The Appropriateness of Business Rescue as opposed to Liquidation:

A critical analysis of the requirements for a successful business rescue order as set out in section 131(4) of the Companies Act 71 of 2008

by

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DECLARATION

I confirm that this is the final corrected version of my minor dissertation. I declare that no unethical research practices were used or material gained through dishonesty. I herewith declare that my academic work is in line with the Plagiarism Policy of the University of Johannesburg with which I am familiar.

LARA-JADE SHER **28 NOVEMBER 2013**

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Aristotle on one occasion said: “The law is reason free from passion” This implies that the law is rational and not affected by emotions. However, during this dissertation, I have found that passion has been a crucial factor to that of learning and interpreting the law. The education I have received during my years at the University of Johannesburg has been indescribable, it has been an unbelievable and incredible journey.

SUMMARY

The Companies Act 71 of 2008 (hereinafter referred to as the Act) was passed by Parliament on 19 November 2008 and assented to by the President on 8 April 2009. The Act came into force on 1 May 2011 and contains the provisions regulating the new business rescue proceedings that replace judicial management under the Companies Act 61 of 1973. However, since the introduction of Chapter 6 of the Act, the courts South Africa still appear to be finding their feet with regard to many of the Act's provisions. In spite of this, the new business rescue practice has become an important part of the South African corporate framework. The outbreak of recent case law has started to shape the direction, which business rescue, as interpreted by the Courts, is taking. An important debate among the courts is whether the courts should rescue a business entity or liquidating the businesses assets in order to settle claims against it. While a liquidation aims to divide the profit from the sale of assets amongst creditors and to dissolve the company, business rescue legislation provides for a restructuring of the financial structure of a distressed debtor to save the business as a going concern and to assist the settlement of claims against the business in full. The business rescue proceedings have been provided for by legislation in the Act, however, the result of the vast recent court decisions show that the Act may not be relied upon unconditionally without proper regard to the circumstances of each case. This research analyses the appropriateness of business rescue as opposed to liquidation by specifically looking at the requirements for a successful business rescue order. This research further analyses whether the decisions of the courts in present case law are on the correct path when interpreting the business recuse provisions in terms of the Act.

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CHAPTER 1: INTRODUCTION

1 INTRODUCTION

> 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. The rescue of a business should be promoted through formal and informal procedures.[1]

A company is a fundamental part of the community in which it does business and it has a direct impact on the economic and the social welfare of that community through its employees, suppliers and distributors.[2] Liquidation is an extreme measure, the consequence of which may be portrayed as the 'guillotining' of a company.[3] Therefore, it is necessary to have legislation that is successful in delivering 'escape routes' from such 'commercial death' that are aimed at rescuing a financially distressed company from its decline towards liquidation.[4] In the past, companies in financial distress in South Africa have had no alternative but to launch proceedings for liquidation.[5] Unfortunately, once liquidated, a company's assets are generally sold at excessive values.[6] Brigitte Mabandla, the then Minister of Justice and Constitutional Development declared in her budget speech in Parliament on 22 June 2004, that the emphasis should be on business rescue rather than liquidation with a view to protecting the economy, workers and their families, creditors and others. The Minister expressed the view that a regulatory environment focusing on rescue rather than liquidation would instill greater investor confidence in the country and the economy.[7] Thus, the introduction of modern business rescue principles is another step forward in making South Africa more competitive and bringing it in line with the modern global economy.[8]

Whereas a liquidation aims to obtain whatever money or value remains from a failed debtor-business in order to settle claims against it, business rescue legislation provides for a

[1]see World Bank (2001) *Principles for Effective Insolvency and Creditor Rights Systems* 5 (available at http://www.worldbank.org/ifa/ipg_eng.pdf).
[2]Loubser *Some Comparative Aspects of Corporate Rescue in South Africa* (2010 LLD thesis) University of South Africa 1.
[3]Bradstreet "The new business rescue: Will creditors sink or swim?" (2011) *SALJ* 352.
[4]Bradstreet (n 3 (2011)) 352.
[5]Levenstein "Shifting mindsets" *Without Prejudice* (October 2011) 11.
[6]n 5 above 11.
[7]see The Department of Justice and Constitutional Development RSA budget speech by Ms Brigitte Mabandla 22 June 2004 5.
[8]Alberts *Business Rescue in South Africa: a critical review of the regulatory environment* (2004 dissertation SA) University of Pretoria 10.

restructuring of the financial structure of an ailing debtor to save the business as a going concern and to facilitate the settlement of claims against the business in full.[9]

Chapter 6 of the Companies Act of 2008[10] provides for a 'business rescue' mechanism. One of the advantages of a successful business rescue is that it prevents job losses. Especially, in a country such as South Africa where unemployment numbers are excessively high.[11] Therefore, having a successful and effective business rescue regime is consequently of great significance to the economic growth and stability of this country.[12]

Section 131(4)(a) of the Act provides:

> unless a company has adopted a resolution contemplated in section 129 (which provides for voluntary business rescue proceedings), an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. After considering an application in terms of subsection (1), the court may, make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that, the company is financially distressed; the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.[13]

In order to qualify for business rescue, the company must be financially distressed. However, the main requirement is that there be a reasonable prospect for rescuing the business. The outbreak of recent case law has started to shape the direction, which business rescue, as interpreted by the Courts, is taking.

2 BACKGROUND

The issue regarding the principles of business rescue as a possible alternative to liquidation procedures has increasingly become relevant.[14] This is seen from certain international organisations such as the World Bank, which has recently issued the "Principles for Effective

[9] Bradstreet (n 3 (2011)) 352-353.
[10] 71 of 2008 (hereinafter referred to as the Act).
[11] n 2 above 1.
[12] n 2 above 1.
[13] s 131(4)(a) of the Act.
[14] n 8 above 1.

Insolvency and Creditor/Debtor Regimes" in 2011[15] and the United Nations' Commission on International Trade law (UNCITRAL), which issued its "Draft legislative guide on Insolvency law" in April 2004.[16] Both the World Bank guide and the UN Guide emphasis the need for business rescue. The World Bank provides 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."[17] While additionally, the UN Guide stipulates that "long term economic benefit is more likely to be achieved through reorganization proceedings, since they encourage debtors to take action before their financial difficulties become severe. Lastly, there are social and political considerations that are served by the availability of reorganization proceedings which protect, for example, the employees of a troubled debtor."[18]

In the South African context, in the early 2000s, it became apparent to government that there was an urgent need to reform South Africa's company laws. As the Minister put, "the new horizons in the commercial world, developed in a short period of 25 years resulting from a generation change, has undoubtedly made the present Companies Act somewhat archaic in many respects and certainly cumbersome in operation."[19] Additionally, the Deputy Director-General of the Consumer and Corporate Regulation Division (CCRD) within the Department of Trade and Industry (DTI) announced on 11 July 2003 that the company law reform process in South Africa was started in 1998, but that 'it had been a stop start exercise.'[20]

Consequently, the company law reform process was officially launched on 11 July 2003. On the day of the official launch of the process, the DTI announced that the starting point would be the formulation of a policy framework which would guide the law reform process.[21] In

[15]World Bank (2011) *Principles for Effective Insolvency and Creditor/Debtor Regimes* 6 (available at http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011[FINAL].pdf).
[16]n 8 above 1-2.
[17]n 15 above 6.
[18]United Nations' Commission on International Trade law (April 2004) *Draft legislative guide on Insolvency law* par 53 available at http://www.iiiglobal.org/component/jdownloads/finish/534/539.html.
[19]Stein "The most significant changes to South Africa's company laws brought about by the Companies Act, no. 71 of 2008" Bowman Gilfillan 2011 (available at http://www.bowman.co.za/FileBrowser/ContentDocuments/NewCompanies-Act-Brochure.pdf (accessed 23-09-2013).
[20]Mongalo "An overview of company law reform in South Africa: From the Guidelines to the Companies Act 2008" 2010 *Modern Company Law for a Competitive South African Economy* 13 14.
[21]Mongalo (n 20) 14.

June 2004 a policy paper was therefore published by the DTI.[22] This contained guidelines on its corporate law reform project, where insolvency and corporate rescue were specifically stated as areas that needed to be reviewed and improved in a new company law.[23] The policy paper stated that judicial management was seldom used and even more rarely led to a successful rescue.[24] It therefore expressed the intention "to create a system of corporate rescue appropriate to the needs of a modern South African economy."[25] The document further mentioned that, by contrast, a number of countries had introduced new systems for business rescue over the past decade.[26] These systems recognised business rescue as a necessary alternative to liquidation and operated on the basis that the value of the company is greater if it or its business is preserved as a going concern, as opposed to the assets being sold off on a piecemeal basis.[27] This worldwide tendency to preserve value by providing formal corporate rescue procedures to businesses in distress, together with the fact that the creditor-friendly judicial management regime has failed as a corporate rescue regime, laid the foundation for a new debtor-friendly business rescue regime.[28]

Subsequently, this regime was finally established in February 2007 with the DTI publishing its first draft Companies Bill, describing the new business rescue provisions in Chapter 6.[29] After a lengthy process, the final Companies Bill was issued in 2008 and assented to by the President on 8 April 2009 as the Companies Act 71 of 2008.[30] Chapter 6 of the Act represents an overhaul of South Africa's former regime of judicial management of financially distressed companies. Business rescue reflects a more genuine concern for helping a struggling business back onto its feet than was evident in the former judicial management.[31]

[22]The Policy Framework for Company Law Reform was only finalised in May 2004 and was published on 23 June 2004 as "South African Company Law for the 21st Century: Guidelines for Corporate Law Reform" in Government Gazette 26493, vol 468, Notice 1183 of 2004.
[23]The Department of Trade and Industry (2004) *Discussion Paper: South African Company Law for the 21st century – guidelines for corporate law reform* par 4.6.2. (available at http://www.pmg.org.za/bills/040715companydraftpolicy.pdf). See n 2 above 1.
[24]n 2 above 3.
[25]n 23 above par 4.6.2.
[26]n 23 above par 4.6.2.
[27]Lamprecht "A case for business rescue" Accountancy SA 2010 http://www.accountancysa.org.za/resources/ShowItemArticle.asp?ArticleId=1970&Issue=1093 (accessed 23-09-2013).
[28]n 27 above.
[29]n 27 above.
[30]Mongalo (n 20) 25.
[31]Bradstreet (n 3 (2011)) 352-353.

3 PROBLEM STATEMENT

Although the debate about business rescue in South Africa is not a new one, the issue has increased significantly in recent months.[32] This issue is important as there is now a continuous view that liquidation should not be the only possibility for a financially distressed company. The courts have started dealing with the new dispensation in several recent judicial decisions and the issue now in the present study is whether the courts have succeeded in developing guidelines relating to business rescue proceedings which practitioners can follow in order to apply successfully for business rescue orders. This study is an attempt to explain the courts interpretations between the competing views of those in favour of business rescue and those who view the liquidation process as being more appropriate.[33]

The purpose of this dissertation is to analyse the provision containing the main requirements (section 131(4) of the Act) for business rescue as interpreted by the courts and as far as possible to clarify uncertainties surrounding this provision and their application. This study intends to deal with the topic by comparing the appropriateness of the business rescue regime as opposed to liquidating a business entity by looking specifically at the requirements for a successful business rescue order. Further, this study will briefly focus on the desirability and advantages of the business rescue system as a significant component of company and corporate insolvency law. A considerable part of this dissertation will be focused on the relevant decisions of the courts in South Africa. The reasoning for focusing on judicial decisions is that business rescue is a novel part of company and corporate insolvency law and thus the decisions and interpretations by the courts is of the utmost importance. Therefore, an understanding has to be achieved as to the way in which the courts have exercised their discretion and the way they are likely to exercise such a discretion in future. Business rescue as interpreted by the courts should thus be understood and expanded upon in order to ensure a consistent and independent business rescue mechanism, thereby strengthening the new dispensation.

4 METHODOLOGY

This dissertation is divided into four chapters. The aims of each chapter are as follows:

[32] n 8 above 8.
[33] Gootkin "Judgments start to flow" *Without Prejudice* (November 2011) 21.

The topic is introduced in Chapter 1 by firstly giving a general introduction to the concept of business rescue and thereafter attempting to explain the historical development to the modern business rescue regime. This chapter is concluded with certain concepts regularly used in this dissertation.

Chapter 2 contains an analysis of the need for business rescue in chapter 6 of the Act, by comparing it to the former judicial management model under the old Act.[34] This chapter concludes with the advantages and benefits of the business rescue system as an important part of corporate law.

Chapter 3 covers the judicial decisions in South Africa on business rescue. An attempt is made to give an understanding that has been gained as to the manner in which the courts have exercised their discretion in business rescue applications.

Chapter 4 concludes this dissertation, in which the conclusions of this dissertation are briefly summarised.

5 CONCEPTS

Concepts	**Shall mean**
"the Act"	The Companies Act 71 of 2008
"the old Act" or "the 1973 Act"	The Companies Act 61 of 1973
Reference to any section	Reference to the Companies Act 71 of 2008 unless otherwise specified.

[34]Company Act 61 of 1973.

CHAPTER 2: BUSINESS RESCUE

1 INTRODUCTION

1.1 The need for Business rescue

> Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.[35]

Although South Africa lags behind the rest of the world when it comes to business rescue systems, it is worth mentioning that South Africa was one of the first countries to actually introduce a business rescue regime under South African company law.[36] South African company law has made a provision for a formal corporate business rescue procedure in the form of judicial management since the start of the Companies Act 46 of 1926.[37] Although judicial management was never considered an effective rescue measure for companies in financial distress, it was nonetheless an early attempt by government to assist businesses that were in financial distress owing to mismanagement or other reasons.[38] However, in *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd,*[39] the court referred to judicial management as "a system which has barely worked since its initiation in 1926."[40] However, Loubser, in her thesis 'some comparative aspects of corporate rescue in South African company law,' disagrees. She provides that the Van Wyk de Vries Commission[41] specifically based its decision to retain judicial management in the Companies Act of 1973[42] on the fact that judicial management had been extremely successful in a number of cases.[43] In spite of the commission receiving representations for the abolition of judicial management because of a low success rate and instances of abuse, the Commission expressed the view that the notable

[35]*Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 2 SA 378 par 14.
[36]Burdette *A Framework for Corporate Insolvency Law Reform in South Africa* (2002 LLD thesis) University of Pretoria 338.
[37]n 2 above 2.
[38]Davis *et al Companies and other Business Structures in South Africa* (2011) 227.
[39]2001 1 All SA 223 (C) at 238.
[40]n 2 above 3.
[41]The Van Wyk de Vries commission of enquiry into the Companies Act (appointed in 1963 under the chairmanship of Mr Justice J Van Wyk de Vries).
[42]Companies Act 61 of 1973 (hereinafter referred to as the 1973 Act).
[43]n 2 above 3.

successes that had been achieved justified its retention. [44]

Yet, despite the above judicial management has never been widely accepted or used.[45] The Companies Act[46] however, now contains the provisions regulating the new business rescue proceedings that have replaced judicial management.[47] The new procedure is intended to give effect to one of the purposes of the Act contained in section 7. This purpose is to "provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders."[48] The minister explained the need for business rescue:

> the Act introduces the principle that the idea of business rescue schemes rather than summary liquidation are more preferable, with the idea in mind that it is better to try and save a business in distress rather than summarily close it down because creditors exceed debtors, the possibility of restoration being more equitable for all interested parties than the current somewhat immediate, maybe too early in some instances, brutal settlement and distribution process.[49]

While it is not the aim of this dissertation to consider the South African business rescue regime in any detail, a short discussion of the previous and current business rescue regimes must be stated. In this chapter, I will discuss judicial management under the old Act, followed by a discussion based on the new business rescue proceedings under the new Act. This will be followed by a discussion based on the advantages of the business rescue regime.

2 JUDICIAL MANAGEMENT UNDER THE 1973 ACT

2.1 Introduction

South Africa has traditionally relied on liquidation as a procedure performed when a company is in economic trouble and faces insolvency.[50] This places the company in a permanent position through the selling of assets and the disassembling of the company into segments.[51]

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[44]Benade "A Survey of the Main Report of the Commission of Enquiry into the Companies Act" 1970 *CILSA* 277 307.
[45]n 2 above 16.
[46]71 of 2008.
[47]n 2 above 16.
[48]s 7(k) of the Act.
[49]Stein and Everingham *The new Companies Act Unlocked* (2011) 408.
[50]Museta *The Development of Business Rescue in South African Law* (2011 dissertation) University of Pretoria 5.
[51]n 50 above 5.

These units are then sold at the best price, subsequently bringing about the end of the company through deregistration and dissolution with no option of revival or further continuance.[52]

Within the South African context not enough attention had been given to the rehabilitation, restoration or the financial health of the debtor which was necessary in South Africa's economic climate.[53] The entire process of bankruptcy has been described as "a conservative insolvency process which effects the immediate or prompts cessation of the business activities of an insolvent debtor; a sale of the assets usually in the piecemeal form, and ultimately, the distribution of the proceeds to creditors. The debtor enterprise or corporation is usually extinguished during, or as a result of the process."[54] However, alternatives in the form of financial reconstruction such as judicial management and statutory compromises found their place in South African law and legal practice.[55] Their purpose was to enable the debtor's enterprise to continue as a going concern.[56] Thus, in terms of the 1973 Act, a company facing difficulty in paying its debts, but which did not want to be liquidated, had only two alternative options.[57] Those being judicial management[58] and compromises.[59]

2.2 Judicial Management in terms of the Companies Act 61 of 1973

When any company was unable to pay its debts or was probably unable to meet its obligations and there was a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the court would, if it appeared just and equitable, grant a judicial management order in respect of that company.[60] The underlying idea was that the judicial manager, being appointed by the court, would perceive and rectify the financial problems of the company and by doing so, enable the company to have become a successful concern.[61] However, judicial management

[52]n 50 above 5.
[53]Smits "Corporate Administration - A Proposed Model" 1999 De Jure 80.
[54]Smits (n 53) 80.
[55]n 50 above 6.
[56]n 50 above 6.
[57]Sharrock *et al Hockly's Insolvency Law* (8th ed) 247.
[58]s 427 of Act 61 of 1973
[59]s 311 of Act 61 of 1973. See n 57 above 247.
[60]s 427 of the Companies Act 61 of 1973.
[61]n 57 above 247.

provided for in the 1973 Act was hardly used as it did not always achieve the desired results and many companies placed under judicial management were eventually wound up.[62]

In terms of section 427(1) of the 1973 Act, the court would have been able to grant an order placing a company under judicial management where: the company, because of mismanagement or any other cause, is unable to pay its debts or is probably unable to meet its obligations; the company has not become or has been prevented from becoming a successful concern; there is a reasonable probability that, if the company is placed under judicial management, it will be enabled to pay its debts or meet its obligations and become a successful concern; or it appears just and equitable to grant a judicial management order.[63]

The first requirement for a provisional judicial management order is that the company must be unable to pay its debts or must probably be unable to meet its obligations.[64] This is referred to as commercial insolvency and it must be proven.[65] The actual or balance-sheet insolvency test, where the liabilities of the company exceed the value of its assets, is not recognised as grounds for a successful application for judicial management order.[66] The second requirement, that the company has not been prevented from becoming a successful concern.[67] The reason for this requirement is not clear since a company that is unable to pay its debts or probably unable to meet its obligations is very obviously not a successful concern.[68] The Act also does not indicate at what point or under what circumstances a company would be regarded as not being a successful concern, and this rather vague requirement is thus an unnecessary addition to the very difficult requirements that have to be proved for a judicial management order.[69] The third requirement was that there must have been reasonable probability that it will be in the position to pay debts or meet obligations and become a successful concern.[70] A very heavy burden of proof rests on the applicant as a result of this requirement that the court must be satisfied that a reasonable probability (and not merely a possibility) exists that the company will be enabled to pay its debts or meet its obligations and

[62]n 57 above 247.
[63]Burdette "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)" 2004 16 *SA Merc LJ* 241 248.
[64]s 427(1)(a) of the 1973 Act.
[65]n 2 above 21.
[66]n 2 above 21-22.
[67]s 427(1)(a) and (b) of the 1973 Companies Act.
[68]n 2 above 22.
[69]n 2 above 22.
[70]s 427(1) of the 1973 Companies Act.

become a successful concern if placed under judicial management.[71] Therefore, a provisional judicial management order may not be used to establish whether judicial management will succeed in rescuing the company, nor will a judicial management order be granted because it would achieve a better result for creditors than an immediate winding-up order. By contrast, a better result for creditors is specifically recognised as an acceptable outcome of the new business rescue proceedings.[72] This requirement and its restrictive interpretation by the courts have been severely criticised as being too stringent and so difficult to prove that most companies with financial difficulties are precluded from obtaining a judicial management order.[73] The last requirement is that the application must be just and equitable, meaning that judicial management must be the most appropriate measure that was not extraordinary but most suitable to the situation at hand.[74] Loubser submits that this requirement is completely unnecessary considering the already strenuous requirements that an applicant for judicial management has to meet and probably contributed quite substantially to the failure of judicial management to become a popular and successful corporate rescue measure.[75] However, even if all of the above requirements have been complied with, the success of the application was still dependent upon the court's discretion. In the case of *Tenowitz v Tenny Investments,*[76] the court refused to grant a final order of judicial management, due to the fact that the applicant had not discharged the onus of proving that the company would become a successful concern in a reasonable period of time.[77]

Thus, judicial management has been termed "an abject failure,"[78] and also a "spectacular failure."[79] The following problems with judicial management as a possible business rescue method can be identified;

- The courts perceive judicial management as an extraordinary measure due to the fact that a creditor of a company that is unable to pay its debts is entitled to make use of liquidation in order to recover payment of his or her claims.[80]

[71] n 2 above 23.
[72] n 2 above 23.
[73] n 2 above 24.
[74] n 2 above 25.
[75] n 2 above 26.
[76] 1979 (2) SA 680 (E).
[77] n 50 above 10-11.
[78] n 49 above 409.
[79] Smits (n 53) 85.
[80] n 36 above 347.

- The requirement that there must be a "reasonable probability" that the company will become a successful concern. This requirement is one of the reasons why judicial management cannot be successfully implemented in South Africa and has been criticised as being outdated and unrealistic. It is submitted that the burden of proof is too onerous, and that the test should rather be one of a "reasonable possibility."[81]
- The costs incurred in running the process are so high that it does not make the process attractive for the creditors, as all the available funds are spent on the process itself.[82]
- The use of liquidators as judicial managers. Olver states that it is absurd to appoint liquidators as judicial managers, as they have been trained to liquidate companies and not save them.[83]

While the above discussion does not cover all the features involving to judicial management, it does shed some light on the problems that make judicial management an unattractive option as an effective business rescue regime in the South African context.[84] Therefore, it was necessary to create a piece of legislation that is aimed at rescuing a financially distressed company from its decline towards liquidation.[85]

3 BUSINESS RESCUE UNDER THE 2008 ACT

Looking at the business rescue procedure holistically as part of the Act, it is worth mentioning section 7(k) of the Act.[86] This section sets out one of the purposes of the Act, namely "to provide for efficient rescue and recovery of financially distressed companies in manner that balances the rights and interests of all relevant shareholders."[87]

This provision expresses the concept of business rescue. This concept of a fresh start for the company changes the ideology of placing heavy constraints on distressed company (debtors) and instead introduces a capitalist approach that rather creates the platform for re-entry into the economy and gives debtors the opportunity to re-emerge in whichever industry they were involved in, contributing positively once again to their surrounding economic sphere.[88] By

[81]n 36 above 347.
[82]n 36 above 348.
[83]Olver "judicial Management: A case for Law Reform" 1986 *THRHR* 84 87. See n 35 above 348.
[84]n 36 above 350.
[85]Bradstreet (n 3 (2011)) 352.
[86]Meskin *et al Henochsberg on the Companies Act 71 of 2008* (2013) 445.
[87]s 7(k) of the Act.
[88]n 50 above 22-23.

means of improved business rescue procedures, distressed companies now have the opportunity of maintaining their status as going concerns in terms of section 7(c) of the Act.[89] This will ultimately increase businesses in South Africa, improving investments and trade through the consistency and reliability of the companies that are in harmony with international standards and which will simultaneously ensure that jobs are kept and economic and social benefits for all are maintained by the community as seen in section 7(d) of the Act.[90]

Chapter 6 of the Act introduces principles relating to business rescue that bring us into line with international principles of business rescue as they exist in foreign jurisdictions.[91] Chapter 6 of the Act provides South Africa with a new mechanism whereby companies can recover from a financially distressed situation.[92] A "financially distressed" situation would occur when:

- it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
- it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.[93]

The term "business rescue" is defined in section 128(1)(b) of the Act as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for: (i) the temporary supervision of the company and of the management of its affairs, business and property; (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a plan to rescue the company by 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 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.[94]

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[89]n 50 above 23. See s 7(c) provides: "The purposes of the Act are to "promote innovation and investment in the South African markets."
[90]n 50 above 23. See s 7(d) which provides that the purposes of the are to "reaffirm the concept of the company as a means of achieving economic and social benefits."
[91]Levenstein "Help is at hand" *Without Prejudice* (November 2008) 12.
[92]Meskin *et al Insolvency Law* (2013) par 18.1. See n 91 above 12.
[93]n 91 above 12. See also s 128(1)(f) of the Act.
[94]s 128(1)(b) of the Act.

The company or affected persons[95] can apply to the court for business rescue proceedings. The whole process is done through a business rescue practitioner.[96] The practitioner investigates the company's affairs and financial situation and after having done so, considers whether there is any reasonable prospect of the company being rescued.[97]

Thus, of great significance in terms of this new concept is section 131(4)(a), which provides that after conidering a business rescue application, the court may make an order placing the company under supervision and commencing business rescue proceedings. The court must be satisfied that:

- The company is financially distressed;
- The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract with respect to employment- related matters;
- It is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the company.[98]

Thus, in order to qualify for business rescue, the company must be financially distressed. However, the main requirement is that there be a reasonable prospect for rescuing the business. The court observed in *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd,*[99] "at the time of the court application, the provision which is directly relevant is section 131. This section is the source of the court's power to make a rescue order. On my interpretation of section 131(4)(a) the prerequisites for a rescue order are that;

- any one of sub-sections (i), (ii) or (iii) must be fulfilled (above); and

- the court must be satisfied that there is a reasonable prospect of rescuing the company concerned."[100]

Thus, the requirement for a reasonable prospect of rescuing the company must be present, irrespective of which of sub-sections (i), (ii) or (iii) is applicable.[101]

[95]In terms of s 128(1)(a) an "affected person" in relation to a company, means (i) a shareholder or creditor of the company; (ii) any registered trade union representing employees of the company and; (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.
[96]n 91 above 13.
[97]n 91 above 14.
[98]s 134(4)(a) of the Act.
[99]2012 5 SA 515 (GSJ).
[100]*AG Petzetakis* case (n 99) par 13.

The Companies and Intellectual Property Commission (CIPC) has indicated that the number companies that have taken the decision to apply for the commencement of business rescue proceedings remains an ongoing process and one which demonstrates that business rescue could possibly offer an alternative to liquidation.[102] It has become evident that business rescue is an alternative option for companies facing insolvency.[103] Rather than being placed in liquidation, it provides an alternative scheme for creditors to be settled within a reasonable period and in terms of the business rescue plan.[104]

Business rescue as a tool for ailing companies is a great improvement in comparison to judicial management.[105] It brings South Africa into line with foreign jurisdictions achieving its purpose in corporate rescue of businesses in financial distress with the view of maximising returns for creditors, ensuring there is preservation of employment contracts, the creation of goodwill and the sustenance of the company as a going concern.[106]

4 ADVANTAGES OF BUSINESS RESCUE

The business rescue procedure is a process that assists the continued existence of financially distressed but sustainable companies. This has proved to be valuable in that the number of liquidations in August this year (2013) dropped by a 15.8% compared to the same period last year (2012).[107] Harris, a director of the litigation department at corporate law firm Bowman Gilfillan, said the decline has indicated that more companies are benefitting from business rescue laws that came into effect in May 2011. He said further that the "fact that the decrease in the number of liquidations has been driven mainly by voluntary liquidations is indicative that the business rescue procedure is taking hold and that there has been an increase in the number of companies seeking assistance."[108] Business rescue thus proves to be a viable alternative to liquidating a business entity. As Harris explained "business rescue aims at

[101] *AG Petzetakis* case (n 99) par 14.
[102] Levenstein "Sink or swim? Business Rescue… the art of treading water" *Without Prejudice* (March 2012) 12 13.
[103] n 102 above 13.
[104] n 102 above 13.
[105] n 50 above 46.
[106] n 50 above 46.
[107] according to figures released by Stats SA (available at: http://www.statssa.gov.za/publications/P0043/P0043August2013.pdf (accessed 06-10-2013).
[108] Harris "Business rescues surge, liquidations decline" Bowman Gilfillan 2012 (available at http://www.moneyweb.co.za/moneyweb-mybusiness/business-rescues-surge-liquidations-decline (accessed 25-11-2013).

avoiding liquidations and job losses by providing businesses with protection against creditors who may want to apply for liquidation. It is an opportunity to reorganise and restructure distressed but viable companies in order to avoid liquidation."[109] There are certain advantages that have been advanced in support of the business rescue regime.

4.1 Business rescue saves jobs

One of the advantages of a successful corporate rescue is that it prevents or limits job losses especially in a country such as South Africa where unemployment figures are unacceptably high.[110] Although, in any rescue attempt, some retrenchments are inevitable as the business has to cut costs to survive, however, business rescue at least tries to save some jobs.[111] The court explained in *Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Limited,*[112] that business rescue represents a shift from the interests of creditors to balancing a wider range of often competing interests including those of employees and shareholders. The court stated that a court must take into account the circumstances of each case in assessing whether there is a reasonable prospect of rescuing a company. The court held that the position of employees as applicants is relevant both when the court considers whether there is a reasonable prospect of rescue as well as in exercising the balancing of rights in order to determine whether it is just and equitable to make an order.[113] In this case, the applicant employees had been working and living on the farm for relatively long periods and they seemed committed to contributing their skills to rescuing the business. Thus the court held that although saving jobs is not one of the stated objects of the Act, courts must take into consideration whether there are employees who could benefit.

It is also important to look at what happens at an employees contract once a business rescue application has been ordered. If a company enters liquidation, all contracts of service with its employees are automatically and immediately suspended.[114] However, during business rescue proceedings, employees of the company will continue to be employed on the same terms and

[109]n 108 above.
[110]n 2 above 1.
[111]Loubser "Tilting at windmills? The quest for an effective corporate rescue procedure in South African law" *Inaugural speech* (2011) 17 (available at http://uir.unisa.ac.za/bitstream/handle/10500/5218/Inaugural%20lecture_Anneli%20Loubser.pdf).
[112]Unreported 8 May 2012 (GNP) (6418/2011,18624/2011 and 66226/2011).
[113]The *Employees Solar Spectrum* case (n 112) par 18 and 19.
[114]n 111 above 18.

conditions as before.[115] Employment contracts are also specifically excluded from a business rescue practitioners power to suspend, or apply to court for the cancellation of any agreement or part thereof to which the company is a party.[116] Any retrenchments contemplated in a business rescue plan are subject to section 189 and 189A of the Labour Relations Act 66 of 1995.[117] This in turn increases confidence in the market and promotes economic stability and growth.

4.2 Creditors get a better return on their claims than in immediate liquidation

As our legislature has inserted in the definition of 'business rescue' an alternative goal for business rescue, that being for a better return for the company's creditors, if it cannot achieve the continued existence of the company on a solvent basis.[118] This is based on the notion that even if the company cannot be rescued, its business or part thereof can be sold as a going concern at a higher price than in a sale after the company has been put into liquidation.[119] The thinking is that to preserve the business coupled with the experience and skill of its employers may, in the end prove to be a better option for creditors in securing full recovery from the debtor.[120]

The argument in favour of a better return for creditors is based on the fact that the new dispensation, with its primary goal of preserving the business, seems to offer creditors a greater prospect of recovering in full and is perhaps therefore better aligned with creditors' primary interest in obtaining full recovery.[121] The advantage is that not only does the primary aim of maximising the likelihood of the company's continued existence on a solvent basis therefore serve creditors' interests indirectly, but achieving a better return for creditors is also explicitly provided for in the secondary aim.[122] Business rescue is generally attractive to creditors because it aims to achieve a result that is more favourable for them than immediate liquidation.[123] As Rajak and Henning stated "it is frequently the case that a creditor will

[115]Sharrock *et al Hockly's Insolvency Law* (9th ed) 282. See s 136(1)(a) of the Companies Act 71 of 2008.
[116]n 111 above 18. See s 136(2) of the Companies Act 71 of 2008.
[117]n 115 above 282.
[118]n 111 above 13.
[119]n 111 above 14.
[120]*Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2012 3 SA 273 (GSJ) par 12.
[121]Bradstreet (n 3 (2011)) 356.
[122]Bradstreet (n 3 (2011)) 356.
[123]Bradstreet (n 3 (2011)) 356.

benefit far more from having the debtor back in the marketplace than from suing the debtor into extinction."[124]

The above can be seen in *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors intervening).*[125] The court regarded the goal of ensuring a better return for credtiors as an independent alternative goal that may be persued for its own sake.[126]

4.3 The suspension and possible cancellation of contractual obligations

While business rescue proceedings are in place, the business rescue practitioner may suspend, entirely, partially, or conditionally any agreement or provision of an agreement to which the company was a party at the commencement of the proceedings, other than an employment contract.[127] The Act provides that where the practitioner exercises the power, the other party to the agreement may assert only a claim for damages against the company.[128] The practitioner may also approach the court for the complete, partial or conditional cancellation of any obligation due by the company, on terms that are just and reasonable in the circumstances.[129]

Nevertheless, in O*akdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events & Exhibitions (Pty) Ltd & Others*,[130] the court described the business rescue practitioner's ability to suspend any obligation of a company under section 136 as "contentious."[131] The court further stated that it may lead to "cherry picking" where the practitioner selects certain obligation best suited to the Company for suspension.[132]

However, despite the above case, I believe that this proves to be an advantage for the ailing company, as the provisions of section 136(2) allow the company, through the business rescue

[124]Rajak and Henning "Business rescue for South Africa" (1999) 116 *SALJ* 262 286.
[125]2011 5 SA 422 (GNP).
[126]see ch 3 below.
[127]n 115 above 282.
[128]n 115 above 282. See s 136(3) of the Act.
[129]n 115 above 282. See s 136(2)(b) of the Act.
[130]2012 3 SA 273 (GSJ).
[131]*Oakdene Square Properties* (GSJ) case (n 130) par 49.
[132]*Oakdene Square Properties* (GSJ) case (n 130) par 49.

practitioner, to extricate itself, whether temporarily or permanently, from onerous contractual provisions that are preventing it or may prevent it, from becoming a successful concern.[133]

4.4 A moratorium in respect of creditors

The commencement of business rescue proceedings results in a general moratorium on all legal proceedings against the company.[134] The reasoning here is that the company needs breathing space to develop a rescue plan without the constant stress from creditors.[135] During business rescue proceedings, no legal proceedings against the company may be commenced or proceeded with in any forum, except with the written consent of the business rescue practitioner or with the leave of the court.[136]

This shows to be an advantage for the debtor company, as the purpose of section 133 of the Act, is to offer the company some breathing space in order to allow its affairs to be restructured in such a way as to allow it to continue operating as a successful concern.[137] In *Investec Bank Ltd v Bruyns,*[138] the court described the moratorium granted by section 133(1) of the Act as a general provision that affords the company protection against legal action on claims in general.[139] The court went further and held "in my view the statutory moratorium in favour of a company that is undergoing business rescue proceedings is a defence *in personam.* It is a personal privilege or benefit in favour of the company."[140]

Consequently, the moratorium on legal proceedings by creditors is a vitally important aspect in the business rescue mechanism as it allows the court to hear the business rescue application and it allows the business rescue practitioner to function effectively.[141]

[133]n 92 above par 18.9.2.
[134]n 115 above 280. See s 133 of the Act.
[135]n 92 above par 18.6.
[136]n 115 above 280. See s 133(1) of the Act.
[137]n 92 above par 18.6.
[138][2012] JOL 28420 (WCC).
[139]*Investec Bank* case (n 138) par 16.
[140]*Investec Bank* case (n 138) par 18.
[141]Beukes "Busniess rescue and the moratorium on legal proceedings" *De Rebus* (June 2012) 36.

CHAPTER 3: ROLE OF COURTS

1 INTRODUCTION

The concept of business rescue had been introduced into our law for the first time in Chapter 6 of the Act. There have been several matters that have been brought before the High Court where the courts have been called upon to interpret and apply some of the provisions in section 131(4).[142] When considering whether a company should be placed under business rescue there appears to be conflicting interpretations in determining whether there is a reasonable prospect for rescuing the company. It seems as if the standard of what is expected from an applicant when applying to court for the business rescue of a company therefore remains unclear and the threshold of a reasonable prospect for rescuing the company is yet to be determined.

2 INTERPRETATION OF THE COURTS

2.1 The meaning of "for rescuing the company"

Although the purpose of business rescue proceedings is stated as being "preceedings to facilitate the rehabilitation of a company," no definition of the term "rehabilitation" is provided in the Act.[143] The term would appear to intimate the recovery of the company to complete solvency (this is reinforced by the use of the words "continuing in existence on a solvent basis" in section 128(b)(iii).[144] However, on closer examination of the remainder of the definition it is clear that if the ultimate rescue of the company is not possible then an outcome that ensures a higher return for creditors than they would have received under liquidation, is also acceptable.[145]

Chapter 6 of the Act has clearly been designed to prevent the demise, through wining-up, of viable companies by making provision for their possible rescue.[146] If a plan cannot be devised to rescue the company under the provisions of chapter 6, then a plan that would achieve a

[142] *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2013 4 SA 539 (SCA) par 5.
[143] n 86 above 446.
[144] n 86 above 446.
[145] n 86 above 446.
[146] n 86 above 446.

better return for a company's creditors than a payment under the rules relating to winding-up, is the next objective.[147]

The most reecnt case dealing with Chapter 6, is the *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*[148] case. Brand AJ was required to consider a compulsary business rescue application in terms of section 131 of the Act. This case is of particular relevance to creditors who may have been concerned about a loss of protection under the new system of business rescue.[149] Whereas judicial management and liquidation have in the past been implemented disproportionately in the favour of creditors, the new business rescue procedure seeks to protect a wider range of interests in the business rescue process.[150] The *Oakdene Square Properties* (SCA) judgment is of particular interest because it breaks the preconceived, perhaps misunderstood, notion of what business rescue is supposed to achieve.[151]

Business Rescue attempts to secure and balance the opposing interests of creditors, shareholders and employees.[152] It encapsulates a shift from creditors' interests to a broader range of interests.[153] The thinking is that to preserve the business coupled with the experience and skill of its employers may, in the end prove to be a better option for creditors in securing full recovery from the debtor.[154]

In terms section 128(1)(b) of the Act, (as mentioned above) there are two goals for commencing business rescue proceedings. The primary goal is to is to facilitate the continued existance of the company and the secondary which is provided 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 creditors or the shareholders of the company than would result from immediate liquidation.[155]

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[147]n 86 above 446.
[148]2013 4 SA 539 (SCA).
[149]Bradstreet "Business rescue proves to be creditor-friendly: CJ Claassen J's analysis of the new business rescue procedure in Oakdene Square Properties" 2013 130 *SALJ* 44.
[150]Bradstreet (n 149 (2013)) 44.
[151]Bradstreet (n 149 (2013)) 44.
[152]Bradstreet (n 3 (2011)) 355. *Oakdene* (GSJ) par 12.
[153]*Oakdene Square Properties* (GSJ) case (n 130) par 12.
[154]*Oakdene Square Properties* (GSJ) case (n 130) par 12.
[155]*Oakdene Square Properties* (SCA) case (n 148) par 23.

Despite the name "business rescue," the purpose of business rescue is not necessarily to prevent a company or corporation from being wound up.[156] Even if the business cannot be restored to a solvent and profitble status the return to creditors in the long run will be much higher.[157] As Smits stated:

> Mordern 'corporate rescue' and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judical banckruptcy procedures, reorganisation seeks to maximise, preserve and possibly even enhance the value of a debtor's busniess enterprise, in order to maximise payment to the creditors of the distressed debtor.[158]

One of the central debates found in *Oakdene Square Properties* (SCA) is what would constitute 'rescuing the company' within the contemplation of section 131(4)(a).[159] One of the significant debates was whether a business rescue application can succeed where the proposed rescue plan provides for the secondary goal only.[160] In other words, whether the requirement of 'rescuing the company' as contemplated in s 131(4)(a) is satisfied where it is clear from the outset that the company can never be saved from immediate liquidation and that the only hope is for a better return than that which would result from liquidation.[161] In the *AG Petzetakis* case,[162] this question was answered in the negative. The court held, "in my view the status of the alternative object in the South African Companies Act depends primarily on an interpretation of that Act. The creation of the alternative object will probably give rise to more litigation. It is, for example, strange to create an object for a new remedy in a definition section. More importantly, it is difficult to understand the reason behind the disjunctive reference to creditors or shareholders and the absence of a reference to employees in that definition."[163] The court held in the *AG Petzetakis* case that, "section 131(4) does not incorporate the alternative object of the rescue plan which is referred to in section 128 namely, a plan which could result in a better return for creditors or shareholders than would result from immediate liquidation. It seems that the intention of the legislature on this point is as follows: (i) the requirements for the granting of a section 131 rescue order include that the company under consideration must have a reasonable prospect of recovery and (ii) once a

[156]Burdette (n 63) 243.
[157]Burdette (n 63) 244.
[158]Smits (n 53) 83.
[159]*Oakdene Square Properties* (SCA) case (n 148) par 22.
[160]*Oakdene Square Properties* (SCA) case (n 148) par 23.
[161]*Oakdene Square Properties* (SCA) case (n 148) par 23.
[162]*AG Petzetakis* case (n 99) par 12.
[163]*AG Petzetakis* case (n 99) par 12.

company is under business rescue, its rescue plan may be aimed at the alternative object, namely a better return than the return of immediate liquidation."[164] It would seem that the court here favoured a secondary effect, rather than a primary aim.[165]

This approach was also followed in *Anthonie Welman v Marcelle Props 193 CC*.[166] The court said that "the issue for determination in this application is whether the development and implementation of the business rescue proceedings would maximise the likelihood of the Close Corporations' continued existence on a solvent basis thereby resulting in a better return for their creditors or shareholders than the pending liquidation proceedings."[167] This court thus favoured the approach in the *AG Petzetakis* case rather than a primary object.[168]

However, in *Gormley v West City Precinct Properties (Pty) Ltd*,[169] the alternative object was stated in the positive as the court held "a viable rescue plan must contain facts to show that if the intended resuscitation of the company should fail, the creditors will not be worse off."[170] In *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors intervening)*,[171] the court gave an affirmative answer to this question. It regarded the goal of ensuring a better return for creditors as an independent alternative goal that may be pursued for its own sake.[172] This view was further echoed in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments*.[173] The court noted that if the aim is simply to secure a better return for creditors, it must be made clear what resources will be made available to the company and on which terms because, 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.[174]

Moreover, in *Oakdene Square Properties* (SCA), the court accepted that the secondary goal of business rescue is an independent rather than an alternative object. The court held that business rescue means to facilitate 'rehabilitation,' which in turn means the achievement of one of two goals: (a) to return the company to solvency or (b) to provide a better deal for

[164] *AG Petzetakis* case (n 99) par 17.
[165] n 86 above 468.
[166] (33958/2011) [2012] ZAGPJHC 32 (GSJ) (24 February 2012).
[167] *Welman* case (n 166) par 12.
[168] n 86 above 468.
[169] 19075/11 (WCC) (18 April 2012).
[170] *Gormley* case (n 169) par 13. See n 86 above 468.
[171] 2011 5 SA 422 (GNP).
[172] n 115 above 276.
[173] 2012 2 SA 423 (WCC).
[174] n 115 above 276.

creditors and shareholders than what they would receive through liquidation.[175] The court accordingly held that that the achievement of any one of the two goals referred to in section 128(1)(b) would qualify as business rescue in terms of section 131(4).[176] In *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*,[177] the court saw it as two independent objects of "rescuing" a company because:

> it is evident in the provisions of section 131(4) that a person making an application for business rescue in terms of section 131(1) of the Act must satisfy the court that there is a reasonable prospect that the company can be rescued by being placed under supervision.[178] The evidence that will suffice to meet this requirement will depend on the object of the proposed business rescue, whether it is to achieve the continued existence of the company on a solvent basis, or alternately to allow the company's business to be managed for an interim period to allow for a better return for the company's creditors.[179]

The importance of taking into account the interests of creditors as well as all other stakeholders is highlighted in the Act, namely, section 7(k). This section states that one of the purposes of the Act is "to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders." According to *Southern Palace Investments*, "business rescue does, however, not necessarily entail a complete recovery of the company in the sense that, after the procedure, the company will have regained its solvency, its business will have been restored and its creditors paid. There is also the further recognition that even though the company may not continue in existence, better returns may be gained by adopting the rescue procedure."[180]

It was further observed in *Breedt v P G Breedt Boorkontrakteurs* CC,[181] in which Hughes AJ said that in an application to place a company under supervision and commence business rescue proceedings in which the object is to secure a better return than would be obtained under immediate liquidation, "the applicant would be required to set out in the founding papers a reasoned factual basis for the alternative scenarios that the court will have to consider, and lay a cogent foundation to enable the court to determine that there is a reasonable prospect that the better return evident on one of those scenarios can be

[175] *Oakdene Square Properties* (SCA) case (n 148) par 26.
[176] *Oakdene Square Properties* (SCA) case (n 148) par 26.
[177] 2012 2 SA 378 (WCC).
[178] n 86 above 469.
[179] n 86 above 469.
[180] *Southern Palace* case (n 173) par 2.
[181] [2013] ZAGPPHC 17.

achieved."[182] The court went on to say that "vague and speculative averments in the founding papers will not suffice."[183] The court concluded that the application to commence business rescue proceedings was flawed and lacking in essential averments or was vague on pertinent issues.[184] The court accordingly dismissed the application.[185]

Therefore, 'rescuing' the business does not mean salvaging the wreck at all costs, but rather making an appropriate use of the business rescue procedure to facilitate an outcome that is in the interests of all stakeholders.[186] Creditors thus appear to find protection in the very definition of business rescue in section 128(1)(b) of the Act, where promoting their interests is included in the procedure's secondary goal.[187] Consequently, if business rescue is able to attain a broader purpose than that which is determined by a literal meaning of the term, courts ought to allow that purpose in so far as it aligns with the purposes of the Act and justly balances the interests of the relevant stakeholders.[188] Accordingly, 'rescue' must also be understood to encompass cases where the debtor's recovery is partial but where the overall result is one of greater benefit to the various interests concerned than would have arisen on liquidation.[189]

2.2 A reasonable prospect

The courts have not been easily persuaded to allow ailing companies into the business rescue process. Before the court will grant an oder, placing the company under supervision under the business rescue regime, the court must be satisifed that there is a 'reasonable prospect' for rescuing the company. The courts have, unless a proper and motivated business rescue plan is pleaded which demonstrates a reasonable prospect for rescuing the company, consistently dismissed the business rescue application and liquidated the company, relief being granted under section 131(4)(b).[190]

Nevertheless, the courts have a discretion in this regard and may order business rescue proceedings provided that the requirements in terms of section 131(4)(a) are satisfied. As the

[182] *Breedt* case (n 181) par 19.
[183] *Breedt* case (n 181) par 20.
[184] *Breedt* case (n 181) par 17.
[185] *Breedt* case (n 181) par 18.
[186] Bradstreet (n 149 (2013)) 51.
[187] Bradstreet (n 149 (2013)) 51.
[188] Bradstreet (n 149 (2013)) 52.
[189] Rajak and Henning (124) 277.
[190] Braatvedt "A new direction" *Without Prejudice* (November 2012) 22.

court observed in the *AG Petzetakis* case "at the time of the court application, the provision which is directly relevant is section 131. This section is the source of the court's power to make a rescue order. On my interpretation of section 131(4)(a) the prerequisites for a rescue order are that;

- any one of sub-sections (i), (ii) or (iii) must be fulfilled (above); and
- the Court must be satisfied that there is a reasonable prospect of rescuing the company concerned."[191]

The meaning of the words "reasonable prospect" in the context of section 131(4) and what is required to demonstrate this requirement, have been the subject of conflicting decisions.[192] Some cases have set a high level of proof for the granting of a compulsary business rescue order, while other matters have taken a more flexible approach.[193]

In *Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd,*[194] the term "prospect" was defined. The court stated "the on line Oxford English dictionary defines 'prospect' as both 'the possibility' or 'likelihood' of some future event occurring. The definition of 'possibility' in turn is 'a thing that may happen or be the case' 'likelihood' is defined as 'the state or fact of something's being likely, probable.'[195]

Business rescue is only available to a company if there is a reasonable prospect that the company can be rescued through the business rescue proceedings.[196] If there is no reasonable prospect for success then the court may set the business rescue application aside and in doing so, may make other orders, for instance placing the company under liquidation.[197] It is unfortunate that Chapter 6 does not define or clarify what is meant by the term 'reasonable prospect of rescuing the company'.[198] However, the meaning of a 'reasonable prospect' has been decided in a number of cases such as *Southern Palace Investments*, where the court held that a 'reasonable prospect' for rescuing the company indicates something less than a

[191] *AG Petzetakis* case (n 99) par 13.
[192] n 92 above par 18.4.3.
[193] n 92 above par 18.4.3.
[194] 2012 4 All SA 590 (WCC).
[195] *Zoneska* case (n 194) par 39.
[196] see s 131(4)(a)(iii).
[197] Rushworth "A critical analysis of the business rescue regime in the Companies Act 71 of 2008" *Modern Company Law for a Competitive South African Economy* 375 381; see s 131(4)(b)).
[198] n 86 above 463.

'reasonable probability,' [199] which was required for placing a company under judicial management under the 1973 Act.[200] Thus, one main reason for the failure of judicial management under the old Act is due to the high threshold set by the legislature and thus the threshold of a 'reasonable prospect' under the new Act is easier to satisfy.[201]

The court held in *Southern Palace Investments* that in order to succeed with a business rescue application, the applicants should give "some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company of (i) the likely costs of rendering the company able to commence with its intended business or to resume the conduct of its core business and (ii) the likely availability of the necessary cash resources in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed."[202] However, the test laid down in *Southern Palace Investments* has not been universally accepted. Henochsberg on the Companies Act stated the strict requirements found in *Southern Palace Investments*, this will probably mean the end for business rescue in South Africa and probably will become as ineffective as judicial management.[203]

The Supreme Court of Appeal (SCA) in *Oakdene Square Properties* agreed with the court *a quo* that the appellants failed to show a 'reasonable prospect' of rescuing the company.[204] The South Gauteng High Court in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kayalami) (Pty) Ltd and others*,[205] refused the application to place the company under business rescue and held that the lack of recent financial statements would make it improbable for the business practitioner to successfully restructure the affairs of the company.[206] According to Claassen J in the court *a quo*, "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 131 of the Act."[207] This is further emphasised by Loubser who expressed the view that it would be "disastrous for the new procedure" if the

[199] see s 427 of the 1973 Companies Act.
[200] *Southern Palace* case (n 173) par 20.
[201] Kleitman and Masters "Better returns for creditors – business rescue" *Without Prejudice* (August 2013) 34 35.
[202] *Southern Palace* case (n 173) par 24.
[203] n 86 above 466.
[204] n 201 above 35.
[205] 2012 3 SA 273 (GSJ).
[206] *Oakdene Square Properties* (GSJ) case (n 130) par 49.
[207] *Oakdene Square Properties* (GSJ) case (n 130) par 18.

same high threshold test used for a judicial management order of "reasonable probability" is to apply to this provision.[208]

The SCA however held that it would not be practical nor rational to be rigid about the way in which the appellant must show a reasonable prospect in every case.[209] Nevertheless, the court stated that some reported decisions laid down that the applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement.[210] However, the court held that the applicant is not required to set out a detailed plan. It was held, that to expect an applicant to already have a business rescue plan in place, at the time the court is approached for an order placing a company under supervision is, to use the language adopted by Eloff J at paragraph 18 in *Southern Palace Investments* "to place the cart before the horse."[211] The responsibility of developing a business rescue plan is left to the business rescue practitioner after proper investigation in terms of section 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in section 128(1)(b).[212]

This is further illustrated in *Employees of Solar Spectrum trading (Pty) Ltd v Afgri Operations Ltd and Another; In re Afgri Operations Ltd v Solar Spectrum Trading (Pty) Ltd,*[213] the court held that the responsibility for developing a business rescue plan is that of the business rescue practitioner and the Act clearly contemplates this happening only after an application for business rescue proceedings has been granted.[214] The court went further and held that to suggest that such a plan should be a prerequisite in meeting the requirements of reasonable prospects, would not only be unduly onerous to an affected person who is an applicant in business rescue proceedings but would also have the effect of importing a requirement that the legislature did not envisage regard being had to the architecture of the Act as a whole.[215] In *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Another (Companies and Intellectual Property Commission and Another Intervening),*[216] the court stated that in regard to the level of proof required in order to show

[208]*Oakdene Square Properties* (GSJ) case (n 130) par 18.
[209]*Oakdene Square Properties* (SCA) case (n 148) par 30.
[210]see for example *Southern Palace Investments 265 (Pty) Ltd* 2012 2 SA 423(WCC) at par 24-25; *Koen v Wedgewood Village Golf Country Estate (Pty) Ltd* 2012 2 SA 378 (WCC) at par 18-20. See also *Oakdene Square Properties* (SCA) case par 30.
[211]*Oakdene Square Properties* (SCA) case (n 148) par 31. See n 86 above 465.
[212]*Oakdene Square Properties* (SCA) case (n 148) par 31.
[213]Unreported 8 May 2012 (GNP) (6418/2011,18624/2011 and 66226/2011).
[214]n 92 above par 18.4.3.
[215]n 92 above par 18.4.3.
[216](21857/2011, 2106/2012) [2012] ZAWCHC 139; 2012 5 SA 497 (WCC); [2012] 4 All SA 103 (WCC) (12 June 2012).

that there is a reasonable prospect of rescuing the company, the judge held that "in my view a court should not set the bar at such a height that the applicant for business rescue has little chance of clearing it and persuading the court to exercise its discretion to grant supervision."[217]

According to *AG Petzetakis,* the court found that based on the facts available to the court, the company was beyond rescue unless it received a large financial injection but there was no indication present that such a financial injection would be received.[218] The court therefore held that the papers do not demonstrate the existence of a reasonable prospect that Petzetakis Africa can successfully be rescued and also does not demonstrate a reasonable prospect of a rescue plan which will achieve a better return than immediate liquidation.[219] Therefore the court ruled against the company going into business rescue.[220]

The courts further observed in the *Koen* case, that a person who applies for a company to be put under supervision in order that business rescue proceedings can commence, "must satisfy the court that there is a reasonable prospect that the subject company can be rescued in the relevant sense by being placed under supervision."[221] In order to establish such a 'reasonable prospect', the court went further and stated that, "the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved."[222] The court added that "vague and speculative averments" in this regard would not suffice.[223] The court accordingly said that the applicants:

> have fallen woefully short of furnishing the court with the material required to make the assessment of whether a reasonable prospect of business rescue succeeding exists. Their case is manifestly dependent on the provision by the mystery potential investor of the means to enable a business rescue practitioner to draw up a feasible rescue plan. What those means might be, or on what terms and conditions they might become available, are as much a mystery as the identity of the party which might provide them.[224]

The court thus dismissed the application to place the company under business rescue proceedings.

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[217] *Nedbank* case (n 216) par 38.
[218] *AG Petzetakis* case (n 99) par 19.
[219] *AG Petzetakis* case (n 99) par 19.
[220] *AG Petzetakis* case (n 99) par 34.
[221] *Koen* case (n 177) par 17.
[222] *Koen* case (n 177) par 17.
[223] *Koen* case (n 177) par 18.
[224] *Koen* case (n 177) par 23.

Furthermore, in the case of *Propspec Investments v Pacific Coasts Investments*,[225] the court concluded that it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard.[226] The court held that "vague averments and mere speculative suggestions will not suffice in this regard. 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."[227] The judge went further and said, "in my view 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. In my judgment a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds."[228] In my opinion, I believe that this case sets the most realistic requirements to achieve a 'reasonable prospect'.

In the *Swart* case, court found that it was common cause that the business was financially distressed but questioned whether there was a reasonable prospect for rescuing the Company. The court held that despite that the respondent had been in financial distress for at least a year, the respondent refused to sell any assets, incurred further debts, made loans and refused to sell any assets to make payment to his creditors. Thus the court correctly concluded that there was no reasonable prospect of rescuing the company.[229] The court in arriving at its decision concluded that the respondent was hopelessly insolvent and that the initiation of business rescue proceedings would not result in creditors achieving better dividends.[230]

Importantly, in *Newcity Group (Pty) Ltd v Pellow NO and Others; China Construction Bank Corporation v Chrystal Lagoon Investments 53 (Pty) Ltd and Others,*[231] the court referred to both the *Southern Palace Investments* and the *Propspec* matters when addressing what it termed the "conflicting views on how a court should determine whether there is a reasonable prospect for rescuing a company."[232] While agreeing that the threshold should not be placed too high to prevent successful business rescue applications, the court nonetheless stated that the guidelines laid down by Eloff AJ in the *Southern Place Investments* case could not be

[225]2013 1 SA 542 (FB).
[226]*Propspec* case (n 225) par 15.
[227]*Propspec* case (n 225) par 11.
[228]*Propspec* case (n 225) par 12.
[229]*Swart* case (n 125) par 40.
[230]*Swart* case (n 125) par 30.
[231](12/45437, 16566/12) [2013] ZAGPJHC 54 (28 March 2013).
[232]n 92 above par 18.4.3.

faulted and that the court found them "well considered and helpful."[233] The court 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."[234]

Thus, the court is vested with a discretion to grant or refuse the relief sought. For example, in *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd intervening)*,[235] the applicant successfully applied for an order under section 131(4)(a) of the Act to place Pinnacle Point Group under supervision and for business rescue proceedings to commence. The courts discretion was further seen in *Van Niekerk v Seriso 321 CC and Another*.[236] The Court held that there was a reasonable prospect that the business rescue practitioner would be able to raise a further bond to pay First Rand Bank the amount due in terms of the surety agreements to enable the respondent to continue operating and generating an income for the respondent or to sell the property at a market related price thereby being in a position to pay all creditors in full.[237]

Accordingly, it is clear from judgments above that the South African courts are embracing a realistic pragmatic approach and is not open to being influenced by vague and speculative averments as to the prospects of restoring an ailing business entity to solvency.

Therefore, financially distressed companies that are genuinely able to make a noticeable and helpful difference to all stakeholders through business rescue proceedings should apply the business rescue regime. However, it seems that our courts are not easily persuaded to grant these applications.

2.3 Financially distressed

Only companies that are financially distressed are capable of being placed under supervision in terms of the business rescue provisions of chapter 6 of the Act.[238] According to the definition in the Act, "financially distressed" in reference to a particular company at any particular time, means that-

[233] *Pellow* case (n 231) par 14. See n 92 above par 18.4.3.
[234] *Pellow* case (n 231) par 14. See n 92 above par 18.4.3.
[235] 2011 5 SA 600 (WCC) (29 February 2012).
[236] (952/11, 23929/11) [2012] ZAWCHC 63 (20 March 2012).
[237] Van *Niekerk* case (n 236) par 33.
[238] n 92 above par 18.3.5.

- it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
- it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.[239]

The original definition, which was provided in the Companies bill 2008, also contained as a first possibility that a company would be financially distressed if it is unable to pay its debts as they fall due and payable and its liabilities exceed its assets.[240] However, Loubser, submitted to the Portfolio Committee on Trade and Industry that there was no apparent reason why a double insolvency test should be set when the resolution or the court order was based on the present financial situation of the company, but only one of the two was required when it was based on the company's expected situation in the six months immediately following.[241] Loubser submitted that, if a company is at present unable to pay its debts, it is also reasonably unlikely to be able to pay all of them as they fall due in the next six months and the company would therefore automatically qualify under the second option.[242] Loubser stated further that, even more a viable and healthy company may experience an unexpected and temporary cash-flow problem, possibly caused by external factors. Although it would be unable to pay its debts, such a company would not be able to use business rescue proceedings to obtain protection against claims by creditors while its problems were being solved, because its liabilities would not exceed its assets, thus not meeting the double insolvency test.[243] Loubser further stated that a company should be allowed to enter business rescue proceedings at the first signs of financial problems and insisting that it must be actually insolvent as well as unable to pay its debts forces the company to wait until its chances of being successfully rescued have been greatly reduced.[244] Loubser's submission was accepted by the Portfolio Committee on Trade and Industry and as a result, the first option in the test for financial distress, based on the company's present financial situation was removed.[245] However, Loubser stated that it would have been preferable and easy to have included in the remaining two tests, the company's present financial situation.[246] However, this section in the Act is still

[239]s 128(1)(f).
[240]n 2 above 56.
[241]n 2 above 56-57.
[242]n 2 above 57.
[243]n 2 above 57.
[244]n 2 above 57.
[245]n 2 above 57.
[246]The Portfolio Committee on Trade and Industry did not implement this recommendation. See n 2 above 57.

a major improvement on the corresponding requirement for judicial management, which requires proof that the company is already unable to pay its debts.[247]

Many court decisions have refused business rescue, stating that the company was hopelessly insolvent and thus there was no reasonable prospect of success. The court in these cases however, never refused the business rescue application on the basis of insolvency but rather on the basis that there was no prospect of success. In the *Swart* case, court found that it was common cause that the business was financially distressed but questioned whether there was a reasonable prospect for rescuing the Company. The court concluded that there was no reasonable prospect of rescuing the company.[248] The court in arriving at its decision concluded that the respondent was hopelessly insolvent and that the initiation of business rescue proceedings would not result in creditors achieving better dividends.[249] In *Oakdene Square Properties* (SCA), it was held that "it is common cause that, although the company appears to be factually solvent in that the value of its assets, at least on the face of it, exceeds its debts, it is unable to satisfy the judgment debt in favour of Nedbank. This means that it is both commercially insolvent for liquidation purposes and financially distressed within the contemplation of section 131(4)(a)(i)."[250] Therefore, the determination of whether a business rescue application will succeed will depend on whether there is a reasonable prospect of success rather than on the basis of insolvency.

However, in the *Gormley* case, the court held that, the provisions of the Act make it clear that the concept of business rescue only applies to companies which are financially distressed as defined in the Act. If a company is not so financially distressed the provisions of Chapter 6 of the Act will not apply.[251] Thus, the court adopted a narrow interpretation of 'financially distressed' and held that a company that is already insolvent, even if only able to pay its debts over an extended period, is not financially distressed as defined in the Act.[252] This was further expressed in *FirstRand Bank Ltd v Lodhi 5 Properties Investment CC*.[253] The court held that "on the clear wording of the definition it relates to a company (or close corporation) that is at the time of an application under section 131 which is neither commercially insolvent or

[247]n 2 above 58.
[248]*Swart* case (n 125) par 40.
[249]*Swart* case (n 125) par 30.
[250]*Oakdene Square Properties* (SCA) case (n 148) par 7.
[251]*Gormley* case (n 169) par 11.
[252]n 115 above 277.
[253]2013 3 SA 212 (GNP).

actually (or factually) insolvent." If the company (or close corporation) is so insolvent the court will in all probability issue an order dismissing the application together with an order placing it under liquidation as envisaged in section 131(4)(b)."[254]

2.4 Abuse

There is always the risk that business recue proceedings may be abused by a company with no prospect of financial recovery to obtain a temporary respite from creditors. However, in order to try and prevent such abuse, the Act now provides certain procedural requirements.[255] However, in *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronotique et Technologies Embarquees SAS*,[256] on a point raised *in limine* by two of the respondents in an application by the business rescue practitioner to have the votes of the shareholders opposing the adoption of a business rescue plan set aside as inappropriate, declared that the business rescue resolution passed by the board of the company "had lapsed and was a nullity" due to the fact that the required time frames as prescribed by section 129(3) and (4), had not been met in regard to the appointment of a business rescue practitioner.[257] In making an order, the court held that "it is clear from the relevant sections contained in chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the resolution beginning rescue proceedings. The purpose of section 129(5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with section 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to 'substantial compliance."[258] This approach was also adopted in *Madodza (Pty) Ltd (in business rescue) v Absa Bank and Others,*[259] in which the court declared that the business rescue resolution had lapsed and become a nullity.[260]

Further, in *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others*,[261] the court held that it "became common cause that the respondents' resolutions did not comply with section 129(3)(a) of the Act and that therefore

[254]*Lodhi Investment* case (n 253) par 29.
[255]s 129(3) and (4). (Voluntary initiation (by resolution)).
[256]unreported, GNP case no 72522/11, 6 June 2012.
[257]n 92 above par 18.4.1.4.
[258]*Advanced Technologies and Engineering Company* case (n 256) par 27.
[259](38906/2012) [2012] ZAGPPHC 165 (15 August 2012).
[260]n 92 above par 18.4.1.4.
[261](812/2012) [2012] ZAECPEHC 39 (21 June 2012).

the resolutions are irregular, a nullity and of no force and effect."[262] However, in *Ex parte Van den Steen NO and another*,[263] it was argued that due to a misrepresentation regarding the status of certain note holders, who were creditors but had not been notified of the business rescue resolution in terms of section 129(3), the company had not fully complied with the notification requirements.[264] However, the company had taken additional steps to bring the business rescue of the company to the attention of all affected persons by the issuing of two press releases and also publishing the business rescue documents on the website of the company's only shareholder.[265] These steps resulted in the note holders becoming aware of the business recue proceedings. The court looked at section 6(9) of the Act which expressly provides for substantial compliance with the prescribed manner of delivery of a notice and that "any deviation from the prescribed manner does not invalidate the action unless that deviation (i) materially reduces the probability that the intended recipient will receive the notice or it is such as would reasonably mislead a person to whom the notice, is to be, delivered."[266] This section enables the court to find that substantial compliance was adhered to if it is established that all affected parties had full knowledge of the notice and its contents.[267] The court also looked at the definition of "publish a notice" in terms of the Companies Regulations 2011 and held that together with section 6(9) of the Act, what is of paramount importance in respect of the delivery of notices to persons entitled thereto is not whether or not delivery has taken place strictly in accordance with the prescribed manner, but whether or not, as a fact, the person to whom delivery ought to have been affected received the requisite notice.[268] The court accordingly held that there was substantial compliance with sections 129(3) and (4).[269]

Therefore, abuse may occur where there is intentional non-compliance with the provisions of section 129(3) and (4) by the company in order to gain the protection of chapter 6 for a brief period of time, only to exit the procedure due to the resolution lapsing and becoming a nullity at a later date.[270]

[262] *Climax Concrete* case (n 261) par 12.
[263] [2013] ZAGPJHC 33 (27 February 2013).
[264] n 92 above par 18.4.1.4.
[265] n 92 above par 18.4.1.4.
[266] the *Ex parte Van den Steen* case (n 263) par 15.
[267] the *Ex parte Van den Steen* case (n 263) par 16.
[268] the *Ex parte Van den Steen* case (n 263) par 19.
[269] the *Ex parte Van den Steen* case (n 263) par 23.
[270] n 92 above par 18.4.1.4.

An important case where the business rescue proceedings were abused by a company with no prospect of financial recovery to obtain a temporary respite from creditors was in the case of *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another*.[271] In this case, Chaim Cohen, the sole shareholder and director of Newcity, applied for an order to begin business rescue proceedings in accordance with section 131(1) of the Act. The second respondent, ABSA Bank Limited, opposed the application for an order to begin business rescue proceedings.[272] This case is important in that the judge decided the business rescue application brought by Cohen should be branded as an abuse and the business rescue application was dismissed.[273] The court held that Cohen had been adopting a strategy which effectively "paralysed the liquidation application."[274] This strategy was to bring business rescue applications at the appropriate stage, relying on section 131(6) of the Act.[275] This subsection provides that the business rescue application will suspend the liquidation proceedings until the court has adjudicated on the business rescue proceedings or the proceedings have ended.[276] The court accordingly held that on the evidence the business rescue application was indeed not genuine.[277]

2.5 Liquidation as opposed to a business rescue order

Until recently it was accepted among legal practitioners that although a court could exercise its discretion against the winding-up of a company, a creditor who brought an application for such a winding-up was entitled *ex debito justitiae* (as of right) to such an order if he could establish the requirements provided for by the previous Companies Act of 1973. In *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd,*[278] Caney J held that creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the relevant Act (at the time of the judgment, this would have been the Companies Act 46 of 1926).[279] Further, in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others,*[280] the court stated that "it matters not that the company's

[271](45670/2011, 28615/2012) [2012] ZAGPJHC 144; [2013] 3 All SA 146 (GSJ) (18 August 2012).
[272]n 190 above 22.
[273]n 190 above 22.
[274]*Absa Bank v Newcity* case (n 271) par 16. See also n 190 above 23.
[275]n 190 above 23.
[276]n 190 above 23.
[277]*Absa Bank v Newcity* case (n 271) par 28.
[278]1962 4 SA 593 (D) at 597.
[279]Mahon "Ex debito justitiae principle liquidated?" *De Rebus* (2013) 39.
[280]1993 4 SA 436 (C) at 440F to 441A.

assets, fairly valued, far exceed its liabilities: Once the court finds that it cannot meet current demands on it and remain buoyant, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of section 345(1)(*c*) as read with section 344(f) of the 1973 Act and is accordingly liable to be wound-up."[281]

However, both the *Rosenbach* and *Rhebokskloof* decisions were decided prior to the commencement of the 2008 Act.[282] In the *Koen* case,[283] Binns-Ward J stated that "it is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible."[284] Thus, in the past the doctrine of *ex debito justitiae* dictated that a creditor that brought itself within the provisions of section 344 and 347 of the 1973 Act would be entitled to a liquidation order as of right, however, now under the new regime, liquidation has been relegated to a last resort and now a liquidation will not be granted where a company, given more time, is able to realise its assets and discharge the debt it owes.[285]

Importantly however, the new Act provides for section 131(4)(b), which states that the court may after dismissing the business rescue application, can make any appropriate order, including an order placing the company under liquidation. However, an application for business rescue must be preferred over a winding-up application.[286] In *Southern Palace Investments* the court held that "however, even if the substantive test with its lower threshold is satisfied, the court still has a discretion not to grant the order. In exercising this discretion, the court should give due weight to the legislative preference for rescuing ailing companies if such a course is reasonably possible. It would therefore be inappropriate for a court faced with a business rescue application to maintain the mind-set (from the earlier regime) that a creditor is entitled *ex debito justitiae* to be paid or to have the company liquidated."[287] Despite the preference for business rescue, a court hearing a business rescue application may make a

[281] n 279 above 39.
[282] n 279 above 40.
[283] 2012 2 SA 378 (WCC).
[284] *Koen* case (n 177) par 14. See n 279 above 40.
[285] n 279 above 40.
[286] n 115 above 241.
[287] *Southern Palace* case (n 173) par 22.

winding-up order when it dismisses the business rescue application.[288]

In *Oakdene Square Properties* (SCA) the court held that business rescue was not appropriate in these circumstances and that liquidation of the company was the preferred remedy.[289] The court held that in light of certain factors, there is a real possibility that liquidation will in fact be more advantages to creditors and shareholders than the proposed informal winding-up of the company through business rescue proceedings.[290] The court went further and held that "I do not believe it constitutes a 'business rescue' within the meaning of section 128(1)(b)(iii). What the section requires is 'the continuing existence of the business of the company on a solvent basis.' A company which merely exists to own cash in the bank, has lost its *raison d'être*. Unless there is a real possibility that the cash in the bank will lead to the resurrection of the company's business, the requirements of section 128(1)(b)(iii) had thus not been satisfied."[291] Thus, it was held that a liquidation order was preferable to that of business rescue.

Thus, up until now the courts have, unless a proper and motivated business rescue plan is pleaded which demonstrates a reasonable prospect for rescuing the company, consistently dismissed the business rescue application and liquidated the company, relief being granted under section 131(4)(b).[292] However, this position may have changed as a result of the recent decision in the *Absa Bank Ltd v Newcity Group (Pty) Ltd, Cohen v Newcity Group (Pty) Ltd and Another*.[293] In this case, one would then have expected the judge to have confirmed the provisional winding up order, as the courts had generally adopted an approach that winding up automatically follows the refusal of a business rescue application.[294] In this case, the judge considered whether to confirm or discharge the provisional liquidation order. The judge emphasised that the court's power in terms of section 344 of the 1973 Act is discretionary. However, what is important in this case is that the creditor still has certain rights and thus the question of whether the e*x debito justitiae* principle remains good law since the commencement of the 2008 Act is relevant. The judge accepted that the Act prescribes a fresh approach to corporate governance as a whole and it now seems to be incorrect to speak of an

[288]n 115 above 241.
[289]*Oakdene Square Properties* (SCA) case (n 148) par 39.
[290]*Oakdene Square Properties* (SCA) case (n 148) par 35.
[291]*Oakdene Square Properties* (SCA) case (n 148) par 39.
[292]n 190 above 22.
[293](45670/2011, 28615/2012) [2012] ZAGPJHC 144; [2013] 3 All SA 146 (GSJ) (18 August 2012). See n 279 above 39.
[294]n 190 above 23.

entitlement to a winding up order simply because the applicant is an unpaid creditor.[295] As the judge stated in paragraph 31 of the decision that "the advent of the Companies Act, 2008, means the age of creditor supremacy is over."[296]

The court noted that the procedure for winding-up is currently regulated by the provisions of the 1973 Act. Section 344 is the sole source of authority that vests a court with the power to liquidate a company on the basis that it is unable to pay its debts.[297] However, in the *Koen* case, it was stated at paragraph 14 "It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible."[298] However, it is accepted that while the provisions of chapter 14 of the 1973 Act remain applicable, the way in which such provisions are to be implemented and interpreted are to be revisited in light of the change in mindset prompted by the introduction of the new Act and more particularly the business rescue regime.[299] While it is clear that the introduction of the business rescue regime provides an alternative to liquidation, it was argued in the *Absa Bank* case that even if a company does not meet the requirements for the granting of a business rescue, the court must still apply the change in mindset when considering whether to exercise its discretion against granting a winding up order to avoid the deleterious consequences of a liquidation.[300] Therefore, the remedy of liquidation appears to have been lowered to a last resort that ought not to be granted if an alternative remedy is available to the applicant, notwithstanding that such remedy might not take the form of business rescue.[301]

The above clearly shows that we are living in a different corporate society and the age of creditor supremacy is over.[302] Consequently, it has been indicated that business rescue is preferred to liquidation. This has been echoed in recent case law. As it was held in the *Southern Palace Investment* judgment, "it would therefore be inappropriate for a court faced with a business rescue application to maintain the mindset (from the earlier regime) that a

[295] n 279 above 39.
[296] n 190 above 24.
[297] n 279 above 39.
[298] n 279 above 40.
[299] n 279 above 40.
[300] n 279 above 40.
[301] n 279 above 40.
[302] n 190 above 24.

creditor is entitled *ex debito justitiae* to be paid or to have the company liquidated."[303] Therefore, as one of the purposes of the Act is to facilitate the efficient rescue of financially distressed companies,[304] a court will give preference to business rescue over liquidation but only where there is a genuine attempt to achieve the aims of the Act.[305]

[303] *Southern Palace* case (n 173) par 22.
[304] s 7(k) of the Act.
[305] n 115 above 275.

CHAPTER 4: CONCLUSION

Prior to 1 May 2011, South Africa's primary corporate rescue mechanism, judicial management, was contained in the 1973 Companies Act.[306] This largely unsuccessful mechanism has now been replaced by a new corporate rescue procedure, business rescue and is contained in Chapter 6 of the Companies Act of 2008.[307]

The new business rescue procedure was designed to prevent the demise, through winding-up, of viable companies by making provision for their possible rescue.[308] Our courts have already started pronouncing themselves on this new concept, however, there is still quite a long way before the organised profession completely gather all the essentials, explore all the gaps of the Act and lay or cast a well covered path that would produce and ensure consistency in the implementation and interpretation of this new concept.[309] Unlike judicial management, business rescue does not only involve that a company be restored to solvency, though this is of course one of the goals of business rescue.[310] As the definition of business rescue further demonstrates, business rescue is also a system that is aimed at temporarily protecting a company against the claims of creditors so that its business can thereafter be disposed of (if it could not be saved) for maximum value as a going concern in order to give creditors and shareholders a better return than they would have received had the company been liquated.[311]

The cases dealing with Chapter 6 show a willingness by the courts to engage the new business rescue procedure, although clearly the provisions of the Act are posing some challenging interpretational problems.[312] It has become evident from the recent case law that the courts are not easily influenced to place financially distressed companies and close corporations into the business rescue process. Nevertheless, the courts do have a discretion in this regard and may order business rescue proceedings provided that the requirements in section 131(4)(a) are satisfied. It is important to remember that only companies that are "financially distressed" are capable of being placed under supervision in accordance with Chapter 6.[313] The prospects for

[306] n 92 above par 18.1.
[307] n 92 above par 18.1.
[308] n 92 above par 18.1.
[309] *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013) par 1.
[310] *Merchant West* case (n 309) par 4.
[311] *Merchant West* case (n 309) par 4.
[312] n 92 above par 18.1.
[313] n 92 above par 18.3.5.

a successful business rescue may differ from case to case. However, as a general rule, the company going into business rescue should present objectively ascertainable details showing that the company has a reasonable prospect of being rescued successfully. However, it seems the standard of what is expected from an applicant when applying to court for the business rescue of a company remains unclear and the position of the threshold of a reasonable prospect for rescuing the company still remains to be determined unquestionably by our courts. The recent case law is an important reminder that business rescue should be pursued where there are clear benefits for it and that the use of business rescue as one of the weapons in the arsenal to fight impending liquidations will be rejected by courts.[314]

Consequently, as one of the purposes of the Act is to facilitate the efficient rescue of financially distressed companies,[315] a court will give preference to business rescue over liquidation but only where there is a genuine attempt to achieve the aims of the Act.[316] If the requirements in section 131(4) are met the court should exercise its discretion in favour of granting a business rescue order.[317] However, as can be seen from the recent case law, our courts are not easily persuaded to grant these applications. It is clear from the recent judgments that the courts are embracing a realistic pragmatic approach and is not open to being influenced by vague and speculative averments as to the prospects of restoring an ailing business entity to solvency. As it has been explained that not every company that is in financial trouble is a suitable candidate for business rescue.[318] As the courts have held "business rescue proceedings are not for the terminally ill. Nor are they for the chronically ill. They are for ailing corporations, which, given time, will be rescued and become solvent."[319]

Nevertheless, business rescue is aimed at providing an alternative to a liquidation process, to make it easier for companies in financial difficulty to be rescued and to continue as commercially viable businesses. Business rescue brings the country in line with international trends but also maximises returns for creditors, saves jobs and ultimately gives financially distressed companies a chance to trade their way out of financial difficulties.[320]

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[314]Shandu "Setting standards: First SCA decision on business rescue proceedings" *Tony Tshihase* Inc (available at: http:www.polity.org.za (22-08-2013)).
[315]s 7(k) of the Act.
[316]n 115 above 275.
[317]n 33 above 20.
[318]n 108 above.
[319]*Welman* case (n 166) par 28.
[320]n 5 above 29.

Further, in almost all cases, it has been emphasised that there must be a genuine attempt at rescuing the financially ailing company.[321] An application for business rescue will not succeed if it has ulterior purposes and it must be ensured that the process is not abused by controllers who would like to "skip the scene" while the business rescue practitioner and creditors try to untangle the mess.[322] It has also been suggested that the rights of creditors no longer reign supreme when a balancing of interests is done by a court in liquidation proceedings.[323] The ethos of the Act (in particular Chapter 6) requires other stakeholders interests to be given as much weight.[324] Thus, despite the name "business rescue," the Act nevertheless permits an alternative or secondary goal of business rescue namely a better return for creditors and shareholders than an immediate liquidation of the company.[325] This potentially expands the scope of business rescue.[326]

However, even though our courts have already started pronouncing themselves on this new concept of business rescue, there is still quite a long way before the profession completely lays or casts a well covered path that would produce and ensure consistency in the implementation and interpretation of the business rescue regime.[327] Moreover, even though the courts dealing with business rescue show a willingness to engage in the new business rescue procedure, the provisions of the Act have however, posed some challenging interpretational problems.[328]

[321]Kleitman "Life under the Companies Act" *Without Prejudice* (November 2013) 36 37.
[322]n 321 above 37.
[323]n 321 above 37.
[324]n 321 above 37.
[325]n 321 above 37.
[326]n 321 above 37.
[327]*Merchant West* case (n 309) par 1.
[328]n 92 above par 18.1.

ANNEXURE 1

Section 128: Application and definitions applicable to Chapter

(1) In this Chapter

(a) ‘‘affected person’’, in relation to a company, means—

(i) a shareholder or creditor of the company;

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

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

(b) ‘‘business rescue’’ means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;

(c) ‘‘business rescue plan’’ means a plan contemplated in section 150;

(d) ‘‘business rescue practitioner’’ means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and ‘practitioner’ has a corresponding meaning;

(e) ‘‘court’’, depending on the context, means either—

(i) the High Court that has jurisdiction over the matter; or

(ii) either—

(aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or

(bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3);

(f) ‘‘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; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;

(g) ‘‘independent creditor’’ means a person who—

(i) is a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2); and

(ii) is not related to the company, a director, or the practitioner, subject to subsection (2);

(h) ‘‘rescuing the company’’ means achieving the goals set out in the definition of ‘‘business rescue’’ in paragraph (b);

(i) ‘‘supervision’’ means the oversight imposed on a company during its business rescue proceedings; and

(j) ‘‘voting interest’’ means an interest as recognised, appraised and valued in terms of section 145(4) to (6).

Section 129: Company resolution to begin business rescue proceedings

1) Subject to subsection (2)(a), the board of a company may resolve that the company

voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.

(2) A resolution contemplated in subsection (1)—

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must—

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)(b), a company must—

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

(5) If a company fails to comply with any provision of subsection (3) or (4)—

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

(b) the company may not file a further resolution contemplated in subsection (1) 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.

(6) 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).

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

Section 131: Court order to begin business rescue proceedings

(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) An applicant in terms of subsection (1) must—

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1), the court may—

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—

(i) the company is financially distressed;

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

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

(5) If the court makes an order in terms of subsection (4)(a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until—

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.

(7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.

(8) A company that has been placed under supervision in terms of this section—

(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132(2); and

(b) must notify each affected person of the order within five business days after the date of the order.

Section 133: General moratorium on legal proceedings against company

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in

its possession, may be commenced or proceeded with in any forum, except—

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers;

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

Section 136: Effect of business rescue on employees and contracts

(1) Despite any provision of an agreement to the contrary—

(a) during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—

(i) changes occur in the ordinary course of attrition; or

(ii) the employees and the company, in accordance with applicable labour laws, agree

different terms and conditions; and

(b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act No. 66 of 1995), and other applicable employment related legislation.

(2) Subject to subsection (2A), despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may -

(a) entirely, partially or unconditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

(2A) When acting in terms of subsection (2)-

(a) a business rescue practitioner must not suspend any provision of-

(i) an employment contract; or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act No. 24 or 1936), would have applied had the company been liquidated;

(b) a court may not cancel any provision of-

(i) an employment contract, except as contemplated in subsection 1;

(ii) an agreement to which section 35A or 35B of the Insolvency Act, (Act No. 24 of 1936), would have applied had the company been liquidated; and

(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company.

(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.

(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.

Section 141: Investigation of affairs of company

(1) As soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.

(2) If, at any time during business rescue proceedings, the practitioner concludes that—

(a) there is no reasonable prospect for the company to be rescued, the practitioner must—

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;

(b) there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and—

(i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or

(ii) otherwise, file a notice of termination of the business rescue proceedings; or

(c) there is evidence, in the dealings of the company before the business rescue proceedings began, of—

(i) voidable transactions, or a failure by the company or any director to perform any material

obligation relating to the company, the practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps;

(ii) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must—

(aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

(bb) direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.

(3) A court to which an application has been made in terms of subsection (2)(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances.

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