COLLEGE OF LAW AND MANAGEMENT STUDIES

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A critical analysis of the role, appointment, and powers of a business rescue practitioner

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DECLARATION

I, Bayanda Nompumelelo Luthuli, hereby declare that *A critical analysis of the role, powers, and appointment of the business rescue practitioner* is my own work and has never been submitted to any tertiary education institution in full or partial fulfilment of the academic requirements of this or any other degree or qualification. Where other writers' ideas have been used, such ideas have been appropriately acknowledged and the words have been changed.

B.N LUTHULI

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DEFINED TERMS

1926 Act	Companies Act 46 of 1926
1973 Act	Companies Act 61 of 1973
Companies Act/ the Act	Companies Act 71 of 2008
Final management	Final judicial management
Final manager	Final judicial manager
Practitioner	Business rescue practitioner
Proceedings	Business rescue proceedings
Provisional management	Provisional judicial management
Provisional manager	Provisional judicial manager

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CHAPTER 1: INTRODUCTION

1 Introduction

South Africa was one of the first few countries to adopt a corporate rescue regime in the form of judicial management.[1] Judicial management was an extraordinary procedure afforded to companies facing financial hardship.[2] It focused on restructuring the company with the aim of restoring it to solvency.[3] However, while on paper, the procedure provided hope for many ailing companies, practically it was unsuccessful as an alternative to liquidation and was regarded as a "dismal failure"[4] for many reasons, which will be discussed in the following chapter. This had a negative impact on the South African economy to the point where there was an increasing need to incorporate a corporate rescue regime that would actually work.[5] This led to the introduction of a new model in 2011 – called business rescue[6] – which aimed to assist ailing companies to recover from their financial difficulties.[7] This procedure is currently governed by Chapter six of the Companies Act 71 of 2008 (hereinafter 'the Act'), and is defined by Section 128(1) (b) of the Act as:

> *Proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-*
>
> *(i) The temporary supervision of the company, and the management of its affairs, business, and property;*
>
> *(ii) A temporary moratorium on the rights of the claimants against the company or in respect of property in its possession; and*
>
> (iii) *The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in*

[1] Loubser A 'Judicial Management as a Business Rescue Procedure in South African Corporate Law' (16) 2 (2004) *SA Mercantile Law Journal* 137, 139.
[2] *Ben-Tovim v Ben-Tovim & Others* 2000 (3) SA 325 (C) at 331.
[3] J J Henning 'Judicial management and corporate rescues in South Africa' (17) 1 (1992) *Journal for Juridical Science* 92.
[4] E Levenstein *An Appraisal of the New South African Business Rescue Procedure* (unpublished LLD thesis, University of Pretoria, 2015) 58.
[5] Ibid at 78.
[6] F H Cassim… et al *Contemporary Company Law* 2 ed (2012) 861.
[7] ibid.

existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[8]

The long-awaited process came with profound changes, including the introduction of a person called the 'business rescue practitioner,'[9] who is a major player in turning the company's financial status around and steering the company in the direction of being salvaged[10]. According to Bradstreet, the success of recouping a company's business is largely dependent on the person administering it.[11] For instance, once appointed, the practitioner is expected to investigate the company's affairs, draft a business rescue plan, and execute it.[12] In investigating the company's affairs, business, property, and financial situation, the practitioner must ascertain whether the company has any reasonable prospect of being rescued.[13] The practitioner also has the discretion to delegate any power or function to a person who was part of the board or pre-existing management of the company.[14] Further, he can remove from office any person who forms part of the pre-existing management of the company[15] and can also apply to the courts to have removed, a director of the company who fails to comply with the Chapter 6 requirements of the Act or hinders him from performing his duties.[16]

From this, it is evident that the role played by the practitioner in the business rescue process is a powerful and pivotal one. However, it does not go without any problems or areas for improvement. Such problems include the practitioner's powers and duties, the requirements for appointing a practitioner, and the remuneration of the practitioner. This mini-dissertation therefore explores and critically analyses these problems with the aim of addressing the practitioner's shortcomings and providing suitable recommendations on how to overcome them.

However, before delving into the role of the business rescue practitioner, it is necessary to provide a thorough understanding of the business rescue culture in South

[8] The Companies Act 71 of 2008. Section 128 (1) (b). Chapter 6.
[9] F H Cassim op cit note 6.
[10] R Papaya 'Are business rescue practitioners adequately regulated?' (2014) 548 (2014) *De Rebus* 29.
[11] R Bradstreet 'The leak in the chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may inadequately affect lenders' willingness and the growth of the economy' (22) 2 (2010) *SA Mercantile Law Journal* 201.
[12] R Sharrock, K Van der Linde & A Smith *Hockly's Insolvency Law* 9 ed (2016) 284—285.
[13] The Companies Act 71 of 2008. Section 141 (2). Chapter 6.
[14] The Companies Act 71 of 2008. Section 140 (1) (b). Chapter 6.
[15] The Companies Act 71 of 2008. Section 140 (1) (c). Chapter 6.
[16] The Companies Act 71 of 2008. Section 137 (5). Chapter 6.

Africa.[17] This requires a thorough analysis of the judicial management system as a model that laid the foundation for corporate rescue in South Africa as well as the concept of business rescue. As such, this study will first discuss the judicial management model, focusing on its incorporation into South African Company Law, provisional and final judicial management, the problems that led to its failure, and the transition from judicial management to the business rescue procedure. Second, it will address the concept of business rescue by examining terms such as *financial distress* and *reasonable prospect of success* as the core requirements of the rescue procedure, as well as discuss the commencement of the procedure and its legal ramifications. Finally, it will critically analyse the business rescue practitioner as the facilitator of the entire business rescue process, focusing on his powers and duties, appointment, and remuneration, before providing recommendations to all identified problems.

2. Statement of Purpose and Rationale

A business rescue practitioner is critical to the success of the business rescue procedure.[18] During the business rescue period, he is afforded extensive powers to turn the company around and is described as a facilitator, manager, supervisor, and an overseer.[19] Section 138 of the Act and Regulations 126[20] set out the business rescue practitioner's appointment requirements.[21] Although section 138, through its heading, 'Qualifications of practitioners', gives the impression that this section outlines the qualification requirements for the practitioner's appointment, this is not the case. It merely sets out criteria that ensure the trustworthiness of the practitioner and the absence of a conflict of interest between the company and the practitioner.[22]

Although these two aspects are essential factors that should be considered when appointing a practitioner, they do not give assurance of the practitioner's integrity, skills, and experience that would enable him to be trusted with the relevant powers and duties.[23]

[17] K N Bagwandeen *A critical analysis of the effectiveness of the business rescue regime as a mechanism for corporate rescue* (unpublished LL.M thesis, University of KwaZulu-Natal, 2018) at 16.
[18] R Papaya op cit note 10 at 29.
[19] ibid.
[20] The Companies Act Regulations, 2011. Regulation 126. Chapter 6.
[21] The Companies Act 71 of 2008. Section 138. Chapter 6.
[22] R Bradstreet op cit note 11 at 205.
[23] ibid.

In light of this, this study aims to constructively assess the practitioner, specifically focusing on his appointment, powers, duties, and remuneration, and how these, if not properly effected, can hinder the success of the business rescue model.

3. Research Question

This mini-dissertation questions the adequacy of the practitioner's appointment and if Section 138 of the Act creates any loopholes for people such as liquidators to assume the role of the practitioner despite their lack of experience in rescuing businesses. If so, does this not return South Africa to the failed judicial management system, thereby jeopardizing the business rescue model?

4. Issues to be examined

In addressing the above question of whether practitioners' are adequately appointed, the following research questions will be dealt with:

Why judicial management was unsuccessful as a corporate rescue regime in South Africa?

What is meant by business rescue?

What role does the business rescue practitioner play in the business rescue process?

Are business rescue practitioners adequately appointed?

5. Research Methodology

The study will adopt a qualitative desktop research as its research methodology. It will take the form of a doctrinal study with a socio-legal studies component. The business rescue model and the business rescue practitioner will be critically examined using various South African and international sources. These will include South African legislation, commission reports, Companies and Intellectual Property Commission notices, and textbooks, as well as South African and international journal articles, law reports, and dissertations.

6. Structure of the Mini-Dissertation

The mini-dissertation will be divided into five chapters, the first being the current one which covers the introduction, statement of purpose and rationale, issues to be examined, and the research methodology.

The second chapter will give a brief background on judicial management as the first corporate rescue system that was introduced into South African company law. It will assess

the model's incorporation, provisional and final judicial management, the problems that led to the system's failure, and the transition from judicial management to the business rescue procedure.

The third chapter will explain what is meant by business rescue and outline the objective behind its implementation. This will be achieved by critically analysing provisions 7 and 128(1) (b) of the 2008 Act which define the purpose of the Act and the concept of business rescue, respectively.

The fourth chapter will analyse the role, appointment, and remuneration of the practitioner to identify gaps within the system that limit the success of the business rescue process. The chapter will outline the powers and duties of the practitioner as outlined in sections 140 and 141 of the Act[24], then examine the section 138[25] requirements, qualifications, and other skills required to hold the office of practitioner, and lastly discuss the practitioner's remuneration as outlined in section 143 of the Act[26].

The fifth and final chapter will place recommendations on how South Africa can overcome the shortcomings of the business rescue system to achieve greater success in the future.

[24] The Companies Act 71 of 2008. Section 140 and 141. Chapter 6
[25] The Companies Act 71 of 2008. Section 138. Chapter 6.
[26] The Companies Act 71 of 2008. Section 143. Chapter 6.

CHAPTER TWO: BRIEF HISTORY ON JUDICIAL MANAGEMENT

1. Introduction

Prior to the enforcement of business rescue in 2011, the Companies Act 61 of 1973 (hereinafter 'the 1973 Act')[27] governed South Africa's corporate rescue system through a process called judicial management.[28] Judicial management was a special procedure afforded to financially ailing companies due to mismanagement or any other exceptional circumstances.[29] It was aimed at restoring companies back to their solvent state.[30] It introduced a person known as "the judicial manager", who was tasked with restructuring a company's affairs to the exclusion of its pre-existing management.[31]

The Companies Act 46 of 1926 (hereinafter referred to as the "1926 Act"), was the first piece of legislation in South Africa to incorporate the concept of judicial management.[32] This model was introduced into the 1926 Act as a completely new feature and departure from existing company law.[33] It was a new system established to assist entities struggling to meet their debts restructure without having to be wound up.[34] In terms of the 1926 Act, the court could make an order placing a company under judicial management only if, upon application, it was satisfied that the company had a reasonable probability of meeting its obligations.[35] However, Sections 195 to 198 of this legislation provided the courts with the discretion to make an order for the appointment of a judicial manager even in circumstances where the affected parties had only approached the court for a winding up order.[36] The intention behind this was to effectively keep the company alive instead of discarding it, while shielding it from the governance of its directors, who had presumably mismanaged it.[37]

In 1932, through the enactment of the Companies Law Amendment Act 11 of 1932, the judicial management model was developed to incorporate the concept of moratorium,

[27] R Bradstreet op cit note 11 at 195.
[28] The Companies Act 61 of 1973. Section 427. Chapter XV.
[29] J J Henning op cit note 3 at 92.
[30] ibid.
[31] A Burdette 'Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)' (16) 2 (2004) *SA Mercantile Law Journal* 246.
[32] A Loubser op cit note 1 at 138.
[33] E Levenstein op cit note 4 at 54.
[34] Companies Act 61 of 1973. Section 427. Chapter XV; F I Ofwono *Suggested Reasons for the failure of Judicial Management as a Business rescue Mechanism in South African Law* (unpublished Post-graduate Diploma in Law thesis, University of Cape Town, 2014) ii.
[35] Olver 'Judicial Management: A case for law reform' 49 (1986) *THRHR* 84.
[36] D A Burdette *A Framework for Corporate Insolvency Law Reform in South Africa*. (Unpublished LL.D thesis, University of Pretoria, 2002) at 343-345.
[37] E Levenstein op cit note 4 at 54.

which temporarily stayed all legal proceedings against the company, as well as the principles of impeachable transactions[38]. In 1939 and 1952, minor amendments were made to the procedure as a result of the reports by the Lansdown Commission[39] and the Millin Commission, respectively.[40] Further, in 1970, the Van Wyk de Vries Commission[41] deliberated the consolidation of the Companies Act and the Masters of the Supreme Court called for the elimination of judicial management due to its low success rate[42] and abuse[43]. However, the Commission did not recommend its abolishment and instead retained it under Section 427 of the 1973 Act[44] because, in a number of cases, it had been effective.[45]

Having briefly explained the incorporation and development of this model into South African company law above, the remainder of this chapter will explore the judicial management system under the 1973 Act. In particular, it will analyse the provisions relating to the provisional and final judicial management; the respective roles that were played by the provisional and final judicial managers; the challenges associated with the system that contributed to its downfall; and lastly, it will discuss the transition from the judicial management model to the business rescue procedure.

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[38] H Rajak & J Henning 'Business rescue for South Africa' (116) 2 (1999) *South African Law Journal* 266; Also see A Burdette op cit note 31; R H Barends *A critical analysis of section 129 of the Companies Act 71 of 2008* (unpublished LL.M thesis, University of the Western Cape, 2017) 2.

[39]The Lansdown Commission report proposed that, because the courts often lacked sufficient evidence to decide on judicial management, and certain matters required preliminary investigations, the Master of the Supreme Court should receive judicial management applications. The Commission also proposed that the judicial manager submit annual reports to the Registrar during the period of judicial management; See Lansdown *Commission of Inquiry into the Companies Act Report* (1970); A H Olver *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 7—11; R H Barends op cit note 38 at 2—3; A Burdette op cit note 31.

[40] The Millin Commission recommended that during judicial management, the manager should only dispose of the company's property or assets with the approval of the court, unless such disposal is done in the company's ordinary scope of business. The commission also proposed that the judicial manager make an application for liquidation if at any time, it became evident that continuing with judicial management would not completely relieve the company of debt. Further, it was recommended that all revenue resulting from judicial management should first go towards the payment of judicial management costs and then the pre-judicial management creditors; see P Millin *Commission of Inquiry into the Amendment of the Companies Act Report (*Verslag van die Kommissie van Ondersoek insake die wysiging van die Maatskappywet*)* (1949); H Olver op cit note 39 at 7—11; R H Barends op cit note 38; A Burdette op cit note 31.

[41]The Van Wyk de Vries Commission investigated the major changes required in the law concerning the company's constitution, incorporation, registration, management, administration, and dissolution, as well as matters incidental thereto; see J van Wyk de Vries *Commission of Inquiry into the Companies Act: Main Report* (1970); M L Benade 'A survey of the main report of the commission of enquiry into the Companies Act' (3) 3 (1970) *Comparative and International Law Journal of Southern Africa* 77; N L Chadwick 'The South African Companies Act' (14) 2 (1970) *Zimbabwe Law Journal* 144.

[42] J van Wyk de Vries op cit note 41 at 525; A. Burdette op cit note 31 at 247.

[43] A. Loubser op cit note 1 at 139.

[44] The Companies Act 61 of 1973. Section 427. Chapter XV.

[45] A. Loubser op cit note 1.

2. Judicial management under the Companies Act 61 of 1973

The requirements for judicial management were provided by Section 427 of the 1973 Act, and they stated that –

A company may be placed under judicial management if, by reason of mismanagement or for any other cause;

I. *the company is unable to pay its debts or probably unable to meet its obligations; and*

II. *the company has not become or is prevented from becoming a successful concern; and*

III. *there is a reasonable probability that if the company is placed under judicial management, it will be enabled to pay its debts or meet its obligations and to become a successful concern; and*

IV. *it appears just and equitable to the court.*[46]

Analysing the section 427 requirements, it can be said that the use of the word 'and' between the requirements suggests that the legislature intended for all the requirements of section 427 to be met before a court could authorise judicial management, otherwise, it would have used the word 'or,' which indicates that if one or the other requirement is satisfied, then judicial management could be granted. The use of the word 'and' on its own can be said to have contributed to judicial management being a difficult rescue regime to obtain. It made the onus of showing that the company qualified for judicial management a heavy burden on the applicant, unlike in business rescue, where it is clear that 'reasonable prospect of rescuing the company' is the main requirement to meet[47] whilst the other requirements require that one or the other requirement also be met.

2.1. Provisional judicial management

Section 427, through its heading ('Circumstances in which a Company may be placed under Judicial Management'), may have implied that the section applied to both forms of judicial management (provisional and final). However, this was not the case.[48] Section 427 was only applicable where an order for provisional judicial management was sought, and in cases of

[46] The Companies Act 61 of 1973. Section 427. Chapter XV.

[47] T Rabilall 'Business Rescue as opposed to Liquidation' 2018 *Companies and Intellectual Property Commission*, available at http://www.cipc.co.za/files/3515/2688/8915/Buisness_Rescue_vs_Liquidation_Article_March_2018.pdf, accessed on 6 June 2021; Also see The Companies Act 71 of 2008. Section 131 (4) (a). Chapter 6.

[48] A Loubser *Some comparative aspects of corporate rescue in South African company law* (unpublished LL.D thesis, University of KwaZulu-Natal, 2010) 20.

final judicial management, the courts turned to provision 432 of the Companies Act of 1973 for guidance.[49]

An order for provisional judicial management often included a moratorium on all actions and legal processes against the company.[50] Section 428(2)(c) provided that 'a provisional judicial management order may contain directions that while the company is under judicial management, all actions, proceedings, the execution of all writs, summonses and other processes against the company be stayed and not proceed without the leave of the Court.'[51] The use of the word 'may' in this subsection indicates that the provisional order could or could not be granted with an order to stay all legal proceedings against the company. This subsection, read together with Section 428(1), which states that 'upon an application under Section 427(2) or (3), the Court may grant a provisional order, stating the return day, or dismiss the application or make any other order that it deems just,'[52] indicates that such suspension had to be applied for and did not flow automatically.[53]

The problem with this was that there was no indication as to whether it was mandatory for the moratorium application to be made alongside the provisional judicial management application and could not be applied for at a later stage, or whether it could be applied for at any stage during the judicial management process. In the case of the former being what the legislature had intended, it is submitted that limiting the moratorium order to an application alongside the provisional order and not allowing the provisional judicial manager to apply for moratorium thereafter, would not only have undermined the purpose of the moratorium, which is to offer ailing companies crucial breathing space to recover[54], but also the very purpose of judicial management in cases where an application for moratorium was overlooked at the time of applying for judicial management. For a judicial manager to restore the company while faced with multiple ongoing legal actions would have proved extremely challenging and detrimental to the process.

The issuing of a provisional judicial management order was not only limited to a judicial management application brought by affected persons, but also extended to liquidation applications where it appeared to the court that judicial management may eliminate the

[49] A Loubser op cit note 48 at 20.
[50] The Companies Act 61 of 1973. Section 428. Chapter XV.
[51] ibid.
[52] The Companies Act 61 of 1973. Section 428(1). Chapter XV.
[53] A. Loubser op cit note 1 at 153.
[54] M F Cassim 'The effects of moratorium on property owners during business rescue' (29) 3 (2017) *SA Mercantile Law Journal* 422.

company's liquidation grounds and result in the company becoming a successful concern, and if authorising judicial management was deemed just and equitable in the circumstances.[55]

2.2. The provisional judicial manager

Once a provisional order was granted, the Master of the High Court (hereinafter 'the Master') was tasked with appointing a provisional judicial manager.[56] The Master could appoint anyone to be a provisional judicial manager provided that that person was not the company's auditor and was not prohibited from holding the office of liquidator.[57]

The manager's main duty was to assume the company's administration.[58] This included setting out a report detailing 'i) an account of the general affairs of the company; ii) a statement of the reasons why the company is unable to pay its debts, meet its obligations, or is prevented from becoming a successful concern; iii) a statement of the assets and liabilities of the company; iv) a complete list of creditors of the company and the amount and the nature of the claim of each creditor; v) particulars as to the source or sources from which money has been or is to be raised for purposes of carrying on the business of the company; and vi) the provisional judicial manager's opinion on the company's prospects of success'.[59]

After this report was compiled, it was considered by the Master in deciding whether an order for final judicial management should be granted. [60]

One of the issues with the provisional judicial manager was that there was no approved procedure or criteria in the 1973 Act for the appointment of a provisional manager, and as a result, in fulfilling this duty, the Master followed the same procedure that was used when appointing a provisional liquidator.[61] This created a gap for liquidators, who specialised in winding up companies and had no experience in rehabilitating companies, to be appointed as provisional judicial managers[62]. Analysing some of the responsibilities of a judicial manager, such as 'providing reasons for the company being unable to pay its debts, meet its obligations, or is prevented from becoming a successful concern' and 'providing an opinion

[55] A. Loubser 'Business Rescue in South Africa: A Procedure in Search for Home' (40) 1 (2007) *Comparative and International Law Journal of Southern Africa* 153.
[56] A. Loubser op cit note 48 at 28; Also see The Companies Act 71 of 2008. Section 429(b) (i). Chapter 6.
[57] The Companies Act 61 of 1973. Section 429 (b) (i). Chapter XV.
[58] P Kloppers 'Judicial Management Reform - Steps to Initiate a Business Rescue' (13) 3 (2001) *SA Mercantile Law Journal* 361.
[59] The Companies Act 61 of 1973. Section 430. Chapter XV.
[60] The Companies Act 61 of 1973. Section 429 (b). Chapter XV.
[61] A. Loubser op cit note 1 at 155.
[62] ibid at 155 —156.

on the company's prospects of success,'[63] these required a detailed examination into the past and present affairs of the company, financial resources, and efficient ways of assisting the company overcome its financial difficulties. Therefore, considering a liquidator's lack of qualifications, skills, and experience in executing such investigations, it is submitted that a provisional liquidator was not the best person to assume this role.

2.3. Final judicial management

In effecting an order for final judicial management, the court had to consider the reports issued by the Registrar of Companies, the Master, and the provisional judicial manager, as well as the interests of the company's members and creditors.[64] Once an order for final judicial management was granted, the company's administration vested in a final judicial manager appointed by the Master.[65] The manager was then expected to run the company to the exclusion of its former management, but under the Master's supervision.[66]

The challenge with excluding the former management from assisting with the restructuring of the company is that managers usually have many years of experience in working with the company and potentially possess useful information and resources that could assist in turning the company's status around. Managers ordinarily have advantageous knowledge, such as that of campaigns that have brought the company the most returns in the past, as well as the root cause of the company's financial distress. As such, it is submitted that their guidance and support was necessary for judicial management to achieve better success. Nonetheless, in circumstances where some or all of the company's managers contributed to the company's downfall, either through fraud or any other misconduct, excluding the former management of the company was the best option.

2.4 The final judicial manager

When an order for final management was issued, the final manager took over from the provisional manager and assumed control of the company.[67] This was done in accordance with the court's orders and in a way that promoted the creditors' and members' interests. [68]

[63] The Companies Act 61 of 1973. Section 430 (1) (c) (ii) and (vi). Chapter XV.
[64] The Companies Act 61 of 1973. Section 432 (2). Chapter XV.
[65] A Loubser op cit note 1 at 155.
[66] The Companies Act 61 of 1973. Section 427 and 432. Chapter XV. Also see A. Loubser op cit note 1 at 152; A. Loubser op cit note 48 at 17.
[67] The Companies Act 61 of 1973.Section 433(a). Chapter XV.
[68] The Companies Act 61 of 1973. Section 433*(b*). Chapter XV.

The final manager was responsible for organising annual financial statements, maintaining accounting records, convening creditors' meetings,[69] and investigating the company's pre-commencement affairs.[70] The intention behind evaluating the company's past operations was to determine whether any company official or director had engaged in any conduct contravening the Act[71] or was personally responsible for any damage suffered by the company[72]. If at any point during the management, the final manager became dissatisfied with the company's ability to achieve solvency, he was required to petition the court for an order terminating judicial management and commencing liquidation proceedings.[73]

From the above, it is clear that the final judicial manager played an integral role in judicial management. However, the legislature failed to set any professional or skill-based requirements to match the responsibilities of the judicial manager.[74] This materially contributed to the system's high failure rate.[75] As long as a person was not the company's auditor or prohibited from occupying the position of a liquidator under the 1973 Act[76], they qualified to be appointed as a judicial manager[77] regardless of not having any skill, qualification, or training relevant to the duties thereof.[78] As a result, there was little to no assurance that persons appointed would be efficiently equipped to undertake the role and steer the company into a profitable direction.

3. The problems with judicial management

Since its introduction, judicial management became an unpopular corporate rescue regime.[79] Some commentators went so far as to say that it was a spectacular failure,[80] while others

[69] The Companies Act 61 of 1973. Section 433(h). Chapter XV.
[70] The Companies Act 61 of 1973. Section 433. Chapter XV; Also see A Loubser op cit note 48 at 114.
[71] The Companies Act 61 of 1973. Section 433 (j). Chapter XV.
[72] The Companies Act 61 of 1973. Section 433 (k) Chapter XV.
[73] The Companies Act 61 of 1973. Section 433 (l). Chapter XV.
[74] A Loubser op cit note 48 at 37.
[75] D A Burdette 'Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process' (32) 1 (1999) *De Jure* 57; A H Olver op cit note 39 at 2; H Rajak op cit note 38 at 268; A Loubser op cit note 48 at 37.
[76] The Companies Act 61 of 1973. Section 370. Chapter XIV.
[77] The Companies Act 61 of 1973. Section 429 (b) (i). Chapter XV.
[78] A Loubser op cit note 48 at 37.
[79] E P Joubert '"Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?' (76) 4 (2013) *THRHR* 551. Also see T P Mbonambi *Ranking of Creditors in Business Rescue Proceedings: A critical evaluation of S135 (1) and (3) of the Companies Act 71 of 2008* (unpublished LL.M thesis, University of KwaZulu-Natal, 2019) 1; A Smits 'Corporate administration: A proposal model' (32) 1 (1999) *De Jure* 85.
[80] A Smits op cit note 79 at 85.

argued that it was ahead of its time.[81] The judicial management system was faced with many challenges and shortcomings that contributed to its failure. The main issue was the over-reliance on the courts.[82] This meant that the company had to incur further expenses in addition to its existing debts.[83] First, an order for provisional management had to be issued, followed by the provisional manager's appointment, which vested with the Master. On the return date for the final judicial management hearing, the court considered sections 427 and 432 of the 1973 Act[84], the provisional manager's report, the position of the company, and the grounds upon which the provisional order was issued, along with all other relevant information, before deciding on whether or not to grant the order[85].

This process was costly, and being granted a provisional order did not guarantee the company an order for final judicial management. This is apparent in *Tenowitz v Tenny Investments (Pty) Ltd*[86], *Makhuva v Lukoto Bus Service (Pty) Ltd*[87], and *Ben-Tovim v Ben-Tovim*[88], which were cases that involved a final judicial management application after a provisional order had been granted. In all these cases, final management was denied, yet the fees of the provisional judicial manager still had to be paid by the company in addition to the legal proceedings costs.

Another problem was that the concept of judicial management was misunderstood. Often, people did not understand the purpose behind judicial management and applied for it even in circumstances where they could have resolved their issues through their internal company remedies or a liquidation order. In the case of *Makuva v Lukoto Bus Services*[89], the court held that the applicants were trying to use the judicial management to further their personal agenda to overthrow the manager of Lukoto Bus Services. They used an urgent application for judicial management as a mechanism to resolve their conflict. They rushed for judicial management without exhausting internal remedies to resolve their differences.[90] This was also the case in *Ben-Tovim v Ben-Tovim*[91] and *Rustomjee v Rustomjee*[92] where the

[81] A Loubser op cit note 55 at 156.
[82] P Kloppers op cit note 58 at 370; H Rajak op cit note 38 at 268; K N Bagwandeen op cit note 17 at 28.
[83] P Kloppers op cit note 58 at 370.
[84] Companies Act 61 of 1973. Section 427 and 432. Chapter XV.
[85] A. Loubser op cit note 1 at 157 —158.
[86] *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E).
[87] *Makhuva v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V).
[88] *Ben-Tovim* supra note 2.
[89] *Makhuva* supra note 87.
[90] *Makhuva* supra note 87 at 393—398.
[91] *Ben-Tovim* supra note 2.
[92] *Rustomjee v Rustomjee (Pty) Ltd* 1960 (2) SA 753 (D).

shareholders were at deadlock and there was hostility between the shareholders of the companies regarding the management of the companies, and the applicants resorted to judicial management. In dismissing these cases, the courts emphasised that judicial management was an extraordinary procedure and a privilege granted to a company that was in financial distress but still had a chance of being a successful concern.[93] In *Ben-Tovim v Ben-Tovim,*[94] the court went on to say that the legislature did not intend for the judicial management process to be used to settle internal disputes amongst the company's management.

The final judicial management requirement, which required the courts to be convinced that if placed under judicial management, the company would become a successful concern, was also a contributing factor to the judicial management's failure.[95] *Tenowitz v Tenny Investments (Pty) Ltd,*[96] confirmed that, according to section 432 of the 1973 Act, the test for final management was whether the company will become a successful concern if placed under judicial management and if doing so was just and equitable. This test was more onerous than the one applied to provisional judicial management.[97] The use of the word 'will' in this test was interpreted to mean that the company needed to have a high probability of success, close to certainty, that it would regain solvency if placed under judicial management.[98] This was too stringent and posed a difficulty for the courts in determining the success or failure of a company.[99]

Lastly, the requirement that companies had to be near insolvency or insolvent to be granted judicial management.[100] This often meant that by the time this process was granted, the company's fate was already sealed and there was not much that the judicial manager could do to turn it around.[101] Klopper[102] was of the view that a company's early submission into judicial management improved its chances of a successful outcome.[103] This view was correct in that an early submission into judicial management would have most likely offered

[93] Ben-Tovim supra note 2 at 331; Rustomjee supra note 92 at 759.
[94] *Ben-Tovim* supra note 2 at 332.
[95] The Companies Act 61 of 1973. Section 432. Chapter XV.
[96] *Tenowitz supra* note 86 at 683.
[97] Tenowitz supra note 86 at 683.
[98] Tenowitz supra note 86 at 683.
[99] N Harvey *Turnaround Management and Corporate Renewal: a South African Perspective* (2011) 71.
[100] D A Burdette op cit note 36 at 349; Also see K N Bagwandeen op cit note 17 at 29.
[101] D A Burdette op cit note 36 at 349.
[102] P. Kloppers '*Judicial Management- A Corporate Rescue Mechanism in Need of Reform*' (1999) 10 Stell LR at 424.
[103] ibid.

the judicial manager sufficient time to thoroughly examine the company's affairs and develop a viable rescue strategy.

4. The shift from judicial management to business rescue

In the late 1990s, several studies began to identify various problems and deficiencies associated with the judicial management system.[104] Some advocated for its reform through changes in judicial management legislation, while others advocated for the implementation of an entirely new Companies Act.[105] As a result, the Trade and Industry Department issued a corporate reform guideline which proposed replacing the outdated creditor-friendly judicial management model with a debtor-friendly business rescue system.[106]

The business rescue system was widely anticipated and regarded as a "game changer" for a variety of reasons,[107] the most important of which was that it had two objectives instead of one.[108] While the judicial management model primarily focused on restoring the company to solvency by paying off all of its debts, business rescue proposed restoring the company to solvency or alternatively, providing better returns to the company's creditors than would have resulted from immediate liquidation.[109] This allowed more companies to explore the regime. Even those that had no intention of being fully restored to solvency but only sought to achieve the secondary objective. Another improvement was that business rescue applied a less stringent test of *reasonable prospect of success* compared to the judicial management's *reasonable probability test*,[110] which required almost certain confirmation that the debtor-company would be able to repay its debts before the process could be granted.[111] Further, unlike judicial management, which could only be commenced by approaching the courts, business rescue provided companies with an opportunity to commence the procedure either by an order of the court or voluntarily through resolution.[112] Essentially, judicial management was viewed as a procedure that limited small companies from utilising it and prioritised debt repayment, while business rescue was seen as an inclusionary system that catered for both

[104] P Klopper op cit note 102; D A Burdette op cit note 75; A Smits op cit note 79; H Rajak op cit note 38.
[105] H Rajak op cit note 38 at 263; A Smits op cit note 79; P Kloppers op cit note 102; D A Burdette op cit note 75 at 58.
[106] GN 1183 of GG 26493, 23/06/2004; 43 – 45.
[107] E Levenstein op cit note 4 at 74.
[108] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Limited* 2013 JDR 1019 (GSJ) at 3.
[109] ibid.
[110] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) at 424; Also see E P Joubert op cit note 79 at 556.
[111] *Tenowitz* supra note 86 at 683.
[112] The Companies Act 71 of 2008. Section 129. Chapter 6.

large and small companies and prioritised the rescue of the company's business through balancing the opposing interests of shareholders, creditors and employees.[113]

In February 2004, the Chief State Law Adviser announced the intention of the government to create an annual fund to assist financially distressed companies.[114] During that time, the Business Rescue Bill was said to be underway, with an expected completion date of May 2004.[115] However, the Bill was only completed in 2007, and was later incorporated into Chapter 6 of the Act, which went into effect in May 2011.[116]

5. Conclusion

Judicial management was introduced into South African company law in 1926 through the Companies Act 46 of 1926[117] as an extra-ordinary system that was to assist financially distressed companies recover from their financial situation and become a successful concern.[118] The model introduced a person called 'the judicial manager' who was responsible for the examination of the company's affairs and administering it back to solvency.[119] This was done to the exclusion of the company's pre-existing managers[120] as it was presumed that they were responsible for the company's mismanagement.[121]

A company wishing to apply for the procedure had to first apply for provisional judicial management, in which the requirements of Section 427 were put to test.[122] If it was clear that the company was unable to pay its debts or meet its obligations; was prevented from becoming a successful concern; had a reasonable probability of success; and it was just and equitable to place the company under judicial management, then the procedure was granted[123] and a provisional judicial manager was appointed to assess the company's affairs and draft a report.[124] After such a report was drafted, it was considered by the Master in deciding whether an order for a final judicial management should be made.[125] For final judicial

[113] R Bradstreet 'The new business rescue: Will creditors sink or swim?' (128)2(2011) *South African Law Journal* 362; Also see Bradstreet op cit note 11 at 195.
[114] A Loubser op cit note 48 at 4.
[115] ibid.
[116] ibid.
[117] A Loubser op cit note 1 at 138.
[118] J J Henning op cit note 3 at 92.
[119] A Burdette op cit note 31 at 246.
[120] ibid.
[121] Levenstein op cit note 4 at 54.
[122] A Loubser op cit note 48 at 20.
[123] Companies Act 1973 of 61. Section 427. Chapter XV. Also see A Loubser op cit note 1 at 141-150.
[124] Companies Act 61 of 1973. Section 427(1) (a) &(c). Chapter XV.
[125] Companies Act 61 of 1973. Section 429(b). Chapter XV.

management to be granted, the test that had to be satisfied was slightly different from that of provisional judicial management. The test was whether the company "will" become a successful concern if placed under judicial management.[126] This test was too stringent and restricted access to this regime in that it required proof of a high probability of success, close to certainty that the company would become successful if placed under judicial management.[127] However, once the final judicial management was granted, a final judicial manager was appointed and trusted with investigating the company's past and present affairs, accounting records, financial statements, and convening creditors' meetings to rectify any mismanagement of the company and to steer the company in the direction of being rescued.[128]

Although the judicial management model on paper appeared appealing, in reality, it was difficult to obtain and was limited to the reach of large companies.[129] It could only be commenced through the court.[130] This was expensive, time-consuming, and restrictive.[131] Also, the procedure could only be sought by companies that were near insolvency.[132] This meant that by the time that this model was granted, the company's fate was already sealed.[133] Further, the judicial management concept was largely misunderstood. Companies applied for the procedure unnecessarily, even in situations that could be resolved through internal dispute channels.[134] These problems triggered an interesting debate in academia, in which some writers advocated for judicial management reform while others for the introduction of an entirely new Companies Act with a new corporate rescue model.[135] This resulted in the Department of Trade and Industry proposing the replacement of judicial management with the business rescue system.[136] In 2004, the Business Rescue Bill was announced to be

[126] Companies Act 61 of 1973. Section 432. Chapter XV.
[127] *Tenowitz* supra note 86 at 683.
[128] Companies Act 61 of 1973. Section 433 (a) – (h). Chapter XV.
[129] A. Loubser op cit note 55 at 156- 157. For examples of how the courts made judicial management difficult to obtain see *Kotze v TulrykBpk* 1977 3 SA 118 (T); *Tenowitz* supra note 86; *Makhuva* supra note 87 and *Ben-Tovim* supra note 2.
[130] P Kloppers op cit note 58 at 370.
[131] ibid.
[132] D A Burdette op cit note 36 at 349.
[133] ibid.
[134] *Makhuva* supra note 87 at 393—398; Also see *Ben-Tovim* supra note 2 at 332.
[135] H Rajak op cit note 38 at 263; A Smits op cit note 79; P Kloppers op cit note 102; D A Burdette op cit note 75 at 58.
[136] GN 1183 of GG 26493, 23/06/2004; 43 – 45.

underway,[137] and in 2007 it was completed and included into Chapter 6 of the Act, which was ultimately enforced in May 2011.[138]

Currently, the business rescue system is still in force, and as a corporate rescue regime that introduced the business rescue practitioner, it is critical that this mini-dissertation examine this concept before focusing on the practitioner's role in the rescue process. The following chapter will therefore explain the business rescue process with the intention of providing a clear understanding of the system and identifying its improvements from the judicial management system.

[137] A Loubser op cit note 48 at 4.
[138] ibid.

CHAPTER THREE: THE BUSINESS RESCUE PROCESS EXPLAINED

1. Introduction

Provision 7(k) of the Companies Act, which sets out the Act's purpose, furnishes for efficient rescue and recovery of financially distressed companies in a fashion that sets a balance between all stakeholders' rights and interests.[139] Although not defined in the Act, 'stakeholders' of a company often include people with a vested interest in the company and can either influence the company's performance and operations or be affected by it.[140] Such persons include the company's shareholders, creditors, employees, and suppliers.[141] By specifying that the purpose of the Act is to rescue companies that are financially distressed '…in a manner that balances the rights and interests of all relevant stakeholders' and making no mention of the facilitation of liquidation proceedings, it can be said that business rescue was intended to be given preference over liquidation. This was confirmed in *Southern Palace Investments 264 (Pty) Ltd v Midnight Storm Investments*[142], where the business rescue's approach was held to be different from that of judicial management in that, under the Act, business rescue is preferred over liquidation, whereas under the 1973 Act, creditors were entitled to liquidation and judicial management was only sought in extraordinary cases.[143]

In light of this, this chapter will establish what is meant by the business rescue procedure, determine its test, explain its commencement and its legal ramifications to understand the process and identify its improvements from the judicial management system.

2. What is meant by business rescue?

As mentioned in the first chapter, business rescue proceedings facilitate the rehabilitation of a company that is facing financial hardship.[144] The focus is on providing the company with a chance to restructure and reorganise its affairs and manage its debts.[145] Business rescue has one of two objectives. The primary purpose is the restructuring of the company's affairs to ensure that it becomes profitable and continues to exist on a solvent basis. If that is not possible, then to ensure that the process yields desired returns for the shareholders and

[139] The Companies Act 71 of 2008. Section 7(k). Chapter 1.
[140] J Fernando 'Definition of Stakeholder', available at https://www.investopedia.com/terms/s/stakeholder.asp, accessed on 1 October 2021.
[141] ibid.
[142] *Southern Palace Investments 265 (Pty) Ltd* supra note 110.
[143] *Southern Palace Investments 265 (Pty) Ltd* supra note 110 at 424 para 21.
[144] The Companies Act 71 of 2008. Section 128(1) (b). Chapter 6.
[145] The Companies Act 71 of 2008. Section 128 (1) (b). Chapter 6.

creditors of the company than would have resulted from the company's early liquidation.[146] The tools used to achieve this include 'a.) temporary supervision and management of its affairs, b.) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession, and c.) the development and enforcement of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity.'[147]

2.1. The test for business rescue

The test for determining a company's need for business rescue is two-fold. It questions whether the company is: a.) financially distressed in respect of its ability to fulfil obligations, and b.) if there is a reasonable prospect of the company being rescued.[148] This means that if the company is not experiencing any financial difficulties, or there is no reasonable prospect of it being rescued, then business rescue cannot commence. The use of the word 'and' between the two requirements clearly outlines that both tests need to be satisfied before business rescue proceedings can commence.

2.1.1. The test for financial distress

According to Section 128(1)(f) of the Act, a company will be deemed financially distressed if it appears to be reasonably unlikely that it will be able to pay all of its debts as they become due and payable within the next six months, or reasonably likely that it will become insolvent within the next six months.[149]

The first leg of the test is often referred to as the 'commercial insolvency test,'[150] and it clearly sets out when a company will be in distress. Where there is a reasonable possibility that the company will fail to pay its debt as it becomes due and payable within the next six months.[151] The phrase 'reasonable likelihood' gives the impression that there has to be a logical reason for concluding that the company will fail to fulfil its obligations in six months.[152] This means that the conclusion must be based on an informed prediction following

[146] The Companies Act 71 of 2008. Section 128 (1) (b) (iii). Chapter 6.
[147] The Companies Act 71 of 2008. Section 128 (1) (b). Chapter 6.
[148] The Companies Act 71 of 2008. Section129 (1) (a) to (b). Chapter 6.
[149] The Companies Act 71 of 2008. Section 128 (1) (f). Chapter 6.
[150] J Jones 'Financial distress- a precursor to business rescue' (2018) 18 (9) *Without Prejudice* 9.
[151] The Companies Act 71 of 2008. Section 128 (1) (f) (i). Chapter 6.
[152] Deloitle & Touche Southern Africa Accounting and Auditing Paper '*The Companies Act: When is a company financially distressed, and what does it mean*?' 2014, available at https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_FinancialDistress_15052014.pdf, accessed on 13 September 2021.

the assessment of the company's financial position and other relevant factors that may affect its liquidity going forward.[153]

The second test, known as the 'balance sheet test' or 'factual insolvency test,' compares the company's assets to its liabilities to determine financial distress.[154] On the face of it, the test seems straight forward. However, upon analysing it, it does not indicate whether or not assets and liabilities in this regard include assets or liabilities to be acquired or incurred in the reasonable near future.[155] In determining if there is a reasonable likelihood of insolvency, it is argued that the company's full financial position be considered and not just its technical insolvency.[156] This means considering all relevant circumstances, such as the fair value of the assets and liabilities of the company, as well as assets and liabilities that are reasonably foreseeable, such as property in the process of being transferred to the company, as well as recapitalisation and subordinate agreements.[157] In *BNY Corporate Trustee Services Limited v Eurosil*[158], which is a United Kingdom decision that dealt with the balance sheet test, the Supreme Court of Appeal correctly determined that to prove balance sheet insolvency, a broader commercial context had to be considered, one that extended beyond the liabilities and assets used to prepare statutory accounts.

Section 5 of the Act provides for the interpretation and application of the Act in a manner that gives effect to its purpose, as stated in section 7[159]. This means interpreting the Act in a way that promotes a.) the development of the South African economy by encouraging entrepreneurship and enterprise[160], b.) innovation and investment[161]; and c.) the creation and use of companies in a manner that enhances the economic welfare of South Africa[162]. Comparing the narrow application of the test (which strictly assesses the company's current liabilities and assets) to the broad application (which considers the company's assets, liabilities, opportunities, investments, subordinate agreements, and other management actions to determine financial distress), it is argued that the broad application best serves the purpose of the Act in that it provides functional start-up companies that are

[153] Deloitle & Touche op cit note 152 at 3.
[154] J Jones op cit note 150 at 9.
[155] Deloitle & Touche op cit note 152 at 3.
[156] ibid.
[157] ibid.
[158] *BNY Corporate Trustees Services Ltd v Eurosail*-UK 2007-3BL plc [2013] UKSC 28.
[159] The Companies Act 71 of 2008. Section 7. Chapter 1.
[160] The Companies Act 71 of 2008. Section 7 (b) (i). Chapter 1.
[161] The Companies Act 71 of 2008. Section 7 (c). Chapter 1.
[162] The Companies Act 71 of 2008. Section 7 (e). Chapter 1.

factually insolvent with an opportunity to develop and compete in the market without being classified as financially distressed and in need of business rescue. Further, by conducting a wider analysis of the company's financial position, the broad approach can prevent the system's abuse by companies that are fully functional and want to commence business rescue proceedings to maximise their profits.

Another problem with the financial distress test is the limitation that it places on the application of business recue[163]. For the test to be satisfied, a reasonable likelihood that the company will fail to pay its debt in the next six months must exist, or a reasonable likelihood of insolvency in the next six months.[164] This means that if a company detects distress at seven months, business rescue proceedings cannot be instituted until it reaches the six-month benchmark.[165] Loubser, supported by KPMG, viewed six months as being a short period to anticipate distress and argued that for the financial distress requirement to be effective and proactive, it should be at least twelve months to allow for the early detection of financial distress[166]. In the decision of *Welman v Marcelle Props 193 CC*[167], business rescue proceedings were found to not be for chronically or terminally ill entities, but rather for distressed entities that would be rescued and become solvent with time.[168] This supports Levenstein's contention that proceedings ought to be instituted at the first sign of financial distress[169]. Therefore, twelve months can be argued to be the best period to anticipate distress because, unlike six months, it would allow for the early institution of business rescue proceedings if a company has identified financial distress early.

2.1.2. The test for reasonable prospect of success

Prior to the introduction of the Companies Act 71 of 2008, the test used to decide on judicial management was that of *reasonable probability*[170] which was later labelled as outdated and unrealistic by writers criticising judicial management.[171] Some proposed that *reasonable probability* be done away with and replaced with *reasonable possibility*, as this appeared to

[163] R Rajaram *Success factors for business rescue in South Africa* (unpublished PhD thesis, University of KwaZulu-Natal, 2016) 41.
[164] The Companies Act 71 of 2008. Section 128 (f). Chapter 1.
[165] A Loubser op cit note 48 at 58.
[166] ibid.
[167] *Welman v Marcelle Props 193 CC* 2012 JDR 0408 (GSJ).
[168] *Welman* supra note 167 at 29 para 28.
[169] E Levenstein & L Barnett 'Basics of Business Rescue' 2011, available at https://www.werksmans.com/wp-content/uploads/2013/04/Werksmans-Basics-of-Business-Rescue.pdf, accessed on 24 September 2021, 4.
[170] The Companies Act 61 of 1973. Section 427. Chapter XV.
[171] P Kloppers op cit note 58 at 362.

pose a less burdensome limitation to business rescue.[172] However, the Act introduced the concept of *reasonable prospect*. The problem with this concept is that the Act does not provide a test for it, nor does it define what is meant by it.[173] As a result, case law is often sought for guidance on how to satisfy this requirement.[174]

The first case to examine the *reasonable prospect* requirement was that of *Southern Palace Investments 265 Ltd v Midnight Storm Investments 386 Ltd*[175] in which *reasonable prospect* was compared to *reasonable probability*, which was the requirement in judicial management. The court stated that the use of different language under business rescue suggested that something less than a reasonable probability was required when determining a *reasonable prospect*.[176] It held that for the court to be able to fully exercise its judicial discretion to grant or deny business rescue, affected parties instituting proceedings must be able to furnish the court with sufficient factual details. This means that such applications cannot be founded on speculative and vague assertions.[177] The court further outlined that when deciding on business rescue, the substantial and objective details that must be assessed include (a.) the likely costs of rendering the company able to commence or resume business, (b.) the availability of cash resources for the company to cover daily expenditure, (c.) the availability of resources such as raw materials and human capital, and (d.) the reasons why the applicant believes that the proposed business plan will have a *reasonable prospect of success*.[178]

Delport and Vorster[179] criticised the evidential burden placed on applicants in *Southern Palace Investments 265 (Pty) Ltd*[180] as being too burdensome and could potentially result in business rescue being an ineffective procedure in the future, as was the case with judicial management.[181] They contended that without a practitioner's assistance, the evidence and information required to determine a *reasonable prospect* would not be freely available to

[172] A Burdette op cit note 31 at 249 fn 39.
[173] N M Kubheka *The requirements of business rescue in South Africa: A critical analysis of reasonable prospect in light of business rescue proceedings in terms of Companies Act 71 of 2008* (unpublished LL.M thesis, University of KwaZulu-Natal, 2020) v.
[174] ibid.
[175] *Southern Palace Investments 265 (Pty) Ltd* supra note 110.
[176] *Southern Palace Investments 265 (Pty) Ltd* supra note 110 at 431 para 21.
[177] *Southern Palace Investments 265 (Pty) Ltd* supra note 110 at 431 para 23.
[178] *Southern Palace Investments 265 (Pty) Ltd* supra note 110 at 432 para 24.
[179] P. Delport, Q. Vorster, & E Henochsberg *Henochsberg on the Companies Act 71 of 2008* (2011).
[180] *Southern Palace Investments 265 (Pty) Ltd* supra note 110.
[181] P. Delport op cit note 179 at 465.

applicants, hence making the requirement difficult to meet.[182] This is correct in that these factors clearly demonstrate that applicants must have detailed financial information on the daily operations of the company, and this information is not readily available to all affected persons owing to the different roles that they play within the company.[183] Joubert[184] correctly argued that because the company's directors have easy access to the company's financial records, they are more likely to prove the existence of a *reasonable prospect* than other affected persons instituting proceedings, such as shareholders, employees, creditors, and suppliers.[185] Therefore, having these factors as a standard for a *reasonable prospect* can be argued to create an unfair limitation on the number of people who can apply for the business rescue procedure.

In *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited*[186], the *reasonable prospect* factors listed in *Southern Palace Investments 265(Pty) Ltd*[187] were found to not be applicable in each matter, and that each case had to be considered on its own merits.[188]

Van der Merwe J in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd*[189], outlined that requiring affected parties to provide minimum concrete and ascertainable details such as- 'the likely costs of rendering the company able to commence its business, the likely availability of the necessary capital resource to enable the company to meet its everyday expenses, concrete factual details of the source, nature, and extent of the resources that are likely to be available to the company, as well as the basis and terms upon which such resources will be available'[190]- is equivalent to setting the standard of proof at *reasonable probability*.[191] This was held to be an unjustified restriction on companies' access to the business rescue regime.[192] Further, Van der Merwe J held that the *reasonable prospect of*

[182] P. Delport op cit note 179 at 465.
[183] E P Joubert op cit note 79 at 555.
[184] ibid.
[185] ibid.
[186] *Employees Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Solar Spectrum Trading 83 (Pty) Ltd* (2012) ZAGPHC 359.
[187] *Southern Palace Investments 265 (Pty) Ltd* supra note 110 at 432.
[188] *Employees Solar Spectrum Trading 83 (Pty) Limited* supra note 186 at para 16.
[189] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB) at para 8 – 12.
[190] *Southern Palace Investments 265 (Pty) Ltd* supra note 110 at 432 para 24.
[191] *Propspec Investments (Pty) Ltd* supra note 189 at 546 para 15.
[192] *Propspec Investments (Pty) Ltd* supra note 189 at 546 para 15.

recovery will be established if an applicant can demonstrate such a *reasonable possibility* based on objectively reasonable grounds.[193]

In *Essa v Bestvest,*[194] the court rejected that a summary of the intended rescue plan had to be included in a business rescue application. It held that the practitioner, once appointed, should bear the burden of developing the plan once he has examined the company, its cause of distress, and its recovery prospects.[195] Even more, it stated that it cannot be approached by an applicant to appoint a practitioner with flimsy grounds and expect the panacea to its problems to be provided by the practitioner. For the court to be able to *evaluate the prospect of success*, it must be furnished with an application that has sufficient facts and documentary evidence.[196]

Zoneska Investments (Pty) Ltd t/a Bonatla, Properties (Pty) Ltd v Midnight Storm Investments[197] was another case that examined *reasonable prospect*. The court determined that sufficient facts must be presented to it before it can be satisfied on objective grounds that there is a *reasonable prospect* of the applicant's proposed plan resulting in a greater dividend for creditors than would result from the company's immediate liquidation.[198]

In *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd,*[199] *reasonable prospect of success* was said to only be limited to the achievement of the primary objective of business recue.[200] However, this was rejected in *Oakdene Square Properties (Pty) Ltd vs Farm Bothasfontein (Kyalami) (Pty) Ltd*.[201]

In *Oakdene Square Properties (Pty) Ltd*[202], which is a leading decision when it comes to *reasonable prospect*, the court assessed the Companies Act section 128(1)*(b)*(iii)[203] which consists of the two objects of business rescue, and held that the question to ask is whether the appellants had established a *reasonable prospect* of achieving any one of the two goals contemplated in section 128(1)*(b)* based on the facts of the case.[204] This means that the

[193] *Propspec Investments (Pty) Ltd* supra note 189 at 545 para 11.
[194] *Essa v Bestvest* 2012 (5) SA 497 (WCC).
[195] *Essa* supra 194 at 507 para 40.
[196] *Essa* supra 194 at 507 para 41.
[197] *Zoneska Investments (Pty) Ltd t/a Bonatla, Properties (Pty) Ltd v Midnight Storm Investments* 2012 (4) SA 590 (WCC).
[198] *Zoneska Investments (Pty) Ltd t/a* supra 197 at para 46; also see para 41.
[199] *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 (5) SA 515 (GSJ).
[200] *A G Petzetakis International Holdings Ltd* supra note 199 at 521 para 17.
[201] *Oakdene Square Properties (Pty) Ltd vs Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA).
[202] *Oakdene Square Properties (Pty) Ltd* supra note 201.
[203] The Companies Act 71 of 2008. Section 128 (1) (b) (iii) Chapter 6.
[204] Oakdene Square Properties (Pty) Ltd supra note 201 at 549 – 550.

reasonable prospect of rescuing a company is not only limited to the achievement of the primary objective as had been set in *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd*[205], but also extends to the company's *reasonable prospect of success* when seeking to obtain nothing more than better returns for its shareholders and creditors than would have resulted from the immediate winding up of the company.[206]

The phrase *reasonable prospect for rescuing the company* was interpreted to mean that applicants had to show, on 'reasonable grounds' that the company has a chance at survival.[207] Even more, the court held that for the requirement to be met, more than a prima facie case had to be established, but less than the *reasonable probability* test, which was the 'yardstick for placing a company under judicial management'[208]. The court also rejected that a substantial measure of detail on the proposed rescue plan was required for this requirement to be satisfied. Nonetheless, it confirmed that a mere speculative suggestion was not sufficient to satisfy a *reasonable prospect*[209].

From the above cases, it is clear that in interpreting this requirement, the courts have avoided setting stringent criteria or factors for consideration with the aim of ensuring that a *reasonable prospect* does not pose the same limitation to business rescue as a *reasonable probability* did to judicial management. However, the failure to set a proper test or guideline by the courts creates blurred lines for applicants seeking to apply for business rescue but are unsure of how to satisfy the *reasonable prospect* requirement. Simply stating that the company must show on 'reasonable grounds' that it has the potential to succeed and that the requirement will be met if more than a prima facie case is established, yet no more than a reasonable probability,[210] does not provide a clear interpretation of the requirement. If anything, it makes it even more difficult to understand where exactly the threshold lies. It is critical for applicants to present a clear case for why they believe the company has a reasonable chance of success. As such, it is submitted that before the courts can issue an order for business rescue, the applicants should at most show factual figures, strategies, or a mini-rescue plan that demonstrates that the company has at least a fifty percent (50%) prospect of success.

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[205] *A G Petzetakis International Holdings Ltd* supra note 199 at 521 at 17.
[206] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 549 – 551.
[207] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 551 para 29.
[208] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 551 para 29.
[209] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 551 para 29.
[210] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 551 para 29.

O'brien and Carlitz[211] contended that when the phrase *reasonable prospect* appears in the Act, it normally refers to the *reasonable foreseeability* test used in the law of delict to determine negligence, considering that *reasonable foreseeability* is a part of the flexible test used to establish legal causation in multiple areas of South African law.[212] However, instead of 'reasonable person,' they argued that the 'reasonable business person' should be the yardstick.[213] This argument is rejected because in *Lomagundu Sheetmetal and Engineering (PVT) LTD v Basson*[214], which was a decision that determined the *reasonable foreseeability* test, the test was said to consider how real the risk of the harm was from emerging, the extent of the potential damage, as well as the costs or challenges associated with guarding against the risk.[215] This outlines that *reasonable foreseeability* examines the likelihood and extent of harm, whereas *reasonable prospect* examines the likelihood of rehabilitating a company or providing better returns for its creditors than would result from liquidation.[216] This means that to apply the test of *reasonable foreseeability* to business rescue, the test would have to be changed drastically, therefore, proving that the two concepts are too distinct to be used interchangeably.

3. Commencement of Business Rescue

According to the Act, business rescue proceedings can commence in one of two ways, namely, voluntarily through a board of directors' resolution[217], alternatively, through an order of the court.[218] Section 129 of the Act offers the board of directors the voluntary commencement of business rescue where they reasonably believe that the company is facing financial difficulties and has a reasonable prospect of recovery.[219] However, in order for such a resolution to be effective; (a.) it must be submitted to the CIPC; (b) a practitioner must be appointed; and (c.) all affected parties must be notified of the resolution as well as the practitioner's appointment.[220] The resolution must be submitted within five business days of

[211] P O'Brien & T Calitz 'A reasonable prospect for rescuing a company as a requirement for business rescue: A decade later' (2021) 4 (2021) *Journal of South African Law* 696.
[212] P O'brien op cit note 211 at 696 fn 69; Also see S v Mokgethi 1990 (1) SA 32 (A) which introduced a flexible legal causation test to criminal law, which ultimately expanded to the law of delict (International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A) 700H-701F), and the law of insurance, (Napier v Collett 1995 3 SA 140 (A) 143E-144F, 146E-J).
[213] P O'Brien op cit note 211 at 696.
[214] *Lomagundu Sheetmetal and Engineering (PVT) LTD v Basson* 1973 (4) SA 523.
[215] Lomagundu Sheetmetal and Engineering (PVT) LTD supra note 214 at 525.
[216] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 549—551 para 23 – 26.
[217]The Companies Act 71 of 2008. Section 129. Chapter 6.
[218] The Companies Act 71 of 2008. Section 131. Chapter 6.
[219] The Companies Act 71 of 2008. Section 129. Chapter 6.
[220] The Companies Act 71 of 2008. Section 129(4)(b). Chapter 6.

adoption, the practitioner must be appointed within five business days, a notice of the practitioner's appointment must be filed within two business days, and all affected persons must be provided with a copy of the appointment within five business days of the appointment.[221] The problem with this is that the Act provides stringent timeframes for the filing of these documents and does not allow for a grace period.[222] This means that failing to comply with these timeframes can result in the resolution's lapse and nullity.[223]

Section 131 of the Act, on the other hand, allows for a court application to commence business rescue proceedings.[224] The application can be made by any affected person, including third parties such as creditors, shareholders, employees, or a registered trade union of the company.[225] However, to issue an order commencing business rescue proceedings, the court must be satisfied that:

(i) The company is financially distressed;

(ii) The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) It is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company.[226]

The financial distress and the reasonable prospect of recovery requirements have been discussed in detail in paragraph 2.1.1 and 2.1.2 of this chapter, and will not be discussed further.

The problem with the non-payment requirement is that it will be satisfied even if the company has only missed one payment.[227] This means that, in the event of an administrative or systematic error that delays payment, this requirement can still be relied on to institute proceedings.[228] With the amount of cases that the courts are faced with every day, this

[221] The Companies Act 71 of 2008. Section 129 (3) to (4). Chapter 6.
[222] N P Serumula *The effect of business rescue and the section 133 moratorium on stakeholders* (unpublished LL.M thesis, University of Pretoria, 2017) 11.
[223] The Companies Act 71 of 2008. Section 129 (5) (a). Chapter 6; Also see N P Serumula op cit note 222.
[224] The Companies Act 71 of 2008. Section 131. Chapter 6.
[225] The Companies Act. Section 128 (1) (a). Chapter 6.
[226] The Companies Act 71 of 2008. Section 131 (4) (a). Chapter 6.
[227] A Loubser 'The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part 1)' 2010 *Journal of South African Law* 510; Also see M Ismail *A critical discussion of the requirements of business rescue in terms of the Companies Act 71 of 2008* (unpublished LL.M thesis, University of KwaZulu-Natal, 2020) 27.
[228] A Loubser op cit note 227 at 510.

requirement can be argued to add to the courts' workload unnecessarily. Loubser[229] argued that for non-payment to constitute grounds for a business rescue procedure, it must have occurred over a stipulated minimum period or frequency, and at most two consecutive payments must have been missed.[230] This is accepted because, with two or more consecutive payments being missed, a pattern of non-payment can be established, which ultimately signals financial difficulty.

The challenge with the just and equitable requirement is that it is not clear on what is meant by 'financial reasons'. Whether or not it includes financial difficulties not covered in the financial distress definition, such as a company that has detected insolvency earlier than six months,[231] or includes any financial benefit that a company may receive if it commences with business rescue proceedings.

4. Legal consequences of business rescue proceedings

4.1. Moratorium

The business rescue system comes with a lot of changes and consequences, with the most important being the moratorium on all legal actions, including enforcement actions against the company, its assets, property, and creditors' rights against the company.[232] The moratorium's purpose is to give the company sufficient breathing room to recover from its financial difficulties.[233] According to Cassim,[234] the moratorium is 'the central pillar of a successful business rescue regime' and 'without it, it would not be possible to rescue a company'. In *Cloete Murry and Another NNO v FirstRand Bank Ltd t/a Westbank*,[235] the court identified the moratorium as being of cardinal importance because it affords distressed companies crucial breathing space or a period of respite to reorganise their affairs.[236] However, it should be noted that the moratorium is not absolute and has limitations.[237] Proceedings can commence or continue with the courts' or practitioner's permission.[238] They can also commence or continue where they pertain to a.) criminal activities committed by the company or its officials; b.) a set-off claim made by the company in any legal proceedings;

[229] A Loubser op cit note 227 at 510.
[230] ibid.
[231] ibid.
[232] The Companies Act 71 of 2008. Section 133. Chapter 6.
[233] M F Cassim op cit note 54 at 422.
[234] ibid at 421 and 422.
[235] *Cloete Murray and another v Firstrand Bank Ltd T/A Wesbank* 2015 (3) SA 438 (SCA).
[236] *Cloete Murray* supra note 235 at 441 para 14.
[237] *Chetty t/a Nationwide Electrical v Hart* 2015 (6) SA 424 (SCA) at 436 para 40.
[238] The Companies Act 71 of 2008. Section 133 (1) (a) and (b).

c.) property or rights over which the company enjoys trustee powers; or d.) a claim made by a regulatory authority such as the South African Revenue Services.[239]

4.2. Protection of Property Interests

During business rescue proceedings, a company is prohibited from disposing of its property or property in its lawful possession, unless it does so either as part of a bona fide arm's length agreement for fair value, approved in advance and in writing by the practitioner; in the ordinary course of its business; or in a transaction included, contemplated within, and undertaken as part of the implementation of a business rescue plan that has been approved in terms of section 152 of the Act.[240] The intention behind this is to ensure that the company retains the necessary equipment and assets to continue its operations.[241]

Where a person possesses property belonging to a company as a result of an agreement concluded before proceedings, that person has the right to keep possession and rights to that property.[242] However, a person that has rights over property that is legally in the possession of the company is prohibited from exercising such rights without the consent of the practitioner.[243] This is regardless of whether the company owns the property or an agreement to the contrary was signed by the parties prior to commencement.[244]

Where the company plans on disposing of property that a creditor has security or interest in, the creditor's consent is required unless a.) the revenue from the sale adequately releases the company of its financial obligation to the creditor, and b.) the creditor will promptly be paid the amount that discharges the company of its indebtedness to the creditor, or c.) the company will promptly provide security for the amount owed to the creditor.[245]

4.3.The position of directors, employees, and creditors under business rescue

When it comes to the company's directors, unlike judicial management, business rescue does not completely strip them of their powers and duties. They remain the directors of the company but under the supervision of the practitioner.[246] Although the practitioner is given complete managerial control over the company, the directors are still expected to continue

[239] The Companies Act 71 of 2008. Section 133 (a) - (f). Chapter 6; Also see P Delport op cit note 179.
[240] The Companies Act 71 of 2008. Section 134(1). Chapter 6.
[241] The Companies Act 71 of 2008. Section 134 (1). Chapter 6.
[242]The Companies Act 71 of 2008. Section 134 (1) (b). Chapter 6.
[243] The Companies Acct 71 of 2008. Section 134 (1) (c). Chapter 6.
[244]The Companies Act 71 of 2008. Section 134(1) (c). Chapter 6.
[245] The Companies Act 71 of 2008. Section 134 (3). Chapter 6.
[246] The Companies Act 71 of 2008. Section 137. Chapter 6.

their management functions, provided that it is reasonable for them to do so.[247] This means that each director is still bound by his fiduciary duties[248]and personal financial interest duties[249] and can still incur personal liability in terms of the Act[250].

Concerning employment contracts, a person employed by the company immediately before the institution of proceedings continues to work for the company under the previous terms and conditions, unless changes occur in the ordinary course of attrition, or the company and the employee consent to different terms and conditions.[251]

When it comes to the creditors of the company, they are expected to continue performing their obligations to the company in the same manner in which they were performing them before commencement.[252] This means continuing to provide goods or services under the same terms, unless the parties agreed otherwise in an agreement concluded prior to the proceedings.[253] However, when it comes to the payment of creditors, the order of preference is largely dependent on post-commencement finance. This ranks the practitioner's remuneration, expenses, and claims related to the proceedings first; employees' post-commencement payments second; secured post-commencement creditor's payments third; unsecured post-commencement creditor's payments fourth; secured pre-commencement creditor's payments fifth; employees' pre-commencement payments sixth; and unsecured pre-commencement creditor's payments last.[254] This clearly demonstrates that the company's pre-commencement lenders' and creditors' interests are the least catered for in the rescue process, irrespective of the fact that they have financed the company the longest and continue to support the process and provide services to the company on an ordinary basis. On the face of it, the post-commencement finance order of preference appears to be unfair. However, it can be argued to be important in encouraging post-commencement investments with the company.

5. Conclusion

[247] The Companies Act 71 of 2008. Section 137. Chapter 6.
[248] The Companies Act 71 of 2008. Section 76(3). Chapter 6.
[249] The Companies Act 71 of 2008. Section 75. Chapter 6.
[250] The Companies Act 71 of 2008. Section 77. Chapter 6.
[251] The Companies Act 71 of 2008. Section 136. Chapter 6.
[252] E Levenstein & L Barnett op cit note 169 at 18.
[253] ibid.
[254] The Companies Act 71 of 2008. Section 135. Chapter 6; Also see *Merchant West Capital Solutions (Pty) Ltd* supra note 108 *at* 109 and *Redpath Mining South Africa (Pty) Ltd v Marsden N.O. & Others* [2013] ZAGPJHC 148.

From the above, it is clear that the Companies Act made significant improvements to corporate rescue. These include the practitioner working alongside the company's directors in rescuing the company.[255] This is different from the approach that was taken in judicial management to completely exclude the former management of the company from the rescue process.[256] The proceedings can now also be commenced by a resolution of the board of directors[257] and not only by a court order. This saves the company time and costs associated with instituting rescue proceedings through the court, but it also leaves the door open for applicants that have no other choice but to approach the court. Under the Act, affected parties such as shareholders, creditors, employees, and trade unions of the company are given the opportunity to institute business rescue proceedings[258] as well as partake in the creation of a viable rescue plan.[259] The inclusion of such people in the process can be argued to work for the company in that it has the potential to bridge the gap between the practitioner and the company's officials, thus encouraging efficient team work and the rescue of the company. The Act also sets an achievable test for business rescue, which is different from the stringent '*reasonable probability*' test for judicial management. Although the Act does not clearly outline a test for *reasonable prospect of success,* the courts have established that it applies to both the primary and secondary objectives of business rescue and that it requires something more than a prima facie case but less than the *reasonable probability* test.[260] This demonstrates that when it comes to corporate rescue, the legislature and the judiciary have lowered the bar and have adopted a more versatile approach to business rescue to ensure that it is easily accessible to companies that need it.

Having determined the meaning of business rescue above, analysed its two-leg test, its commencement, and its legal implications, this mini-dissertation will now turn to the business rescue practitioner as the facilitator of the business rescue process. When a business rescue practitioner is appointed, he is tasked with investigating the company's affairs[261] and developing and implementing a business rescue plan with the intention of turning the

[255] The Companies Act 71 of 2008. Section 137. Chapter 6.
[256] FH Cassim op cit note 6.
[257] The Companies Act 71 of 2008. Section 129. Chapter 6.
[258] The Companies Act 71 of 2008. Section 131. Chapter 6.
[259]The Companies Act 71 of 2008. Section 152. Chapter 6; Also see section 145.
[260] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 551.
[261] Companies Act 71 of 2008. Section 141. Chapter 6.

company around or providing better returns to the company's creditors than would have resulted from immediate liquidation.[262]

The practitioner plays a vital role in the rescue of the company and assumes wide-ranging powers and duties.[263] However, his office is not without any problems or areas for improvement. As such, the following chapter will critically analyse the practitioner's powers and duties, appointment, and remuneration to identify such problems and provide appropriate recommendations.

[262] Companies Act 71 of 2008. Section 150. Chapter 6.

[263] For an outline of such powers and duties, see Companies Act 71 of 2008. Sections 141(1) and 150. Chapter 6.

CHAPTER FOUR: THE BUSINESS RESCUE PRACTITIONER

1. Introduction

Once a resolution or order for business rescue is passed and a practitioner is appointed, the practitioner assumes complete management of the company in place of its board of directors and previous management.[264] This means that he is entrusted with the director's responsibilities and duties and is subject to personal liability in terms of Sections 75 and 77 of the Act[265]. A practitioner is defined 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…'.[266] The practitioner's main duty, and probably the most crucial, is to formulate a business rescue plan that must be ratified by the company's creditors and shareholders before it can be implemented.[267] Given the practitioner's role in business rescue, it is critical that he can be trusted with the responsibility and is capable and qualified to carry out his powers and duties efficiently. This chapter will therefore explore the extent of the practitioner's powers and duties and identify issues associated with the practitioner's appointment and remuneration that hinder the system's success.

2. The powers and duties of the business rescue practitioner

Although the practitioner has extensive control over the company's existing management,[268] he can choose to delegate some of his work to the company's manager or director if necessary.[269] He also has the power to remove from office anyone forming part of the company's pre-existing management[270] and appoint a new person to form part of the company's executive team.[271] However, it must be noted that the appointment of such persons is limited to section 140 (2) of the Act, which prohibits the appointment of persons that have a relationship with the company that would compromise their integrity, impartiality, or objectivity;[272] or persons related to persons with such a relationship.[273] According to section 141 of the Act, the main duties of the practitioner are to examine the company's

[264] The Companies Act 71 of 2008. Section140 (1) (a). Chapter 6.
[265] The Companies Act 71 of 2008. Section 140 (3) (b). Chapter 6; Also see Section 75 which sets out personal financial interest duties and section 77 which explains personal liability of directors.
[266] The Companies Act 71 of 2008. Section 128 (1) (d). Chapter 6.
[267] The Companies Act 71 of 2008. Section 140 (1) (d) (i). Chapter 6; Also see E Levenstein op cit note 4 at 394.
[268] The Companies Act 71 of 2008. Section140 (1) (a). Chapter 6.
[269]The Companies Act 71 of 2008. Section 140(1). Chapter 6.
[270]The Companies Act 71 of 2008. Section 140 (1) (c) (i). Chapter 6.
[271] The Companies Act 71 of 2008. Section 140 (1) (c) (ii). Chapter 6.
[272] The Companies Act 71 of 2008. Section 140 (2) (a). Chapter 6.
[273] The Companies Act 71 of 2008. Section 140 (2) (b). Chapter 6.

business, financial situation, property, and affairs to determine if it has a reasonable prospect of recovery and to draft and enforce a business rescue plan.[274] If no reasonable prospect of recovery exists, the practitioner is tasked with notifying the court of such, as well as the company and affected parties. Further, the practitioner is expected to petition the court for an order terminating business rescue proceedings and commencing with liquidation.[275] Proceedings can also be terminated where the practitioner believes that the company is no longer in financial distress.[276] Further, if at any point during the proceedings, it is evident to the practitioner that prior to the proceedings, the company entered into voidable transactions or failed to meet material obligations, he must rectify the situation and encourage the management to do the same.[277] Where reckless trading, fraud, or any other law contravention is detected, the practitioner is obliged to forward such evidence to the appropriate authorities for investigation, and the management of the company is also required to rectify the situation.[278]

2.1 The Business Rescue Plan

If it is evident to the practitioner that a reasonable prospect of success exists, he is then tasked with developing the company's business rescue plan.[279] The practitioner is expected to develop, present, and propose the plan [280] to the approval of the company's creditors before it can be adopted and implemented by the company.[281] The plan must consist of ways in which the practitioner intends to rescue the company, supported by the necessary documentation to convince creditors to approve it.[282] According to section 152(2) of the Act, the plan will get preliminary approval if it is supported by persons holding more than 75% of the creditors' voting interest and at least 50% of the independent creditors' voting interest.[283] This means that if one of the two requirements is not met, the rescue plan will not be considered.[284] The plan will also not be considered if the voting threshold is met but the creditors with majority voting rights have voted against the adoption of the plan,[285] unless a vote of approval has been passed by the creditors to allow the practitioner an opportunity to develop and present

[274] The Companies Act 71 of 2008. Section 141 (1). Chapter 6; Also see section 150 (1).
[275] The Companies Act 71 of 2008. Section 141 (2) (a) (i) and (ii). Chapter 6.
[276]The Companies Act 71 of 2008. Section 141 (2) (b). Chapter 6.
[277] The Companies Act 71 of 2008. Section 141 (2) (c) (i). Chapter 6
[278] The Companies Act 71 of 2008. Section 141 (2) (c) (ii) (aa) and (bb). Chapter 6
[279] The Companies Act 71 of 2008. Section 140. Chapter 6.
[280] The Companies Act 71 of 2008. Section 131(5). Chapter 6.
[281] The Companies Act 71 of 2008. Section 152. Chapter 6; Also see section 145.
[282]The Companies Act 71 of 2008. Section 150(2) (b). Chapter 6.
[283] The Companies Act 71 of 2008. Section 152 (2). Chapter 6.
[284] The Companies Act 71 of 2008. Section 153 (1) (a) (i) and (ii); Also see section 152 (3) (a).
[285] The Companies Act 71 of 2008. Section 152 (3) (c) (ii) (bb). Chapter 6.

another plan, or the practitioner has notified the creditors of an intention to obtain a court order setting aside the vote's outcome.[286] Section 132(2)(c) of the Act also states that proceedings will not continue if the business rescue plan is rejected by the company's creditors and no attempt is made by other affected parties to extend them.[287]

The problem with Sections 152(2) and 132(2) (c) of the Act is that they give major creditors too much power over the implementation of the rescue plan, which overrides the interests of minor creditors and other stakeholders. It is clear that where there are conflicting views between a major creditor, a minor creditor, and the company regarding the plan, the voices of the minor creditor and the company become irrelevant. Although the practitioner has the discretion to approach the court for an order invalidating the creditors' vote,[288] this can be argued to not always be in the company's best interest because it requires additional costs and time, which a financially distressed company might not have.[289] Also, looking at previous decisions in which a major creditor had rejected the rescue plan, it is argued that the courts would most likely support the major creditor over the company.

In *Gormley v West City Precinct Properties (Pty) Ltd and Another,*[290] the court considered that the majority creditor was clear from the beginning that it had no intention of supporting the business rescue plan and held that this was essentially fatal to the business rescue application.[291] Traverso DJR stated that-

> *In any event, it appears that this application is an exercise in futility. In terms of section 152(2) of the Act, any business rescue plan must be approved by the holders of more than 75% of the creditors' voting interest. The Bank, on Gormley's own papers, holds in excess of 75% of the creditors' voting interest. West City has failed over the past three years to pay or even reduce its indebtedness to the Bank, and the Bank will not approve a business plan which involves both waiting another three to five years to be paid, and West City utilising assets securing the Bank's claim to pay West City's running expenses and West City's other creditors. That much is clear from the Bank's answering affidavit and the Bank has already rejected this notion. In terms of section*

[286] The Companies Act 71 of 2008. Section 153(1) (a) (i) and (ii). Chapter 6.
[287] The Companies Act 71 of 2008. Section 132 (2) (c). Chapter 6.
[288] The Companies Act 71 of 2008. Section 153(1) (a) (i) and (ii). Chapter 6.
[289] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 555 para 38.
[290] *Gormley v West City Precinct Properties (Pty) Ltd* 2013 JDR 1895 (WCC).
[291] *Gormley* supra note 290 at 12 para 22.

132(2) (c) of the Act, the Bank's rejection of such rescue plan will therefore end the business rescue proceedings.[292]

In *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others*[293], the major creditor's support was held to be of cardinal importance when commencing business rescue through section 131 of the Act. It was also determined that the existence and presentation of a supported, achievable draft rescue plan at the time of the business rescue application would improve the application's prospect.However, the absence of a final plan at the court application phase would not necessarily be fatal to the application.[294]

In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*,[295] in obiter, Brand JA stated that where the majority creditor is clear on his opposition of business rescue based on certain grounds, such an objection cannot be ignored, given that it is not mala fide or unreasonable.[296] Sections 152 and 132(2) (c) (i) were said to mean that 'the rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings'.[297] He also added that although the rejection of the rescue plan may be revisited by the court,[298] it comes with additional time and costs and the courts normally do not interfere with the creditors' decision, unless it is unreasonable.[299]

In light of this, it is possible to argue that Sections 152(2) and 132(2)(c)(i) of the Act do not reflect the purpose of the Act as envisioned by Section 7(k).They fail to align all the rights and interests of relevant stakeholders. They confer too much power on majority creditors to the detriment of other stakeholders. On closer analysis of these provisions, they can be said to have an element of the creditor-friendly approach adopted under the 1973 Act, which left it up to the creditors and shareholders of the company to decide whether the company applied for liquidation or judicial management.[300]

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[292] *Gormley* supra note 290 at 12 para 22.
[293] *A G Petzetakis International Holdings Ltd* supra note 199.
[294] *A G Petzetakis International Holdings Ltd* supra note 199 at 521 para 13; Also see Y Kleitman 'When creditors reject business rescue' (14) 8 (2014) *Without Prejudice* 6.
[295]*Oakdene Square Properties (Pty) Ltd* supra note 201.
[296] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 555 para 38.
[297] ibid.
[298] The Companies Act 71 of 2008. Section 153. Chapter 6.
[299] *Oakdene Square Properties (Pty) Ltd* supra note 201 at 555 para 38.
[300] The Companies Act 61 of 1973. Section 427 (2). Chapter XV; Also see sections 346 and 103.

3. The Appointment of the Business Rescue Practitioner

A business rescue practitioner can either be appointed by way of a resolution of the board of directors or by an order of the court.[301] Proceedings commenced by a resolution require the board of directors to make an appointment for a practitioner within five business days following the filing of the resolution with the Commission.[302] Considering the imperative role played by the practitioner in the business rescue process, five days can be argued to be insufficient to appoint an adequate practitioner. This means that to satisfy this requirement, a company would have to already have a practitioner in mind prior to even proposing business rescue. Where proceedings commence by an order of the court, the court may also issue an appointment order for an interim practitioner following a nomination by the applicant.[303] However, it is important to note that such a nomination is temporary and will only be made final when ratified by majority of creditors at the creditors' first meeting.[304] Whether appointed by a resolution or court order, a practitioner is required to satisfy the Section 138(1) appointment requirements before he can assume his role.

Section 138 (1) requires a practitioner to be -

> *(a) 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, and 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).*[305]

These requirements look at three things: first, whether the practitioner is a member of any of the listed professions; second, whether the practitioner has engaged in any misconduct that disqualifies him from being the company's director; and finally, whether there is a conflict of interest between the practitioner and the company. Essentially, these requirements

[301] The Companies Act 71 of 2008. Section 129 (3) (b). Chapter 6; Also see section 131(5).
[302]The Companies Act 71 of 2008. Section 129 (3) – (4). Chapter 6.
[303] The Companies Act 71 of 2008. Section 131 (5). Chapter 6.
[304] The Companies Act 71 of 2008. Section 131(5). Chapter 6.
[305] The Companies Act 71 of 2008. Section 138(1) (a) – (f). Chapter 6; Also see Companies and Intellectual Property Commission, *Transitional Period of Conditional Licenses*, Notice 30 0f 2017.

assess the trustworthiness of the practitioner rather than his actual skill and experience in rescuing the company.[306] Although the trustworthiness of the practitioner is an essential component in rescuing a company, his skills and experience are just as important to the process, and it is submitted that without it, the proceedings can be considered doomed from the beginning.

In a study published in 2018 involving a group of business rescue practitioners, the practitioners' perceptions of the success of the business rescue process, as well as the impact of qualifications and experience on the procedure, were examined.[307] The findings revealed that: a.) the practitioners often lacked the necessary competencies such as experience and knowledge to successfully effect their tasks;[308] b.) the practitioner's skills and experience are more important than his qualifications;[309] c.) there is no substitution for experience; and d.) being a professional is not enough to rescue a company.[310] One practitioner went so far as to state that driving the business rescue process without any practical experience 'is like learning to drive a motor car while sitting at your desk'.[311] This demonstrates how ineffective it is to facilitate a rescue without the necessary knowledge and experience. As a result, it was recommended that junior practitioners (with limited experience) be jointly appointed with senior practitioners (with more experience), and that further skill-based requirements be added to the Section 138 (1) requirements[312]. A similar study, which assessed the changes required for the survival and success of business rescue legislation, also discovered that unsuccessful rescues are often attributed to business rescue practitioners with limited knowledge and skill.[313] The outcome of these studies clearly identify the main problem hindering the success of the business rescue process as the section 138(1) requirements, which do not consider the practitioner's skills and experience upon appointment.

[306]R, Bradstreet op cit note 11 at 205.
[307] T Naidoo & A Patel 'Business practices in South Africa: An explorative view' (11) 1 (2018) *Journal of Economic and Financial Science* 7; Also see T Patel *Business rescue in South Africa: An exploration of business rescue and the role of the business rescue practitioner* (unpublished LL.M thesis, University of KwaZulu-Natal, 2018) 64.
[308] T Naidoo op cit note 307 at 7.
[309] ibid 7.
[310] ibid 7.
[311] ibid 7.
[312] Ibid 7.
[313] R Rajaram, A M Singh, & N S Sewpersadh 'Business Rescue: Adopt or die' (21) 1 (2018*) South African Journal of Economics and Management Sciences* 12.

Section 128(1)(d) read together with the Act's definition of a 'person' indicates that a practitioner can either be a natural or juristic person.[314] However, these requirements do not seem to accommodate juristic persons.[315] They require the practitioner to have a legal, accounting, or business management qualification and to not be prohibited from acting as a company's director.[316] A juristic person cannot meet such requirements because it lacks the ability to obtain any qualification, and Section 69(7) of the Act expressly prohibits the appointment of juristic persons as directors of a company.[317] Therefore, it is submitted that in drafting these requirements, the legislature did not have juristic persons in mind, or else it would have included separate requirements for juristic persons or included a provision clearly stating that where a juristic person is appointed as a practitioner, the section 138(1) requirements must be applied against an official of such a juristic person who can be entrusted with the duties of the practitioner.[318]

The requirements also failed to completely exclude liquidators from being appointed as practitioners.[319] If a liquidator is a member in good standing of a legal, accounting, or business management profession accredited by the Commission, has been licensed by the Commission, is not subject to a probation order, is not prohibited from being a company's director, does not have any relationship contemplated in Section 138 (1) (e), or related to anyone with such a relationship, then he can enjoy appointment as a practitioner.[320] However, if the rescue proceedings fail and the company is forced to liquidate, section 140(4) of the Act prohibits the subsequent appointment of a liquidator who had been the company's practitioner during its business rescue process.[321] This can be argued to be a good precaution by the legislature to avoid any potential abuse of the rescue regime by liquidators that wish to take advantage of the gap in the system. Nonetheless, the Section 138(1) requirements are shallow and allow liquidators inexperienced in rescuing businesses to take on the practitioner's role, to the detriment of the rescue process. On the face of it, these requirements may appear to be an upgrade from the appointment of judicial managers under judicial

[314] The Companies Act 71 of 2008. Section 128 (1) (d). Chapter 6.
[315] A Loubser op cit note 48 at 93.
[316] The Companies Act 71 of 2008. Section 138(1). Chapter 6.
[317] The Companies Act 71 of 2008. Section 69 (7). Chapter 6; Also see K Mpofu & A Nwafor 'Exploring the role of the business rescue practitioner in rescuing a financial company' (14) 2 (2018) *Corporate Board: Role, Duties and Composition* 21.
[318] GN 1664 of GG 32832, 22/12/2009, Regulation 133(3); Also see A Loubser op cit note 48 at 93.
[319] R Papaya op cit note 10 at 30.
[320] ibid.
[321] The Companies Act 71 of 2008. Section 140(4). Chapter 6.

management,[322] however, on closer analysis, it is clear that they do not solve the problem of liquidators being appointed as judicial managers that was identified in various studies[323] criticising judicial management. Henoschberg[324] also points out that being a liquidator does not automatically qualify a person for a position as a rescue practitioner.[325] This is correct in that the two roles are distinct and require different skills and expertise[326].

Another dilemma is the requirement that the practitioner must be a member in good standing of a legal, accounting, or business management profession accredited by the Commission.[327] The use of the word 'or' instead of 'and' between the listed professions indicates that being a member of either one of the three professions qualifies an individual for appointment as a practitioner in terms of the Act. Pretorius[328] describes the functions of a practitioner as being vaguely stated, complex, and involving various competencies inaccessible to an ordinary business person.[329] As a result, he argued that a practitioner must have advanced knowledge on legal issues and procedures, business management and financial expertise, and human relations skills.[330] Koen[331] was also of a similar view and argued that a practitioner must have legal, accounting, and business management skills.[332] These views are correct in that a legal qualification alone cannot assist a practitioner develop efficient accounting and business management skills that are also required in rescuing a company. It can only assist him in the legal part of running the business, such as assessing risk and compliance, drafting and reviewing agreements, understanding insolvency laws, and managing the legal department of the company. An accounting qualification also does not equip the practitioner with the necessary legal and business management skills, and a

[322] Under judicial management, there were no requirements for the appointment of a judicial manager. As long as a person was not disqualified from being appointed as a liquidator and was not an auditor of the company, he or she could be appointed by the Master to take on the role; see The Companies Act 61 of 1973. Section 429 (b) (i). Chapter XV.
[323] DA Burdette op cit note 36 at 349; also see P Kloppers op cit note 102 at 427; A. Loubser op cit note 1 at 155; A Loubser op cit note 48 at 44; F I Ofwono op cit note 34.
[324] R Payaya op cit note 10 at 30.
[325] ibid.
[326]R Rajaram op cit note 313 at 12; Also see J de Hutton 'Guide – liquidation, business rescue & compromise in South Africa' nd *Bowmans* 7 – 14, available at https://www.bowmanslaw.com/wp-content/uploads/2019/11/Liquidation-Business-Rescue-and-Compromise-in-South-Africa.pdf, accessed on 4 January 2022.
[327] The Companies Act 71 of 2008. Section 138(1). Chapter 6.
[328] M, Pretorius. 'Tasks and activities of the business rescue practitioner: a strategy and practice approach' (17) 3 (2013) *South African Business Review* 1.
[329] ibid.
[330] ibid at 2.
[331] L. Koen 'Appointing the best business rescue practitioner' (16) 7 (2013) *Without Prejudice* 14.
[332] ibid.

business management qualification cannot equip the practitioner with efficient accounting and legal skills. As such, it is submitted that for a practitioner to properly manage all spheres of a company's business, he must be a member of all three professions.[333]

From the above, it is argued that an amendment to the practitioner's appointment requirements is necessary if the legislature intends on making business rescue a successful corporate rescue regime.

4. The Remuneration of the Practitioner

According to Regulation 128 of the Companies Act 71 of 2008, for his services, a practitioner can charge up to R15 625 per day for a small company, R18 750 per day for a medium company, and R25 000 per day for a large company.[334] In addition to his remuneration, the practitioner can also charge contingency fees following an agreement with the company if he has achieved a particular goal relating to the proceedings, or has adopted the plan within a certain period.[335] However, it must be noted that the validity of such agreements is contingent on the approval of the company's majority creditors and shareholders.[336]

The problem with this remuneration structure is that it does not account for the practitioner's skill and experience. As a result, a senior practitioner with extensive experience rescuing a small company can be paid a lower amount than a moderately experienced practitioner rescuing a medium-sized company. Also, stakeholders have expressed concern over the excessive fees charged by practitioners during proceedings, considering the time spent on proceedings as well as practitioners' poor performance in rescuing businesses.[337] These exorbitant fees have been argued to escalate the costs of the proceedings while limiting the availability of resources for a successful business rescue.[338]

Another issue is that the Act does not provide for the taxation and scrutiny of the practitioner's remuneration, disbursements, and expenses.[339] This was identified as an area for improvement in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd,*[340] following a comparison to liquidation, which was said to have more

[333] P. Delport op cit note 179 at 484.
[334] The Companies Act 71 of 2008. Section 143(6). Chapter 6; Also see The Companies Act Regulations, 2011. Regulation 128 (1). Chapter 6.
[335] The Companies Act 71 of 2008. Section 143(2) (a) and (b). Chapter 6.
[336] The Companies Act 71 of 2008. Section 143(3) (a) and (b). Chapter 6.
[337] M Pretorius op cit note 328.
[338] A Visser 'Business Rescue rate has some way to go' 2013 *Business Day Live* 1.
[339] *Murgatroyd v Van Den Heever & others* NNO 2015 (2) SA 514 (GJ) at 517 para 4.
[340] *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).

independent control than business rescue because it provides for the taxation of the liquidator's costs.[341] Delport[342] was also of the view that it was unwise for the legislature not to provide for an independent body to scrutinize the practitioner's claims to limit the risk of abuse by practitioners seeking to claim exorbitant fees.[343] Entitling the practitioner to such fees and not providing for taxation and direct oversight of the practitioner's claims can create a gap for practitioners to unnecessarily place companies on business rescue, manage several companies simultaneously, or even delay the termination of proceedings to earn unjustified fees.[344] Therefore, it is submitted that when amending the Act, the legislature should consider including taxation and oversight provisions for the practitioner's claims.

5. Conclusion

The practitioner is entrusted with a lot of powers and duties in the business rescue process.[345] He can appoint anyone to become a part of the company's management and remove anyone forming part of the company's previous management from the office.[346] He is trusted with examining the company's affairs, business, financial situation, and property to establish if it has a reasonable prospect of being rescued.[347] If a reasonable prospect of success is present, he is then tasked with developing a business rescue plan that must be approved by the company's creditors before it can be implemented.[348] It is interesting to see that, as powerful a role the practitioner holds in this process, he is limited by the creditors' right to vote on the plan. This means that in drafting the plan, he has to consider the views or interests of the creditors to avoid the rejection of the plan, which would ultimately end the proceedings.[349]

In terms of the appointment of the practitioner, the Section 138 requirements create a gap for liquidators to act as practitioners, despite the differences in skills and expertise between the two professions.[350] They also focus more on the practitioner's trustworthiness than on his actual skill and experience in carrying out his duties.[351] They fail to accommodate the appointment of juristic persons as practitioners and only require the practitioner to be a

[341] *Oakdene Square Properties (Pty) Ltd and others* supra note 340 at 290 para 49(10).
[342] P Delport op cit note 179 at 499.
[343] ibid; Also see *Murgatroyd* supra note 339 at 517 para 4.
[344] W Du Preez *The status of post commencement finance for business rescue in South Africa* (unpublished M.B.A thesis, University of Pretoria, 2012) 143.
[345] The Companies Act 71 of 2008. Section 140 and 141. Chapter 6.
[346] The Companies Act 71 of 2008. Section 140(1) (c) (i) and (ii). Chapter 6.
[347] The Companies Act 71 of 2008. Section 141(1). Chapter 6.
[348] The Companies Act 71 of 2008. Section 140 (1)(d)(i). Chapter 6; Also see S150 (1).
[349] The Companies Act 71 of 2008. Section 132(2). Chapter 6.
[350] R Papaya op cit note 10 at 30.
[351] R, Bradstreet op cit note 11 at 205.

member of one of the three professions included in Section 138(1) of the Act.[352] From this, it is clear that the Section 138 requirements fail to ensure that the individuals appointed as practitioners possess all of the necessary qualities to rescue a company. This can be argued to be a major issue because it turns the business rescue proceedings into a case of the blind leading the blind.

With the remuneration of the practitioner, a practitioner is paid according to the size of the company rather than his skill and experience.[353] The Act entitles the practitioner to exorbitant fees[354] and makes no provision for the taxation and scrutiny of such fees.[355] This increases the cost of the proceedings while limiting the amounts invested in the success of business rescue[356] and also exposes the procedure to abuse by practitioners.[357] To bridge this gap, it is submitted that the legislature should consider adjusting the existing remuneration structure, as well as the fees of the practitioner, and appoint an independent body to oversee all claims made by the practitioner.[358]

Having identified the challenges associated with the business rescue practitioner that are impeding on the success of the business rescue process above, the following chapter will make recommendations to address the identified issues in order to improve the calibre of business rescue practitioners appointed as well as the reach and impact of the business rescue system in South Africa.

[352] The Companies Act 71 of 2008. Section 138 (1). Chapter 6.
[353] The Companies Act 71 of 2008. Section 143(6). Chapter 6; Also see The Companies Act Regulations, 2011. Regulation 128 (1). Chapter 6.
[354] The Companies Act 71 of 2008. Section 143 (6). Chapter 6.
[355] *Murgatroyd* supra note 339 at 517 para 4.
[356] A Visser op cit note 338 at.1; Also see R Rajaram op cit note 163 at 50.
[357] *Murgatroyd* supra note 339 at 517 para 4.
[358] *Murgatroyd* supra note 339 at 517 para 4.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

1. Introduction

The business rescue procedure was established to assist financially distressed entities to recover from their difficulties.[359] It was first introduced in 2011 by Chapter six of the Companies Act of 2008,[360] replacing the judicial management corporate rescue system, which had been unsuccessful in the previous years.[361]

The concept of business rescue brought many changes, including the induction of a person known as 'the business rescue practitioner' who is responsible for taking over the company and turning it into a successful concern.[362] It presented the development of the business rescue plan, which must be ratified by the company's creditors before it can be implemented.[363] It paved the way for practitioners to work alongside the company's previous management in rescuing the company rather than requiring the process to be run solely by the practitioner.[364] Furthermore, it adopted the reasonable prospect of success requirement and did away with the reasonable probability of success test that was used under judicial management.[365] This created a less burdensome test for business rescue[366] because it does not require the applicant to show certainty that the company will become a successful concern if placed under business rescue.

According to Nell,[367] South Africa's success rate for business rescue is around 10%, however, excluding companies that are already in an irreversible state, this increases to 35%.[368] Despite the changes brought about by business rescue, it is clear that the system is not functioning as expected, therefore, it is critical that the system's key challenges be identified and addressed. Given that this mini-dissertation has effectively outlined some of the key challenges associated with the business rescue procedure, this Chapter will conclude

[359] The Companies Act 71 of 2008. Section 128(1) (b). Chapter 6.
[360] M Brinkley & I Le Roux 'Role conflict of business rescue practitioner' (15) 1 (2018) *Journal of Contemporary Management* 2.
[361] P T J Bezuidenhout *A review of the business rescue in South Africa since implementation of the Companies Act* (71/2008) (unpublished Bcs Actuarial Science Hons thesis, North-West University, 2012) 1 and 13.
[362] The Companies Act 71 of 2008. Section 140. Chapter 6.
[363] The Companies Act 71 of 2008. Section 140(1) (d) (i). Chapter 6.
[364] The Companies Act 71 of 2008. Section 140 (1) (b). Chapter 6.
[365] The Companies Act 71 of 2008. Section 129 (1) (a) and b. Chapter 6; Also see section 131.
[366] *Southern Palace Investments 265 (Pty) Ltd* supra note 110 at 431 para21; Also see E P Joubert op cit note 79 at 556.
[367] C Smith 'Business rescue explained: How, when and for whom it works' (2000) Fin24, available at https://www.news24.com/fin24/economy/business-rescue-explained-how-when-and-for-whom-it-works-20200607#:~:text=George%20Nell%2C%20a%20senior%20business,will%20go%20up%20to%2030%25, accessed on 14 November 2021.
[368] ibid.

the mini-dissertation by making recommendations on how to overcome these challenges to achieve better results in the future.

2. Recommendations

Concerning the financial distress test, which examines the company's reasonable likelihood of insolvency in the next six months, it is proposed that the full financial position of the company be considered and not just its technical insolvency.[369] This includes determining the fair value of the company's liabilities and assets, reasonably foreseeable assets and liabilities, and any management action taken, including recapitalisation, subordination contracts, and letters of support.[370] This has the potential to reduce the possibility of the system being abused by companies that are profitable but want to initiate proceedings to avoid legal action.

On the issue of six months being an insufficient period to anticipate distress, it submitted that twelve months should be the yardstick to allow for the early institution of rescue proceedings where a company has identified financial distress early.[371] This has the potential to limit the number of terminally ill companies that commence proceedings, therefore, increasing the system's success rate.

Concerning the *reasonable prospect of success*, it is proposed that the legislature properly define this concept, or set criteria that will help break down the case to meet to satisfy this requirement.[372] Nonetheless, the legislature must be careful not to create burdensome criteria such as the one established in *Southern Palace Investments,*[373] which posed an unfair limitation on access to the business rescue procedure.

On the commencement of business rescue by resolution, more lenient timeframes such as twenty working days or a grace period of ten working days should be implemented for the filing of the resolution, the appointment of the practitioner, and the filing of the appointment notice. The current time limits are too stringent and fail to consider that appointing a suitably qualified and experienced business rescue practitioner may require more than five days, particularly where the screening of the candidates is concerned.

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[369] Deloitle & Touche op cit note 152 at 3.
[370] ibid.
[371] A Loubser op cit note 48 at 58.
[372] E Levenstien op cit note 4 at 629; Also see K N Bagwandeen op cit note 17 at 89.
[373] *Southern Palace* Investments *265 (Pty) Ltd* op cit note 110.

Concerning the Section 131 (4) (a)[374] non-payment requirement for business rescue, it is recommended that the non-payment occur over a stipulated minimum period before it can constitute a ground for rescue proceedings[375] to prevent affected parties from flocking to the courts after a missed payment due to a systematic error. It is proposed that the legislature include a provision outlining that before an affected person can rely on this section, the company must have missed at least two or more consecutive payments.[376]

Financial reasons under the just and equitable requirement for business rescue must be defined, as it is unclear whether it includes companies that have detected financial distress earlier than six months[377] or a financial benefit that a company stands to gain by instituting rescue proceedings.

On the issue of Sections 152 and 132 of the Act[378] prioritising majority creditors' interests over those of other stakeholders, it is proposed that the legislature amend these sections to prioritise the interests of the company over those of its creditors. This means that where the views of the majority creditor clash with those of the minority creditor, employees, or the company regarding the rescue plan, the best interests of the company should always prevail. This is not to mean that the creditors' interests do not matter. However, they must be weighed against other stakeholders' interests and should never override the interests of the company.

Concerning the issue of juristic persons not being accommodated by the Section 138(1) requirements,[379] the legislature should consider including a provision stating that where a juristic person is appointed as a practitioner, the section 138 requirements must be applied against an official of such a juristic person.[380] The provision, however, must be explicit about the role of such a person in the process. For example, it must state whether the person is expected to perform the duties of the practitioner on behalf of the juristic person or if they are only required for the appointment of the juristic person. Alternatively, the legislature can include requirements specific to the appointment of juristic persons as

[374] The Companies Act 71 of 2008. Section 131 (4) (a). Chapter 6.
[375] A Loubser op cit note 227 at 510.
[376] ibid.
[377] ibid.
[378] The Companies Act 71 of 2008. Section 152. Chapter 6.
[379] A Loubser op cit note 48 at 93.
[380] GN 1664 of GG 32832, 22/12/2009, Regulation 133(3); Also see A Loubser op cit note 48 at 93.

practitioners to ensure that only qualified juristic persons are trusted with this position instead of any entity established by an Act of Parliament, as was provided by the CIPC.[381]

On Section 138(1) qualification requirements, it is recommended that the legislature amend this provision to make all three qualifications (legal, accounting, and business management) mandatory for the practitioner's appointment rather than one, because all three comprise necessary knowledge and skills that a practitioner requires to efficiently rescue a company.[382] A standard training and admission assessment should also be introduced to assist potential practitioners develop the relevant skills and knowledge to facilitate rescue proceedings.[383] Other necessary skills that should be considered are political skills such as mediation, negotiation, and conflict resolution, which can assist a practitioner in managing the company in a way that aligns all stakeholders' interests.[384]

To manage the issue of liquidators being appointed as business rescue practitioners, it is proposed that the legislature include a provision explicitly prohibiting a liquidator from holding the position of practitioner unless he has developed his skills to fit the position by being a member of a legal, accounting, and business management profession and has satisfied all other appointment requirements.

To prevent practitioners from abusing the business rescue system, Serumula[385] suggested that the regulator revise the practitioner's powers and authority.[386] She did not, however, clarify whether revising in this context meant adding another person to the rescue process to share the practitioner's powers and duties, or delegating a significant amount of power and authority to the company's existing management. In the case of the former, it is submitted that this would result in drastic system changes as well as additional costs. With the latter, it is submitted that this would only work where the company's pre-existing management did not contribute to the company's failure. As such, it is argued that the best option would be for the practitioner to retain his power and authority, and for the legislature to provide for the establishment of an independent professional body for practitioners that

[381] See Companies and Intellectual Property Commission, *Transitional Period of Conditional Licenses*, Notice 49 of 2017.
[382] L. Koen op cit note 331 at 14; Also see M, Pretorius op cit note 328 at 1; P. Delport op cit note 179 at 484.
[383] M Pretorius 'Business rescue status quo report: Final report' 2015 *Business Enterprises of the University of Pretoria,* available at http://pmg-assets.s3-website-eu-west 1.amazonaws.com/151110Business_Rescue.pdf, accessed on 28 January 2022.
[384] R Rajaram op cit note 163 at 148.
[385] N P Serumula op cit note 222 at 64.
[386] ibid.

will offer professional training and develop custom assessments for potential practitioners[387], as well as monitor all claims made by the practitioner and the practitioner's conduct to keep him in check. The body would have to establish a code of conduct for practitioners and impose strict disciplinary measures on those who violate it. The legislature should also consider making provision for the taxation of the practitioner[388], as well as revisit the practitioner's remuneration structure to ensure that practitioners are remunerated based on their skill and experience rather than the size of the entity being rescued.

3. Conclusion

Business rescue was introduced into South African company law at a time when judicial management was failing to rehabilitate companies,[389] and it has since yielded positive results, though its success rate remains relatively low[390]. It has rescued several companies, including: a) Advanced Technologies and Engineering Company; b) Ellerines and Optimum Coal Mine; c) Meltz Success; d) Moyo Restaurants; e) ODM President Stores; f) Pearl Valley Golf Estate; and g) Southgold Exportation.[391] It provides ailing companies with an opportunity to restructure and reorganise.[392] This has wide-ranging effects for a company's creditors, shareholders, suppliers, and employees,[393] as it can result in higher returns for creditors, help the company regain solvency, and preserve employment.[394] Nonetheless, it is not always a viable solution for struggling companies,[395] particularly, where the liquidation of the company is inevitable.

As outlined in chapters two and three of this mini-dissertation, the rescue process does not come without any shortcomings, particularly when it comes to the business rescue practitioner's appointment. As a driver of the process, the practitioner should be appointed based on his skill and experience,[396] as well as his knowledge of rescuing a company.

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[387] R Papaya op cit note 10 at 30; Also see M Pretorius op cit note 383.
[388] *Oakdene Square Properties (Pty) Ltd* supra note 340 at 290 para 49(10).
[389] P T J Bezuidenhout op cit note 361.
[390] C Smith op cit note 367.
[391] E Levenstein 'Getting clever with business rescue' (12) 7 (2012) *Without Prejudice* 30; Also see T Patel op cit note 307 at 75.
[392]E Levenstein op cit note 169 at 3.
[393] ibid.
[394] 'The benefits of business rescue for companies' Corporate Business Rescue Services South Africa 2018, available at https://corporatebusinessrescue.co.za/the-benefits-of-business-rescue-for-companies/, accessed on 29 December 2021.
[395] ibid.
[396] 'The variety of skills required of a good business rescue practitioners' HG.org Legal Resources nd, available at https://www.hg.org/legal-articles/the-variety-of-skills-required-of-a-good-business-rescue-practitioner-24176 accessed on 6 December 2021.

However, these are the very things that are overlooked upon his appointment. This demonstrates that practitioners are not appointed adequately. As such, it is proposed that significant changes and oversight be applied to the appointment requirements to better equip the practitioner for the role, and to ensure that the system is not subjected to abuse and becomes a successful corporate rescue regime. Separate requirements must be introduced for the appointment of juristic persons as practitioners; the legal, accounting, and business management qualifications must all be made mandatory for the appointment;[397] standard training and admission assessments must be introduced; the practitioner's political skills must be considered; liquidators must be prohibited from occupying the position of practitioner; and a professional body for practitioners must be created to monitor and oversee all claims made by the practitioner.[398]

[397] L. Koen op cit note 331; Also see M Pretorius op cit note 328; P Delport op cit note 179.
[398] R Payaya op cit note 10.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Miss Bayanda Nompumelelo Luthuli (216002972)
School Of Law
Howard College

Dear Miss Bayanda Nompumelelo Luthuli,

Protocol reference number: 00006895
Project title: A Critical Analysis of the Role, Appointment, and Powers of a Business Rescue Practitioner

Exemption from Ethics Review

In response to your application received on , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

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.

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

Yours sincerely

[redacted]

Prof Shannon Joy Bosch
Academic Leader Research
School Of Law