as a business rescue practitioner and carry out their duties, they should be required to be well rounded and have the skills and abilities that lawyers, accountants and businessmen have, and not just one skill set.⁴⁹⁶ However, to achieve such a position may be prove to be difficult, as there is no one all-encompassing profession that requires a person to have all of the above mentioned skills. Even though s 138(1)(a) of the 2008 Act by referring to three main professions, does provide CIPC with many

⁴⁹² Regulation 126(1).

⁴⁹³ Section 138(1) and Regulation 126(1).

⁴⁹⁴ Regulation 126(1).

⁴⁹⁵ Ibid.

⁴⁹⁶ P, Delport ...et al. supra note 281 at 484.

candidates to choose from, it excludes people of any other professions.⁴⁹⁷

Business rescue practitioners need to be competent across various different areas, which Pretorius⁴⁹⁸ pointed out by saying that “[a] business rescue practitioner’s (BRP) tasks are complex, vaguely stated and involve a wide range of competencies not accessible to the average business person.”⁴⁹⁹ According to him a business rescue practitioner needs to have “high-level business management and financial expertise, human relations skills and knowledge of legal and related frameworks and processes.”⁵⁰⁰ Koen⁵⁰¹ concurred with this view, who said that a business rescue practitioner needs to have legal, accounting and business management skills.⁵⁰² It is thus submitted that it is important for business rescue practitioners to have the skills and knowledge of all three professional disciplines because of the “multidisciplinary nature of business rescue”⁵⁰³.

The first two professional bodies that were accredited by CIPC, was only on 21 October 2016.⁵⁰⁴ These two bodies were: the Institute of Accountants and Commerce (IAC); and the South African Institute of Professional Accountants (SAIPA).⁵⁰⁵ Therefore, from 1 May 2011 to 21 October 2016, no professional bodies had been accredited. Levenstein⁵⁰⁶ said that because of this, “every appointment of a business rescue practitioner to date has thus been invalid, as no business rescue practitioner is a member of a profession duly accredited by the CIPC.”⁵⁰⁷ This approach has inadvertently applied the Afrikaans version of the 2008 Act as mentioned in paragraph 3 above, as business rescue practitioners were solely appointed by being licensed by

⁴⁹⁷ People belonging to other professions include insolvency liquidators who because of their experience, may in certain circumstances, be more suitably qualified to take on the role of business rescue practitioner. See P, Delpont ... et al. supra note 281 at 484.

⁴⁹⁸ M, Pretorius supra note 40 at 1.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid 2.

⁵⁰¹ Lynne Koen is a director of a law firm Maponya who wrote an article in a business rescue feature on business rescue practitioners. See M, Vanderstraeten supra note 40 at 14.

⁵⁰² Ibid. Koen further submitted that it should not be sufficient for a business rescue practitioner to have the skills set of any one of the three mentioned professions, but should rather be required to have the following: knowledge of the law with specific emphasis on insolvency law; financial knowledge and the ability to understand financial documents and statements, and be able to manage a business.

⁵⁰³ Supra note 455 at 16.

⁵⁰⁴ ‘Accreditation of Professional Bodies’ available at <http://www.cipc.co.za/index.php/news/accreditation-professional-bodies/>, accessed on 9 October 2017.

⁵⁰⁵ Ibid.

⁵⁰⁶ Levenstein, E supra note 272 at 397 footnote 510.

⁵⁰⁷ Ibid.

CIPC.⁵⁰⁸ On 28 June 2017, CIPC further accredited SAICA.⁵⁰⁹ The accreditation of three professional bodies shows that some progress has been made in regulating business rescue practitioners. However, all three bodies accredited by CIPC are focused on the profession of accounting which can lead to business rescue practitioners being appointed without having any legal or business knowledge at all. It is submitted that this the accreditation of any professional body that falls within the “legal, accounting or business management profession”⁵¹⁰ alone will not be sufficient to ensure to that a business rescue practitioner has all the skills necessary to drive a successful rescue.

In addition to the lack of suitably qualified business rescue practitioner been appointed, it is submitted that CIPC plays a very passive role in the regulation process. This is evident from Regulation 126(1) which states that CIPC has to bear in mind *“the ability of such profession to discipline its members and the Commission may revoke any such accreditation if it has reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members.”*⁵¹¹ The problem with this Regulation is that there is no clear guidance on how CIPC will become aware of the fact that a professional body is no longer of the ability to “monitor or discipline its members”.⁵¹² It is thus unclear as to who will bear the onus of informing CIPC of such information. Does it fall on the professional body or does it fall on CIPC? This clear lack of guidance can lead to unsuitable business rescue practitioners remaining in their post because CIPC lacks knowledge and information. The same reasoning applies to a situation of a member no longer been in good standing with their professional body⁵¹³. Papaya⁵¹⁴ submitted that in such a case, it is unclear as to who will bear the onus of having to deal with this situation.⁵¹⁵ Papaya⁵¹⁶ further submitted

⁵⁰⁸ Ibid.

⁵⁰⁹ ‘SAICA accredited as a professional body for business rescue practitioners’ available at <https://www.saica.co.za/Default.aspx?TabId=695&Itemid=5797&language=en-ZA> , accessed on 9 October 2017.

⁵¹⁰ Section 138(1)(a) of the 2008 Act.

⁵¹¹ Regulation 126(1)(a).

⁵¹² Ibid.

⁵¹³ P, Delport ...et al. supra note 281 at 484.

⁵¹⁴ R, Papaya supra note 77 at 30.

⁵¹⁵ Ibid. Will CIPC have to create some sort of a system or ‘watch dog’ committee to constantly monitor members’ professional membership, or whether they must create a requirement that business rescue practitioners have to submit copies of their professional membership to CIPC every month.

⁵¹⁶ R, Papaya supra note 77 at 30.

that as the 2008 Act and Regulations stand, professional bodies have taken the role of the "middle-men in the regulation of business rescue practitioners."⁵¹⁷ It is submitted that is not an ideal situation as far as regulation is concerned.

A study was conducted in 2016 on a group of business rescue practitioners to explore the reasons surrounding the low success rate of business rescue proceedings.⁵¹⁸ This study found that business rescue practitioners ranked experience to be important than qualifications.⁵¹⁹ The study further revealed that the group of business rescue practitioners believed that many business rescue practitioners did not have skills to successfully carry out their duties.⁵²⁰ Two recommendations were made by the group of business rescue practitioners to improve the quality of business rescue practitioners appointed.⁵²¹ The first recommendation was that there is no substitution for experience, and proposed that junior practitioners, who have very little experience, should be jointly appointed with a senior practitioner, who has the necessary to rescue a company.⁵²² Their second recommendation was that being a professional is not sufficient, and that additional requirements needed to be included for consideration in the appointment of business rescue practitioners.⁵²³ They supported the discussion above that "there is a flaw in performing business rescue from a purely accounting and legal perspective."⁵²⁴ It is interesting to hear the views of business rescue practitioners as they have firsthand knowledge of what one needs to successfully rescue a company and of what is currently lacking in our legislation. From the above view point of business rescue practitioners, it is clear that changes needed to be made to the appointment process to make their role more effective.

⁵¹⁷ Ibid.

⁵¹⁸ Supra note 455 at 24.

⁵¹⁹ Supra note 455 at 14.

⁵²⁰ Supra note 455 at 15.

⁵²¹ Supra note 455 at 15.

⁵²² Supra note 455 at 16.

⁵²³ Ibid.

⁵²⁴ Ibid.

3.2. Licensed to act as a business rescue practitioner

Before any professional bodies were accredited by CIPC⁵²⁵, this method of appointment was the only way prospective business rescue practitioner could be appointed.⁵²⁶ Even after the three professional bodies were accredited, practitioners who were not members of them still had to utilise this avenue to become a business rescue practitioner.⁵²⁷ For a person to be appointed as a business rescue practitioner under this method, they have to be licensed by CIPC.⁵²⁸ The Regulations have provided clarity on the process in respect of which a license can be applied for.⁵²⁹ An applicant first has to file a Form CoR.126.1 with CIPC, together with the required fee.⁵³⁰ CIPC thereafter has to consider the application and can request further information from the applicant.⁵³¹ Once CIPC has considered the application, it can make either of the following three decisions⁵³².

- 3.2.1. Issue licenses to applications if it believed that the applicants are of good character and integrity, and is sufficiently educated and equipped to carry out the role of a business rescue practitioner⁵³³, or
- 3.2.2. Issue conditional licenses to applicants, based on certain terms, after considering their education⁵³⁴; or
- 3.2.3. Refuse to issue applicants licenses in writing, together with reasons for their decisions.⁵³⁵

⁵²⁵ The first two professional bodies were accredited on 21 October 2017.

⁵²⁶ See Notice 30 of 2017 *Transitional Period of Conditional Licenses* by CIPC.

⁵²⁷ Section 138(1)(b) of the 2008 Act.

⁵²⁸ Ibid.

⁵²⁹ Regulation 126.

⁵³⁰ Regulation 126(2). The fee to be paid is found in Table CR.1 of the Regulations.

⁵³¹ Regulation 126(3)(a) and (b).

⁵³² Regulation 126(6).

⁵³³ Regulation 126(6)(a).

⁵³⁴ Regulation 126(6)(b). Conditional licenses can be issued on what has been described as "a case by case basis". This means that applicants would only be given licenses to act as business rescue practitioners in respect of the specific companies that they had applied to act for. See C, Dick *supra* note 41 at 13. However, since May 2015, CIPC began to issue "open licenses" to prospective business rescue practitioners. See Levenstein, E *supra* note 272 at 399 and footnote 520.

⁵³⁵ Regulation 126(6)(c).

CIPC is prohibited from issuing licenses to applicants if they are "...disqualified from appointment as a practitioner in terms of section 138 (1)(c) or (d)."⁵³⁶ CIPC is also empowered to, once licenses have been issued, including conditional licenses, to revoke such licenses if the applicant in question later has become disqualified from acting as a business rescue practitioner, based on either of the above two outright prohibitions to been issued a license.⁵³⁷ CIPC is further empowered to suspend or revoke a license if the person no longer complies with the qualifications that had to be met for a person to be issued a license, or if the license was issued on certain terms, and the person has not acted in accordance with those terms.⁵³⁸

Provision is also made for applicants who were granted licenses, conditional licenses or who were refused licenses, to apply to the Companies Tribunal (hereinafter referred to as the Tribunal) to have the decisions of CIPC reviewed.⁵³⁹ The Tribunal thereafter has the power to "partially or entirely confirm or set aside the Commission's decision".⁵⁴⁰

One of the main problems with this method of appointment has been pointed out by Dick⁵⁴¹ as being the lack of clarity on who can apply for a license.⁵⁴² Section 138(1)(b) of the 2008 Act states that "[a] person may be appointed...only if the person-...(b)has been licensed as such by the Commission..."⁵⁴³ and Regulation 126(2) further states the following "[a] person may apply to the Commission for a license..."⁵⁴⁴ There is no clarity on who qualifies as being a person for the purpose of being issued a license. As mentioned, s 1 of the 2008 Act only indicates that 'persons' are not only limited to natural persons, and that juristic persons are included.⁵⁴⁵ The wording of this section

⁵³⁶ Regulation 125(5).

⁵³⁷ Regulation 126(7)(a). The two grounds in respect of which CIPC can revoke licenses refers to the two qualifications required of a person to be a business rescue practitioner set out in terms of s 138(1)(c) and (d) of the 2008 Act.

⁵³⁸ Regulation 126(7)(b).

⁵³⁹ Regulation 126(8).

⁵⁴⁰ Ibid.

⁵⁴¹ C, Dick *supra* note 41 at 12.

⁵⁴² Ibid.

⁵⁴³ Section 138(1)(b) of the 2008 Act.

⁵⁴⁴ Regulation 126(2).

⁵⁴⁵ Section 1 of the 2008 Act. The definition of 'persons' were discussed in paragraph 2 of this chapter in relation to who can be appointed as a business rescue practitioner.

and Regulation therefore allows any person of any profession or any juristic person to bring an application for a license.

The lack of clarity on this issue, appears to provide a solution to one of the main problems identified with s 138(1)(a) of the 2008 Act, which is that business rescue practitioners are limited to belonging to either a “legal, accounting and business management profession”.⁵⁴⁶ As now, under the licensing requirements, people belonging to any profession may be licensed to act as business rescue practitioner. It is submitted that even though this makes the appointment process fairer, Dick⁵⁴⁷ argued that this is still problematic as there should be some degree of regulation on who can be licensed to act as business rescue practitioners, and therefore proposed that “[a]n amendment or addition to the regulation needs to prescribe certain minimum qualifications of an applicant in the same manner as with the appointment of members who belong to a professional body that is accredited by the Commission.”⁵⁴⁸ Veldhuizen⁵⁴⁹ further pointed out another issue, which is that business rescue practitioners who do belong to either of the three recognised professions are thus “largely self-regulated, if the oversight by the CIPC could be considered regulation at all”.⁵⁵⁰

Therefore, it is submitted that the current wording of s 138(1)(b) of the 2008 Act and Regulation 126(2) to (8) does not provide CIPC with sufficient regulatory control. This is further evident from the fact that even though CIPC has the power to revoke or suspend licenses provided, who will bear the onus of disclosing information to CIPC to allow them to make such decisions? CIPC therefore even lacks the assistance of a middleman in the form of professional bodies to help CIPC them, which it does in the case of s 138(1)(a) of the 2008 Act appointments.⁵⁵¹

From the above discussion on s 138(1)(a) and (b) and Regulation 126 and the problems associated with it, there is no doubt that there are huge gaps in the current

⁵⁴⁶ Section 138(1)(a) of the 2008 Act.

⁵⁴⁷ C, Dick *supra* note 41 at 12.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ P, J Veldhuizen *supra* note 41 at 29.

⁵⁵⁰ *Ibid.*

⁵⁵¹ See paragraphs 3.1 and 3.1.1 of this chapter for a discussion on s 138(1)(a) of the 2008 Act.

legislation and Regulations which needed to be amended to make the appointment process more effective and ensuring that suitably qualified people are appointed.

3.3. People who are prohibited from being appointed as business rescue practitioners in terms of s 138(1)(c) to (f) of the 2008 Act.

Section 138(1)(c) to (f) of the 2008 Act sets out the people that cannot be appointed as business rescue practitioners.⁵⁵² The following people are prohibited from being appointed as business rescue practitioners:

3.3.1. People that are "subject to an order of probation in terms of s 162(7)".⁵⁵³

In terms of s 162(7) of the 2008 Act, courts are empowered to place a director under probation for various reasons.⁵⁵⁴ The reasons speak directly to the directors' ability to successfully manage a business and make financially sound decisions. A director that did not act in accordance with his duties, made questionable decisions, or failed to meet a companies or close corporations' debts or obligations to which they were a director, cannot be seen as possessing the business knowledge that is required of a business rescue practitioner.⁵⁵⁵

⁵⁵² Section 138(1)(c) to (f) of the 2008 Act.

⁵⁵³ Section 138(1)(c) of the 2008 Act.

⁵⁵⁴ In terms of s 162(7) of the 2008 Act a director can be placed under probation if: they failed to pass a resolution despite the companies' failure to meet the solvency and liquidity test; did not act according to the duties set out for a director; or acted, or supported the decision to act in a way set out in s 163(1) of the 2008 Act. See s 163(1) of the 2008 Act which deals with the situation where a director who acted in any manners set out in (a) to (c) can apply to court for relief. A director may also be placed under probation in terms of s (7)(b) of the 2008 Act, which empowers a court to make a probation order if "*within any period of 10 years after the effective date— (i) the person has been a director of more than one company, or a managing member of more than one close corporation, irrespective of whether concurrently, sequentially or at unrelated times; and (ii) during the time that the person was a director of each such company or managing member of each such close corporation, two or more of those companies or close corporations each failed to fully pay all of its creditors or meet all of its obligations, except in terms of— (aa) a business rescue plan resulting from a resolution of the board in terms of section 129; or (bb) a compromise with creditors in terms of section 155.*" See s 152(7)(a) of the 2008 Act.

⁵⁵⁵ C, Dick *supra* note 41 at 13.

3.3.2. People that are “disqualified from acting as a director”⁵⁵⁶ in terms of s 69(8) of the 2008 Act.

A person will be disqualified from acting as a director for various different reasons which include the following: being prohibited by court⁵⁵⁷, been a declared delinquent⁵⁵⁸; been an unrehabilitated insolvent⁵⁵⁹; prohibited by public regulation⁵⁶⁰, if they have been removed from an office due to misconduct⁵⁶¹; and if they have been convicted of “theft, fraud, forgery, perjury or an offense”⁵⁶² which can be related to either fraud, the management of a company, or an offence under various Acts including the 2008 Act.⁵⁶³

3.3.3. A person that has another relationship “with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship”⁵⁶⁴.

This subsection is self-explanatory, which is to ensure the independence and objectivity of a business rescue practitioner. A business rescue practitioner that has a vested relationship with the company, other than being its business rescue practitioner, may not carry out its duties effectively and impartially.

⁵⁵⁶ Section 138(1)(d) of the 2008 Act.

⁵⁵⁷ Section 69(8)(a) of the 2008 Act.

⁵⁵⁸ Ibid.

⁵⁵⁹ Section 69(8)(b)(i) of the 2008 Act.

⁵⁶⁰ Section 69(8)(b)(ii) of the 2008 Act.

⁵⁶¹ Section 69(8)(b)(iii) of the 2008 Act.

⁵⁶² Section 69(8)(b)(iv)(aa) of the 2008 Act.

⁵⁶³ Section 69(8)(b)(iv)(bb) to (cc) of the 2008 Act. See C, Dick supra note 41 at 14 who reasoned the inclusion of this prohibition well by stating that “*When divesting the management or directors of their control of the company, this is done with the intention to bring in someone who can replace the management and take control of the company’s affairs where the current management is deemed to have failed. The appointment of a business rescue practitioner who has been disqualified from being a director would be a contradiction in terms and would completely defeat the purpose of resuscitating the company to financial health.*”

⁵⁶⁴ Section 138(1)(e) of the 2008 Act.

3.3.4. A person that is related to a person that is prohibited from being appointed for not been able to act with "integrity, impartiality or objectivity..."⁵⁶⁵

This subsection needs to be understood together with prohibition above. A business rescue practitioner that is prohibited from being appointed because they are regarded as being unable carry out its duties independently and objectively, it naturally follows that any of their relatives also cannot be appointed to act as the business rescue practitioner of that company.⁵⁶⁶

4. Regulation of business rescue practitioners

Based on the above discussion on the ways business rescue practitioners are appointed, one cannot argue that there is no level of regulation of business rescue practitioners. Section 138(1) of the 2008 Act regulates their appointment by providing CIPC with the regulatory power to accredit legal, accounting, and business management professional bodies that prospective business rescue practitioners must be members in good standing off.⁵⁶⁷ In addition to this, CIPC is given regulatory power to issue licenses to prospective business rescue practitioners who make applications to it.⁵⁶⁸

Section 138(1)(c) to (f) of the 2008 Act also provides some regulatory control by prohibiting certain people from being able to be appointed as a business rescue practitioner are discussed in paragraph 3.3 above. In addition to this, to ensure that suitably qualified business rescue practitioners are appointed, Regulation 127(2)(b) has categorised companies as either being large, medium and small companies based on their "...most recent public interest score..."⁵⁶⁹ Depending on what category a company falls within, only certain business rescue practitioners, which have been

⁵⁶⁵ Ibid.

⁵⁶⁶ A, Loubser supra note 7 at 105. This will ensure that the business rescue plan as well as the other duties carried out by the business rescue practitioner is not subject to any influence by a person disqualified on the basis of subsection (e) of the 2008 Act. See C, Dick supra note 41 at 14-15.

⁵⁶⁷ Section 138(1)(a) of the 2008 Act.

⁵⁶⁸ Section 138(1)(b) of the 2008 Act.

⁵⁶⁹ Regulation 127(2)(b)(i) to (iii).

categorised as being either an experienced, senior, or junior business rescue practitioner, can be appointed to act for them.⁵⁷⁰

It is submitted that these categorisation of companies and business rescue practitioners are a welcome regulatory method as it ensures that the correct business rescue practitioners are appointed to different sizes of business. This is important as it is commonly assumed that the larger the business is, the more complex the rescue will be, which will require a very experienced business rescue practitioner. However, despite these categories, it does not address the root of the problem, which requires clearer regulation of the kinds of people that will be regarded as being qualified in terms of s 138(1) of the 2008 Act. The 2008 Act has empowered the Minister to make regulations dealing with the “(a) standards and procedures to be followed by the Commission in carrying out its licensing functions and powers in terms of this Section; and (b) minimum qualifications for a person to practice as a business rescue practitioner, including different minimum qualifications for different categories of companies.”⁵⁷¹

The legislature has therefore attempted to regulate the appointment of business rescue practitioners through these sections and Regulations, however, as discussed above, there are many pitfalls associated with both methods of appointment.

5. **Important changes introduced by Notice 49 published by CIPC**

As of 2 May 2017, CIPC has introduced a new method of regulating the appointment of business rescue practitioners which had to be complied with before 1 October 2017.⁵⁷² This new method was first introduced by CIPC in Notice 30 on 2 May 2017⁵⁷³ which was later withdrawn and replaced with Notice 49 on 19 September 2017.⁵⁷⁴ As discussed above, previously, under s 138(1)(a) and (b) of the 2008 Act and Regulation

⁵⁷⁰ Regulation 127(2)(b) and 127(2)(c) and (3). Therefore, for example, a junior business rescue practitioner can be appointed to act for a small company but cannot be appointed to act for a medium or large company by themselves, and only as an assistant to an experienced or senior business rescue practitioner. See Regulation 127(3)(b).

⁵⁷¹ Section 138(3) of the 2008 Act.

⁵⁷² Supra note 47.

⁵⁷³ Notice 30 of 2017 *Transitional Period of Conditional Licenses* by CIPC.

⁵⁷⁴ Supra note 47.

126, prospective business rescue practitioners could have been appointed by either being a member of an accredited legal, accounting or business management professional body, or by being licensed by CIPC.⁵⁷⁵ As only three professional bodies were accredited by June 2017, which were all accounting based, all business rescue practitioners appointed would have been licensed by CIPC through individual applications.⁵⁷⁶

However, This process has since been changed by Notice 49 which states that now "...all practitioners as well as aspiring practitioners are advised to belong to a legal, accounting or business management profession recognised by the South African Qualifications Authority (SAQA)"⁵⁷⁷ and only those professional bodies "as well as juristic persons created by an Act of Parliament would be accredited by CIPC to have their members licensed as business rescue practitioners."⁵⁷⁸ A deadline of 1 October 2017 was given for those professional bodies recognised by SAQA and juristic persons to apply to CIPC for accreditation.⁵⁷⁹

Simply put, the process required all business rescue practitioners as well as prospective business rescue who wish to practice as business rescue practitioners, to ensure that they either were members of:

1. A "legal, accounting or business management profession"⁵⁸⁰ that is recognised by SAQA; or
2. A member of a "...juristic persons created by an Act of Parliament"⁵⁸¹.

These recognised professional bodies and juristic persons thereafter had the duty of applying to CIPC, before 1 October 2017, for their professional bodies or juristic persons to be accredited in order "...to have their members licensed as business

⁵⁷⁵ Section 138(1)(a) and (b) of the 2008 Act and Regulation 126. See paragraphs 2 and 3 of chapter 4 of this dissertation for a discussion on these two methods of appointment.

⁵⁷⁶ See the discussion in paragraph 3.1.1 of this chapter on the accreditation of professional bodies.

⁵⁷⁷ Supra note 47.

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid.

rescue practitioners”.⁵⁸² In the applications that had to be made by professional bodies and juristic persons, they would have had to show compliance with their “professional rules and disciplines in order to be able to accredit their own members”.⁵⁸³ Therefore, in terms of this new process, people will be now be licensed to act as business rescue practitioners through their membership to their recognised and accredited bodies or their accredited juristic persons, provided that they comply with the requirements to be set down by their professional body or juristic persons to be accredited as a member.⁵⁸⁴ This shows that being “...a member in good standing of a profession subject to regulatory authority...”⁵⁸⁵ of their professional body or juristic person is still key to prospective business rescue practitioners being licensed.⁵⁸⁶

However, it is important to take note that Notice 49 still makes provision for people that did not belong to a recognised and accredited professional body or an accredited juristic person before 1 October 2017, to still act as business rescue practitioners.⁵⁸⁷ This provision is made by allowing them still to bring individual applications to CIPC for conditional licenses.⁵⁸⁸

According to an article by Booysen⁵⁸⁹ of the *Business Report*, “in order to assure competence and efficiency, it has been widely agreed that the regulation of business rescue practitioners was important in the preservation and integrity of the business rescue procedure.”⁵⁹⁰ Booysen⁵⁹¹ referred to the views of PJ Veldhuizen⁵⁹² who has placed an integral role in the “regulation of business rescue in South Africa”⁵⁹³, who said that “the responsibility of a business rescue practitioner is onerous. When appointed, they effectively take over the running of a stressed company and step into

⁵⁸² Ibid.

⁵⁸³ J Booysen ‘New legislation plan for business rescue professionals’ 11 July 2017 available at <https://www.iol.co.za/business-report/new-legislation-plan-for-business-rescue-professionals-10231276>, accessed on 13 October 2017.

⁵⁸⁴ Supra note 47.

⁵⁸⁵ Section 138(1)(a) of the 2008 Act.

⁵⁸⁶ James, ‘SAICA accredited as a Professional Body for Business Rescue Practitioners’ 11 July 2017 available at <https://www.bbrief.co.za/2017/07/11/saica-accredited-professional-body-business-rescue-practitioners/>, accessed on 13 October 2017.

⁵⁸⁷ Supra note 47.

⁵⁸⁸ Ibid.

⁵⁸⁹ Supra note 563.

⁵⁹⁰ Ibid.

⁵⁹¹ Ibid.

⁵⁹² PJ Veldhuizen is the CEO of the Law firm Gillian and Veldhuizen.

⁵⁹³ Supra note 563.

the shoes of the chief executive/board of directors. They are also officers of the court and, therefore, have the fiduciary duty of a director, this certainly requires oversight”⁵⁹⁴ and that “up until now disgruntled parties were forced to turn to the courts for assistance, which can be a lengthy and expensive process. Business rescue practitioners will now be bound by a professional disciplinary code.”⁵⁹⁵

From the above discussion on the new changes in the appointment process, it is evident that this new regulatory method is just in its beginning phase, with still major work to be done by CIPC in terms of accreditation, and thereafter by the accredited professional bodies and juristic persons, by ensuring that their members are in good standing and adhere to their rules and disciplines to be able to license them. As submitted by Veldhuizen⁵⁹⁶ this new appointment process does ensure stricter licensing of business rescue practitioners as they will be bound “by a professional disciplinary code”.⁵⁹⁷ The professional bodies and juristic persons will have an onus to ensure that its members, who receive their licenses, act in accordance with its rules and thus remain a member in good standing. This clearly shows a stricter level of oversight over business rescue practitioners, as my understanding is that, if a member for any reason is no longer in good standing, they will lose their license to practice as a business rescue practitioner.

Furthermore, on the understanding of this new process, Regulation 126(1)(a) which sets out the considerations that CIPC must take into account prior to accrediting a professional body, will still apply to CIPC now, when it has to accredit professional bodies and juristic persons.⁵⁹⁸ Furthermore, the professional bodies that CIPC may accredit, must be recognised by SAQA.⁵⁹⁹ A professional body that applies to SAQA to be recognised has to make an application to SAQA which will be “evaluated against the Policy and Criteria for Recognising a Professional Body and Registering a Professional Designation for the Purpose of the NQF Act”.⁶⁰⁰ An application to SAQA

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

⁵⁹⁶ PJ Veldhuizen is the CEO of the Law firm Gillian and Veldhuizen.

⁵⁹⁷ Ibid.

⁵⁹⁸ Regulation 126(1)(a) and supra note 47.

⁵⁹⁹ Supra note 47.

⁶⁰⁰ ‘Professional Body Recognition and Professional Designation Registration’ available at <http://www.saqa.org.za/show.php?id=5749>, accessed on 13 October 2017.

requires in depth information in respect of the professional body in order to recognise them.⁶⁰¹ It is submitted that this will make the process easier for CIPC when deciding whether or not to accredit a professional body who in lieu will license their members, as it will merely have to assess the SAQA evaluation report to determine whether the professional body is suitable for accreditation.

6. Conclusion

Business rescue, which only became effective on 1 May 2011, is still a novel concept in our legal system.⁶⁰² It was introduced at a time when its predecessor, judicial management was failing, for the reasons discussed in chapter 2, and needed to be replaced.⁶⁰³ Business rescue was introduced with a warm welcome, as at the time, many companies were being liquidated and thus having a negative effect on our economy.⁶⁰⁴ It therefore, by being a creditor oriented system, provided companies with the opportunity of being rescued by either the company itself or its affected persons.⁶⁰⁵ The aim is to rescue the company by restructuring it in such a manner that will be beneficial to the company and all its stakeholders.⁶⁰⁶ This is evident from s 7(k) of the 2008 Act being a purposes of the 2008 Act.⁶⁰⁷

Business rescue has successfully rescued many companies such as: Pearl Valley Golf Estate; Advanced Technologies and Engineering Company; Meltz Success; Moyo Restaurants; ODM President Stores; Southgold; Ellerines and Optimum Coal Mine.⁶⁰⁸

⁶⁰¹ Ibid. See also the Evaluation Report prepared by the Directorate for Registration and Recognition which is responsible to deal with the applications received, in respect of an application by the Turnaround Management Association Southern Africa (TMA-SA) for recognition. From the evaluation report the criteria that must be met include the following: it is a legally constituted entity; has human resources and financial resources department; has good corporate governance practices; protects the public; has education and training and the competencies that members must have. See 'Evaluation Report for the recognition of professional bodies and registration of professional designations' available at [http://www.saga.org.za/docs/webcontent/2017/TMA%20-SA%20%20report%20\(gazette\).pdf](http://www.saga.org.za/docs/webcontent/2017/TMA%20-SA%20%20report%20(gazette).pdf), accessed on 13 October 2017.

⁶⁰² P, J Veldhuizen supra note 41 at 1.

⁶⁰³ See chapter 2 of this dissertation for a discussion on judicial management and the reasons advanced for its failure.

⁶⁰⁴ A, Loubser supra note 6 at 1-2.

⁶⁰⁵ R, Bradstreet supra note 20 at 353. See s 129 and 131 of the 2008 Act which deals with the two ways that a company may be placed under business rescue.

⁶⁰⁶ Section 7(k) of the 2008 Act.

⁶⁰⁷ Ibid.

⁶⁰⁸ Levenstein, E supra note 1.

However, there have been many cases where companies were unable to be rescued and ultimately found themselves being liquidated.⁶⁰⁹ One of the reasons that has been associated with business rescue proceedings failings, is the business rescue practitioner appointed to manage the process.⁶¹⁰ The business rescue practitioner appointed has a very difficult task ahead of them as they are essentially the new management and board of directors of a company that is in dire assistance.⁶¹¹ It is thus imperative for the success of the proceedings that a business rescue practitioner that has the necessary skills, qualifications, and experience is appointed to take charge of the rescue mission.⁶¹²

The legislature in the 2008 Act and the Regulations has attempted to regulate this process by providing direction on who can, how, and who cannot be appointed as a business rescue practitioner.⁶¹³ Despite the legislature's attempts at regulating the process, as discussed in this chapter, there appears to be some problems with how s 138 of the 2008 Act and Regulation 126 and 127 reads, and whether it is sufficient to ensure that the correct people are appointed.⁶¹⁴ It is submitted that, based on my submissions made in this chapter, this section and Regulations do not provide adequate control over appointments made. However, during the period that I was writing this paper, CIPC introduced a new regulatory tool to attempt to ensure that the profession of business rescue practitioners is adequately regulated by requiring recognised professional bodies and juristic persons created by an Act of Parliament to assist them.⁶¹⁵ Professional bodies and juristic persons that will be accredited by

⁶⁰⁹ The total number of companies that were liquidated at in January 2012, which was only seven months after business rescue came into effect, was approximately 310 companies. See 'Statistics of liquidations and insolvencies (Preliminary) available at <http://www.statssa.gov.za/publications/P0043/P0043September2016.pdf> accessed on 14 October 2017. However, in February 2017, the total number of companies liquidated were only 146 companies. See 'Statistics of liquidations and insolvencies (preliminary)' available at <http://www.statssa.gov.za/publications/P0043/P0043February2017.pdf>, accessed on 25 March 2017.

⁶¹⁰ P,J Veldhuizen 'Regulation and control of business-rescue practitioners: is there a suitable legal framework' *Business Tax and Company Law Quarterly* (2014) 6(4) 29-30 and 'An explorative view of business rescue practitioner in SA' available at <http://mailimages.vibrantmedia.co.za/2016/unisa/meditaripapers/Patel.pdf>, accessed on 5 April 2017 5.

⁶¹¹ Section 140(1)(a) of the 2008 Act.

⁶¹² M, Pretorius supra note 40 at 2.

⁶¹³ Section 138 of the 2008 Act and Regulation 126. See paragraphs 2 and 3 of this chapter for a discussion on the regulatory attempts in the 2008 Act and Regulations.

⁶¹⁴ See paragraphs 2 and 3 of this chapter for a discussion on the pitfalls associated with the current reading of s 138 of the 2008 Act and Regulation 126.

⁶¹⁵ Supra note 47.

CIPC, will be able to license their members if they meet the requirements that they each set out for licensing.⁶¹⁶

This new regulatory tool was brought to the attention of the public on 2 May 2017 by Notice 30 and later replaced by Notice 49.⁶¹⁷ It is submitted that the new procedure in respect of which business rescue practitioners are appointed, is an attempt by CIPC to have more control over the people that will be tasked with an enormous and burdensome task of rescuing companies. CIPC, together with the accredited professional bodies and juristic persons will all play an integral role to play in ensuring that business rescue practitioners maintain the integrity of the business rescue proceedings.⁶¹⁸ It is submitted that SAIPA, which was accredited by CIPC in 2016 in terms of s 138(1)(a) of the 2008 Act met the deadline of 1 October 2017 and has submitted its application to CIPC.⁶¹⁹ SAICA has stated in a confirmation document that their application included their "proposed framework that will recognise the members that are eligible for licensing as BRPs."⁶²⁰ SAIPA further provided information in respect of the "minimum requirements for eligibility of licensing as a Business Rescue practitioner"⁶²¹ which their members must comply with to be licensed as a business rescue practitioner.⁶²² This includes the following: being a "full member of SAIPA in good standing"⁶²³; having "a qualification/certificate in Business Rescue; or Liquidations or Insolvency"⁶²⁴ and having "verifiable experience in business rescue or company liquidations or insolvency administration or company restructuring."⁶²⁵

Based on the above discussed, one can get an idea of what an application to CIPC for accreditation had to include. It is going to very interesting to see which professional bodies and juristic persons are finally accredited by CIPC. The accreditation of professional bodies and juristic persons will create a new list of business rescue

⁶¹⁶'Accreditation of SAIPA for the Regulation of Business Rescue Practitioners' available at http://www.succeedadmin.co.za/Storage/saipa/2016/Internal/Nov/W2/A2_Accreditation_of_SAIPA_for_the_Regulation_of_Business_Rescue_Practitioners.pdf, accessed on 13 October 2017.

⁶¹⁷ Supra note 47 and 573.

⁶¹⁸ P, J Veldhuizen supra note 41 at 29.

⁶¹⁹ Supra note 616.

⁶²⁰ Ibid.

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ Ibid.

⁶²⁴ Ibid.

⁶²⁵ Ibid.

practitioners that a companies' board of directors or an applicant bringing a court application will be able to consider when appointing or nominating a business rescue practitioner.⁶²⁶ It is therefore submitted that this new regulatory tool will ensure that members of accredited professional bodies and juristic persons are suitably qualified before being able to be licensed to act as business rescue practitioners, and will contribute to increasing the number of successful business rescue proceedings. This in turn will only contribute positively to our employment rate, poverty levels and our economy.

⁶²⁶ Ibid.

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Notices

1. Notice 30 of 2017 Transitional Period of Conditional Licenses by CIPC.
2. Notice 49 of 2017 Transitional Period of Conditional Licenses by CIPC.

30 June 2017

Ms Tasmiya Essop Patel (211506982)
School of Law
Howard College Campus

Dear Ms Patel,

Protocol reference number: HSS/0973/017M

Project title: Business Rescue in South Africa: An exploration of business rescue and the role of the business rescue practitioner

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Mr Simphiwe P Phungula
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

Dr Shenuka Singh (Chair)

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