

**A CRITICAL ANALYSIS OF SECTION 129 OF THE COMPANIES ACT 71 OF 2008**

by

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A mini-thesis submitted in partial fulfillment of the requirements for the degree



**UNIVERSITY OF THE WESTERN CAPE**

**SUPERVISOR: PROFESSOR MS WANDRAG**

**JUNE 2017**

## DECLARATION

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I declare that ***A critical analysis of section 129 of the Companies Act 71 of 2008*** is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that I have not previously submitted this work, or part of it, for examination at this or any other higher education institution.

**STUDENT:** RH Barends

**DATE:** 23 June 2017

**SIGNED:**



**SUPERVISOR:** Prof MS Wandrag

**DATE:** 23 June 2017

**SIGNED:**



## ACKNOWLEDGEMENTS

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Thank You Lord for Your mercy, love, and protection which have carried me throughout my life. All praise and honour to You.

I would like to express my sincere gratitude to all the amazing human beings who have played a pivotal role, directly and indirectly, in the realisation of this study.

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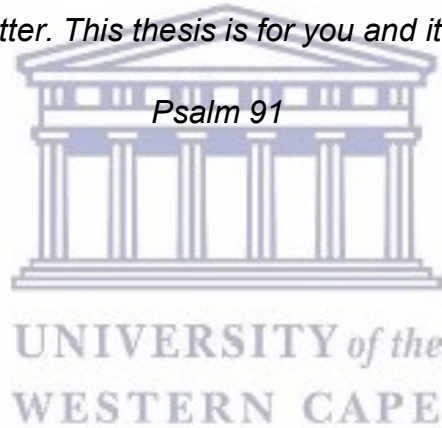
## DEDICATION

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*I affectionately dedicate this thesis to my family.*

*To my parents, Lenie and Hector Barends, thank you for all the sacrifices you have made for Craig and I, even during the toughest circumstances. Thank you for your continued love, unstinting support, encouragement and prayers. None of the academic accolades, I have achieved, would have been possible without you guys. Thank you for the role models you continue to play in my life.*

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## KEY TERMS

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Better return for creditors

Business rescue

Business rescue practitioner

Corporate rescue

Financially distressed

Judicial management

Judicial manager

Liquidation

Reasonable probability

Reasonable prospect



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## CHAPTER 1:

### INTRODUCTION

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#### 1.1. Introduction

A company forms an important part of a community in which it conducts business. It, therefore, has a direct impact on the economic and thus the social well-being of that community through its employees, suppliers and distributors.<sup>1</sup> Consequently, the failure of a company has a large effect on society than merely its employees and creditors.<sup>2</sup> In some instances this may lead to companies being liquidated.<sup>3</sup> Granting an order of liquidation, results in the demise of the corporate entity and the attendant loss of jobs. This is further protracted by an unsatisfactory *pro rata* share in the residue for unsecured creditors, and the abandonment of claims when such are not proved.<sup>4</sup>

Having a corporate rescue<sup>5</sup> procedure in place can prevent or even limit the amount of job losses, or provide an alternative measure as opposed to liquidation of companies.<sup>6</sup> Corporate rescue affords a company a second chance, after having once failed, to restructure its financial affairs and once again become a successful concern.<sup>7</sup>

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<sup>1</sup> Loubser A *Some comparative aspects of corporate rescue in South Africa* (published LLD thesis, University of South Africa, 2010) 1.

<sup>2</sup> Searle R *Will there be a need for informal loan workouts? A question from Chapter 6 of the new Companies Act* (published MCom thesis, University of the Witwatersrand, 2013) 8.

<sup>3</sup> Item 9 of Schedule 5 of the Companies Act 71 of 2008 (hereinafter referred to as 'the 2008 Companies Act') provides a transitional arrangement whereby section 345 of the Companies Act 61 of 1973 (hereinafter referred to as 'the 1973 Companies Act') will have continued application to liquidation and winding-up of insolvent companies. Part G of Chapter 2 in the 2008 Companies Act makes provision for section 79 which states that solvent companies may be wound-up voluntarily in terms of section 80 or compulsory in terms of section 81 of the 2008 Companies Act. Furthermore, a solvent company may also be liquidated in terms of section 81 of the 2008 Companies Act. See *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA) para 11-16.

<sup>4</sup> Bradstreet R 'The new business rescue: Will creditors sink or swim' (2011) 128 *South African Law Journal* 352.

<sup>5</sup> Corporate rescue means the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and the continued rewarding of capital and investment.

<sup>6</sup> Kloppers P 'Judicial Management – A corporate rescue mechanism in need of reform?' (1999) 10 *Stellenbosch Law Review* 418.

<sup>7</sup> Museta GM *The development of business rescue in South African law* (published LLM thesis, University of Pretoria, 2011) 2.

## 1.2. Background

South Africa was one of the first countries to introduce a corporate rescue procedure in the form of judicial management.<sup>8</sup> Judicial management was first introduced in South Africa in terms of the Companies Act 46 of 1926 ('the 1926 Act').<sup>9</sup> The said procedure was a novel mechanism whereby distressed companies could restructure their debt without the need to be placed in liquidation.<sup>10</sup> Judicial management was, therefore, used by companies that were experiencing financial difficulties as a result of mismanagement or other special circumstances and that would lead to it once again becoming a successful concern.<sup>11</sup> The purpose of the said procedure was to protect businesses, which suffered temporary setbacks, in vital industries in a young developing country that could not afford to have their commercial enterprises dissipated by winding-up and dissolution.<sup>12</sup>

Although judicial management was a commendable approach to save companies from being liquidated, the said procedure suffered practical difficulties. In an attempt to address these practical difficulties a number of commissions of inquiry were appointed to amend judicial management.<sup>13</sup> The most important of these amendments was introduced in 1932,<sup>14</sup> which made provision for a moratorium on claims by creditors and introduced the principles of impeachable transactions to apply to judicial management.<sup>15</sup> Further minor amendments<sup>16</sup> were made in 1939, as a result of the report by the

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<sup>8</sup> Although judicial management is no longer part of South African law, it will be discussed in greater detail under Chapter 2 of this study. Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002) 338.

<sup>9</sup> The Companies Act 46 of 1926 came into effect on 16 June 1926. Davis D (ed), Butler D & Mongalo T *et al Companies and other business structures in South Africa: Commercial Law* 3ed (2013) 235.

<sup>10</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 53.

<sup>11</sup> Henning JJ 'Judicial management and corporate rescues in South Africa' (1992) 1 *Tydskrif vir Regswetenskap* 92.

<sup>12</sup> Meskin PM, Delpont P, & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 923.

<sup>13</sup> Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16 *South African Mercantile Law Journal* 246

<sup>14</sup> Companies Amendment Act 11 of 1932.

<sup>15</sup> Rajak H & Henning J 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 266.

<sup>16</sup> The Lansdown and Millin Commissions recommended, at the time, that certain amendments be made to the applicable legislation. In the Lansdown Commission, it was recommended that an

Lansdown Commission, and 1952, following the report of the Millin Commission.<sup>17</sup> When the Van Wyk de Vries Commission of Inquiry ('the Commission of Inquiry')<sup>18</sup> was deliberating the consolidation of the Companies Act in the 1970's, the Master of the Supreme Court called for the abolition of judicial management due to its low success rate.<sup>19</sup> However, the Commission of Inquiry decided not to abolish judicial management.<sup>20</sup> As a result, judicial management was retained under the Companies Act 61 of 1973 ('the 1973 Act'),<sup>21</sup> which replaced the 1926 Act.

Although judicial management underwent some changes when the 1926 Act was replaced by the 1973 Act it remained relatively unchanged since then.<sup>22</sup> At the time,

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application for judicial management must first be referred to the Master of the Supreme Court for a report, as the courts were often not in possession of sufficient evidence which enabled them to decide on the merits of granting an application, and in certain cases, it was necessary for a preliminary investigation to be carried out. Furthermore, it was recommended that the duties of the judicial manager be extended to provide for annual reports, to be sent to the Registrar each year while the company was in judicial management. These recommendations led to the introduction of the Companies Amendment Act 23 of 1939. The Millin Commission, recommended that the judicial manager should only sell assets upon approval from the court if a company is under judicial management, except if it is in the ordinary course of the company's business, and to make it a duty to apply for a winding-up order if, at any time, he was of the opinion that the continuance of the judicial management order would not enable the company to pay its debts in full, and that any moneys becoming available during judicial management should be applied first to the payment of costs and in the conduct of the company's business and only thereafter to the payment of the pre-judicial management creditors. These recommendations were subsequently incorporated in the Companies Amendment Act 46 of 1952. See Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 7-11.

<sup>17</sup> Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16 *South African Mercantile Law Journal* 246.

<sup>18</sup> The Commission of Inquiry was appointed on 14 October 1963. Benade ML 'A survey of the main report of the commission of enquiry into the Companies Act' (1970) 3 *Comparative and International Law Journal of Southern Africa* 277.

<sup>19</sup> Rajak H & Henning J 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 266; Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 139.

<sup>20</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 139; Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16 *South African Mercantile Law Journal* 247.

<sup>21</sup> The Companies Act 61 of 1973 came into effect on 1 January 1974. Loubser A *Some comparative aspects of corporate rescue in South Africa* (published LLD thesis, University of South Africa, 2010) 3; Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16 *South African Mercantile Law Journal* 247; Rajak H & Henning J 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 266.

<sup>22</sup> Loubser A 'Business rescue in South Africa: A procedure in search of a home?' (2007) 40 *Comparative and International Law Journal of Southern Africa* 153.

there was a widespread acceptance that judicial management under the 1973 Act was failing the local economy as few, if any, judicial management processes resulted in success.<sup>23</sup> Judicial management was generally not favoured as a corporate rescue procedure since more often than not, the company would be placed into liquidation subsequent to the granting of a judicial management order.<sup>24</sup>

South Africa lagged behind most developed and some developing countries when it came to modern international trends associated with turnarounds or corporate rescues.<sup>25</sup> South Africa had hung on to a creditor-friendly culture<sup>26</sup> despite continued developments in international jurisdictions which were focused on developing a more rescue-oriented approach.<sup>27</sup> The popularity of modern business rescue regimes internationally and the fact that judicial management had not been very successful in South Africa resulted in a calling for the review of judicial management.<sup>28</sup>

South Africa was in dire need of new legislative provisions to replace judicial management. What was needed was a new dispensation, bringing South African company law in line with international economic principles of corporate rescue.<sup>29</sup> This would meet the needs of modern South Africa which would foster the benefits of a debtor-friendly culture.<sup>30</sup> The fact that judicial management had failed and that liquidation was the only option left in dealing with failing companies drove South Africa

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<sup>23</sup> Mongalo T 'An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008' 2010 *Acta Juridica* xviii.

<sup>24</sup> Loubser A 'Tilting at windmills? The quest for an effective corporate rescue procedure in South African law' (2013) 25 *South African Mercantile Law Journal* 437-438.

<sup>25</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 261.

<sup>26</sup> South Africa has a creditor friendly culture which is aimed at assisting creditors in obtaining payment of amounts owing to them, whereas a debtor friendly culture, which South Africa is not, allows a debtor to enter a rescue procedure to assist them in reviving their company. Harvey N (ed) *Turnaround management and corporate renewal: A South African perspective* (2011) 132.

<sup>27</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 261.

<sup>28</sup> Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part1)' (2004) 16 *South African Mercantile Law Journal* 247.

<sup>29</sup> Kloppers P 'Judicial Management – A corporate rescue mechanism in need of reform?' (1999) 10 *Stellenbosch Law Review* 434.

<sup>30</sup> Kloppers P 'Judicial Management – A corporate rescue mechanism in need of reform?' (1999) 10 *Stellenbosch Law Review* 434.

to look abroad to what was available elsewhere in restructuring financially distressed companies.<sup>31</sup>

International organisations such as the World Bank ('the World Bank')<sup>32</sup> and the United Nations Commission on International Trade Law ('UNCITRAL')<sup>33</sup> both issued reports which emphasised the need for business rescue.

The report by the World Bank states that:

'the rescue of a business preserves jobs, provides creditors with a greater return based on higher going concern values of the enterprise, potentially produces a return for owners and obtains for the country the fruits of the rehabilitated enterprise'.<sup>34</sup>

In addition to the above, the UNCITRAL report stipulated that:

'long term economic benefit is more likely to be achieved through reorganisation proceedings, since they encourage debtors to take action before their financial difficulties become severe'.<sup>35</sup>

Having regard to the above statements, in their respective reports, it became clear that there was an urgent need to reform South Africa's company law. In May 2004, the Department of Trade and Industry ('the DTI') published a policy paper which established guidelines for corporate law reform.<sup>36</sup> The DTI was not merely looking to amend

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<sup>31</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 52.

<sup>32</sup> The World Bank is a vital source in providing financial and technical assistance to developing countries around the world. The World Bank 'Principles for effective insolvency and creditor/debtor regimes' available at <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> (accessed 12 March 2017).

<sup>33</sup> The United Nations Commission on International Trade Law ('UNCITRAL') prepares international legislative texts for use by States in modernising commercial law and non-legislative texts by commercial parties in negotiating transactions. United Nations Commission on International Trade Law 'Legislative guide on insolvency law' available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html) (accessed 12 March 2017) iii.

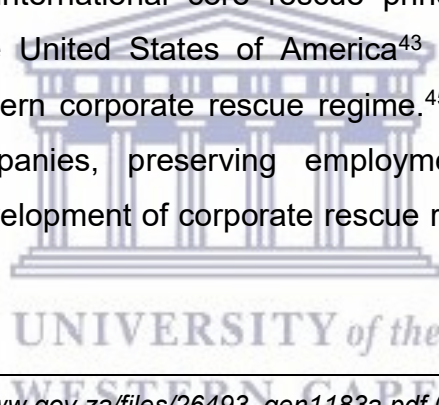
<sup>34</sup> The World Bank 'Principles for effective insolvency and creditor/debtor regimes' available at <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> (accessed 12 March 2017) 8.

<sup>35</sup> United Nations Commission on International Trade Law 'Legislative guide on insolvency law' available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html) (accessed 12 March 2017) 28.

<sup>36</sup> Department of Trade and Industry 'South African Company Law for the 21<sup>st</sup> Century Guidelines for Corporate Law Reform' available at

the 1973 Act which at the time had been in force for almost thirty years and had never been subjected to any fundamental reform.<sup>37</sup> Rather, the stage was set for a far-reaching fundamental revamp of South Africa's corporate legislation.<sup>38</sup> The policy paper contained guidelines on its corporate law reform project, insolvency and corporate rescue which were specifically mentioned as areas that needed to be reviewed and improved.<sup>39</sup> The policy paper had set out its intention to create a system of corporate rescue appropriate to the needs of a modern South African economy.<sup>40</sup> The programme for reform was to bring corporate South Africa in line with international trends which could reflect the changing environment for business in South Africa.<sup>41</sup> It was recognised that South Africa's company law regime had to become up-to-date, competitive and designed for a modern corporation.<sup>42</sup>

By adopting many of the international core rescue principles applicable in foreign jurisdictions, particularly the United States of America<sup>43</sup> and the United Kingdom,<sup>44</sup> South Africa created a modern corporate rescue regime.<sup>45</sup> This was aimed at saving financially distressed companies, preserving employment and restructuring the discharge of debt.<sup>46</sup> The development of corporate rescue regimes applicable in foreign



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<sup>37</sup> [http://www.gov.za/sites/www.gov.za/files/26493\\_gen1183a.pdf](http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf) (accessed 6 February 2017).  
Mongalo T 'An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008' 2010 *Acta Juridica* xv.

<sup>38</sup> Mongalo T 'An overview of company law reform in South Africa: From the guidelines to the Companies Act 2008' 2010 *Acta Juridica* xv.

<sup>39</sup> Department of Trade and Industry 'South African Company Law for the 21<sup>st</sup> Century Guidelines for Corporate Law Reform' available at [http://www.gov.za/sites/www.gov.za/files/26493\\_gen1183a.pdf](http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf) (accessed 6 February 2017) 43.

<sup>40</sup> Department of Trade and Industry 'South African Company Law for the 21<sup>st</sup> Century Guidelines for Corporate Law Reform' available at [http://www.gov.za/sites/www.gov.za/files/26493\\_gen1183a.pdf](http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf) (accessed 6 February 2017) 43.

<sup>41</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 267.

<sup>42</sup> Department of Trade and Industry 'South African Company Law for the 21<sup>st</sup> Century Guidelines for Corporate Law Reform' available at [http://www.gov.za/sites/www.gov.za/files/26493\\_gen1183a.pdf](http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf) (accessed 6 February 2017) 43.

<sup>43</sup> Bankruptcy Reform Act of 1978 as amended, codified in Title 11 of the United States Code.

<sup>44</sup> UK Insolvency Act 1986 and UK Enterprise Act 2002.

<sup>45</sup> Kindly note that the jurisdictions of the United States of America and the United Kingdom will not be discussed further in this study.

<sup>46</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 15.

jurisdictions thus set the tone for the development of rescue practice in South Africa.<sup>47</sup> As a result, a new corporate rescue procedure in the form of business rescue was introduced under Chapter 6 of the Companies Act 71 of 2008 ('the 2008 Act').<sup>48</sup> Chapter 6 of the 2008 Act which refers to business rescue proceedings now effectively replaces the provisions of judicial management.<sup>49</sup>

'[B]usiness rescue' is defined in section 128(1)(b) of the Act as proceedings to facilitate the rehabilitation of a company that is financially distressed.<sup>50</sup> This is achieved by means of three measures being:

'the temporary supervision of the company, and of the management of its affairs, business and property;<sup>51</sup> a temporary moratorium on the rights of claimants against the company or in respect of property in its possession;<sup>52</sup> and the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equities in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company'.<sup>53</sup>

The purpose of business rescue is to assist in the efficient rescue of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.<sup>54</sup> The new business rescue procedure has therefore been designed to prevent the demise, through winding-up, of viable companies by making provision for their possible rescue.<sup>55</sup> An added benefit of the said procedure is that a company can commence rescue proceedings either by way of a board resolution<sup>56</sup> or by a court

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<sup>47</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 15.

<sup>48</sup> The Companies Act 71 of 2008 came into effect on 1 May 2011. Bradstreet R 'The leak in the chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' (2010) 22 *South African Mercantile Law Journal* 195.

<sup>49</sup> Stein C & Everingham GK (eds) *The new Companies Act unlocked* (2011) 25.

<sup>50</sup> Section 128(1)(f) of the 2008 Companies Act.

<sup>51</sup> Section 128(1)(b)(i) of the 2008 Companies Act.

<sup>52</sup> Section 128(1)(b)(ii) of the 2008 Companies Act.

<sup>53</sup> Section 128(1)(b)(iii) of the 2008 Companies Act.

<sup>54</sup> Section 7(k) of the 2008 Companies Act.

<sup>55</sup> Meskin PM, Magid PAM & Borraine A (eds) *et al Insolvency law* (2016) para 18.1.

<sup>56</sup> Section 129 of the 2008 Companies Act.



order.<sup>57</sup> This creates a dual gateway for companies to commence business rescue proceedings.<sup>58</sup> It is, therefore, not necessary for a company to acquire the court's permission to obtain a business rescue order.<sup>59</sup> A board resolution thus signifies a reduction in time and cost compared to the judicial management procedure, where much reliance was placed on court proceedings.<sup>60</sup> Section 129 of the 2008 Act therefore provides an alternative measure to commence rescue proceedings as opposed to judicial management proceedings.<sup>61</sup>

### 1.3. Statistics

Statistics available based on business rescue proceedings can be obtained from the Companies and Intellectual Property Commission ('the CIPC').<sup>62</sup> Although representatives of the CIPC have from time to time provided statistics regarding business rescue proceedings, these have been *ad hoc* and may differ at times.<sup>63</sup> A brief overview of statistics made available by the CIPC from 2011 to date, will reflect the current status of business rescue proceedings in South Africa.

On 31 December 2016, the CIPC published its quarterly report on the status of business rescue proceedings in South Africa.<sup>64</sup> The said report covers the period of 1 May 2011, the date Chapter 6 of the 2008 Act came into effect, to 31 December 2016. The report

<sup>57</sup> Section 131 of the 2008 Companies Act. This section outlines the procedure where an affected person may apply to court at any time for an order placing the company under supervision and commencing business rescue proceedings by satisfying the requirements in section 131(4)(a) of the 2008 Companies Act. Kindly note that section 131 of the 2008 Companies Act will not be discussed in greater detail but will be referred to in order to explain business rescue proceedings throughout this study.

<sup>58</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 454.

<sup>59</sup> Stein C & Everingham GK (eds) *The new Companies Act unlocked* (2011) 25.

<sup>60</sup> Cassim FHI (ed), Jooste R & Shev J *et al Contemporary company law* 2ed (2012) 866.

<sup>61</sup> Rushworth J 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' *2010 Acta Juridica* 408.

<sup>62</sup> Section 185 of the 2008 Companies Act. Companies and Intellectual Property Commission 'Status of business rescue proceedings in South Africa December 2016' available at [http://www.cipc.co.za/files/8114/9131/0792/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_December\\_2016\\_version1\\_0.pdf](http://www.cipc.co.za/files/8114/9131/0792/Status_of_Business_Rescue_in_South_Africa_December_2016_version1_0.pdf) (accessed 3 May 2017).

<sup>63</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 615.

<sup>64</sup> Companies and Intellectual Property Commission 'Status of business rescue proceedings in South Africa December 2016' available at [http://www.cipc.co.za/files/8114/9131/0792/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_December\\_2016\\_version1\\_0.pdf](http://www.cipc.co.za/files/8114/9131/0792/Status_of_Business_Rescue_in_South_Africa_December_2016_version1_0.pdf) (accessed 3 May 2017).

reflects the number of business rescue filings, invalid filings, the number of business rescue proceedings that have been terminated and the reason for said termination.

According to the report a total number of 2422 cases were filed to commence business rescue proceedings. From the total number of filings, the following is evident, 214 proceedings were a nullity in law, 454 proceedings were terminated by filing of a Notice of Termination (CoR 125.2), 385 proceedings were substantially implemented by way of filing a Notice of Substantial Implementation (CoR 125.3), 252 proceedings ended up directly in liquidation without a Notice of Termination (CoR 125.2) being filed, 14 proceedings were set aside<sup>65</sup> and 1103 proceedings, as at 31 December 2016, were still in business rescue.<sup>66</sup>

The above statistics have shown that there has been an increase in the number of business rescue filings since inception of Chapter 6 of the 2008 Companies Act. Although not all successful, the statistics reveals that there has been a paradigm shift from companies commencing liquidation proceedings to utilising business rescue proceedings.

#### **1.4. Research questions and objectives**

This study outlines the development of judicial management as a corporate rescue procedure. The requirements under section 427(1) of the 1973 Act and some of the defects and weaknesses experienced with judicial management are analysed. This will provide the necessary background and understanding of judicial management which could be blamed for its failure to function as an effective corporate rescue procedure. This is of particular importance as the study will mainly focus on the board resolution to commence business rescue proceedings in terms of section 129 of the 2008 Act. The

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<sup>65</sup> Companies and Intellectual Property Commission 'Status of business rescue proceedings in South Africa December 2016' available at [http://www.cipc.co.za/files/8114/9131/0792/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_December\\_2016\\_version1\\_0.pdf](http://www.cipc.co.za/files/8114/9131/0792/Status_of_Business_Rescue_in_South_Africa_December_2016_version1_0.pdf) (accessed 3 May 2017) 1.

<sup>66</sup> Companies and Intellectual Property Commission 'Status of business rescue proceedings in South Africa December 2016' available at [http://www.cipc.co.za/files/8114/9131/0792/Status\\_of\\_Business\\_Rescue\\_in\\_South\\_Africa\\_December\\_2016\\_version1\\_0.pdf](http://www.cipc.co.za/files/8114/9131/0792/Status_of_Business_Rescue_in_South_Africa_December_2016_version1_0.pdf) (accessed 3 May 2017) 2.

main requirements of section 129 of the 2008 Act will then be evaluated against the background of the defects and weaknesses experienced with judicial management.

Given the purpose of this study the following questions are posed:

- What were the main defects and weaknesses experienced with judicial management?
- Has the new business rescue procedure, by virtue of section 129 of the 2008 Act, addressed the defects and weaknesses experienced with judicial management?
- Is business rescue, by virtue of section 129 of the 2008 Act, an improvement on its predecessor, judicial management?
- What recommendations are proposed to improve the efficacy of business rescue by virtue of section 129 of the 2008 Act?

### 1.5. Significance of the study

Prior to the introduction of business rescue under Chapter 6 of the 2008 Act, judicial management was the primary form of corporate rescue in South Africa. Judicial management was mainly a court driven procedure. Companies that experienced financial difficulty and seeking to restructure their financial affairs were obliged to apply to court for a judicial management order in terms of section 427(1) of the 1973 Act.<sup>67</sup>

Judicial management suffered inherent problems which deterred the practical application of the procedure<sup>68</sup> and led to very few companies being rescued.<sup>69</sup> As a result, this position changed when business rescue under Chapter 6 of the 2008 Act replaced the provisions of judicial management under the 1973 Act.<sup>70</sup>

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<sup>67</sup> Henning JJ 'Judicial management and corporate rescues in South Africa' (1992) 1 *Tydskrif vir Regswetenskap* 92.

<sup>68</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 4.

<sup>69</sup> Olver AH 'Judicial management – A Case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 85-86.

<sup>70</sup> Bradstreet R 'The new business rescue: Will creditors sink or swim' (2011) 128 *South African Law Journal* 353.

Companies in financial distress may now gain the protection under Chapter 6 of the 2008 Act without approaching a court to commence business rescue proceedings.<sup>71</sup> The said protection is attained by passing and filing a company resolution, approved by the board of directors, with the CIPC in terms section 129 of the 2008 Act.

Business rescue by virtue of section 129 of the 2008 Act is a complete departure from judicial management. Section 129 of the 2008 Act is a significant feature to this study as it provides a voluntary route to commence business rescue proceedings that is an inexpensive alternative to the time consuming court proceedings.

The significance of the study is, therefore, to determine whether business rescue by virtue of section 129 of the 2008 Act has addressed the problems experienced with judicial management and if so, whether it is an improvement to its predecessor, judicial management.

#### **1.6. Limitation of the study**

This study will focus on the main legislative requirements of section 129 of the 2008 Act. Should one attempt to evaluate business rescue proceedings as outlined in Chapter 6 of the 2008 Act in its entirety, the ambit to be covered could potentially be too broad and the study may not be able to deal with all the provisions comprehensively. Therefore, for the purpose of this study, only the main legislative requirements of section 129 of the 2008 Act will be evaluated.

#### **1.7. Research methodology**

Given the purpose of this study, an analytical research methodology is appropriate. The main sources consulted consist of legislation, case law, journal articles, textbooks, reports, and internet references. In addition hereto, the writings by scholars who contributed to this aspect of law will be consulted.

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<sup>71</sup> Section 129(1) of the 2008 Companies Act.

## **1.8. Chapter overview**

### CHAPTER 1: INTRODUCTION

Chapter one serves as an introduction and background to the study. It gives a brief overview of the development of corporate rescue mechanisms in South Africa. It also provides the research questions and objectives, significance of the study, limitation of the study, research methodology and chapter outline.

### CHAPTER 2: JUDICIAL MANAGEMENT UNDER SECTION 427 OF THE 1973 ACT

In this chapter the development of judicial management is discussed. This is followed by an analysis of the requirements in terms of section 427(1) of the 1973 Act. More importantly, reference is made to the problems experienced with judicial management. These aspects are of particular importance as it will be evaluated against the main legislative requirements of section 129 of the 2008 Act, which is analysed in Chapter three.

### CHAPTER 3: BUSINESS RESCUE UNDER SECTION 129 OF THE 2008 ACT

In this chapter reference is made to business rescue as defined in section 128(1)(b) of the 2008 Act. This is followed by an analysis of the main legislative requirements under section 129 of the 2008 Act. Having considered the main legislative requirements under section 129 of the 2008 Act, it was noted that it may lead to abuse of the business rescue procedure, which is also evaluated. However, it is submitted that there are sufficient procedural and substantive measures in place to prevent abuse of the said procedure. The chapter concludes by comparing business rescue to judicial management.

### CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

This chapter concludes that business rescue by virtue of section 129 of the 2008 Act have addressed the main problems experienced with judicial management as a corporate rescue procedure. It is, therefore, a welcomed improvement as it allows the board of a company to adopt a resolution to commence business rescue without having

to obtain a courts permission. Although business rescue by virtue of section 129 of the 2008 Act is laudable, there is room for improvement. This chapter proposes recommendations that can used to improve the practical efficacy of section 129 the 2008 Act.



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## CHAPTER 2:

### JUDICIAL MANAGEMENT UNDER SECTION 427 OF THE 1973 ACT

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#### 2.1. Introduction

Judicial management has been part of South African company law since its inception in the Companies Act 46 of 1926. The said procedure was hardly resorted to or accepted despite attempts made to improve it by amendments to the applicable legislation.<sup>72</sup> Judicial management had also not achieved the success legislators may have envisioned.<sup>73</sup> Some of the reasons were related to the lack of precedents set by courts, inherent deficiencies in the legislation<sup>74</sup> and the conservative approach adopted by South African courts when dealing with judicial management applications.<sup>75</sup>

This chapter examines judicial management in terms of section 427 the 1973 Act, detailing those aspects identified as problematic. The examination will seek to unravel the reason why judicial management as a corporate rescue procedure had failed and how these defects affected the success of the procedure. This chapter will provide the reader with insight regarding judicial management and its onerous requirements that had to be satisfied before a judicial management order would be granted. Furthermore, an overview regarding the judicial manager will be provided by focusing on their appointment and qualifications. Moreover, this chapter concludes judicial management by outlining the main problems experienced with the said procedure.

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<sup>72</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 16.

<sup>73</sup> Museta GM *The development of business rescue in South African law* (published LLM thesis, University of Pretoria, 2011) 1.

<sup>74</sup> Ofwono FI *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law* (published Post Graduate Diploma in Law thesis, University of Cape Town, 2014) ii.

<sup>75</sup> *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C) 233.

## 2.2. Judicial management

Judicial management offered companies in financial difficulty a measure of protection in the hope that with better management they would overcome their difficulties and avoid liquidation.<sup>76</sup> Judicial management, therefore, enabled a company suffering a temporary setback due to mismanagement or other special circumstances to once again become a successful business concern.<sup>77</sup> The purpose of the said procedure was to rescue the company itself in its entirety and not only its business or a viable part thereof.<sup>78</sup> Essentially, this would be achieved by replacing the existing management of the company with a judicial manager<sup>79</sup> under the supervision of the court, who takes over the company's business with the purpose of restoring it to profitability.<sup>80</sup>

An application for a judicial management order was applied for by anyone entitled to apply for the winding-up of a company.<sup>81</sup> The application would be made by the company itself, by one or more of its creditors, a contingent or prospective creditor, by one or more of its members or jointly by any of them.<sup>82</sup> This was, however, one of the grounds on which judicial management had been criticised.<sup>83</sup> The formal application to, and order of, the court required to place a company under judicial management rendered the procedure expensive and onerous on an applicant.<sup>84</sup>

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<sup>76</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 28.

<sup>77</sup> Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002) 343.

<sup>78</sup> Lamprecht C 'Business rescue replacing judicial management: An assessment of the extent of problems solved' (2008) 22 *South African Journal of Accounting Research* 189.

<sup>79</sup> See part 2.7. below.

<sup>80</sup> Section 427(1) of the 1973 Companies Act.

<sup>81</sup> Section 427(2) read with section 346 of the 1973 Companies Act; Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 150.

<sup>82</sup> Section 346 of the 1973 Companies Act. Benade ML (ed), Henning JJ & Du Plessis JJ *et al Entrepreneurial law incorporating the new Companies Act manual* (2009) 414

<sup>83</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 18.

<sup>84</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 18.



### 2.3. Requirements for a judicial management order

In terms of section 427(1) of the 1973 Act, the granting of a judicial management order by a court rests on various requirements.

These requirements are:

- (a) 'If, by reason of mismanagement or any other cause
  - (i) the company is unable to pay its debts or is probably unable to meet its obligations; and
  - (ii) has not become, or is prevented from becoming, a successful business concern; and
- (b) there is a reasonable probability that, if the company is placed under judicial management, it will be in a position to
  - (i) pay its debts or meet its obligations; and
  - (ii) become a successful business concern,a court may, if it appears just and equitable, grant a judicial management order'.<sup>85</sup>

Part (a) of the requirements relates to the state that a company finds itself in, and had to be proved before an applicant would have *locus standi* to obtain a judicial management order. Whereas, part (b) of the requirements relates to what can be achieved by obtaining a judicial management order, and what needs to be proved before the court would grant the order.<sup>86</sup> Even if the above requirements had been met, the court would not have granted an order for judicial management if it did not appear to the court that it is just and equitable to do so.<sup>87</sup> This, however, required an applicant to adhere to all the requirements set forth in section 427(1) of the 1973 Act as they were not seen as alternative requirements to granting a judicial management order in these circumstances.<sup>88</sup>

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<sup>85</sup> Section 427(1) of the 1973 Companies Act. Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part1)' (2004) 16 *South African Mercantile Law Journal* 248.

<sup>86</sup> Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part1)' (2004) 16 *South African Mercantile Law Journal* 248.

<sup>87</sup> See part 2.3.5. below.

<sup>88</sup> Ofwono FI *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law* (published Post Graduate Diploma in Law thesis, University of Cape Town, 2014) 4.

As mentioned above, section 427(1) of the 1973 Act contained the requirements which had to be met by an applicant before a judicial management order would be granted.

Each requirement is outlined and discussed below.

### 2.3.1. Mismanagement

The court would grant a judicial management order on the grounds of mismanagement or for any other cause where it was satisfied that the mismanagement constrained the internal administration of the company.<sup>89</sup> Olver<sup>90</sup> is of the opinion that the words 'mismanagement or for any other cause' should have been removed from section 427(1) of the 1973 Act. A company's financial trouble could not solely be caused by mismanagement. It could have ensued by ceding a company's activities due to litigation; temporary illiquidity of a property company or the temporary labour unrest resulting in disruption of the work force.<sup>91</sup>

According to Loubser reference made to mismanagement was an unnecessary feature.<sup>92</sup> Reference should not have been made to 'mismanagement or any other cause' of the company's financial problems.<sup>93</sup> This would have made it clear that any company may benefit from judicial management, allowing a company to utilise the procedure irrespective of their reasons for financial trouble.<sup>94</sup>

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<sup>89</sup> Section 427(1) of the 1973 Companies Act.

<sup>90</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 47.

<sup>91</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 47.

<sup>92</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 21.

<sup>93</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 162.

<sup>94</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 162.

### 2.3.2. Inability to pay debts<sup>95</sup>

In order for a court to grant a provisional judicial management order, a company must have been unable to pay its debts or must probably be unable to meet its obligations.<sup>96</sup> Since no provision was made in the 1973 Act in terms of which a company would be deemed unable to pay its debts for the purpose of a judicial management application, the inability to pay debts had to be proved.<sup>97</sup>

Alternatively to the inability of a company to pay its debts, it may have been proven that the company was probably unable to meet its obligations.<sup>98</sup> It would seem that a company would probably be unable to meet its obligations when it is unlikely to be able to meet its existing obligations when they fall due for payment.<sup>99</sup> The 1973 Act did not provide an explanation of what was meant by obligations.<sup>100</sup>

According to Loubser, it can be assumed that 'obligations' consisted of a wider meaning than merely the payment of debts, and included any contractual obligations that the company had to perform.<sup>101</sup> Olver is of the view that a company may be able to pay its current debts but it may foresee that it will not be able to meet its future obligations.<sup>102</sup> These obligations need not necessarily be payment of debts but could have been any



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<sup>95</sup> Also known as the 'insolvency requirement'. Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16 *South African Mercantile Law Journal* 250; Kloppers P 'Judicial management reform – Steps to initiate a business rescue procedure' (2001) 13 *South African Mercantile Law Journal* 374-375. Inability to pay debts may take the form of commercial insolvency. Commercial insolvency occurs when a company is unable to meet its day to day expenses. Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 49.

<sup>96</sup> Section 427(1)(a) of the 1973 Companies Act.

<sup>97</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 21.

<sup>98</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.

<sup>99</sup> Blackman MS, Jooste RD & Everingham GK *et al Commentary on the Companies Act* (2002) 15-5.

<sup>100</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.

<sup>101</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.

<sup>102</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 50.

other obligations such as the fulfillment of a contract.<sup>103</sup> However, since the requirement was stated in the present tense in the 1973 Act, Loubser submits that this would only apply to the inability to meet its obligations in the immediate or foreseeable future.<sup>104</sup>

The requirement that a company must already be unable to pay its debts limits the chance of the company being successfully rescued.<sup>105</sup> This was counter-productive to the overall aim of judicial management.<sup>106</sup> Rescuing the business at that particular time might have been too late to turn the business around.<sup>107</sup> Kloppers is of the opinion that insolvency or pending insolvency should not have been a strict requirement.<sup>108</sup> The reason being that it not only acts as a bar for its more general use, but it also defeats the object of the exercise, namely staving off insolvency and making a company profitable again.<sup>109</sup> Kloppers submits that the earlier a company recognises that it should restructure itself because of pending financial problems, the better the chances of avoiding eventual liquidation and the greater the possibility of a successful restructure.<sup>110</sup>

According to Loubser the applicant should have been given an opportunity to show that the company was in need of assistance.<sup>111</sup> This could have been done by proving either that the company was unable to pay its debts or probably unable to meet its obligations. It could have been proved that the company was not operating as a successful concern

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- <sup>103</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 50.
- <sup>104</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 143.
- <sup>105</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.
- <sup>106</sup> Ofwono FI *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law* (published Post Graduate Diploma in Law thesis, University of Cape Town, 2014) 11.
- <sup>107</sup> Ofwono FI *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law* (published Post Graduate Diploma in Law thesis, University of Cape Town, 2014) 11-12.
- <sup>108</sup> Kloppers P 'Judicial management reform – Steps to initiate a business rescue procedure' (2001) 13 *South African Mercantile Law Journal* 374-375.
- <sup>109</sup> Kloppers P 'Judicial management reform – Steps to initiate a business rescue procedure' (2001) 13 *South African Mercantile Law Journal* 374-375.
- <sup>110</sup> Kloppers P 'Judicial management reform – Steps to initiate a business rescue procedure' (2001) 13 *South African Mercantile Law Journal* 375.
- <sup>111</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 162.

at the time, irrespective of whether it had been successful before.<sup>112</sup> Therefore, in most business rescue<sup>113</sup> procedures, if a company is likely to become unable to pay its debts, this is also accepted as one of the grounds for commencing business rescue proceedings.<sup>114</sup>

### 2.3.3. Failure to become a successful concern

Another requirement is that the company has not become or is prevented from becoming a successful concern.<sup>115</sup> This requirement was not clear since a company that is unable to pay its debts or probably unable to meet its obligations was clearly not a successful concern.<sup>116</sup> The 1973 Act did not specify at what point or under which circumstances a company would be regarded as not being a successful concern.<sup>117</sup> A literal interpretation of this requirement would have the absurd result of excluding a company that has been, but no longer is, a successful concern.<sup>118</sup>

By contrast, the requirement could have been an important and sensible alternative to the inability to pay debts requirement.<sup>119</sup> This meant that a company that was still able to pay its debts and meet its obligations but obviously struggling and on the verge of disaster, could be placed under judicial management. This could have been done at a time when its chances of being rescued are far better than they would have been should the company reach commercial insolvency.<sup>120</sup> Loubser submits that this rather vague

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<sup>112</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 162.

<sup>113</sup> See part 3.2. below.

<sup>114</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.

<sup>115</sup> Section 427(1)(b) of the 1973 Companies Act.

<sup>116</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.

<sup>117</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.

<sup>118</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 144.

<sup>119</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 144.

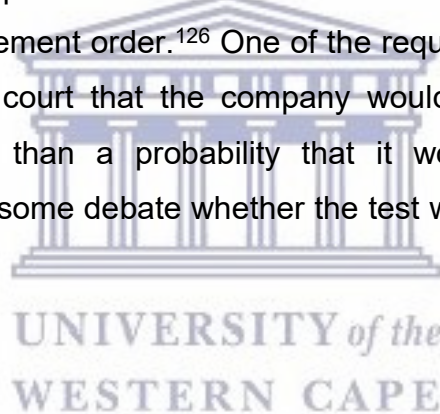
<sup>120</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 144.

requirement was an unnecessary addition to the already onerous requirements that had to be satisfied before a judicial management order would be granted.<sup>121</sup>

#### 2.3.4. Reasonable probability

The court would not grant a judicial management order unless the applicant establishes that there is a reasonable probability that, if placed under judicial management, the company would be enabled to pay its debts or meet its obligations and become a successful concern.<sup>122</sup> This meant that a provisional judicial management order<sup>123</sup> could not be resorted to in order to establish whether it would succeed in rescuing a company.<sup>124</sup> Furthermore, a judicial management order could not be granted because it would achieve a better result for creditors than the immediate liquidation.<sup>125</sup>

Section 432 of the 1973 Act placed an even heavier burden of proof on the applicant to obtain a final judicial management order.<sup>126</sup> One of the requirements of this section was that it must appear to the court that the company would be enabled to become a successful concern, rather than a probability that it would become a successful concern.<sup>127</sup> There has been some debate whether the test was the same at the time the



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<sup>121</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 22.

<sup>122</sup> Section 427(1)(b) of the 1973 Companies Act. Blackman MS, Jooste RD & Everingham GK *et al Commentary on the Companies Act* (2002) 15-5 – 15-6; Henning JJ 'Judicial management and corporate rescues in South Africa' (1992) 17 *Tydskrif vir Regswetenskap* 93; *Ex parte Onus (Edms) Bpk Du Plooy NO v Onus (Edms) Bpk en Andere* 1980 (4) SA 63 (O) 66; *Kotze v Tulryk Bpk en Andere* 1977 (3) SA 118 (T) 122; *Noordkaap Lewendehawe Ko-Operasie Bpk v Schreuder en 'n Ander* 1974 (3) SA 102 (A) 109-110; *Ben-Tovim v Ben-Tovim and Others* 2000 (3) SA 325 (C) 333; Meskin PM, Delpont P & Kunst JA (ed) *et al Henochsberg on the Companies Act* 5ed (1994) 926.

<sup>123</sup> Section 427(1) of the 2008 Companies Act.

<sup>124</sup> *Kotze v Tulryk Bpk en Andere* 1977 (3) SA 118 (T) 122.

<sup>125</sup> By contrast, a better return for creditors is specifically recognised as an acceptable outcome of the new business rescue procedure. See part 3.2. below. See also Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 23.

<sup>126</sup> Loubser A *Some Comparative Aspects of Corporate Rescue in South African Company Law* (published LLD thesis, University of South Africa, 2010) 23; Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 43.

<sup>127</sup> Loubser A *Some Comparative Aspects of Corporate Rescue in South African Company Law* (published LLD thesis, University of South Africa, 2010) 23.

provisional and final orders were considered, or whether the test should be more stringent upon the return date of the order.<sup>128</sup>

In *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd*<sup>129</sup> the court, on the basis of the language of sections 427 and 432 of the 1973 Act, was of the view that the onus on the applicant for a final judicial management order was heavier than that on an applicant for a provisional order.<sup>130</sup> There must have been a strong probability amounting to a near certainty that the company concerned will become a successful concern if placed under judicial management.<sup>131</sup>

However, in *Ex parte Onus (Edms) Bpk Du Plooy NO v Onus (Edms) Bpk en Andere*<sup>132</sup> the court, correctly dissented from this view and held that the same burden of proof for a reasonable probability, applied to both an application for a provisional and final judicial management order.<sup>133</sup> This view was further evident from cases such as *Kotze v Tulryk Bpk en Andere*<sup>134</sup> and *Ladybrand Hotel (Pty) Ltd v Segal and Another*<sup>135</sup> that the test when granting the final judicial management order should be the same as in the case when granting a provisional order.<sup>136</sup> The aforesaid view was supported by Kloppers<sup>137</sup> and Meskin<sup>138</sup> although Olver<sup>139</sup> was of the opinion that a stricter test should have been applied. Therefore, the requirements in granting a judicial management order, whether

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<sup>128</sup> Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002); *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) 683. See also Cilliers HS, Benade ML & Henning JJ *et al Corporate law* 3ed (2000) 481.

<sup>129</sup> 1979 (2) SA 680 (E).

<sup>130</sup> *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) 683.

<sup>131</sup> Meskin PM, Delpont P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 926.

<sup>132</sup> 1980 (4) SA 63 (O).

<sup>133</sup> *Ex parte Onus (Edms) Bpk Du Plooy NO v Onus (Edms) Bpk en Andere* 1980 (4) SA 63 (O) 66.

<sup>134</sup> 1977 (3) SA 118 (T) 120-123.

<sup>135</sup> 1975 (2) SA 357 (O) 358.

<sup>136</sup> Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002) 347–348.

<sup>137</sup> Kloppers P 'Judicial management reform – Steps to initiate a business rescue procedure' (2001) 13 *South African Mercantile Law Journal* 363-364.

<sup>138</sup> Meskin PM, Delpont P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 926.

<sup>139</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 42-43.

provisional or final were contained in section 427 of the 1973 Act and section 432 of the 1973 Act merely empowered the court to grant a final order.<sup>140</sup>

The requirement that a company must be enabled to pay its debts means that all debts must have been paid in full and within a reasonable time.<sup>141</sup> It would normally lead to the further requirement that the court must be satisfied that the company would be able to find the necessary funds or financing to pay its debts.<sup>142</sup> Loubser submits that the provision requiring the applicant to show that judicial management would enable the company to pay its debts and become a successful concern should be viewed as a single requirement.<sup>143</sup> Therefore, should a company become able to pay its debts it will be a successful concern.<sup>144</sup>

It is clear from this requirement that the corporate entity itself must be rescued by judicial management and not just the business of the company, or a viable part thereof.<sup>145</sup> This requirement and its restrictive interpretation by the South African courts have been severely criticised. The reason being, that this requirement was too onerous to prove and most companies with financial difficulties were precluded from obtaining a judicial management order.<sup>146</sup> When an applicant applied to court for a provisional judicial management order, it had to prove that the company was already unable to pay its debts. In the same application, an applicant then had to convince a court that it would be able to pay all the company's debts if a judicial management order were granted.

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<sup>140</sup> Meskin PM, Delpont P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 926.

<sup>141</sup> Meskin PM, Delpont P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 926-926(1); *Ben-Tovim v Ben-Tovim and Others* 2000 (3) SA 325 (C) 332.

<sup>142</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 24.

<sup>143</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 24.

<sup>144</sup> *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) 683; Cilliers HS, Benade ML & Henning JJ *et al Corporate Law* 3ed (2000) 480-481.

<sup>145</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 24.

<sup>146</sup> Rajak H & Henning J 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 267-268.



This made it practically impossible to convince a court to grant a judicial management order.<sup>147</sup>

### 2.3.5. Just and equitable

A court would, as an additional requirement, consider whether it appears just and equitable to grant a judicial management order.<sup>148</sup> According to Loubser, this was the most problematic requirement under section 427(1) of the 1973 Act.<sup>149</sup> No concrete explanation was provided in the 1973 Act stipulating what circumstances would satisfy this requirement. In addition hereto, South African courts have shied away from defining just and equitable, which led to various interpretations of the just and equitable requirement.<sup>150</sup>

As a result, South African courts viewed judicial management as an extraordinary procedure rather as an alternative to liquidation.<sup>151</sup> The reason being, that judicial management infringed on the rights of creditors to liquidate a company in order to obtain payment of their debts.<sup>152</sup> This resulted in South African courts adopting the principle that judicial management is a special privilege which was granted only in exceptional circumstances.<sup>153</sup> However, Kloppers submits that there was no compelling reason for South African courts to treat judicial management as a special privilege and

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<sup>147</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 24.

<sup>148</sup> Section 427(1) of the 1973 Companies Act.

<sup>149</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 25.

<sup>150</sup> Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 37.

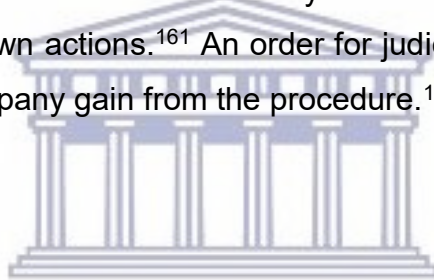
<sup>151</sup> Burdette DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part1)' (2004) 16 *South African Mercantile Law Journal* 247.

<sup>152</sup> Loubser A 'Tilting at windmills? The quest for an effective corporate rescue procedure in South African law' (2013) 25 *South African Mercantile Law Journal* 454.

<sup>153</sup> Loubser A 'Tilting at windmills? The quest for an effective corporate rescue procedure in South African law' (2013) 25 *South African Mercantile Law Journal* 454; *Silverman v Doornhoek Mines, Ltd. Smith v Doornhoek Mines, Ltd* 1935 TPD 349 353; *Tenowitz and Another v Tenny Investments (Pty) Ltd; Spur Steak Ranches (Pty) Ltd v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) 683; *Ben-Tovim v Ben-Tovim and Others* 2000 (3) SA 325 (C) 331; *Ladybrand Hotel (Pty) Ltd v Segal and Another* 1975 (2) SA 357 (O) 359; *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C) 233; Meskin PM, Delpont P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 924.

an extra-ordinary procedure.<sup>154</sup> According to Kloppers, there was nothing in the 1973 Act which stated that judicial management had been a special privilege or an extra-ordinary procedure.<sup>155</sup> Other interpretations of this requirement indicated that judicial management were not intended for small companies<sup>156</sup> or that it should be granted only if there were no other appropriate remedy available.<sup>157</sup>

Loubser submits that this requirement was unnecessary considering the already arduous requirements that an applicant for a judicial management order had to satisfy.<sup>158</sup> In addition hereto, a court had the discretion whether or not to grant an order of judicial management, irrespective of compliance with all the requirements set out in section 427(1) of the 1973 Act.<sup>159</sup> It is, therefore, important to note that a court would not grant a judicial management order if the company was able to rectify its own misfortunes.<sup>160</sup> South African courts would only intervene when a company was incapable of remedying its own actions.<sup>161</sup> An order for judicial management would also not be granted should a company gain from the procedure.<sup>162</sup>



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- <sup>154</sup> Kloppers P 'Judicial Management – A corporate rescue mechanism in need of reform?' (1999) 10 *Stellenbosch Law Review* 426.
- <sup>155</sup> Kloppers P 'Judicial Management – A corporate rescue mechanism in need of reform?' (1999) 10 *Stellenbosch Law Review* 426.
- <sup>156</sup> *Rustomjee v Rustomjee (Pty) Ltd* 1960 (2) SA 753 (D) 753; *Ronaasen and Others v Ronaasen & Morgan (Pty) Ltd* 1935 CPD 562 563; *Tobacco Auctions Ltd v AW Hamilton (Pvt) Ltd* 1966 (2) SA 451 (R) 453; Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 25; Olver AH 'Judicial management – A case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 88; Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 35.
- <sup>157</sup> *Rex v Ondundu Goldfields Ltd* 1937 CPD 375 379-380. See also *Makhuva and Others v Lukoto Bus Services (Pty) Ltd and Others* 1987 (3) SA 376 (V); *Ben-Tovim v Ben-Tovim and Others* 2000 (3) SA 325 (C). Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 25.
- <sup>158</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 26.
- <sup>159</sup> *Ben-Tovim v Ben-Tovim and Others* 2000 (3) SA 325 (C) 331; Meskin PM, Delport P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 923; Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 33; Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 150.
- <sup>160</sup> Cilliers HS, Benade ML & Henning JJ *et al Corporate Law* 3ed (2000) 481.
- <sup>161</sup> Cilliers HS, Benade ML & Henning JJ *et al Corporate Law* 3ed (2000) 481.
- <sup>162</sup> *Makhuva and Others v Lukoto Bus Service (Pty) Ltd and Others* 1987 (3) SA 376 (V) 586.

## 2.4. The judicial manager

### 2.4.1. Appointment

As soon as a provisional judicial management order was granted, the Master of the High Court had to appoint a provisional judicial manager in accordance with the policy determined by the Minister,<sup>163</sup> to take over the management of the company.<sup>164</sup> Although the section refers to the appointment of only a single provisional manager, more than one may have been appointed.<sup>165</sup> It should, however, be noted that appointing more than one judicial manager increased the cost involved in the procedure.<sup>166</sup> Since the 1973 Act did not contain a prescribed procedure for appointment of judicial managers, the Master would follow the same procedure as that for the appointment of a provisional liquidator.<sup>167</sup> This meant that a provisional judicial manager would be appointed from the Master's panel of insolvency practitioners who enjoyed the support of the majority of creditors.<sup>168</sup>

After a provisional judicial management order was granted, the person or persons whose names were submitted to the Master for appointment as final judicial manager(s) was nominated at the meetings of creditors.<sup>169</sup> The nomination and appointment of a final judicial manager were regulated *mutatis mutandis* by the provisions which applied to the nomination and appointment of liquidators of a company that was being wound-

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<sup>163</sup> Section 15(1A) of the 1973 Companies Act. The Minister may determine the policy for the appointment of a provisional judicial manager. Once the Minister publishes the said policy in the Gazette, the Minister must make any appointment of a provisional judicial manager in accordance with such policy. Meskin PM, Delpont P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 934; Blackman MS, Jooste RD & Everingham GK *et al Commentary on the Companies Act* (2002) 15-14.

<sup>164</sup> Section 429(b)(i) of the 1973 Companies Act.

<sup>165</sup> Meskin PM, Delpont P & Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 934.

<sup>166</sup> Ofwono FI *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law* (published Post Graduate Diploma in Law thesis, University of Cape Town, 2014) 5.

<sup>167</sup> Section 368 of the 1973 Companies Act.

<sup>168</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 34.

<sup>169</sup> Section 432(2) of the 1973 Companies Act. Shrand D (ed) *The law and practice of insolvency winding-up of companies and judicial management* 3ed (1977) 332; Blackman MS, Jooste RD & Everingham GK *et al Commentary on the Companies Act* (2002) 15-16.

up.<sup>170</sup> In most cases the same person who was appointed as provisional judicial manager would be nominated by the creditors at their meeting<sup>171</sup> and then appointed as final judicial manager by the Master.<sup>172</sup> However, the Master was able to disregard a nominated person by the creditors as judicial manager without providing reasons for his or her decision.<sup>173</sup>

#### 2.4.2. Qualifications

No special qualifications were required of persons appointed as judicial manager.<sup>174</sup> The only positive qualification for appointment as provisional or final judicial manager was that the individual appointed must furnish security for the proper performance of his or her duties.<sup>175</sup> The fact that judicial managers were not required to have any professional training or having membership in a professional body meant that there was no control over their activities.<sup>176</sup> According to Kloppers, statutory qualifications for appointment as judicial manager should have been imposed.<sup>177</sup> These qualifications should then have been implemented over a period of time to allow development in the profession of judicial management.<sup>178</sup>

The lack of statutory regulation regarding the qualifications of judicial managers was one of the shortfalls of judicial management.<sup>179</sup> A judicial manager was not disqualified from being appointment as a liquidator where judicial management had failed and the

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<sup>170</sup> Section 431(4) of the 1973 Companies Act.

<sup>171</sup> Section 429(b)(ii) of the 1973 Companies Act. This meeting was convened by the Master of the High Court.

<sup>172</sup> Section 431(4) of the 1973 Companies Act.

<sup>173</sup> Lamprecht C 'Business rescue replacing judicial management: An assessment of the extent of problems solved' (2008) 22 *South African Journal of Accounting Research* 192.

<sup>174</sup> Rajak H & Henning J 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 264.

<sup>175</sup> Section 429(b)(i) and Section 375(1) of the 1973 Companies Act.

<sup>176</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 37.

<sup>177</sup> Kloppers P 'Judicial Management – A corporate rescue mechanism in need of reform?' (1999) 10 *Stellenbosch Law Review* 430.

<sup>178</sup> Kloppers P 'Judicial Management – A corporate rescue mechanism in need of reform?' (1999) 10 *Stellenbosch Law Review* 431.

<sup>179</sup> Bradstreet R 'The leak in the chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' (2010) 22 *South African Mercantile Law Journal* 204.

company subsequently wound-up.<sup>180</sup> This meant that the same person appointed as judicial manager would qualify twice for payment of fees, once as judicial manager and again as liquidator.<sup>181</sup> The reason behind this notion is that the fees for liquidation were higher than the fees awarded to judicial management.<sup>182</sup>

Olver<sup>183</sup> believes that judicial managers should not have been appointed as liquidators of a company if they were the judicial managers of that particular company. According to Olver, it was ludicrous to appoint liquidators as judicial managers, as they were trained to liquidate companies and not save them.<sup>184</sup> Rajak and Henning share the view that the wrong people were used as judicial managers.<sup>185</sup> They suggested that a panel of retired or semi-retired businesspeople should have been employed in order to oversee the rescue procedure, whichever form it takes.<sup>186</sup> The complete lack of requirements for appointment as judicial manager was one of the main reasons why judicial management did not enjoy the success rate legislatures may have had in mind.<sup>187</sup> This resulted in the abuse of the procedure which contributed to its failure and early termination as a corporate rescue procedure.<sup>188</sup>

## 2.5. Main problems experienced with judicial management

From South African case law and numerous articles written on judicial management, it is submitted that the procedure suffered from a number of deficiencies which prevented it from being a successful corporate rescue procedure.

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<sup>180</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 37-38.

<sup>181</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 156.

<sup>182</sup> Olver AH 'Judicial management – A case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 87.

<sup>183</sup> Olver AH 'Judicial management – A case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 87.

<sup>184</sup> Olver AH 'Judicial management – A case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 86-87.

<sup>185</sup> Rajak H and Henning JJ 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 284

<sup>186</sup> Rajak H and Henning JJ 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 284.

<sup>187</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 37.

<sup>188</sup> Jacobs LM 'Ondersoek na die bevoegdheids en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter' (2013) 10 *LitNet Akademies* 68.

Judicial management failed as a corporate rescue procedure due to South African courts treating it as an extraordinary procedure as it infringed on the rights of creditors to liquidate a company in order to receive payment of their debts. As a result, judicial management was only considered under very special circumstances.<sup>189</sup> This approach ignored the fact that saving the company or its business would have benefits extending further than protecting the company's creditors or liquidation of the company.<sup>190</sup>

The constant involvement of courts rendered the procedure expensive, slow and burdensome on an applicant wishing to apply for judicial management.<sup>191</sup> The costs incurred in running the process were so high that it did not make the process attractive to creditors, as all the available funds were spent on the process itself.<sup>192</sup> This situation was further exacerbated by the fact that only a provisional order was granted on the first application.<sup>193</sup> An applicant, therefore, had to approach the court for a second time to obtain a final judicial management order<sup>194</sup> of which the court would have the discretion to grant the final order or not.<sup>195</sup> The need to approach the courts created a deterrent effect for users of the procedure which diminished its popularity.<sup>196</sup> It would have been prudent if a court considered the extent and scope of a company's business activities before granting a judicial management order.<sup>197</sup> Furthermore, the court should have taken cognisance of the company's assets and liabilities and the nature of its difficulties before any judicial management order would be granted.<sup>198</sup>

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<sup>189</sup> See part 2.3.5. above.

<sup>190</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 43.

<sup>191</sup> See part 2.2. above. Kloppers P 'Judicial Management Reform – Steps to initiate a business rescue procedure' (2001) 13 *South African Mercantile Law Journal* 363; Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002) 348.

<sup>192</sup> Rajak H & Henning JJ 'Business rescue for South Africa' (1999) 116 *South African Law Journal* 268.

<sup>193</sup> Section 427(1) of the 1973 Companies Act.

<sup>194</sup> Section 432 of the 1973 Companies Act.

<sup>195</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 43.

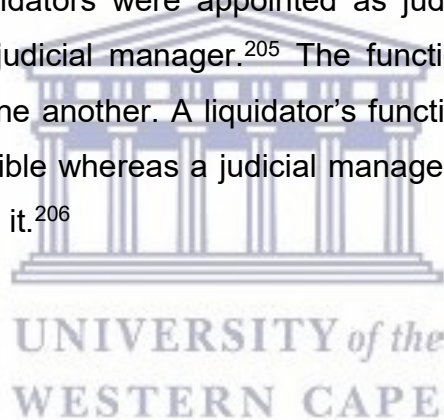
<sup>196</sup> Ofwono FI *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law* (published Post Graduate Diploma in Law thesis, University of Cape Town, 2014) 10.

<sup>197</sup> *Tobacco Auctions Ltd v AW Hamilton (Pvt) Ltd* 1966 (2) SA 451 (R) 453.

<sup>198</sup> *Tobacco Auctions Ltd v AW Hamilton (Pvt) Ltd* 1966 (2) SA 451 (R) 453.

Another serious drawback of judicial management was the onerous requirements and the burden of proof which an applicant had to satisfy, before a judicial management order was granted.<sup>199</sup> Each requirement had to be satisfied before a court would consider or for that matter grant a judicial management order.<sup>200</sup> It was nearly impossible to satisfy each requirement and if so, the court ultimately had the discretion to grant or refuse a judicial management application.<sup>201</sup>

A serious defect in judicial management was the complete lack of regulatory control over and qualifications of judicial managers.<sup>202</sup> The 1973 Act did not prohibit the subsequent appointment of a judicial manager as the liquidator for the same company.<sup>203</sup> Judicial managers were appointed without having the necessary experience or expertise, and were left to carry out their functions without any real oversight or control.<sup>204</sup> Liquidators were appointed as judicial managers which were contrary to the goals of a judicial manager.<sup>205</sup> The functions of the two professions differed diametrically from one another. A liquidator's function was to sell the business for the highest amount possible whereas a judicial manager's function was to save the business and possibly revive it.<sup>206</sup>



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<sup>199</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 43.

<sup>200</sup> *Ben-Tovim v Ben-Tovim and Others* 2000 (3) SA 325 (C) 331; Meskin PM, Delport P, Kunst JA (eds) *et al Henochsberg on the Companies Act* 5ed (1994) 923; Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 33; Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 150.

<sup>201</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 150.

<sup>202</sup> See part 2.4. above.

<sup>203</sup> Olver AH 'Judicial management – A case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 86-87.

<sup>204</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 43.

<sup>205</sup> Ofwono FI *Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law* (published Post Graduate Diploma in Law thesis, University of Cape Town, 2014) 13.

<sup>206</sup> Lamprecht C 'Business rescue replacing judicial management: An assessment of the extent of problems solved' (2008) 22 *South African Journal of Accounting Research* 193.

Judicial managers generally did not have the required business acumen to revive a company experiencing financial trouble.<sup>207</sup> This diminished the success rate of judicial management. It further created room for abuse of the procedure due to the conflict of interest created when the same individual appointed as judicial manager would be appointed as the liquidator of the same company.<sup>208</sup> As a result, ample fictitious judicial management applications were launched at court.<sup>209</sup> This meant that a judicial manager was never pressured to complete his or her task within a stipulated time frame.<sup>210</sup> A judicial manager could therefore, continue to earn fees for an indefinite period without making any real progress.<sup>211</sup> Again, the lack of any control by a professional organisation meant that the judicial manager would not be held liable for any unprofessional or dubious conduct.<sup>212</sup>

While the above exposition does not cover all aspects relating to judicial management, it does shed some light on the main problems that made judicial management an unattractive option as an effective corporate rescue procedure.<sup>213</sup>

## 2.6. Concluding remarks

Judicial management was an attempt by the legislature to create a corporate rescue procedure conducive for companies to utilise, given their financial circumstances. The said procedure, however, had fundamental weaknesses and lacked precedent for thorough implementation. This resulted in the limited success rate of the procedure as very few rescues emerged in practice. The conservative approach by South African courts and the unrealistic requirements which had to be satisfied under section 427(1)

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<sup>207</sup> Loubser A 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16 *South African Mercantile Law Journal* 155-156.

<sup>208</sup> Olver AH 'Judicial management – A case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 86.

<sup>209</sup> Olver AH 'Judicial management – A case for law reform' (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 87.

<sup>210</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 44.

<sup>211</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 44.

<sup>212</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 44.

<sup>213</sup> Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002) 350.



of the 1973 Act, prevented judicial management to develop as an effective means of saving companies in financial straits.<sup>214</sup>

It was evident that South Africa was in need of a revised but modern corporate rescue procedure that could effectively regulate company's suffering financial setbacks.<sup>215</sup> South Africa needed a system that was inexpensive, cost-effective and swift in its application.<sup>216</sup> As a result, a new corporate rescue procedure in the form of business rescue was introduced which is discussed in greater detail in the forthcoming chapter, with particular emphasis on section 129 of the 2008 Act.



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<sup>214</sup> Burdette DA, Boraine A & Smith A 'Business rescue in South Africa' available at [http://www.law.hku.hk/aiifl/wp-content/uploads/2014/07/2002\\_oct\\_Business-Rescue-in-South-Africa.doc](http://www.law.hku.hk/aiifl/wp-content/uploads/2014/07/2002_oct_Business-Rescue-in-South-Africa.doc) (accessed 30 May 2017) 15.

<sup>215</sup> Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002) 351.

<sup>216</sup> The Centre for Advanced Corporate and Insolvency Law (CACIL) University of Pretoria 'The Development of a Modern and Effective Business Rescue Model for South Africa' available at <http://www.turnaroundsa.com/pdf/The%20development%20of%20a%20modern%20and%20effective%20business%20rescue%20model%20for%20South%20Africa.pdf> (accessed 6 February 2017) 30.

## CHAPTER 3:

### BUSINESS RESCUE UNDER SECTION 129 OF THE 2008 ACT

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#### 3.1. Introduction

Chapter 6 of the 2008 Act provides a new corporate rescue procedure in the form of business rescue to companies finding themselves in financial distress. Business rescue replaced judicial management as a corporate rescue procedure under the 1973 Act as it failed to achieve the intended success the legislature may have envisioned.<sup>217</sup>

The evaluation conducted in Chapter two of this study placed particular emphasis on some of the main problems experienced with judicial management which contributed to its failure. Against this background, reference and comparative comments is made to Chapter two to ascertain whether business rescue, by virtue of section 129 of the 2008 Act, have addressed these problems and whether it is an improvement to its predecessor, judicial management.

Section 129 of the 2008 Act is a novel provision which outlines the procedure to commence business rescue by passing a board resolution. In evaluating section 129 of the 2008 Act, only the main requirements of this provision will be discussed.

This chapter will provide the reader with insight to what business rescue entail. In addition hereto, there are certain requirements that must be satisfied when the board of a company voluntary resolves to commence business rescue proceedings in terms of section 129 of the 2008 Act. Furthermore, this chapter will provide an overview of the business rescue practitioner with reference to the appointment and qualification criterion of the practitioner. Moreover, the abuse of business rescue will be examined. This chapter concludes by comparing business rescue with judicial management.

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<sup>217</sup> Museta GM *The development of business rescue in South African law* (published LLM thesis, University of Pretoria, 2011) 1.

### 3.2. Business rescue

With the inception of the 2008 Act on 1 May 2011, business rescue was introduced under Chapter 6 of the 2008 Act. Business rescue effectively replaces judicial management. In so doing, the legislature attempted to address many of the problems encountered with judicial management.<sup>218</sup> Although the 2008 Act uses the term business rescue, it is strictly speaking a corporate rescue procedure. The aim of business rescue is not just to rescue the company's business or potentially successful parts thereof, but rather the whole company or the corporate entity.<sup>219</sup>

The term business rescue is defined in section 128(1)(b) of the 2008 Act as proceedings to facilitate the rehabilitation of a company that is financially distressed by means of three measures:

'the temporary supervision of the company, and of the management of its affairs, business and property;<sup>220</sup> a temporary moratorium on the rights of claimants against the company or in respect of property in its possession;<sup>221</sup> and the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equities in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company'.<sup>222</sup>

The purpose of business rescue is to facilitate the rehabilitation<sup>223</sup> of a company that is in financial difficulty.<sup>224</sup> The said procedure has therefore been designed to prevent the demise, through winding-up, of viable companies by making provision for their possible rescue.<sup>225</sup> In terms of section 128(1)(b)(iii) of the 2008 Act business rescue has two

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<sup>218</sup> Swart WJC 'Business rescue: Do employees have better (reasonable) prospects of success?' (2014) 35 *OBITER* 407.

<sup>219</sup> Davis D (ed), Butler D & Mongalo *et al Companies and other business structures in South Africa* 3ed (2013) 237.

<sup>220</sup> Section 128(1)(b)(i) of the 2008 Companies Act.

<sup>221</sup> Section 128(1)(b)(ii) of the 2008 Companies Act.

<sup>222</sup> Section 128(1)(b)(iii) of the 2008 Companies Act.

<sup>223</sup> Levenstein submits that the word rehabilitation is significant as it is vague but it envisages the 'rescue' or 'saving' of a company in financial distress. Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 283-284.

<sup>224</sup> Rushworth J 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' 2010 *Acta Juridica* 375.

<sup>225</sup> Meskin PM, Magid PAM & Borraine A (eds) *et al Insolvency law* (2016) para 18.1.

objectives. First, if a plan cannot be devised and implemented to rescue the company under the provisions of Chapter 6 of the 2008 Act, then the next objective is a plan that would achieve a better return for a company's creditors or shareholders than that which would ensue pursuant to its winding-up.<sup>226</sup>

The first objective of business rescue in terms of section 128(1)(b)(iii), refers to the restructuring and revival of the company's business to allow it to trade on a solvent basis.<sup>227</sup> South Africa's business rescue model is, therefore, aimed at ensuring that financially distressed companies are reorganised and placed back into the marketplace where an entity can continue trading and contribute to the economy.<sup>228</sup> On the other hand, the second objective of the business rescue definition would lead to the sale of the assets or business of the company which results in a better return for creditors or shareholders than what they would have received in a liquidation application.<sup>229</sup> Business rescue is, therefore, not meant to provide companies with a mechanism with which to delay payment to creditors with no feasible plan of ever paying its debts.<sup>230</sup> It is also not a means of restructuring its debts over lengthy periods of time.<sup>231</sup>

The cases referred to below will illustrate how South African courts have interpreted and applied the business rescue definition in terms of section 128(1)(b)(iii) of the 2008 Act.

*Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another*<sup>232</sup> dealt with the second objective of the business rescue definition and the court refused granting a

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<sup>226</sup> Meskin PM, Magid PAM & Boraine A (eds) *et al Insolvency law* (2016) para 18.1.

<sup>227</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 284.

<sup>228</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 285.

<sup>229</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 285.

<sup>230</sup> *Firstrand Bank Limited v Normandie Restaurants Investments and Another* (189/2016) [2016] ZASCA 178 para 19. See part 3.10 below.

<sup>231</sup> *Firstrand Bank Limited v Normandie Restaurants Investments and Another* (189/2016) [2016] ZASCA 178 para 19. See part 3.10 below.

<sup>232</sup> (19075/11, 15584/11) [2012] ZAWCHC 33.

business rescue order.<sup>233</sup> The reason being, that no convincing evidence was led to suggest that creditors would receive a better return should the company be placed in business rescue. In addition hereto, the plan put forth suggested a wind-down of the company which would not assist the creditors.<sup>234</sup>

In *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and Another, Investec Bank Ltd v Aslo Holdings (Pty) Ltd*,<sup>235</sup> the court considered the definition of business rescue. It was held that in order to support an argument that a better return to creditors would be available than in terms of liquidation, a 'reasoned factual basis' would have to be set out in the court papers as vague and speculative averments would not succeed.<sup>236</sup> Levenstein submits that this is the correct approach given the fact that should neither of the objectives in section 128(1)(b)(iii) of the 2008 Act be met by a company, liquidation would be a better option.<sup>237</sup>

The court in *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*<sup>238</sup> dealt with section 128(1)(b)(iii) of the 2008 Act. The court found that no basis was argued that a liquidator would be less successful in realising a proper market value for the immovable property than a business rescue practitioner.<sup>239</sup> It was held that no other option was available except for placing the respondent in liquidation.<sup>240</sup> Despite the negative connotations surrounding

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<sup>233</sup> *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 para 12.

<sup>234</sup> *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 para 12.

<sup>235</sup> (25051/11, 18112/2011) [2012] ZAWCHC 110.

<sup>236</sup> *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and Another, Investec Bank Ltd v Aslo Holdings (Pty) Ltd* (25051/11, 18112/2011) [2012] ZAWCHC 110 para 19.

<sup>237</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 287.

<sup>238</sup> [2012] 2 All SA 433 (GSJ).

<sup>239</sup> *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] 2 All SA 433 (GSJ) para 49.

<sup>240</sup> *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] 2 All SA 433 (GSJ) para 49.

liquidation, there was no reasons advanced that business rescue would yield a better financial return for the creditors.<sup>241</sup>

Similarly, in relation to section 128(1)(b)(iii) of the 2008 Act, the court, in *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks and Another Intervening)*<sup>242</sup> held that business rescue does not necessarily entail a complete recovery of a company to solvency or restoration of its business and creditors being paid.<sup>243</sup> It could also mean that, although a company may not continue in existence, a better return may be gained by adopting the rescue procedure.<sup>244</sup>

The Supreme Court of Appeal ('the SCA') in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd*<sup>245</sup> confirmed that section 128(1)(b)(iii) of the 2008 Act contained a primary and secondary goal.<sup>246</sup> The primary goal is to facilitate the continued existence of the company in a state of insolvency.<sup>247</sup> The secondary goal which is provided for as an alternative, even if the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company that would result from immediate liquidation.<sup>248</sup> The SCA held that the achievement of either the primary or secondary goal of business rescue would therefore qualify as business rescue.<sup>249</sup>



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<sup>241</sup> *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] 2 All SA 433 (GSJ) para 49.

<sup>242</sup> [2012] JOL 28893(WCC).

<sup>243</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks and Another Intervening)* [2012] JOL 28893 (WCC) para 2.

<sup>244</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks and Another Intervening)* [2012] JOL 28893 (WCC) para 2.

<sup>245</sup> [2013] 3 All SA 303 (SCA).

<sup>246</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 23.

<sup>247</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 23.

<sup>248</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 23. See also *Griessel and Another v Lizemore and Others* [2016] JOL 34038 (GJ) para 75.

<sup>249</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 26.

### 3.3. Resolution by the board of a company

As indicated in Chapter two of this study, one of the major drawbacks of the judicial management procedure was the heavy reliance placed on court proceedings. One of the improvements of the new business rescue procedure is the limited role courts play in the commencement of business rescue proceedings.<sup>250</sup> As previously mentioned, business rescue can either commence through a resolution by the board of the company<sup>251</sup> or by court order.<sup>252</sup> Section 129 of the 2008 Act outlines the procedure to commence business rescue by a board resolution.<sup>253</sup>

In terms of section 129(1) of the 2008 Act:

‘the board of a company may resolve<sup>254</sup> that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe<sup>255</sup> that –

- (a) the company is financially distressed;<sup>256</sup> and
- (b) there appears to be a reasonable prospect<sup>257</sup> of rescuing the company’.<sup>258</sup>

All that is required for a company to commence business rescue proceedings is a resolution by the board, which amounts to a resolution adopted by a simple majority.<sup>259</sup>

<sup>250</sup> Swart WJC ‘Business rescue: Do employees have better (reasonable) prospects of success?’ (2014) 35 *OBITER* 407.

<sup>251</sup> Section 129 of the Companies Act of 2008. Section 1 of the 2008 Companies Act defines the board as ‘the board’ of directors of a company.

<sup>252</sup> Section 131 of the 2008 Companies Act.

<sup>253</sup> Section 129 of the 2008 Companies Act.

<sup>254</sup> Although the term ‘may resolve’ indicates a choice on the part of the board to adopt a business rescue resolution, it must be borne in mind that should the board elect not to adopt such a resolution in circumstances where the company is clearly financially distressed, the company may be placed under compulsory business rescue in terms of section 131 of the 2008 Act. Meskin PM, Magid PAM & Boraine A (eds) *et al Insolvency law* (2016) para 18.4.1.1.

<sup>255</sup> Reasonable grounds to believe refer to a company’s specific circumstances at the time, and which will be known to the board, which is a subjective test (belief) based on objective facts (the company’s financial position) and also that there is a belief that there is a reasonable prospect, the latter being an objective test. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 459.

<sup>256</sup> See part 3.3.1. below.

<sup>257</sup> See part 3.3.2. below

<sup>258</sup> Section 129(1) of the 2008 Companies Act.

<sup>259</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 455. See also *Griessel and Another v Lizemore and Others* [2016] JOL 34038 (GJ) para 140 where the Court held that such a decision by the board against the wishes of the shareholders would be indicative of *mala fides*. A board that was not properly constituted, cannot take a valid board resolution or if so constituted does not take the resolution with the majority as

According to Levenstein, any board of a company, when faced with a decision whether or not to pass a resolution and place a company in business rescue, will have to deliberate over the peculiar factual matrix that the company faces at the relevant time.<sup>260</sup> There are no specific guidelines or check list provided to the board to assist them in making such a decision.<sup>261</sup> In practice, the board of a company is usually cautious when deciding to commence business rescue proceedings. They would normally engage with the nominated business rescue practitioner<sup>262</sup> to conduct what is called a pre-assessment<sup>263</sup> of the company to ascertain whether the company is a suitable candidate for business rescue proceedings.<sup>264</sup>

The rationale for a voluntary route is that no one is in a better position than the board of a company to determine whether a company is financially distressed.<sup>265</sup> Therefore, the sooner a company receives assistance in the form of business rescue the better chance it may have of being rescued.<sup>266</sup> The board of a company may commence business rescue proceedings if they have reasonable grounds to believe that the two

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required by the Act this purported resolution would be a nullity and ineffective for the purpose of commencing business rescue proceedings.

<sup>260</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 308-309.

<sup>261</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 309.

<sup>262</sup> See part 3.9. below.

<sup>263</sup> The pre-assessment will entail an investigation into the business, dealings and affairs of the company. In practice, the pre-assessment procedure is becoming necessary and essential to any successful business rescue process. The starting point would be to assess whether or not the company is indeed financially distressed in terms of section 128(1)(f) of the 2008 Companies Act. And if so, would there be any merit in the company proceeding to pass a resolution to place the company under supervision. The pre-assessment further includes a careful analysis of the prospects of a business rescue plan and whether it can be developed and implemented, if approved, to ultimately rescue the company or, alternatively, render a better return for creditors or shareholders than would result from the immediate liquidation of the company. It is highly recommended that, during the pre-assessment, the nominated business rescue practitioner consult extensively with the management, auditors, existing bankers and the creditors of the company prior to the company filing for business rescue by way of a formal resolution to place all the relevant parties on the same footing regarding the potential business rescue proceedings. Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 310–311.

<sup>264</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 310.

<sup>265</sup> *Lazenby v Lazenby Vervoer VV and Others* (M328/2014) [2014] ZANWHC 41 para 23.

<sup>266</sup> Delpont P, Meskin PM(ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 454.



requirements namely, financially distressed and reasonable prospect of rescuing the company, are met.

A breakdown of the requirements in terms of section 129 of the 2008 Act, and what the board of a company need to consider when adopting a resolution is set out below. The requirements are 'financially distressed', 'reasonable prospect of rescue', and 'rescuing the company'. There is currently no definition of 'a reasonable prospect for rescuing the company' and as a result, these aspects will be discussed separately. In addition, there are procedural requirements that must be complied with once the board of a company has resolved to commence business rescue proceedings.

### 3.3.1. Financially distressed

Section 128(1)(f) of the 2008 Act defines when a company is trading under financial distress.

'Financially distressed, in reference to a particular company at any particular time, means that -

- (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (cash flow test);<sup>267</sup> or
- (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (balance sheet test).<sup>268</sup>

The first part of the definition seems fairly clear and refers to commercial insolvency.<sup>269</sup>

A company will be financially distressed if there is a reasonable likelihood<sup>270</sup> that the company may reach a position within the next six months where it will no longer be able

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<sup>267</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 452(1).

<sup>268</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 452(1).

<sup>269</sup> Commercial insolvency occurs when a company is unable to meet its day to day expenses. Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 49; Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 297.

<sup>270</sup> 'Reasonable likelihood' implies that there must be a rational basis for the conclusion that the company may not be able to pay its debts within the next six months. Erasmus J 'The Companies Act: When is a company financially distressed, and what does it mean?' available at [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_FinancialDistress\\_15052014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_FinancialDistress_15052014.pdf) (accessed 6 February 2017) 2.

to pay its debts as they become due and payable.<sup>271</sup> Therefore, if it appears reasonably likely to the board that the company will be unable to pay its debts as they become due and payable within the immediately ensuing six months, the board will have to consider commencing business rescue proceedings.<sup>272</sup>

The above conclusion is based on the current financial position of the company, by considering all relevant circumstances<sup>273</sup> that may impact the company's liquidity in the foreseeable future.<sup>274</sup> This provides the board of a company with sufficient time to make a determination and consider a business rescue application.<sup>275</sup> It is, therefore, advisable to commence business rescue proceedings at an early stage, at least six months before cash-flow difficulties emerge.<sup>276</sup>

In *Merchant West Workings Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another*,<sup>277</sup> the court held that a business rescue plan cannot be invoked where a company is already insolvent.<sup>278</sup> This is one of the aspects differentiating business rescue from judicial management. This means that rescue proceedings can commence six months in advance should signs of financial distress begin to appear. Therefore, a company that is trading profitably and is cash positive but does not have the wherewithal to repay a large debt which will become due

<sup>271</sup> Erasmus J 'The Companies Act: When is a company financially distressed, and what does it mean?' available at [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_FinancialDistress\\_15052014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_FinancialDistress_15052014.pdf) (accessed 6 February 2017) 2.

<sup>272</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 452(1).

<sup>273</sup> Circumstances that will be taken into account is whether the debt of creditors is or can be subordinated, whether creditors are willing to extend their credit and whether there is additional funding available, externally (debt) or internally (share capital). A (factual) objective evaluation of these factors will determine the ability to pay all debts, but only as they fall due. Also, it is respectfully submitted that the funding criteria are relevant if the board has to determine if there are reasonable grounds to believe that the company is financially distressed. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 452(1).

<sup>274</sup> Erasmus J 'The Companies Act: When is a company financially distressed, and what does it mean?' available at [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_FinancialDistress\\_15052014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_FinancialDistress_15052014.pdf) (accessed 6 February 2017) 2.

<sup>275</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 297.

<sup>276</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 298.

<sup>277</sup> [2016] JOL 36732 (GSJ).

<sup>278</sup> *Merchant West Workings Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* [2016] JOL 36732 (GSJ) para 8.

and payable within the next six months would be financially distressed, thus being a contender for business rescue.<sup>279</sup>

The second part of the financially distress definition deals with insolvency,<sup>280</sup> and here the question often arises as to whether this refers to factual (technical) insolvency<sup>281</sup> or commercial insolvency.<sup>282</sup> According to Levenstein, the only reasonable interpretation that can be equated to the second part of the definition must be that there is an expectation by the board of a company that the company will become insolvent on its balance sheet (liabilities exceeds assets) in the next six month period.<sup>283</sup> This leads to the conclusion that the second part of the financially distressed definition refers to factual insolvency as commercial insolvency has already been established in part one of the definition.<sup>284</sup>

Furthermore, there is no definition in the 2008 Act of the word 'insolvent' contained in section 128(1)(f)(ii) of the 2008 Act.<sup>285</sup> This have led to some confusion when one compares the threshold levels of financial distress (in the second part of the definition) with the principles of insolvency law, namely when one is obliged to wind-up a company

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<sup>279</sup> *Merchant West Workings Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* [2016] JOL 36732 (GSJ) para 8.

<sup>280</sup> See *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA) para 14-16.

<sup>281</sup> Also known as the balance sheet test, where the company's liabilities exceed its assets. Erasmus J 'The Companies Act: when is a company financially distressed, and what does it mean?' available at [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_FinancialDistress\\_15052014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_FinancialDistress_15052014.pdf) (accessed 6 February 2017) 2.

<sup>282</sup> This will occur where a company is unable to pay its debts even though its assets may exceed its liabilities or when a company is unable to meet its day to day expenses. Erasmus J 'The Companies Act: when is a company financially distressed, and what does it mean?' available at [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_FinancialDistress\\_15052014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_FinancialDistress_15052014.pdf) (accessed 6 February 2017) 2; Olver AH *Judicial management in South Africa* (unpublished PhD thesis, University of Cape Town, 1980) 49. See also *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA) para 14-16.

<sup>283</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 300.

<sup>284</sup> Locke N 'The meaning of 'solvent' for purposes of liquidation in terms of the Companies Act 71 of 2008: *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*' (2015) 27 *South African Mercantile Law Journal* 161-162; Wainer HE 'The insolvency conundrum in the Companies Act' (2015) 132 *South African Law Journal* 512; Cassim FHI (ed), Jooste R & Shev J *et al Contemporary company law* 2ed (2012) 864; See also *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA) para 16.

<sup>285</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 300.

on the basis of it being insolvent.<sup>286</sup> The court in *Ohlsson's Cape Breweries Ltd v Totten*<sup>287</sup> held that the term 'insolvent' means the liabilities of the debtor, fairly estimated, exceed the value of the debtor's assets, fairly valued.<sup>288</sup> This position was confirmed by the SCA in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited*<sup>289</sup> where the court held that the legislature is presumed to be acquainted with the interpretation of earlier legislation by the court, which applies where there has been settled judicial interpretations before legislation was passed.<sup>290</sup> It is respectfully submitted that the conclusion drawn by the SCA, although in an attempt to clarify the confusion regarding the term 'insolvent' in the second part of the financially distressed definition, remains an uncertainty when a company in financial distress contemplates business rescue proceedings.<sup>291</sup>

As stated above, the term 'insolvent' is not defined in the 2008 Act. Section 4 of the 2008 Act outlines the solvency and liquidity test.

In terms of section 4 the 2008 Act:

'a company satisfies the solvency and liquidity test at a particular point in time if, considering all reasonably foreseeable financial circumstances of the company at that time –

- (a) the assets of the company, as fairly valued, equal or exceed the liabilities of a company, as fairly valued<sup>292</sup>; and
- (b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of-
  - (i) 12 months after the date on which the best is considered; or

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<sup>286</sup> Section 134 of the 1973 Companies Act outlines the circumstances when a company may be wound up by the court. Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 304. According to Loubser the legislature seem to have forgotten this is not a liquidation of the company and that the company is quite possibly not insolvent or unable to pay its debts, as was the case under judicial management, and may not even become so. There is a disturbing and inappropriate confusion and mixing of principles of corporate and contractual law, on the one hand, and insolvency law on the other. The legislature decided to separate corporate rescue from insolvency law and should remain consistent and true to this principle in the provisions regulating corporate rescue proceedings. Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 381.

<sup>287</sup> 1911 TPD 48.

<sup>288</sup> *Ohlsson's Cape Breweries Ltd v Totten* 911 TPD 48 50.

<sup>289</sup> 2014 (2) SA 518 (SCA).

<sup>290</sup> *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited*<sup>290</sup> 2014 (2) SA 518 (SCA) para 18.

<sup>291</sup> See part 4.2.4 below.

<sup>292</sup> This is referred to as being factually solvent.

- (ii) in the case of a distribution<sup>293</sup> contemplated in paragraph (a) of the definition of distribution in section 1, 12 months following that distribution'.<sup>294</sup>

It is important to identify the difference between section 4 of the 2008 Act, the solvency and liquidity test, and the test used for financial distress in terms of 128(1)(f) of the 2008 Act set out above. A company will be financially distressed if it is either commercially<sup>295</sup> 'or' factually<sup>296</sup> insolvent in the immediate ensuing six months as stipulated in section 128(1)(f) of the 2008 Act.<sup>297</sup> Whereas, a company will be solvent and liquid if it is factually<sup>298</sup> 'and' commercially<sup>299</sup> solvent in terms of section 4 of the 2008 Act.<sup>300</sup> Another distinguishing factor between sections 4 and 128(1)(f) of the 2008, is that the period referred to in section 128(1)(f) of the 2008 Act is six months and not twelve months as set out in section 4 of 2008 Act and thus contemplates a shorter and more immediate time frame within which to consider the financial position of the company.<sup>301</sup>

Given the above examination, it is submitted that section 4 of the 2008 Act fail to assist in determining whether a company is financially distressed for the purpose of section 128(1)(f) of the 2008 Act. More importantly, section 4 of the 2008 Act only applies to provisions of the 2008 Act where reference is made to the phrase 'the solvency and liquidity test'.<sup>302</sup>

The other pertinent aspect relating to the second part of the financially distressed definition is the words 'will become' insolvent. In *Gormley v West City Precinct Properties (Pty) Ltd and Another; Anglo Irish Bank Corporation Ltd v West Precinct*

<sup>293</sup> See section 1 of the 2008 Companies Act.

<sup>294</sup> This is referred to as being commercially solvent.

<sup>295</sup> Section 128(1)(f)(i) of the 2008 Companies Act.

<sup>296</sup> Section 128(1)(f)(ii) of the 2008 Companies Act.

<sup>297</sup> Magardie OMI *Companies in financial distress during business rescue proceedings* (published LLM thesis, University of Pretoria, 2015) 16.

<sup>298</sup> Section 4(1)(a) of the 2008 Companies Act.

<sup>299</sup> Section 4(1)(b) of the 2008 Companies Act

<sup>300</sup> Section 4(1)(a) and (b) of the 2008 Companies Act must be satisfied for a company to be solvent and liquid. See Van der Linde K 'The solvency and liquidity approach in the Companies Act 2008' 2009 *Tydskrif vir Suid-Afrikaanse Reg* 225.

<sup>301</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 301.

<sup>302</sup> See section(s) 44(3)(b)(i), 45(3)(b)(i), 46(1)(b), 46(1)(c) and 113(1) of the 2008 Companies Act. Locke N 'The meaning of 'solvent' for purposes of liquidation in terms of the Companies Act 71 of 2008: *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*' (2015) 27 *South African Mercantile Law Journal* 159.

*Properties (Pty) Ltd and Another*<sup>303</sup> it was held that the second part of the financially distressed definition used the words 'will become' insolvent and thus referred to future insolvency of a company.<sup>304</sup> A company that was already insolvent therefore did not meet the requirements of the definition and could not be placed under business rescue.<sup>305</sup> However, in *First Rand Bank Ltd v Lodhi 5 Properties Investment CC and Others*<sup>306</sup> the court expressed the view, although only *obiter*, that the definition of financially distressed did not refer to the present commercial or factual insolvency, the court granted a winding-up order.<sup>307</sup>

In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd*<sup>308</sup> the SCA held that although the company had been factually solvent it was unable to settle its debt owed to Nedbank.<sup>309</sup> In the circumstances the company was both commercially insolvent for liquidation and financially distressed in terms of section 131(4) of the 2008 Act.<sup>310</sup> However, the court held that in granting a business rescue application, it will do so on the basis of a reasonable prospect and not on the basis of insolvency.<sup>311</sup> Therefore, should a company already be insolvent or unable to pay its debts, does not automatically constitute as a reason in itself to refuse an application for commencing business rescue proceedings.<sup>312</sup> In fact, it is rather used as one of the

<sup>303</sup> (19075/11; 15584/11) [2012] ZAWCHC 33.

<sup>304</sup> *Gormley v West City Precinct Properties (Pty) Ltd and Another; Anglo Irish Bank Corporation Ltd v West Precinct Properties (Pty) Ltd and Another* (19075/11; 15584/11) [2012] ZAWCHC 33 para 11-12; Davis D (ed), Butler D & Mongalo T *et al Companies and other business structures in South Africa* (2013) 246.

<sup>305</sup> Davis D (ed), Butler D & Mongalo T *et al Companies and other business structures in South Africa* (2013) 246.

<sup>306</sup> (38326/11) [2013] ZAGPPHC 515.

<sup>307</sup> *First Rand Bank Ltd v Lodhi 5 Properties Investments CC and Others* (38326/11) [2013] ZAGPPHC 515 para 12-18. See also *Lodhi 5 Properties Investments CC and Others v Firstrand Bank Limited* [2015] 3 All SA 32 (SCA) para 17.

<sup>308</sup> [2013] 3 All SA 303 (SCA).

<sup>309</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 7.

<sup>310</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 7.

<sup>311</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 39.

<sup>312</sup> Davis D (ed), Butler D & Mongalo T *et al Companies and other business structures in South Africa* 3ed (2013) 246; See also *Swart v Beagles Run Investments 25 (Pty) Ltd and Others* [2012] JOL 28486 (GNP); *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC).

factors to be taken into account by courts in determining whether there is a reasonable prospect that a company can be rescued.<sup>313</sup>

In light of the above discussion, a company is deemed financially distressed if it is commercially insolvent in terms of section 128(1)(f)(i) of the 2008 Act 'or' factually insolvent in terms of section 128(1)(1)(f)(ii) of the 2008 Act. Therefore, a company that is already insolvent is not a contender to commence business rescue proceedings. Furthermore, the cases outlined above have illustrated how courts would determine when a company would be financially distressed. However, the board of a company would still have limited guidance in their decision to ascertain whether or not their company is in fact trading within the ambit of the financially distressed definition.<sup>314</sup> According to Levenstein, the board of a company need to make a decision whether or not, in the next six months, the balance sheet of the company will change<sup>315</sup> to an extent where the company's liabilities will exceed its assets.<sup>316</sup> Therefore, the board of a company must be able to determine if the company is financially distressed which is based on the current financial position of the company, but considering all the relevant circumstances that may impact the company's liquidity in the foreseeable future.<sup>317</sup>

### 3.3.2. Reasonable prospect of rescue

'Reasonable prospect' of rescuing the company is not defined in the 2008 Act. However, South African courts have already made pronouncements on this particular requirement. Although the court cases, outlined below, interpreted the meaning of the words 'reasonable prospect' of rescuing the company in the context of section 131(4) of

<sup>313</sup> Davis D (ed), Butler D & Mongalo T *et al Companies and other business structures in South Africa* 3ed (2013) 246.

<sup>314</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 300.

<sup>315</sup> According to Levenstein, this change can be brought about by numerous events such as an agreement in subordination of creditors' claims, a restatement of the value of either the assets or the liabilities of the company, a contingent liability that might become due and payable within the intervening period, or a possible sale of assets of the company at a loss, all of which may result in a negative effect on the company's balance sheet. Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 299-300.

<sup>316</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 300.

<sup>317</sup> Erasmus J 'The Companies Act: when is a company financially distressed, and what does it mean?' available at [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_FinancialDistress\\_15052014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_FinancialDistress_15052014.pdf) (accessed 6 February 2017) 2.

the 2008 Act<sup>318</sup> and not section 129(1) of the 2008 Act, the words have the same meaning in both sections.<sup>319</sup> It means that the board in the case of section 129(1) of the 2008 Act or the applicant in the case of section 131(4) of the 2008 Act would have to meet this requirement prior to commencing business rescue proceedings.<sup>320</sup>

In *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd*<sup>321</sup> the court referred to the online Oxford English Dictionary and defined the word 'prospect' as both 'the possibility' or 'likelihood' of some future event occurring.<sup>322</sup> The court noted that the definition of 'possibility' in turn is 'a thing that may happen or be the case' and 'likelihood' is defined as 'the state or fact of something being likely, probable'.<sup>323</sup>

However, in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)*<sup>324</sup> the court mentioned that reasonable probability under judicial management required something more than what is expected by a reasonable prospect under business rescue.<sup>325</sup> The court further held that something less is required under reasonable prospect in the case of business rescue, which is a consequence of a different mind-set that is associated with business rescue.<sup>326</sup> The mind-set that accompanied judicial management in the previous



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<sup>318</sup> In terms of section 131 of the 2008 Companies Act, an affected person may apply to court at any time for an order placing the company under supervision and commencing business rescue proceedings. However, in doing so, there are certain requirements, in terms of section 131(4) of the 2008 Companies Act which an applicant must satisfy before a court would grant an order for business rescue.

<sup>319</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 460.

<sup>320</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 461.

<sup>321</sup> [2012] 4 All SA 590 (WCC).

<sup>322</sup> *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* [2012] 4 All SA 590 (WCC) para 39.

<sup>323</sup> *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd* [2012] 4 All SA 590 (WCC) para 39.

<sup>324</sup> [2012] JOL 28893 (WCC).

<sup>325</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 21

<sup>326</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 21.



corporate rescue regime was one that favoured liquidation versus a rescue regime that is evident from section 7(k) of the 2008 Act.<sup>327</sup>

The court considered the meaning of the words 'reasonable prospect' by looking at various factors that would indicate the existence of a reasonable prospect in a given case.<sup>328</sup> The court created a 'check list'<sup>329</sup> which an applicant had to satisfy before a court would grant a business rescue application.<sup>330</sup> According to Joubert, the court in *Southern Palace*<sup>331</sup> had the correct idea of creating a kind of check list to enable a court to determine what must be satisfied to prove that a reasonable prospect of rescuing a company is present.<sup>332</sup> However, the detail required to meet this checklist was often not available at the stage where the application for business rescue is brought before the court.<sup>333</sup>

In *Nedbank Ltd v Bestvest 153 (Pty) Ltd, Essa and Another v Bestvest 153 (Pty) Ltd and Another*<sup>334</sup> the court dealt with the level of proof required to show that there is a reasonable prospect of rescuing the company present in terms of section 131 of the

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<sup>327</sup> Joubert EP "Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 556.

<sup>328</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 24.

<sup>329</sup> The court identified the following aspects that need to be dealt with in an application to prove that a reasonable prospect exists regarding a company's ability to continue its existence on a solvent basis: the cause of the failure needs to be addressed, a remedy for the failure needs to be offered, there is a reasonable prospect that the remedy advanced will be sustainable and that the aforesaid aspects prove, based on concrete and objective ascertainable details beyond mere speculation, that the remedy is sustainable. *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 24.

<sup>330</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 24; Joubert EP "Reasonable possibility" versus "reasonable prospect": did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 556-557.

<sup>331</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC).

<sup>332</sup> Joubert EP "Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 557.

<sup>333</sup> Joubert EP "Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?' (2013) 76 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 557.

<sup>334</sup> [2012] 4 All SA 103 (WCC).

2008 Act.<sup>335</sup> In determining the said level of proof required, the court held that the bar should not be set at such a height that the applicant for business rescue has minimal chance of clearing it.<sup>336</sup>

The court in *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others*<sup>337</sup> held that the provisions of section 131(4) of the 2008 Act is clear.<sup>338</sup> An applicant applying for business rescue in terms of section 131(1) of the 2008 Act must satisfy the court that there is a reasonable prospect that the subject company can be rescued.<sup>339</sup> Furthermore, in order to succeed in the application, the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the objectives of business rescue can be achieved.<sup>340</sup> This meant that vague averments and mere speculative suggestions would not suffice in rescuing a company.<sup>341</sup>

In *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*<sup>342</sup> the court refused the application for business rescue. The reason being, that the most recent financial statements were not made available to the business rescue practitioner to restructure the affairs of the company.<sup>343</sup> The court held that if the facts indicate a reasonable possibility of a company being rescued, a court may exercise its discretion in favour of granting an order contemplated in section

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<sup>335</sup> *Nedbank Ltd v Bestvest 153 (Pty) Ltd, Essa and Another v Bestvest 153 (Pty) Ltd and Another* [2012] 4 All SA 103 (WCC) para 38.

<sup>336</sup> *Nedbank Ltd v Bestvest 153 (Pty) Ltd, Essa and Another v Bestvest 153 (Pty) Ltd and Another* [2012] 4 All SA 103 (WCC) para 38; Meskin PM, Magid PAM & Borraine A (eds) *et al Insolvency law* (2016) para 18.4.3.

<sup>337</sup> 2012 (2) SA 378 (WCC).

<sup>338</sup> *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 17.

<sup>339</sup> *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 17.

<sup>340</sup> *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 17.

<sup>341</sup> *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 20.

<sup>342</sup> [2012] 2 All SA 433 (GSJ).

<sup>343</sup> *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] 2 All SA 433 (GSJ) para 49.

131 of the 2008 Act.<sup>344</sup> This particular view was confirmed by Loubser<sup>345</sup> in which she stated that it would be 'disastrous for the new procedure' if the same high threshold test used for a judicial management order of reasonable probability is to apply to this provision.<sup>346</sup>

A further illustration of determining reasonable prospect was in the case of *Employees of Solar Spectrum Trading 83 (Pty) Ltd v AFGRI Operations Ltd and Another, In Re; AFGRI Operations Ltd v Solar Spectrum Trading 83 (Pty) Ltd*<sup>347</sup> where the court held that a 'prospect' is something uncertain and that might occur in the future.<sup>348</sup> This uncertainty is determined on factors that might transpire in the future.<sup>349</sup> However, the court held that all facts and evidence in support of the contention that the likelihood of rescuing the company exists must be reasonable.<sup>350</sup>

The court in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another*<sup>351</sup> held that it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect.<sup>352</sup> There can be no doubt that in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.<sup>353</sup> The most important consideration in this matter is the fact that the court adopted a more realistic approach when it considered the meaning of

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<sup>344</sup> *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] 2 All SA 433 (GSJ) para 18.

<sup>345</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 506.

<sup>346</sup> *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] 2 All SA 433 (GSJ) para 18.

<sup>347</sup> [2012] ZAGPPHC 359.

<sup>348</sup> *Employees of Solar Spectrum Trading 83 (Pty) Ltd v AFGRI Operations Ltd and Another, In Re; AFGRI Operations Ltd v Solar Spectrum Trading 83 (Pty) Ltd* [2012] ZAGPPHC 359 para 33.

<sup>349</sup> *Employees of Solar Spectrum Trading 83 (Pty) Ltd v AFGRI Operations Ltd and Another, In Re; AFGRI Operations Ltd v Solar Spectrum Trading 83 (Pty) Ltd* [2012] ZAGPPHC 359 para 33.

<sup>350</sup> *Employees of Solar Spectrum Trading 83 (Pty) Ltd v AFGRI Operations Ltd and Another, In Re; AFGRI Operations Ltd v Solar Spectrum Trading 83 (Pty) Ltd* [2012] ZAGPPHC 359 para 33.

<sup>351</sup> 2013 (1) SA 542 (FB).

<sup>352</sup> *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 15.

<sup>353</sup> *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 11.

a reasonable prospect. The court held that ‘a prospect in this context means an expectation. An expectation may come true or it may not. It, therefore, signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable’.<sup>354</sup>

In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*<sup>355</sup> the SCA agreed with the court *a quo* in that the appellants failed to show a ‘reasonable prospect’ of rescuing the company.<sup>356</sup> The SCA held that it will be neither practical nor prudent to be prescriptive about the way in which the appellant must show a reasonable prospect in every case.<sup>357</sup> The SCA reiterated the fact that some reported decisions required a substantial measure of detail about the proposed plan to satisfy this requirement.<sup>358</sup> The court held that ‘the applicant is not required to set out a detailed plan and that it can be left to the business rescue practitioner after proper investigation in terms of section 141 of the 2008 Act.’<sup>359</sup> But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in section 128(1)(b)(iii) of the 2008 Act’.<sup>360</sup>

In *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others*<sup>361</sup> the court held that a company can only be rescued if there is a reasonable prospect that one of the objectives set out in section 128(1)(b)(iii) of the 2008 Act will be

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<sup>354</sup> *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 12.

<sup>355</sup> 2013 (3) All SA 303 (SCA).

<sup>356</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 37-39; Kleitman Y & Masters C ‘Better returns for creditors – Business rescue: Company law’ (2013) 76 *Without Prejudice* 35.

<sup>357</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 30.

<sup>358</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 30. See also *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 24-25; *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 18-20; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 11 and para 15.

<sup>359</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 31.

<sup>360</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 31.

<sup>361</sup> (12/45437, 16566/12) [2013] ZAGPJHC 54.

attained on the basis of facts, not speculation.<sup>362</sup> Furthermore, if objectively there is a reasonable possibility or likelihood of those uncertain future events occurring, the jurisdictional requirements have been satisfied, and the court can exercise its discretion.<sup>363</sup> The court noted that the guidelines by Eloff J in *Southern Palace*<sup>364</sup> are well considered and helpful.<sup>365</sup> The court was in agreement with both the *Propspec*<sup>366</sup> and *Southern Palace*<sup>367</sup> judgments but added that the test should be flexible and the circumstances of each case will determine whether the available facts give rise to a reasonable prospect or not.<sup>368</sup>

In *Newcity Group (Pty) Ltd v Pellow N.O. and Others*<sup>369</sup> the SCA noted that as to what a 'reasonable prospect' means in *Oakdene Square Properties*<sup>370</sup> was properly described as a yardstick higher than a mere *prima facie* case or an arguable possibility.<sup>371</sup> This was, however, lesser than a 'reasonable probability' and a prospect based on reasonable grounds to be established by a business rescue applicant.<sup>372</sup> The SCA in agreement with the court *a quo* held that Newcity had failed to establish a prospect based on reasonable grounds.<sup>373</sup> In conclusion, business rescue would not have

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<sup>362</sup> *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 para 14.

<sup>363</sup> *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 para 14.

<sup>364</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC).

<sup>365</sup> *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 para 14.

<sup>366</sup> *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB).

<sup>367</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC).

<sup>368</sup> *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (12/45437, 16566/12) [2013] ZAGPJHC 54 para 14.

<sup>369</sup> (577/2013) [2014] ZASCA 162.

<sup>370</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA).

<sup>371</sup> *Newcity Group (Pty) Ltd v Pellow N.O and Others* (577/2013) [2014] ZASCA 162 para 16.

<sup>372</sup> *Newcity Group (Pty) Ltd v Pellow N.O and Others* (577/2013) [2014] ZASCA 162 para 16.

<sup>373</sup> *Newcity Group (Pty) Ltd v Pellow N.O and Others* (577/2013) [2014] ZASCA 162 para 23

returned Crystal Lagoon to solvency or provide a better deal for its creditors and sole shareholder, Newcity, than what they would receive through liquidation.<sup>374</sup>

Given the above court judgements, it is clear that an applicant who wishes to commence business rescue proceedings must be able to satisfy the court that the company has a reasonable prospect of being rescued, as vague and speculative averments will not be sufficient. The board of a company might not have to convince the court that there is a reasonable prospect of rescuing the company at the time of adopting the resolution. However, it may have to do so should an affected person<sup>375</sup> apply to court to have the resolution set aside.<sup>376</sup> It is to be noted that there is no legislative requirement for the board of a company to justify their bare assertion that a reasonable prospect exists.<sup>377</sup> Nevertheless, the board of a company need to take cognisance of this requirement when resolving to commence business rescue proceedings.

### 3.3.3. Rescuing the company

Section 128(1)(h) of the 2008 Act defines 'rescuing the company' as achieving the goals set out in the definition of business rescue in terms of section 128(1)(b)(iii) of the 2008 Act.<sup>378</sup> Thus, section 128(1)(h) of the 2008 Act must be read in conjunction with section 128(1)(b)(iii) of the 2008 Act. South African courts have differed on the issue whether business rescue proceedings may be used to secure a better return for creditors or shareholders where there is no clear prospect of the company continuing to operate on a solvent basis or being restored to solvency.<sup>379</sup>

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<sup>374</sup> *Newcity Group (Pty) Ltd v Pellow N.O and Others (577/2013)* [2014] ZASCA 162 para 23.

<sup>375</sup> Section 128(1)(a) of the 2008 Companies Act. An affected person refers to all parties who are stakeholders during business rescue proceedings.

<sup>376</sup> Section 130 of the 2008 Companies Act. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 461.

<sup>377</sup> Elliott A 'The abuse of business rescue: Beware the serial debtor' available at <http://www.hoganlovells.cn/1024/enUS/newsmedia/newspubs/pubDetail.aspx?publication=11216> (accessed 3 February 2017).

<sup>378</sup> See part 3.2. above.

<sup>379</sup> Sharrock R, Van der Linde K & Smith A *Hockly's insolvency law* 9ed (2012) 276.

However, in *Swart v Beagles Run Investments 25 (Pty) Ltd and Others*<sup>380</sup> the court gave an affirmative answer to this issue, and noted that the goal of ensuring a better return for creditors as an independent secondary goal may be persuaded for its own sake.<sup>381</sup> In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks and Another Intervening)*<sup>382</sup> the court held that if the aim is simply to secure a better return for creditors, it must be clear what resources will be made available to the company and on which terms.<sup>383</sup> In the absence of such information, it would be mere speculation to say that creditors will be better off than they would have been with immediate liquidation.<sup>384</sup>

In *AG Petzetakis International Holdings v Petzetakis Africa (Pty) Ltd and Others*<sup>385</sup> the court doubted whether the objective of ensuring a better return for creditors can be relied on to support a business rescue application at the outset.<sup>386</sup> The court held that in terms of section 131(4) of the 2008 Act, before a court can make an order to commence business rescue proceedings, it must be satisfied that the company can indeed be rescued.<sup>387</sup> A similar approach was followed in *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West Precinct Properties (Pty) Ltd and Another*<sup>388</sup> where the court held that a viable rescue plan must contain facts to show that if the intended resuscitation of the company should fail, the creditors would not be worse off.<sup>389</sup>

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<sup>380</sup> [2012] JOL 28486 (GNP).

<sup>381</sup> *Swart v Beagles Run Investments 25 (Pty) Ltd and Others* [2012] JOL 28486 (GNP) para 18.

<sup>382</sup> [2012] JOL 28893 (WCC).

<sup>383</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 25.

<sup>384</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 25.

<sup>385</sup> 2012 (5) SA 515 (GSJ).

<sup>386</sup> *AG Petzetakis International Holdings v Petzetakis Africa (Pty) Ltd and Others* 2012 (5) SA 515 (GSJ) para 17.

<sup>387</sup> *AG Petzetakis International Holdings v Petzetakis Africa (Pty) Ltd and Others* 2012 (5) SA 515 (GSJ) para 19.

<sup>388</sup> (19075/11, 15584/11) [2012] ZAWCHC 33.

<sup>389</sup> *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 para 13.

In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*<sup>390</sup> the SCA held that 'business rescue' means to facilitate 'rehabilitation', which in turn means the achievement of one of two goals.<sup>391</sup> First, to return the company to solvency, or secondly, to provide a better deal for creditors or shareholders than what they would receive through liquidation.<sup>392</sup> This construction would also coincide with the reference in section 128(1)(h) of the 2008 Act to the achievement of the goals (plural) set out in section 128(1)(b)(iii) of the 2008 Act.<sup>393</sup>

It follows that achievement of any one of the two goals referred to in section 128(1)(b)(iii) of the 2008 Act would qualify as business rescue in terms of section 131(4) of the 2008 Act.<sup>394</sup> This clearly indicates that 'rescuing the company' is to achieve either objective of business rescue as defined in section 128(1)(b)(iii) of the Act. Although the court applied section 128(1)(h) of the 2008 Act, read together with section 128(1)(b)(iii) of the 2008 Act within the context of section 131 of the 2008 Act,<sup>395</sup> it is submitted that this has the same outcome in terms of section 129 of the 2008 Act.

It is clear from the above cases that business rescue in terms of section 128(1)(b)(iii) of the 2008 Act has two goals, namely a primary and secondary goal. The primary goal would be to facilitate the continued existence of the company in a state of insolvency. The secondary goal which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company. Although this aspect was mainly considered by South African courts under section 131 of the 2008 Act it serves as

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<sup>390</sup> 2013 (3) All SA 303 (SCA) (27 May 2013).

<sup>391</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 26.

<sup>392</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 26.

<sup>393</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 26.

<sup>394</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 26.

<sup>395</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 26. In terms of section 131 of the 2008 Companies Act, an affected person may apply to court at any time for an order placing the company under supervision and commencing business rescue proceedings.



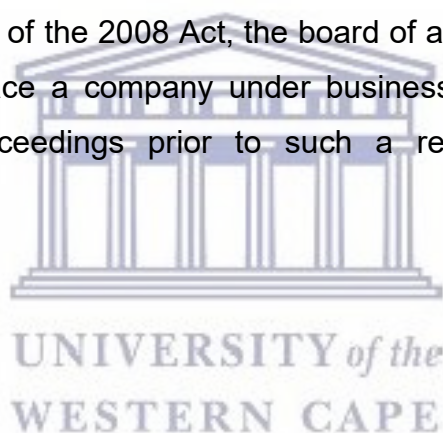
guidance for proper interpretation of business rescue in terms of section 129 of the 2008 Act.

Effectively 'rescuing the company' means achieving either goal in terms of section 128(1)(b)(iii) of the 2008 Act.

### 3.4. Board of a company not allowed to adopt a resolution

A resolution by the board initiating<sup>396</sup> voluntary business rescue proceedings cannot be adopted if liquidation proceedings<sup>397</sup> have already been initiated by or against the company.<sup>398</sup> This is to prevent the board of a company thwarting an application to liquidate a company by adopting a business rescue resolution.<sup>399</sup> Once adopted, the resolution will have no force or effect until it has been filed with the CIPC.<sup>400</sup>

In terms of section 129(2)(a) of the 2008 Act, the board of a company is precluded from adopting a resolution to place a company under business rescue as a result of the initiation of liquidation proceedings prior to such a resolution being adopted.<sup>401</sup>



<sup>396</sup> Initiated in terms of section 129(1) of the 2008 Companies Act, is intended to have the same meaning as the word commenced in terms of section 131(6) of the 2008 Companies Act. *First Rand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) para 17.

<sup>397</sup> The differing interpretations of the meaning of 'liquidation proceedings' was settled in *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA) where the SCA held at para 10 that liquidation is the exhaustive process by which a company is brought to an end and is not, eg, the legal process such as the pending application for liquidation. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 480(22). The reference to liquidation proceedings by or against the company is clearly a reference to a voluntary winding-up of a company in terms of section 352 of the 1973 Companies Act, as well as a reference to a winding-up of a company by the court in terms of section 348 of the 1973 Companies Act. Krige J 'Frustrating the vultures lunch' (2013) 13 *Without Prejudice* 20-21.

<sup>398</sup> Section 129(2)(a) of the 2008 Companies Act. The rescue proceedings officially commence on the date of filing the board resolution with the Companies and Intellectual Property Commission (hereinafter referred to as the 'CIPC'). Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 62-63.

<sup>399</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 462; *Sulzer Pumps (South Africa) (Pty) Ltd v O & M Engineering CC* (19740/2014) [2015] ZAGPPHC 59 para 29.

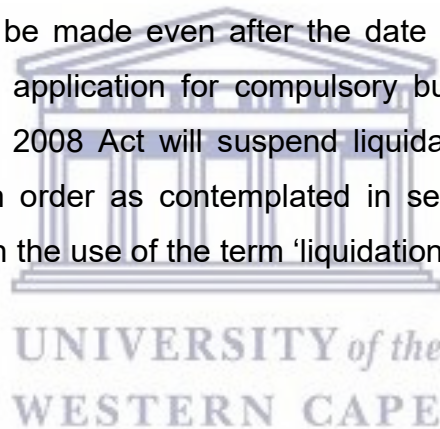
<sup>400</sup> Section 129(2)(b) of the 2008 Companies Act.

<sup>401</sup> Krige J 'Frustrating the vultures lunch' (2013) 13 *Without Prejudice* 21.

However, upon application to court by an affected person,<sup>402</sup> liquidation proceedings may be converted into business rescue proceedings.<sup>403</sup>

In *Richter v Absa Bank Limited*<sup>404</sup> the SCA held that there is no sensible justification for drawing the proverbial 'line in the sand' between pre- and post-final liquidation in circumstances where the prospects of a business rescue application may successfully exist.<sup>405</sup> The legislature did not do so, and to restrict business rescue to those cases in which a final winding-up order has not been granted is inimical to the 2008 Act.<sup>406</sup> A proper interpretation of liquidation proceedings in relation to section 131(6) of the 2008 Act includes proceedings that occur after the occurrence of a winding-up order to liquidate the assets and account to the creditors, up to deregistration of a company.<sup>407</sup>

Thus an application in terms of section 131(6) of the 2008 Act to place a company under business rescue can be made even after the date a final liquidation order has been granted.<sup>408</sup> Therefore, application for compulsory business rescue proceedings under section 131(6) of the 2008 Act will suspend liquidation proceedings until such time as the court grants an order as contemplated in section 132(1)(c) of the 2008 Act.<sup>409</sup> This also accords with the use of the term 'liquidation proceedings' in section 129 of the 2008 Act.<sup>410</sup>



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<sup>402</sup> Section 132(1)(b) read with section 131 of the 2008 Companies Act.

<sup>403</sup> Section 132(2)(a)(ii) of the 2008 Companies Act. Sections 131(6) and (7) of the 2008 Companies Act deal with a court's ability to grant an order placing a company under compulsory business rescue in circumstances where 'liquidation proceedings' have commenced, but using different terminology. Subsection (6) makes reference to the situation where liquidation proceedings have already been commenced by or against the company at the time an application for an order placing the company under business rescue is made, while subsection (7) empowers the court to make an order contemplated in subsections (4) or (5) of the 2008 Companies Act at any time during the course of any liquidation proceedings, or proceedings to enforce any security against the company. Meskin PM, Meskin PM (ed) & Vorster Q *et al Insolvency law* (2016) para 18.4.3.

<sup>404</sup> 2015 (5) SA 57 (SCA).

<sup>405</sup> *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA) para 17.

<sup>406</sup> *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA) para 17.

<sup>407</sup> *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA) para 18.

<sup>408</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 360.

<sup>409</sup> Stoop H 'When does an application for business rescue proceedings suspend liquidation proceedings?' (2014) 47 *De Jure* 334.

<sup>410</sup> Stoop H 'When does an application for business rescue proceedings suspend liquidation proceedings?' (2014) 47 *De Jure* 334.

Accordingly, where during liquidation evidence becomes available that business rescue proceedings will yield a better return for shareholders or creditors, there could be no reason to deny business rescue only because a company is in final liquidation.<sup>411</sup> Allowing this to happen would fall within the ambit of the business rescue definition and achieve the objectives as envisaged by the 2008 Act.<sup>412</sup> Should business rescue not achieve either goal as envisaged by the 2008 Act, a court has the discretion to dismiss the application.<sup>413</sup>

### 3.5. Procedural requirements

#### 3.5.1. Notice and publication of business rescue resolution

Considering the ease of entry in terms of section 129 of the 2008 Act to commence business rescue proceedings and the consequences related thereto, it comes as no surprise that there are stringent procedural and notice requirements. A board of a company must, therefore, adhere to the procedural and notice requirements when enforcing their resolution to commence business rescue proceedings.

Section 129(3) of the 2008 Act states:

‘Within five business days<sup>414</sup> after a company has adopted and filed a resolution, as contemplated in section 129(1) of the 2008 Act, or such longer time as the CIPC, on application by the company, may allow, the company must –

- (a) publish a notice<sup>415</sup> of the resolution, and its effective date, in the prescribed manner<sup>416</sup> to every affected person,<sup>417</sup> including with the notice a sworn

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<sup>411</sup> *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA) para 15.

<sup>412</sup> *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA) para 15.

<sup>413</sup> *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA) para 15.

<sup>414</sup> Section 5(3) of the 2008 Companies Act.

<sup>415</sup> In terms of Regulation 2(c) of the 2008 Companies Act, the phrase ‘publish a notice’ means to publicise information to the general public, or to a particular class of persons as applicable in specific circumstances, by any means that can reasonably be expected to bring the information to the attention of the persons for whom it is intended. Furthermore, the notice must correspond to Form CoR 123.1 of the regulations of the 2008 Companies Act.

<sup>416</sup> Section 129(3)(b) of the 2008 Companies Act.

<sup>417</sup> Section 128(1)(a) of the 2008 Companies Act defines affected persons as a shareholder or creditor of the company, a registered trade union representing employees of the company or the representatives of employees not affiliated to a trade union. Levenstein believes that, when publishing the notice of appointment of the business rescue practitioner to an affected persons in terms of section 129(4)(b) of the 2008 Companies Act, creditors and contingent creditors should be recognised as affected persons. The reason being that, should a company sign a guarantee for the obligations due by its holding company to a third party, the third party would be a

statement of the facts relevant to the grounds on which the board resolution was founded'<sup>418</sup> ...

Section 129(3)(a) of the 2008 Act is intended to give further assurance to stakeholders that the board of a company will properly discharge their duties when considering a business rescue resolution.<sup>419</sup>

The notice of the resolution is published by the company by delivering a copy of the notice and resolution to every affected person in accordance with regulation 7 of the 2008 Act.<sup>420</sup> A copy of the notice must be displayed in a conspicuous manner at the registered office of the company, the principal places of conducting the business activities of the company and at any workplace where employees of the company are employed.<sup>421</sup> Furthermore, a copy of the notice must be displayed on any website that is maintained by the company and intended to be accessible by affected persons.<sup>422</sup> Moreover, if it is a listed company, a copy of the notice must be displayed on any electronic system maintained by the relevant exchange for the communication and exchange of information by and among companies listed on that exchange.<sup>423</sup>

Section 6(10) of the 2008 Act provides that where a notice is required or permitted to be given or published to any person, then it is sufficient if the notice is transmitted electronically, directly to that person for the notice to be conveniently printed by the recipient within a reasonable time and at a reasonable cost. Section 6(11) of the 2008 Act provides that a document, record or statement, other than a notice contemplated in section 6(10) of the 2008 Act, can be published by electronic communication or a notice

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contingent or conditional creditor on the occurrence of the non-performance of the holding company as their right would substantially be affected and should therefore be notified of the commencement of business rescue proceedings as well as the appointment of the business rescue practitioner in terms of section 129(3) and (4) of the 2008 Companies Act. Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 318-319.

<sup>418</sup> Section 129(3)(a) of the 2008 Companies Act.

<sup>419</sup> Stein C & Everingham GK (eds) *The new Companies Act unlocked* (2011) 413.

<sup>420</sup> Regulation 7 read with sections 6(10) and 6(11) of the 2008 Companies Act. Regulation 123(2)(a) of the 2008 Companies Act.

<sup>421</sup> Regulation 123(2)(b)(i) of the 2008 Companies Act.

<sup>422</sup> Regulation 123(2)(b)(ii) of the 2008 Companies Act.

<sup>423</sup> Regulation 123(2)(b)(iii) of the 2008 Companies Act.

of availability being delivered to each intended recipient with instructions for receiving the complete document, record or statement.

Annexure 3, Table CR 3 of the 2008 Act outlines the methods and times for delivery of documents in terms of regulation 7 of the 2008 Act. Generally, delivery to any person can be made by facsimile (if the person has a fax number), electronic mail (if the person has an email address), registered post to the person's last known address, or by any other means authorised by the High Court.<sup>424</sup> If it is impossible for delivery to take place in one of the manners provided for in the 2008 Act or regulations, application may be made to the Tribunal or the High Court for an order of substituted service.<sup>425</sup>

In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group and Others*<sup>426</sup> the court accepted that notification by email is one of the permitted methods of notification.<sup>427</sup> Thus, emailing the application to commence business rescue proceedings to creditors of the company is sufficient delivery of the notice.<sup>428</sup> In support of this contention, the court further held that in the case of a company with a large number of shareholders, physical delivery of the notice to all the shareholders may practically not be feasible.<sup>429</sup>

Furthermore, in the case of a listed company<sup>430</sup> an announcement on the Securities Exchange News Service ('SENS')<sup>431</sup> is one of the prescribed methods of bringing corporate information to the attention of shareholders, in addition to individual

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<sup>424</sup> Annexure 3, Table CR 3, item 1 of the 2008 Companies Act, dealing with any person. In addition to the type of delivery that can be made to any person, Table CR 3 of the 2008 Companies Act specifies additional methods of delivery for natural persons, the Tribunal, the CIPC, a company or similar body corporate, the State or a Province, a municipality, trade unions, employees of firms, a partnership, firm or association, and a statutory body other than the CIPC and Tribunal. Regulation 7(3) of the 2008 Companies Act. Meskin PM, Meskin PM (ed) & Vorster Q *et al* *Insolvency law* (2016) para 18.4.1.2.

<sup>426</sup> 2011 (5) SA 600 (WCC).

<sup>427</sup> *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* 2011 (5) SA 600 (WCC) para 14

<sup>428</sup> *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* 2011 (5) SA 600 (WCC) para 14.

<sup>429</sup> *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* 2011 (5) SA 600 (WCC) para 16.

<sup>430</sup> Johannesburg Stock Exchange 'JSE Limited Listing Requirements' available at <https://www.jse.co.za/current-companies/issuer-regulation> (accessed 22 December 2016) 12.

<sup>431</sup> Johannesburg Stock Exchange 'JSE Limited Listing Requirements' available at <https://www.jse.co.za/current-companies/issuer-regulation> (accessed 22 December 2016) 15.

notification.<sup>432</sup> The court suggested where email addresses for shareholders and creditors are available, these should be used, rather than resorting to substituted service.<sup>433</sup> The court held that if SENS is to be used as a substitute for personal identification, it would be preferable for the proposed substituted service to include not only publication through SENS but also publication in a national newspaper.<sup>434</sup>

### 3.5.2. Notice and publication of appointment of business rescue practitioner

Section 129(3) of the 2008 Act reads as follows:

‘Within five business days after the company has adopted a resolution to voluntarily initiate business rescue proceedings, or such longer period as the CIPC may allow upon application by the company, the company must ... appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment’.<sup>435</sup>

The company must file a notice of the appointment of the practitioner<sup>436</sup> with the CIPC within two business days after appointing the business rescue practitioner.<sup>437</sup> Furthermore, a copy of the notice of appointment must be published to each affected person within five business days after the notice was filed.<sup>438</sup>

The notice of the appointment of the business rescue practitioner is published by the company by delivering a copy of the notice and resolution to every affected person in accordance with regulation 7 of the 2008 Act.<sup>439</sup> Also, each affected person may be informed of the availability of a copy of the notice in the manner contemplated in section 6(11)(b)(ii) of the 2008 Act, read with regulation 6 of the 2008 Act.<sup>440</sup> From the provisions of regulation 123(4) of the 2008 Act, it is apparent that upon publication of a

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<sup>432</sup> *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* 2011 (5) SA 600 (WCC) para 17.

<sup>433</sup> *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* 2011 (5) SA 600 (WCC) para 17.

<sup>434</sup> *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Others* 2011 (5) SA 600 (WCC) para 18.

<sup>435</sup> Section 129(3)(b) of the 2008 Companies Act.

<sup>436</sup> The notice must correspond to Form CoR 123.2 of the 2008 Companies Act.

<sup>437</sup> Section 129(4)(a) of the 2008 Companies Act.

<sup>438</sup> Section 129(4)(b) of the 2008 Companies Act.

<sup>439</sup> Regulation 123(4)(a) of the 2008 Companies Act.

<sup>440</sup> Regulation 123(4)(b) of the 2008 Companies Act.

notice of the appointment of a business rescue practitioner, the company has a choice either to deliver a copy of the notice to each affected person or to inform each affected person of the availability of a copy of the notice.<sup>441</sup>

Therefore, should a company elect to deliver the notice of appointment to an affected person in terms of regulation 123(4)(a) of the 2008 Act, then the provisions of regulation 7 of the 2008 Act will apply.<sup>442</sup> Delivery may, therefore, take place in any manner contemplated in section 6(10) or section 6(11) of the 2008 Act, or in the manner set out in Annexure 3, Table CR 3 of the 2008 Act.<sup>443</sup> However, if a company elects to inform each affected person of the availability of a copy of the notice in terms of regulation 123(4)(b) of the 2008 Act, then the provisions of section 6(11)(b)(ii), read with regulation 6 of the 2008 Act, will apply.<sup>444</sup>

In terms of section 6(11)(b)(ii) of the 2008 Act, it will be sufficient to deliver to each intended recipient (all affected persons) a notice of the availability of the document (notice of the appointment of a business rescue practitioner).<sup>445</sup> Also, a summary of its content, together with instructions for receiving the complete notice if so required would suffice.<sup>446</sup> In this regard regulation 6 of the 2008 Act specifically provides that a notice announcing the availability of a document in terms of section 6(11)(b)(ii) of the 2008 Act must be in writing. Furthermore, the said notice must be delivered to each intended recipient in paper form at the intended recipient's last known delivery address, or in electronic form at his or her last known electronic mail address.<sup>447</sup>

The notice must set out the title of the document (the availability of which is being announced), the extent of the period during which the document will remain available, and the means by which the document may be acquired by the recipient.<sup>448</sup>

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<sup>441</sup> Meskin PM, Magid PAM & Boraine A (eds) *et al Insolvency law* (2016) para 18.4.1.3.

<sup>442</sup> Meskin PM, Magid PAM & Boraine A (eds) *et al Insolvency law* (2016) para 18.1.3.

<sup>443</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 464.

<sup>444</sup> Meskin PM, Magid PAM & Boraine A (eds) *et al Insolvency law* (2016) para 18.1.3.

<sup>445</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 464.

<sup>446</sup> Meskin PM, Magid PAM & Boraine A (eds) *et al Insolvency law* (2016) para 18.1.3

<sup>447</sup> Regulation 6(1)(a)(i)-(ii) of the 2008 Companies Act.

<sup>448</sup> Regulation 6(1)(b)(i)-(iii) of the 2008 Companies Act.

Furthermore, the notice must include a statement summarising the purpose of the document (in this case the notice to appoint a business rescue practitioner).<sup>449</sup> Finally, the document must be made available to the intended recipients either in paper copy<sup>450</sup> or electronically.<sup>451</sup>

### 3.6. Failure by the board of a company to comply with the procedural requirements

In terms of section 129(5) of the 2008 Act:

'If a company fails to comply with any provision of subsection (3) or (4) of 2008 Act-

(a) Its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity'<sup>452</sup> ...

This means that should the board fail to comply with the procedural requirements, the board resolution adopted would lapse and become a nullity. However, the lack of clarity and the practical consequences of the term 'lapses and is a nullity' led to a number of conflicting judgments.<sup>453</sup> This uncertainty was finally settled by the SCA in *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others*<sup>454</sup> where it was held that non-compliance with the procedural requirements does not automatically result in the business rescue proceedings lapsing and becoming a nullity.<sup>455</sup>

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<sup>449</sup> Regulation 6(1)(c) of the 2008 Companies Act.

<sup>450</sup> Alternatively, a printed version of an electronic original produced by or on behalf of the company on demand by an intended recipient. Regulation 6(2)(a) of the 2008 Companies Act.

<sup>451</sup> Electronic version of documents must be made available in a manner and form such that it can conveniently be accessed and printed by the recipient within a reasonable time and at a reasonable cost. Regulation 6(2)(b) of the 2008 Companies Act.

<sup>452</sup> Section 129(5)(a) of the 2008 Companies Act.

<sup>453</sup> *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique Et Technologies Embarquées SAS* Case No: 72522/11 (GNP) para 26 and 27; *Madodza (Pty) Ltd v ABSA Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 para 24 and 25; *ABSA Bank Limited v Caine N.O. and Another, In Re; ABSA Bank Limited v Caine N.O. and Another* (3813/2013, 3915/2013) [2014] ZAFSHC 46 para 22; *Nel NO and Another v Panamo Properties (Pty) Ltd and Others* (56399/2013) [2013] ZAGPPHC 287 para 26 and para 31; *Ex parte van den Steen N.O. and Another* 2014 (6) SA 29 (GJ) para 20 and para 23; *Newton Global Trading (Pty) Ltd v Corte and Another* 2015 (3) SA 466 (GP) para 12.

<sup>454</sup> 2015 (3) All SA 274 (SCA).

<sup>455</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 29.



The SCA held that in terms of section 132(2)(a)(i) of the 2008 Act, business rescue proceedings end when the court sets aside the resolution that commenced those proceedings.<sup>456</sup> This meant that when a court grants an order in terms of s 130(5)(a) of the 2008 Act, the effect of that order is not merely to set the resolution aside, but to terminate business rescue proceedings.<sup>457</sup> If this has not occurred, even if the business rescue resolution has lapsed and becomes a nullity in terms of section 129(5)(a) of the 2008 Act, the business rescue proceedings commenced by that resolution has not terminated.<sup>458</sup> The SCA noted that business rescue will only be terminated when the court sets the resolution aside.<sup>459</sup>

It would mean that the board of a company may commence business rescue proceedings by way of a resolution once it is filed with the CIPC.<sup>460</sup> However, the resolution and the process of business rescue that it commenced, may be challenged at any time after the resolution was passed and before the business rescue plan is adopted.<sup>461</sup> If there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity and may be set aside under section 130(1)(a)(iii) of the 2008 Act.<sup>462</sup> Therefore, in all cases, the court must be approached for the resolution to be set aside and business rescue proceedings to



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<sup>456</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 28

<sup>457</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 28.

<sup>458</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 28.

<sup>459</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 28. Loubser is of the opinion, that to set aside business rescue proceedings by a court order is nonsensical. Accordingly, a resolution to commence business rescue proceedings, that have lapsed and subsequently becomes a nullity means that the resolution never came into effect in the first place and cannot in addition be set aside by a court order in terms of section 132(2)(a)(i) of the 2008 Companies Act. Loubser A 'Nienakoming van die voorgeskrewe prosedures na indiening van 'n direksiebesluit om met ondernemingsredding te begin: Is *Panamo Properties (Pty) Ltd v Nel* die (regte) antwoord?' (2016) 13 *LitNet Akademies* 855.

<sup>460</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 466.

<sup>461</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 466.

<sup>462</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 29.

terminate.<sup>463</sup> This avoids the absurdity that would otherwise arise of trivial non-compliance with the time periods specified under sub-sections 129(3) and (4) of the 2008 Act.<sup>464</sup>

Section 129(5) of the 2008 Act reads as follows:

'If a company fails to comply with any provision of subsection (3) or (4) of the 2008 Act ... the company may not file a further resolution contemplated in subsection (1) of the Act for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution'.<sup>465</sup>

This provision may have serious consequences to the board of a company if it already informed all affected persons that it is financially distressed.<sup>466</sup> The company's position is that it may apply to court for an order allowing the court to consent to it filing a further resolution, on good cause shown. Alternatively, the company will have to apply to court for its own liquidation.<sup>467</sup> It cannot be practical for a company to continue trading and if it does so, the board of a company are exposing themselves to personal liability.<sup>468</sup> However, the period of three months does not apply if the court, on good cause shown in an *ex parte* application by the company or an affected person, approves the filing of a further resolution within a shorter time frame.<sup>469</sup>

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<sup>463</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 29.

<sup>464</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 29.

<sup>465</sup> Section 129(5)(b) of the 2008 Companies Act.

<sup>466</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 318.

<sup>467</sup> Section 81(1)(b) read with section 141(2)(a) of the 2008 Companies Act. Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 318.

<sup>468</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 318.

<sup>469</sup> Section 129(5)(b) of the 2008 Companies Act. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 465.

### 3.7. Board of a company not allowed to adopt a liquidation resolution

In terms of section 129(6) of the 2008 Act:

‘A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2)’.

Loubser is of the opinion that the prohibition does not specifically refer to a special resolution for the voluntarily winding-up of a company<sup>470</sup> although the use of the word ‘begin’ may indicate this to be the case.<sup>471</sup> According to Loubser, as a measure of certainty, the prohibition should state clearly whether both a resolution for voluntary winding-up and one to apply to court for liquidation are prohibited during rescue proceedings.<sup>472</sup> Loubser submits that the company may not take a resolution either to enter voluntary winding up or to apply to court for an order winding up the company, if that is the intended meaning of section 129(6) of the 2008 Act.<sup>473</sup>

Although a company may not adopt a voluntary resolution to commence liquidation proceedings after business rescue proceedings has already been initiated, an affected person in terms of section 132(a)(i) of the 2008 Act as well as the business rescue practitioner in terms of section 141(2)(a)(ii) of the 2008 Act may, on application to court, have the business rescue proceedings converted into liquidation proceedings.<sup>474</sup>

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<sup>470</sup> Section 349 of the 1973 Companies Act.

<sup>471</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 65.

<sup>472</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 65.

<sup>473</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 65.

<sup>474</sup> See *Commissioner for the South African Revenue Service v Primrose Gold Mines (Pty) Ltd and Others* (A932/14) [2016] ZAGPPHC 737.

### 3.8. Failure by the board of a company to adopt a resolution

In terms of section 129(7) of the 2008 Act:

'If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice<sup>475</sup> to each affected person, setting out the criteria referred to in section 128(1)(f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section'.

This section allows the board of a company to notify all affected parties to inform them that the company is in financial distress, which will enable them to apply for business rescue themselves while the possibility of a successful rescue still exists.<sup>476</sup> According to Loubser, it would be irresponsible to expect the board of a company to send out such a damaging notice in spite of the possibility that the expected insolvency or illiquidity may not come about.<sup>477</sup>

The delivery of such a notice will have severe damaging consequences to a company. Claims will be accelerated, overdrafts called up and suppliers will insist on payment in cash.<sup>478</sup> This will further curb the board of a company from negotiating a pre-packed deal with creditors when pursuing business rescue proceedings.<sup>479</sup> In addition hereto, creditors receiving this notice may launch recovery proceedings which may include an application brought by an affected person in terms of section 131 of the 2008 Act for a business rescue order<sup>480</sup> or a possible application for such a company's liquidation.<sup>481</sup>

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<sup>475</sup> The notice must correspond to Form CoR 123.3 of the 2008 Companies Act regulations. Regulations 123(5)(a) and (b) of the 2008 Companies Act. Regarding the delivery of this notice to affected persons, see part 3.5. above.

<sup>476</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 66.

<sup>477</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 66.

<sup>478</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 320.

<sup>479</sup> Loubser A *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 66-67.

<sup>480</sup> *Lazenby v Lazenby Vervoer VV and Others* (M328/2014) [2014] ZANWHC 41 para 21.

<sup>481</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 321.

One of the reasons a board could put forward for not adopting a business rescue resolution, would be that there are no reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company.<sup>482</sup> Another reason could be that the board is unable to adopt a business rescue resolution due to the fact that there is an application pending for liquidation of the company in terms of section 129(2)(a) of the 2008 Act.<sup>483</sup>

Failure by the board of a company to send out this notice, may give rise to potential personal liability of the board for their conduct as contemplated in section 22(1) of the 2008 Act.<sup>484</sup> The reason being, that the said conduct is reckless and could be seen to be conducted with intent to defraud the creditors of the company.<sup>485</sup> Furthermore, members of the board may be guilty of an offence in terms of section 214(1)(c) of the 2008 Act. This would occur, if those members of the board were knowingly a party to an act or omission by a company calculated to defraud a creditor or with another fraudulent purpose.<sup>486</sup> Thus, failure by the board of a company to send out the notice in terms of section 129(7) could result in criminal liability including a fine or imprisonment not exceeding 10 years or to both such fine and imprisonment in terms of section 216(a) of the 2008 Act.<sup>487</sup>

In addition to the above, the board of a company may be sued personally on a civil basis by an affected party in terms of section 218(2) of the 2008 Act should a member of the board cause loss or damage to such an affected party as a result of any contravention of the 2008 Act.<sup>488</sup> As long as the board of a company carefully deliberate

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<sup>482</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2015) 467.

<sup>483</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2015) 467.

<sup>484</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 322.

<sup>485</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 322.

<sup>486</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 322.

<sup>487</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 322.

<sup>488</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 322.

whether or not their company is indeed financially distressed and choose not to send out the notice in good faith,<sup>489</sup> they would have a defence to any civil claim in terms of section 22(1) or section 218(2) of the 2008 Act or a criminal charge in terms of section 214(1)(c) of the 2008 Act.<sup>490</sup>

### 3.9. The business rescue practitioner

#### 3.9.1. Appointment

The board of a company must within five business days after adopting and filing a resolution or within such time the CIPC may allow on application,<sup>491</sup> appoint a business rescue practitioner who has consented in writing to the appointment.<sup>492</sup> In order to be appointment as business rescue practitioner, the applicant must satisfy the requirements in terms of section 138 of the 2008 Act.<sup>493</sup> Section 128(1)(d) of the 2008 Act defines a 'business rescue practitioner' as a person<sup>494</sup> appointed, or two or more persons appointed jointly to oversee a company during business rescue proceedings.

Upon appointment, the business rescue practitioner has various powers in terms of supervision of the company and in particular has full management control during the business rescue process.<sup>495</sup> Section 140 of the 2008 Act outlines the general duties and powers of the business rescue practitioner. Section 140(1)(a) of the 2008 Act states that during a company's business rescue proceedings, the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management. This would imply that management may remain in place to be overseen

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<sup>489</sup> Section 77(2)(a) of the 2008 Companies Act.

<sup>490</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 322.

<sup>491</sup> Section 129(3) of the 2008 Companies Act.

<sup>492</sup> Section 129(3)(b) of the 2008 Companies Act.

<sup>493</sup> Section 129((3)(b) of the 2008 Companies Act. See part 3.9.2. below.

<sup>494</sup> In terms of section 1 of the 2008 Companies Act, the word 'person' includes a juristic person, and is therefore conceivable that a company may also be appointed as a business rescue practitioner. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 483.

<sup>495</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 394. The objective of the business practitioner is to place a business rescue plan before the creditors for approval and to achieve either one of the objectives in terms of section 128(1)(b)(iii) of the 2008 Companies Act. See further section 150 of the 2008 Companies Act.

by the business rescue practitioner, and the business rescue practitioner is the one with ultimate control over the management of the business.<sup>496</sup>

### 3.9.2. Qualifications

Unlike the judicial manager, a business rescue practitioner has to meet certain requirements to qualify for appointment in terms of section 138(1)(a)–(f) of the 2008 Act. No provision was made for this eventuality under judicial management. It is therefore an important consideration when appointing a business rescue practitioner that is suitably qualified. The qualifications required for appointment as a business rescue practitioner serves as assurance of the practitioner's ability to protect the interest of all stakeholders.<sup>497</sup>

In terms of section 138(1) of the 2008 Act:

'a person may be appointed as the business rescue practitioner of a company only if the person –

- (a) is a member in good standing of a legal, accounting or business management profession<sup>498</sup> accredited by the CIPC;<sup>499</sup>
- (b) has been licensed as such by the CIPC in terms of subsection (2);<sup>500</sup>

<sup>496</sup> Bradstreet R 'The leak in the chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22 *South African Mercantile Law Journal* 200.

<sup>497</sup> Bradstreet R 'The leak in the chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22 *South African Mercantile Law Journal* 204.

<sup>498</sup> The business rescue practitioner profession has been primarily designed to accommodate professionals that are active in the legal, accounting and business management spheres. The fact that persons who are not legal, accounting or business management professionals may also be licensed to practice as business rescue practitioners, appears to acknowledge that other persons outside these professional spheres, such as insolvency practitioners, should also be accommodated if they are suitably qualified. Ideally a business rescue practitioner should have some grounding in all three the identified areas of specialisation, for example law, accounting and business management, and not have specialised expertise in one of these. Therefore, a person who is not a member of an accredited body, but who nevertheless meets the remaining eligibility criteria for appointment as a business rescue practitioner, may apply to the CIPC for a license to act as such in terms of section 138(1)(b) of the 2008 Companies Act. Meskin PM, Delport P & Kunst JA (eds) *et al Insolvency law* (2016) para 18.14.2. See regulation 126 of the 2008 Companies Act.

<sup>499</sup> Section 138(1)(a) of the 2008 Companies Act. The South African Institute of Professional Accountants has recently been accredited by the CIPC to act as business rescue practitioners. South African Institute of Professional Accountants 'Business rescue accreditation green light for SAIPA members' available at <http://www.saipa.co.za/pressreleases/417000/business-rescue-accreditation-green-light-saipa-members> (accessed 1 March 2017).

- (c) is not subject to an order of probation in terms of section 162(7);<sup>501</sup>
- (d) would not be disqualified from acting as a director of the company in terms of section 69(8);<sup>502</sup>
- (e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;<sup>503</sup> and
- (f) is not related to a person who has a relationship contemplated in paragraph (d).<sup>504</sup>

In terms of section 138(3) of the 2008 Act, the Minister may make regulations available dealing with the accreditation of professional bodies and the licensing of business rescue practitioners which the CIPC is obliged to follow in appointing business rescue practitioners.<sup>505</sup> The Minister has also made additional regulations available relating to minimum qualifications for a person to act as a business rescue practitioner, which includes different minimum qualifications for different categories of companies.<sup>506</sup> The manner in which the minimum qualifications are imposed on business rescue



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<sup>500</sup> Section 138(1)(b) read with section 138(2) of the 2008 Companies Act. The CIPC may license any qualified person to practice in terms of the 2008 Act and may suspend or withdraw any such license in the prescribed manner. See regulation 126 of the 2008 Companies Act. Up until May 2015 only conditional licenses were being granted by the CIPC, on an urgent case-by-case basis, until the CIPC completes an investigation into the accreditation of professional bodies as business rescue practitioners. Meskin PM, Delpont P & Kunst JA (eds) *et al Insolvency law* (2016) para 18.14.2. The CIPC may also provide licenses to applicants that is of good character and integrity and that the applicant's education and experience are sufficient to equip the applicant to perform the functions of a business rescue practitioner. Meskin PM, Delpont P & Kunst JA (eds) *et al Insolvency law* (2016) para 18.14.2.1.

<sup>501</sup> Section 138(1)(c) of the 2008 Companies Act.

<sup>502</sup> Section 138(1)(d) of the 2008 Companies Act.

<sup>503</sup> Section 138(1)(e) of the 2008 Companies Act. The purpose of this section is to ensure that the business rescue practitioner has not had any prior dealings with the company of which he or she has been appointed that would place his or her independence and impartiality in doubt. Meskin PM, Delpont P & Kunst JA (eds) *et al Insolvency law* (2016) para 18.14.2. See also *Breedt v PG Breedts Boorkontrakteurs CC and Others* (10581/2012) [2013] ZAGPPHC 17 para 15 and 16; *Griessel and Another v Lizemore and Others* [2016] JOL 34038 (GJ) para 124.

<sup>504</sup> Section 138(1)(f) of the 2008 Companies Act.

<sup>505</sup> Section 138(3)(a) read with regulation 126 of the 2008 Companies Act.

<sup>506</sup> Section 138(3)(b) read with regulation 127 of the 2008 Companies Act. The restrictions imposed on business rescue practitioners in terms of regulation 127 of the 2008 Companies Act, also apply to business rescue practitioners who are members of accredited professional bodies under section 138(1)(a) of the 2008 Companies Act and are in addition to any restrictive conditions placed on a licensee where the business rescue practitioner has been licensed in terms of the provisions of section 138(1)(b) of the 2008 Companies Act. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 486.



practitioners is to divide them into junior practitioners,<sup>507</sup> experienced practitioners<sup>508</sup> and senior practitioners.<sup>509</sup>

The size or type of company a business rescue practitioner may be appointed to, will depend on the category the practitioner qualifies for.<sup>510</sup> The companies of which a business rescue practitioner may be appointed to, is divided into large companies,<sup>511</sup> medium companies<sup>512</sup> and small companies.<sup>513</sup> Therefore, a junior practitioner may be appointed as the business rescue practitioner of any small company,<sup>514</sup> but may not be appointed as the practitioner for any medium or large company, or for a state owned company. The junior practitioner may, however, be appointed as an assistant to an experienced or senior practitioner.<sup>515</sup> Furthermore, an experienced practitioner may be appointed as the business rescue practitioner of any small or medium company.<sup>516</sup> However, an experienced practitioner may not be appointed as the business rescue practitioner of any large company, or state owned company, unless as the appointment

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<sup>507</sup> Regulation 127(2)(c)(iii) of the 2008 Companies Act. A junior practitioner is a business rescue practitioner who immediately before being appointed as such, had no experience in business turnaround practice or acted as a business rescue practitioner in terms of the 2008 Companies Act; or has gained business turnaround experience before the effective date of the 2008 Companies Act for a combined period of less than 5 years.

<sup>508</sup> Regulation 127(2)(c)(ii) of the 2008 Companies Act. An experienced practitioner is a business rescue practitioner who immediate before being appointed as such of a particular company, has gained experience in business turnaround practice before the effective date of the 2008 Companies Act, or as a business rescue practitioner in terms of the 2008 Companies Act, for a combined period of at least 5 years.

<sup>509</sup> Regulation 127(2)(c)(i) of the 2008 Companies Act. A senior practitioner is a business rescue practitioner who immediately before being appointed as such for a particular company has gained experience in business turnaround practice before the effective date of the 2008 Companies Act, or as a business rescue practitioner in terms of the 2008 Companies Act, for a combined period of at least 10 years. Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 486.

<sup>510</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 486.

<sup>511</sup> Regulation 127(2)(b)(i) of the 2008 Companies Act. A large company is a company, other than a state owned company, whose most recent public interest score is 500 or more. Note that public interest scores of a company is calculated in terms of regulation 26(2) of the 2008 Companies Act.

<sup>512</sup> Regulation 127(2)(b)(ii) of the 2008 Companies Act. A medium company is any public company whose most recent public interest score is less than 500, or any other company, other than a state owned company, whose most recent public score is at least 100 but less than 500.

<sup>513</sup> Regulation 127(2)(b)(iii) of the 2008 Companies Act. A small company is any company, other than a state owned company or public company, whose most recent public interest score, is less than 100.

<sup>514</sup> Regulation 127(3)(a) of the 2008 Companies Act.

<sup>515</sup> Regulation 127(3)(b) of the 2008 Companies Act.

<sup>516</sup> Regulation 127(4)(a) of the 2008 Companies Act.

is in the capacity as an assistant to a senior practitioner.<sup>517</sup> Moreover, a senior practitioner may be appointed as the business rescue practitioner of any company.<sup>518</sup>

### 3.10. Abuse of business rescue proceedings

Chapter 6 of the 2008 Act affords companies in financial distress various procedural and substantive protections and advantages during the business rescue procedure.<sup>519</sup> The low barriers to entry coupled with the tempting array of advantages and protections have unfortunately opened the procedure to abuse.<sup>520</sup> Unclear drafting of the provisions governing business rescue proceedings have negatively affected the procedure. This negative impact hampered the understanding and implementation of business rescue proceedings. As a result, it led to much confusion regarding the meaning of business rescue and provided ample scope for litigious parties to exploit inconsistencies in the 2008 Act.<sup>521</sup> This allowed applicants to advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose.<sup>522</sup>

The cases referred to below will illustrate how business rescue proceedings have been abused. These cases will, further, showcase how South African courts have dealt with abuse of the said procedure.

In *Swart v Beagles Run Investments 25 (Pty) Ltd and Others*,<sup>523</sup> several creditors opposed a business rescue application on the basis that it amounted to an abuse of the process and an attempt by the company to avoid or postpone the payment of its

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<sup>517</sup> Regulation 127(4)(b) of the 2008 Companies Act.

<sup>518</sup> Regulation 127(5) of the 2008 Companies Act.

<sup>519</sup> Elliott A 'The abuse of business rescue: Beware the serial debtor' available at <https://www.hoganlovells.com/en/publications/the-abuse-of-business-rescue-beware-the-serial-debtor> (accessed 6 February 2017).

<sup>520</sup> Elliott A 'The abuse of business rescue: Beware the serial debtor' available at <https://www.hoganlovells.com/en/publications/the-abuse-of-business-rescue-beware-the-serial-debtor> (accessed 6 February 2017).

<sup>521</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 1.

<sup>522</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 1.

<sup>523</sup> [2012] JOL 28486 (GNP).

debts.<sup>524</sup> The court, after correctly identifying that the company was insolvent, refused to grant the business rescue application and concluded that winding-up of the company would be a better option in these circumstances.<sup>525</sup>

From a practical perspective abuse of business rescue proceedings may occur where there is intentional non-compliance with the procedural requirements of section 129 of the 2008 Act.<sup>526</sup> As a result hereof, a company would gain the protection of Chapter 6 of the 2008 Act for a brief period of time, only to exit the procedure due to the resolution lapsing and becoming a nullity at a later date.<sup>527</sup> Additional cases have arisen in this regard. South African courts have, therefore, made pronouncements on these issues as will be illustrated below.

In *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others*<sup>528</sup> the court held that it became common cause that the respondent's resolution did not comply with, *inter alia*, section 129(3)(a) of the 2008 Act and that the resolution were irregular, a nullity and of no force and effect.<sup>529</sup> The court held that the respondent's resolution coupled with the failure to comply with the provisions of section 129 of the 2008 Act indicated the respondent's intention to avoid payment of the amounts due to the applicant.<sup>530</sup>

The court in *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks and Another Intervening)*<sup>531</sup> held that it is necessary to caution against abuse of the business rescue procedure, because rendering a company temporary immune to actions by creditors so as to enable the directors or other

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<sup>524</sup> *Swart v Beagles Run Investments 25 (Pty) Ltd and Others* [2012] JOL 28486 (GNP) para 12 and para 27.

<sup>525</sup> *Swart v Beagles Run Investments 25 (Pty) Ltd and Others* [2012] JOL 28486 (GNP) para 42.

<sup>526</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 466.

<sup>527</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 466.

<sup>528</sup> (812/2012) [2012] ZACPEHC 39.

<sup>529</sup> *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others* (812/2012) [2012] ZACPEHC 39 para 12.

<sup>530</sup> *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others* (812/2012) [2012] ZACPEHC 39 para 26.

<sup>531</sup> [2012] JOL 28893 (WCC).

stakeholders to pursue their own agenda.<sup>532</sup> The court went further to state that, an application for business rescue must be carefully scrutinised so as to ensure that a genuine attempt is made to achieve the aims of the statutory remedy.<sup>533</sup> The current case did not reflect a genuine attempt.<sup>534</sup>

Similarly to the above case, in *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another*<sup>535</sup> the business rescue application brought by the applicant had been branded as an abuse and manipulation of the business rescue procedure.<sup>536</sup> The court found that it was clear from the timing of the business rescue application that its sole objective was to paralyse the liquidation application.<sup>537</sup>

In *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another*<sup>538</sup> the court refused granting a business rescue order as the rescuing plan was merely a wind-down of the company which would not assist the creditors in getting a better return.<sup>539</sup> The court further held that business rescue would have been used to frustrate creditors' rights and to stave off liquidation for motives of their own.<sup>540</sup>

The court in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*<sup>541</sup> refused the application to commence business rescue

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<sup>532</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 3.

<sup>533</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 3.

<sup>534</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 3.

<sup>535</sup> [2013] 3 All SA 146 (GSJ).

<sup>536</sup> *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another* [2013] 3 All SA 146 (GSJ) para 28.

<sup>537</sup> *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another* [2013] 3 All SA 146 (GSJ) para 28.

<sup>538</sup> (19075/11, 15584/11) [2012] ZAWCHC 33.

<sup>539</sup> *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 para 12.

<sup>540</sup> *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 para 15.

<sup>541</sup> [2013] 3 All SA 303 (SCA); See also *Yatzee Investments CC v CAPX Finance Pty Ltd* (3300/2015) [2015] ZAWCHC 117.

proceedings.<sup>542</sup> The reason being, that the company's proposal that the business rescue practitioner rather than the liquidator should sell the property consisted of no more than an alternative, informal kind of winding-up of the company.<sup>543</sup> The court held that business rescue was not intended to achieve a winding-up of a company and avoid eventual liquidation as this was not the intention of achieving the goals of business rescue.<sup>544</sup> As a result, liquidation proceedings were better suited and more advantageous to creditors and shareholders.<sup>545</sup>

In *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others*<sup>546</sup> the SCA dealt with the commencement of business rescue proceedings in terms of section 129 of the 2008 Act. The court decided on what effect intentional non-compliance with the procedural requirements may have on the business rescue process.<sup>547</sup> As a result of the intentional non-compliance with the procedural requirements by the respondents, the court terminated the business rescue proceedings.<sup>548</sup> The court further held that commencement of business rescue proceedings by the respondents was solely to delay the transfer of a property.<sup>549</sup> The court described the respondents conduct as a stratagem involving a wholly undesirable exploitation of legal technicalities for their own advantage.<sup>550</sup>

The judgment handed down by the SCA in *Panamo*<sup>551</sup> is a clear attempt by the court to curtail the abuse of business rescue proceedings and to preclude litigants from

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<sup>542</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 33.

<sup>543</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 33.

<sup>544</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 33.

<sup>545</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA) para 35.

<sup>546</sup> 2015 (3) All SA 274 (SCA) para 5 and para 29.

<sup>547</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 4.

<sup>548</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 28-29.

<sup>549</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 5.

<sup>550</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 5.

<sup>551</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA).

exploiting technical issues in order to undermine the business rescue process.<sup>552</sup> It is clear that the provisions in the 2008 Act as well as those under Chapter 6 do contain remedies to prevent business rescue proceedings from being stultified by creditors or those who stand behind the company, in the form of its shareholders and directors.<sup>553</sup>

### 3.11. Business rescue versus judicial management

The new business rescue procedure introduced under Chapter 6 of the 2008 Act effectively replaces judicial management. In light of the above discussion, a comparison is drawn between business rescue under the 2008 Act and judicial management under the 1973 Act. This will be evaluated as far as it is relevant, bearing in mind the limitations as previously indicated in this study.

One of the major improvements of the new business rescue procedure is the limited role courts play in the commencement of business rescue proceedings compared to what the position was under judicial management.<sup>554</sup> Business rescue can now commence by way of a resolution by the board of a company which must be filed with the CIPC.<sup>555</sup> This is a major improvement and a cost saving initiative, unlike the rather cumbersome and expensive court route experienced with judicial management.<sup>556</sup>

Under judicial management, there was a strict requirement that the company must be unable to pay its debts before a judicial management order may be granted.<sup>557</sup> However, under section 129(1)(a) of the 2008 Act, the board of a company commencing business rescue proceedings must have reasonable grounds to believe that the company is financially distressed.<sup>558</sup> This is determined by taking into account the

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<sup>552</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 21; Loubser A 'Nienakoming van die voorgeskrewe prosedures na indiening van 'n direksiebesluit om met ondernemingsredding te begin: Is *Panamo Properties (Pty) Ltd v Nel* die (regte) antwoord?' (2016) 13 *LitNet Akademies* 861.

<sup>553</sup> *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (3) All SA 274 (SCA) para 34.

<sup>554</sup> Swart WJC 'Business rescue: Do employees have better (reasonable) prospects of success?' (2014) 35 *OBITER* 407.

<sup>555</sup> Section 129 of the 2008 Companies Act.

<sup>556</sup> See part 2.10. above.

<sup>557</sup> Burdette DA *A framework for corporate insolvency law reform in South Africa* (published LLD thesis, University of Pretoria, 2002) 349. See part 2.5.2. above.

<sup>558</sup> Section 128(1)(f) of the 2008 Companies Act.

current financial position of the company, and considering all relevant circumstances that may impact the company's liquidity in the foreseeable future.<sup>559</sup> This is a welcomed approach as a company does not need to be insolvent or in dire straits before it may commence business rescue proceedings.

It is important to note that the 2008 Act now refers to a 'reasonable prospect'<sup>560</sup> as opposed to a 'reasonable probability' under the 1973 Act.<sup>561</sup> Reasonable prospect has not been defined in the 2008 Act which resulted in South African courts making pronouncements on this particular requirement.<sup>562</sup> It is, however, generally accepted that reasonable prospect is a lessor requirement than reasonable probability which was the yardstick for placing a company under judicial management.<sup>563</sup> The mind-set reflected in various cases that dealt with judicial management applications in respect of the reasonable probability requirement was that, *prima facie*, the creditor was entitled to a liquidation order.<sup>564</sup> This resulted in judicial management orders being granted only in exceptional circumstances whereas business rescue follows the opposite of this approach.<sup>565</sup>

From the provisions dealing with judicial management under the 1973 Act, judicial management would normally be granted for an indefinite period of time. However, section 129 of the 2008 Act imposes strict procedural requirements which the board of a company must comply with upon filing their resolution with the CIPC to commence business rescue proceedings.<sup>566</sup> Non-compliance with the procedural requirements by the board of a company may result in the business rescue proceedings being

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<sup>559</sup> See part 3.3.1. above and footnote 273 above.

<sup>560</sup> See part 3.3.3. above.

<sup>561</sup> See part 2.5.4. above.

<sup>562</sup> See part 3.3.3. above.

<sup>563</sup> Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 461.

<sup>564</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 21; Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 450. See part 2.3.5. above.

<sup>565</sup> *Southern Palace Investments 256 (Pty) Ltd v Midnight Storm Investments 386 Ltd (Registrar of Banks & Another Intervening)* [2012] JOL 28893 (WCC) para 21; Delpont P, Meskin PM (ed) & Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2016) 450. See part 2.3.5. above.

<sup>566</sup> See part 3.5. above.

terminated, upon application to court.<sup>567</sup> The reasoning behind the strict procedural requirements is to secure efficient rescue of the company within the prescribed time lines. This prevents abuse of the procedure by the applicant which was, however, the situation under judicial management.<sup>568</sup>

Upon granting a judicial management order, all the directors would cease to hold office and the company's management was handed over to the judicial manager as he or she took full control of the company.<sup>569</sup> By contrast, where a company commenced business rescue proceedings, the board of the company remains in place. The board would, however, work under the instructions of the appointed business rescue practitioner which is another positive aspect of the new rescue procedure.<sup>570</sup> This allows the business rescue practitioner to focus on the critical changes within the company. Whereas the day to day management of the company would be attended to by the board of a company which was not the role the judicial manager played under the 1973 Act.<sup>571</sup>

Judicial managers under the 1973 Act were another cause for concern. The 1973 Act did not contain a prescribed procedure for the appointment of judicial managers. The appointment of judicial managers was done by the Master who would follow the same procedure when appointing insolvency practitioners.<sup>572</sup> Furthermore, the Master would appoint any person as a judicial manager, except the auditor of the company or a person disqualified under the 1973 Act from being appointed as a liquidator in a winding-up application.<sup>573</sup>

No special qualifications were required of persons appointed as a judicial manager.<sup>574</sup> The only positive qualification for appointment as a judicial manager was that the

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<sup>567</sup> See part 3.6. above.

<sup>568</sup> See parts 2.4.2 and 2.5. above.

<sup>569</sup> See part 2.2. above.

<sup>570</sup> See part 3.9.1. above.

<sup>571</sup> Roodt Inc Attorneys 'Business rescue under the new Companies Act is an improvement over judicial management' available at <http://roodtinc.com/archive/newsletter78.asp> (accessed on 11 March 2017).

<sup>572</sup> See part 2.7.1. above.

<sup>573</sup> See part 2.7.1. above.

<sup>574</sup> See part 2.7.2. above.



individual appointed must furnish security for the proper performance of his or her duties.<sup>575</sup> Encouragingly, the 2008 Act has dedicated an entire section on the qualifications of a business rescue practitioner.<sup>576</sup> In order to qualify for appointment as business rescue practitioner, an applicant must be a member in good standing of a legal, accounting or business management profession accredited by the CIPC.<sup>577</sup> It does, however, not preclude an applicant who is also a liquidator from being so appointed.<sup>578</sup> It is also important to note that if a liquidator is appointed as the business rescue practitioner of a company in business rescue he or she cannot be appointed as liquidator should the business rescue application fail and an order for liquidation be granted.<sup>579</sup> This prevents a situation where a conflict of interest may arise.<sup>580</sup>

### 3.12. Conclusion

The above exposition is a clear illustration that business rescue proceedings is the preferred option should a company find itself in financial distress and there is a reasonable prospect of rescuing the company. The said procedure provides companies with an opportunity for a fresh start and a healthy breathing space in which to restructure its debts.<sup>581</sup> This is amplified by the fact that the majority of business rescue procedures commence in terms of section 129 of the 2008 Act.<sup>582</sup> The ease of entry into a business rescue process by way of section 129 of the 2008 Act, supports the contention that business rescue is a viable option available to companies in financial distress as compared to what judicial management offered companies finding themselves in the same position.

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<sup>575</sup> See part 2.7.2. above.

<sup>576</sup> Section 138 of the 2008 Companies Act. See part 3.9. above.

<sup>577</sup> See part 3.9.2. above.

<sup>578</sup> See part 3.9.2. above.

<sup>579</sup> See part 3.9.2. above. Section 140(4) of the 2008 Companies Act; Jacobs LM 'Die nuwe ondernemingsreddingspraktisyn: Geneesheer of begrafnisondernemer? 'n Ondersoek na die kwalifikasies van die reddingspraktisyn' (2012) 9 *LitNet Akademies* 209.

<sup>580</sup> Jacobs LM 'Die nuwe ondernemingsreddingspraktisyn: Geneesheer of begrafnisondernemer? 'n Ondersoek na die kwalifikasies van die reddingspraktisyn' (2012) 9 *LitNet Akademies* 209.

<sup>581</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 607.

<sup>582</sup> See part 1.3. above.

## CHAPTER 4:

### CONCLUSION AND RECOMMENDATIONS

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#### 4.1. Conclusion

South Africa has for many years been in dire need of a corporate rescue procedure as a result of companies finding themselves in financial difficulty.<sup>583</sup> The first attempt was in the form of judicial management which provided companies suffering a temporary setback an alternative mechanism to that of liquidation.<sup>584</sup> Judicial management, when enacted, had the purpose of creating an alternative relief measure to debtors and creditors alike.<sup>585</sup> However, in most instances, judicial management was rarely used and even more rarely led to a successful conclusion.<sup>586</sup> Evidently, judicial management required improvements to be made as its shortcomings over the years had been exposed.<sup>587</sup> This laid the foundation for a modern corporate rescue procedure to emerge namely business rescue.

Chapter 6 of the 2008 Act introduced business rescue as the new corporate rescue procedure which replaced its predecessor judicial management. It is clear that the legislature, through business rescue has acknowledged the shortcomings of judicial management and has attempted to build a system devoid of these shortcomings.<sup>588</sup> Business rescue has, therefore, established a standard for restructuring companies in

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<sup>583</sup> Harvey N (ed) *Turnaround management and corporate renewal: A South African perspective* (2011) 78.

<sup>584</sup> Stein C & Everingham GK (eds) *The new Companies Act unlocked* (2011) 408.

<sup>585</sup> Museta GM *The development of business rescue in South African law* (published LLM thesis, University of Pretoria, 2011) 20.

<sup>586</sup> Accountancy South Africa 'The clean-up issue' available at <http://www.accountancysa.org.za/wordpress/wp-content/uploads/issues/2010/ASA-June-2010.pdf> (accessed 6 February 2017) 26.

<sup>587</sup> See Chapter 2 above.

<sup>588</sup> Ofwono FI *Suggested Reasons for the failure of Judicial Management as a Business Rescue Mechanism in South African Law* (published Post-Graduate Diploma in Law thesis, University of Cape Town, 2014) 21.

financial distress.<sup>589</sup> The said procedure has incorporated the elements of a modern and effective corporate rescue procedure to assist ailing companies.<sup>590</sup>

The most significant difference between business rescue and judicial management is that it is no longer necessary for a company to acquire a court's permission to obtain the protection offered by Chapter 6 of the 2008 Act.<sup>591</sup> All that is now required, as an alternative to court proceedings, is a resolution by the board of a company that effectively declares that the company is in financial distress and that there is a reasonable prospect of rescuing the company.<sup>592</sup> This further reflects the legislature's intention to make rescue and restructuring an easier mechanism to secure a fresh start to companies in financial distress, and supports a shift to a more debtor-friendly approach.<sup>593</sup>

Business rescue by virtue of section 129 of the 2008 Act, assists companies to obtain the protection offered by Chapter 6 of the 2008 Act and is not only cost effective but saves a considerable amount of time. It is, therefore, submitted that business rescue in the context of section 129 of the 2008 Act has addressed the shortcomings experienced with judicial management and a welcomed improvement to its predecessor, judicial management.



#### 4.2. Recommendations

In this study, the author considered business rescue in the context of section 129 of the 2008 Act by comparing it to judicial management in terms of section 427(1) of the 1973 Act. From the evaluation of current legislation and case law, several shortcomings have been identified, in the preceding chapter, which relate to the commencement of

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<sup>589</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (published LLD thesis, University of Pretoria, 2015) 550.

<sup>590</sup> Harvey N (ed) *Turnaround management and corporate renewal: A South African perspective* (2011) 452. See part 1.2. above.

<sup>591</sup> Stein C & Everingham GK (eds) *The new Companies Act unlocked* (2011) 25. See part 3.3. above.

<sup>592</sup> Section 129(1) of the 2008 Companies Act.

<sup>593</sup> Levenstein E *An appraisal of the new South African business rescue procedure* (Published LLD thesis, University of Pretoria, 2015) 635. See also *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] 2 All SA 433 (GSJ) para 12.

business rescue in terms of section 129 of the 2008 Act. In an effort to address these shortcomings, the following recommendations are proposed -

4.2.1. The board of a company should be legally obliged to conduct a pre-assessment of its company before voluntarily resolving to commence business rescue proceedings.<sup>594</sup> The pre-assessment will serve as an advantage and legal safeguard to the board should they contemplate business rescue proceedings. A pre-assessment report will place directors in a better position to make a proper determination of whether the company is financially distressed<sup>595</sup> and if so, whether there is a prospect of rescuing the company.<sup>596</sup>

By conducting a pre-assessment, allows the board of a company to seek advice and commence business rescue proceedings at an early stage before it is too late to rescue the company. Furthermore, since there is no guide available to the board of a company, besides current case law, to ascertain whether the company is financially distressed, the pre-assessment will assist the board in this regard and serve as a safeguard against civil or criminal liability in terms of the 2008 Act.<sup>597</sup>

4.2.2. The term 'reasonable prospect'<sup>598</sup> of rescuing the company remains problematic despite the decisions by the SCA in *Oakdene Square Properties*<sup>599</sup> and *Newcity Group*.<sup>600</sup> It would have been useful if the court could have developed a test or threshold to determine when a company would be viable to be rescued.<sup>601</sup> The board of a company is often not in a position to properly analyse whether there is a reasonable prospect of the company being rescued. Therefore, as mentioned

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<sup>594</sup> See part 3.3. and footnote 263 above.

<sup>595</sup> See part 3.3.1. above.

<sup>596</sup> See part 3.3.2. above.

<sup>597</sup> See part 3.8. above.

<sup>598</sup> See part 3.3.2. above.

<sup>599</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA). See also part 3.3.2. above.

<sup>600</sup> *Newcity Group (Pty) Ltd v Pellow N.O and Others* (577/2013) [2014] ZASCA 162.

<sup>601</sup> Pretorius M 'Business rescue status quo report' available at [http://www.cipc.co.za/files/4714/2866/7900/Report\\_Number\\_3\\_ammended\\_30032015.pdf](http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf) (accessed on 31 May 2017) 55-56.

above, the pre-assessment is cardinal in assisting the board when resolving to commence business rescue proceedings. It is recommended that the legislature introduce a definition into section 128 of the 2008 Act stipulating what a 'reasonable prospect' of rescuing a company entails. Alternatively, to assist the board of a company, it is recommended that the CIPC compile and publish a guide which outlines minimum requirements which stipulates when a reasonable prospect of a company being rescued is imminent.

4.2.3. The prohibition in terms of section 129(6) of the 2008 Act, should state clearly whether both a resolution for voluntary winding-up and one to apply to court for liquidation are prohibited during rescue proceedings.<sup>602</sup> It is recommended that the provision should state that a company may not take a resolution either to enter voluntary winding up or to apply to court for an order winding up the company. This will take into account circumstances where an affected person in terms of section 132(a)(i) of the 2008 Act or the business rescue practitioner in terms of section 141(2)(a)(ii) of the 2008 Act may, on application to court, have the business rescue proceedings converted into liquidation proceedings.<sup>603</sup>

4.2.4. There is currently no definition of the term 'insolvent' contained in the 2008 Act which has led to some level of confusion.<sup>604</sup> It is, therefore, recommended that a definition of the term 'insolvent' be introduced into section 128 of the 2008 Act. It is, therefore, recommended that the term 'insolvent' in terms of section 128(1)(f)(ii) of the 2008 Act and for the purpose of business rescue proceedings should be amended to read as follows: '... it appears to be reasonably likely that the company's liabilities, fairly valued, will exceed its assets, fairly valued within the immediately ensuing six months'.<sup>605</sup> This will draw a clear distinction between the factual and commercial insolvency in terms of section 128(1)(f) of the 2008 Act.<sup>606</sup>

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<sup>602</sup> See part 3.7. above.

<sup>603</sup> See part 3.7. above.

<sup>604</sup> See part 3.3.1. above.

<sup>605</sup> See part 3.3.1. above.

<sup>606</sup> See part 3.3.1. above.

4.2.5. It is further recommended that the board of a company should approach a competent and duly accredited business rescue practitioner that is senior or experienced in business turnarounds to conduct a pre-assessment report of the company.<sup>607</sup> Based on the business rescue practitioners findings, he or she would be able to advise the board whether business rescue is in fact a viable option to the company or not.<sup>608</sup> Depending on the outcome of the business pre-assessment report, the company may thereafter decide whether to voluntarily commence business rescue proceedings.

Incorporating the above recommendations may provide greater legal certainty and clarity when a board of a company voluntarily commences business rescue proceedings in terms of section 129 of the 2008 Act. Although section 129 of the 2008 Act provides a voluntary route for a company, in financial distress, to commence business rescue proceedings, it is submitted that not every company may necessarily qualify for business rescue as the circumstances of each case will determine whether the available facts give rise to utilising business rescue proceedings. Therefore, should the board of a company voluntarily resolve to commence business rescue proceedings in terms of section 129 of the 2008 Act, there must be a genuine attempt at rescuing the company in order to achieve the objectives of the 2008 Act.

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<sup>607</sup> See part 3.9. above.

<sup>608</sup> Pretorius M 'Business rescue status quo report' available at [http://www.cipc.co.za/files/4714/2866/7900/Report\\_Number\\_3\\_ammended\\_30032015.pdf](http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf) (accessed on 31 May 2017) 57.

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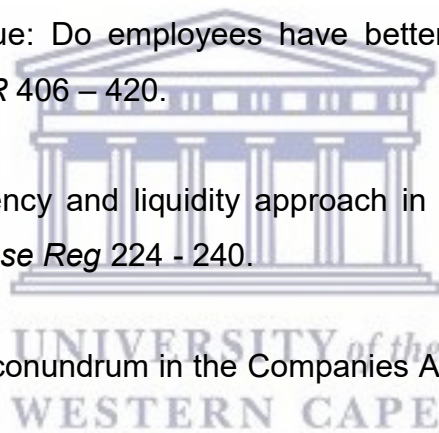
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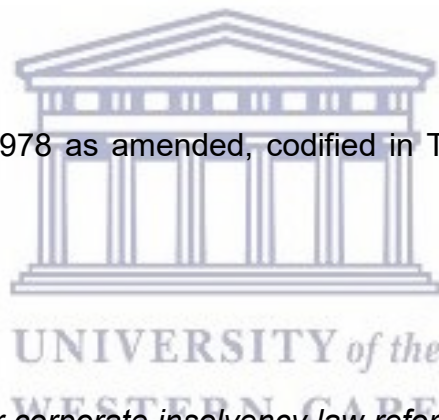
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