AN OVERVIEW OF THE BUSINESS RESCUE MORATORIUM CONTAINED IN SECTION 133 OF THE COMPANIES ACT 71 OF 2008

by

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SUMMARY

South African company law has seen many changes in respect of corporate rescue, due to *inter alia* globalisation, increase in open trade, instant and freer communication and the need for better regulation of companies and stakeholders. As a result, the previous rescue mechanism of judicial management was widely criticised and poorly implemented. The Companies Act 71 of 2008[1] has however now replaced judicial management with business rescue.

Business rescue encompasses many facets, most importantly the moratorium in section 133. Section 133 has already, and will even more so in future, have a dramatic impact on the launching or continuation of any legal or enforcement proceedings against a company undergoing business rescue, the status and enforceability of its contracts and the rights of affected parties (*ie* creditors, shareholders and directors).

This study will discuss the general nature and effects of rescue moratoria and the moratoria (or lack thereof) created under the Companies Act 61 of 1973,[2] the 2008 Companies Act and the administration procedure in England. The moratorium under each relevant rescue procedure will be analysed according to its purpose, nature, effects and procedure. As such, this study will attempt to set out why the section 133 moratorium is the cornerstone to the business rescue procedure and vital in securing the turnaround of the company.

The section 133 moratorium will, to a great extent, determine whether business rescue is a saving grace in South Africa. I will discuss why I welcome business rescue (and its moratorium) and consider it an improvement on judicial management, but also what I regard as its inherent weaknesses. This study will conclude with my proposals regarding prudent amendments that have to be made to the 2008 Companies Act.

[1] Hereinafter the 2008 Companies Act.
[2] Hereinafter the 1973 Companies Act.

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CHAPTER 1

INTRODUCTION

"The moratorium or stay on proceedings is a cornerstone of all business rescue procedures."[3]

1 *Context of thesis*

Most modem nations have created statutory mechanisms which provide protection for financially distressed corporate entities, which if implemented, enable the rehabilitation and return to the commercial world as an active and financially sound enterprise. Corporate rescue, although primarily aimed at rectifying the insolvency of the corporate entity, may, if implemented correctly, result in saving jobs, enabling productivity, ensuring payment of debts and protecting investments.[4] Corporate rescue mechanisms provide a useful alternative to the liquidation or winding up of a company.[5] This is why rescue has become increasingly popular and important. Even South African company law was recently reformed with the introduction of the 2008 Companies Act, which includes the more effective business rescue, which reflects the modern rescue culture.[6] It is, however, not an easy task to rescue a company as there are numerous parties whose rights are affected, including those of shareholders, employees, creditors, directors and the company itself. Rescue procedures therefore establish certain rescue mechanisms which may/must be implemented during the rescue. A mechanism normally prescribed in rescue procedures is that of a moratorium, or stay on legal and enforcement proceedings against the company, whilst the rescue procedure is underway. Business rescue is no exception and specifically provides for such a moratorium in section 133, which section will be the focus of this study.

2 *Problem statement*

The broad problem statement of this study will be to determine why the stay on legal and enforcement proceedings whilst a company is undergoing rescue, specifically business rescue, has been described as "a crucial element of any corporate rescue mechanism" and "[o]ne of the key ingredients for the success of any rescue attempt".[7] In making this determination, this

[3] Kloppers "Judicial management – a corporate rescue mechanism in need of reform?" 1999 3 *Stell LR* 417 429.
[4] Rajak and Henning "Business rescue for South Africa" 1999 116 *SALJ* 262; FHI Cassim *et al Contemporary Company Law* (2012) 862.
[5] FHI Cassim *et al* (n 4) 861.
[6] ch 6 of the 2008 Companies Act.
[7] Delport *et al* "Henochsberg on the Companies Act 71 of 2008" (loose leaf) 2013 478; Bradstreet "The new business rescue: will creditors sink or swim?" 2011 *SALJ* 352 372; FHI Cassim *et al* (n 4) 878 states "the most important consequence of the commencement of business rescue proceedings is that there is an automatic and general moratorium".

study will scrutinise and propose amendments to the provisions of the 2008 Companies Act relating to the business rescue moratorium, which amendments will ultimately increase the possibility of successfully rescuing distressed companies.

3 *Methodology*

The following aspects will be discussed to answer the problem statement:

a) Chapter 2 – The rescue moratorium in South Africa. This chapter will discuss the judicial management and business rescue moratoria (discussing the protection afforded by and nature of both moratoria). The business rescue procedure will be discussed to place the section 133 moratorium in context.
b) Chapter 3 - The rescue moratorium in England. This chapter will discuss the moratorium regarding administration proceedings in England.[8] England has been chosen as reference because a substantial portion of South African corporate laws has been adopted or based on English legislation.
c) Chapter 4 - Conclusion. Herein I will discuss the successes and weaknesses of the business rescue moratorium. I will propose what I deem are prudent amendments that have to be made to sections 132 and 133 to properly give effect to the purpose of the business rescue moratorium.

4 *Delineations and limitations*

Certain sections in the 2008 Companies Act, such as sections 131, 132, 134 and 150, are relevant to the moratorium in section 133, but such sections will not be the focus hereof and will only be referred to briefly. The procedural elements of business rescue, judicial management, liquidation and administration will further only be discussed insofar as it aids in the analysis of section 133.

[8] Reference herein is made to England, although these insolvency laws apply in the greater United Kingdom, including England, Wales and Ireland.

CHAPTER 2

THE RESCUE MORATORIUM IN SOUTH AFRICA

1 *Introduction*

The department of trade and industry found in its May 2004 policy paper that judicial management was rarely used and even more rarely lead to a successful rescue of a company.[9] Practitioners, courts and academics also agreed that it had to be amended or replaced.[10] The improved and more modern 2008 Companies Act sets out in section 7(k) to "provide for efficient rescue and recovery of financially distressed companies" wherein "the rights and interests of all relevant stakeholders" are balanced.[11] In giving effect thereto, the legislature created business rescue to enable the rescue of companies without having to resort to liquidation, the latter only negatively affecting the value of the business.[12]

This chapter analyses the business rescue moratorium contained in section 133, considering general aspects of rescue moratoria, the nature of the judicial management moratorium and the context of the section 133 moratorium within the business rescue procedure. An attempt will also be made to indicate why the section 133 moratorium is a welcome improvement, but still remains a "work in process".

2 *Judicial management*

2.1 Duration of judicial management

An application had to be launched to court on the grounds set out in section 427(1) of the 1973 Companies Act to place a company under judicial management.[13] If it was deemed just and equitable, the court would grant a provisional judicial management order.[14] Judicial management commenced when the provisional order was granted by the court.

Perhaps one of the greatest shortcomings of judicial management was that the 1973 Companies Act did not provide for a date upon which judicial management would

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[9] *GG* 26493 (23-06-2004) at par 4.6.2.
[10] Salant "Business rescue operations and the new Companies Act" 2010 January/February *De Rebus* 28 29; Levenstein "Business rescue – help is at hand" 2008 November *Without Prejudice* 12; Loubser "Business rescue in South Africa: a procedure in search of a home?" 2007 *CILSA* 152 156; Bowles and Bruyns "Business rescue in the 2008 Companies Bill" 2009 April *Without Prejudice* 12; Kloppers (n 3) 417; Olver "Judicial management – a case for law reform"1986 49 *THRHR* 84 86.
[11] The 2008 Companies Act is more modern as s 5(b) allows the courts to consider foreign law.
[12] Rushworth "A critical analysis of the business rescue regime in the Companies Act 71 of 2008: business rescue: part III' 2010 *Acta Juridica* 375; Beukes "Business rescue and the moratorium on legal proceedings" 2012 June *De Rebus* 34.
[13] s 427(2).
[14] s 427(1).

terminate.[15] As a result, the judicial management order was effective for an undefined period of time. Courts have however upheld the opinion that the time period could not exceed all reasonability.[16] A judicial manager and/or person having an interest in the company were entitled to apply for the cancellation of the judicial management order.[17] The judicial manager was obliged to do so if he concluded at any time during the process that judicial management would not succeed, where after he had to initiate liquidation proceedings.[18] If an application for cancellation was brought as envisaged, the court could order the cancellation of the judicial management order if it appeared that the purpose of the judicial management order had been fulfilled, or that it was undesirable for the judicial management order to remain effective.[19]

2.2 The moratorium

A moratorium is a temporary stopping of an activity through some sort of agreement.[20] For rescue purposes it would mean the cessation of legal and commercial activity for a determined period of time until future events permit a removal of the suspension or issues regarding the activity have been resolved.

The 1973 Companies Act required, *inter alia*, that a company had to be unable to pay its debts or be unable to meet its obligations before a court could grant a provisional judicial management order.[21] Affected parties would however still want to pursue legal and/or enforcement action to protect their interests. Such action would however increase the distress already suffered by the company and could be detrimental to both the company and affected party.[22]

[15] In *Keens Electrical (Jhb) (Pty) Ltd v Lightman Wholesalers (Pty) Ltd* 1979 4 SA 186 (T) 189, De Villiers AJ stated that the court had a discretion to determine a fixed period for judicial management, but that it was usually undesirable to do so.
[16] *Irvin & Johnson Ltd v Oelofse Fisheries Ltd, Oelofse v Irvin & Johnson Ltd* 1954 1 SA 231 (E) 237; *Marais v Leighwood Hospitals (Pty) Ltd* 1950 3 SA 567 (C) 572.
[17] s 440(1).
[18] s 433(l).
[19] s 440(1).
[20] Hornby *Oxford Advanced Learner's Dictionary of Current English* (1995).
[21] s 427(1)(a).
[22] The rescue would fail, immediate liquidation would ensue and a creditor could receive a lesser return in liquidation than it would have in the rescue proceedings. The business rescue moratorium for example gives direct effect to the business rescue requirements in s 128(1)(b) and (h), *ie* to maximise the creditors' return and to achieve the business rescue goals. In a worst case scenario, a creditor who is solely reliant on income from the company may suffer such distress that it may also be required to launch rescue proceedings.

The provisional order could (and normally did)[23] include an order that all actions, proceedings, the executions of all writs, summonses and all other processes against the company would be stayed during the judicial management procedure, unless the court approved the continuation thereof.[24] The rescue attempts would be futile without such a moratorium and judicial management would consequently fail.[25] The moratorium served an auxiliary purpose in allowing the provisional judicial manager the opportunity to investigate, consider and take the steps needed to rescue the company.

The commencement of judicial management did not trigger a moratorium automatically - it was only triggered if an applicant specifically included a prayer therefor in its application and the prayer was granted by the court.[26] Before granting such an order, the court would have to, *inter alia*, consider the effect of the moratorium on the creditors.[27] There was no moratorium in effect before the court granted the moratorium.[28] Legal and/or enforcement action could therefore still be taken against the company, which could increase the company's distress.

Although there was a moratorium in effect after the provisional order, the court still had discretionary powers in all cases to grant leave to sue (in respect of proceedings in existence at the date the provisional order is granted and future proceedings), the discretion not being restricted insofar as the scope of the proceedings was concerned.[29] The only proviso was that court had to exercise its discretion judicially, not arbitrarily or capriciously, and considering all the prominent and material aspects of the matter (*eg* the purpose of judicial management).[30] Meskin noted the court had to consider what had taken place since the granting of the judicial management order, including the conduct of the applicant applying for

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[23] *Samuel Osborn* (*SA) Ltd v United Stone Crushing Co* (*Pty*) *Ltd* 1938 WLD 229; *Ross v Northern Machinery & Irrigation* (*Pty*) *Ltd* 1940 TPD 119; *Irvin & Johnson Ltd v Oelofse Fisheries Ltd* (n 16) 237; *Millman v Swartland Huis Meubileerders* (*Edms*) *Bpk* 1972 1 SA 741 (C) 747; Loubser "Judicial management as a business rescue procedure in South African corporate law" 2004 16 *SA Merc LJ* 138 153 Delport *et al* "Henochsberg on the Companies Act 61 of 1973" (loose leaf) 2011 931; Blackman *et al Commentary on the Companies Act* (loose leaf) Vol 9 at 15-02.

[24] s 428(2); Cilliers *et al Corporate Law* (2000) 483.

[25] Henning "Aspekte van surchéance van betaalinge in die respyt- en insolvensiereg" 1991 54 *THRHR* 523 538; Loubser *Some comparative aspects of corporate rescue in South African company law* (2010 thesis SA) 32; *General Leasing Corporation Ltd v Thorne* 1975 4 SA 157 (C) 162 states the moratorium is granted to assist towards the recovery of the company.

[26] Loubser (n 10) 154.

[27] *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 4 SA 598 (C) 615.

[28] Loubser (n 25) 85.

[29] *Samuel Osborn* (*SA*) *Ltd v United Stone Crushing Co* (*Pty*) *Ltd* (n 23) 235; *Ross v Northern Machinery & Irrigation* (*Pty*) *Ltd* (n 23) 120; *Irvin & Johnson Ltd v Oelofse Fisheries Ltd* (n 16) 237; Delport *et al* (n 23) 932 however states it "is respectfully doubted whether the Court can grant the leave envisaged by the subsection in the provisional order: for such grant would, in effect, have the result that the Court would have issued a direction other than one that all actions etc are to be stayed, which direction is incompetent".

[30] *Western Bank Ltd v Laurie Fossati Construction* (*Pty*) *Ltd* 1974 4 SA 607 (E) 610-611.

leave and that of the company in judicial management and the facts which were before the court when the order was granted (or which could then have been).[31] Further considerations included the effect of such order for leave on the judicial management process and whether or not the refusal to grant leave would be approving or aiding illegality.[32]

Interestingly, section 432 of the 1973 Companies Act (the final judicial management order) did not expressly provide for a moratorium. Section 432(3) only provided that the final order must contain directions for the vesting of the management of the company in the final judicial manager, the handing over of accounting and matters to the final judicial manager, the discharge of the provisional judicial manager and any other directions regarding the management of the company or matters incidental thereto.[33] It has been argued that it must be assumed that the moratorium will automatically be confirmed when the provisional order is confirmed.[34] This seems logical as judicial management would fail if legal and/or enforcement action could still be taken against the company whilst it was under final judicial management.[35] It is further unlikely that the legislature intended to award the court a discretion to grant a moratorium under section 428, but not under section 432.[36] It has also been argued that the absence of a moratorium provision in section 432(3) must be interpreted to mean that the court was not authorised to lift the moratorium granted under the provisional order after the final order had been granted.[37] It is again submitted that the legislature would not have awarded the discretion to the court to confirm/dismiss the whole, or parts of, the provisional order on the return date without awarding the discretion to lift certain other parts of the provisional order (*eg* the moratorium).[38]

Once the final order was granted, the court could not grant leave that any action, proceedings or execution against the company could proceed.[39] As such, the powers of the court to authorise further legal and/or enforcement action after the final order was granted, were limited. Blackman goes as far as to state, in respect of judicial management, that apart from

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[31] Delport *et al* (n 23) 932.
[32] Delport *et al* (n 23) 932; *Samuel Osborn* (*SA*) *Ltd v United Stone Crushing Co* (*Pty*) *Ltd* (n 23) 236.
[33] s 432(3)(a) – (c).
[34] Loubser (n 23) 153-154.
[35] n 22.
[36] *Ben-Tovim v Ben-Tovim* 2000 3 All SA 264 (C) correctly quoted section 432(2), which states the court may "make any other order it may deem just". Section 428 in any event states a moratorium may be ordered "while the company is under judicial management", including the period after the final judicial management order.
[37] Cilliers (n 24) 486.
[38] Supported by Loubser (n 25) 32-33. Cilliers *et al* (n 24) 487, despite his view (n 37), comments "such a result seems undesirable". S 428(3) and 432(3) in any event confers the discretion to the court to, at any time an in any manner, vary the terms of the judicial management orders. This would seem to support the argument herein.
[39] *Wire Industries Steel Products and Engineering Co (Coastal) Ltd v Surtees and Health* 1953 2 SA 531 (A).

"the particular powers which it expressly confers upon the court, the Companies Act does not confer upon the court any general power to interfere with legal rights or lawful interests".[40]

The moratorium under both the provisional and final orders was not limited to civil actions, but would also include a stay on all criminal actions against the company.[41] The moratorium was general in nature, affording protection against any legal and/or enforcement proceedings in general.[42] The moratorium did not specifically prohibit legal and/or enforcement proceedings against the company's property, but because the moratorium was a wide and general moratorium, it can be assumed it would find application thereto.[43] Although the 1973 Companies Act did not directly provide therefore, the moratorium interrupted prescription on claims against the company, but the granting of a provisional or final order had no effect on the running of prescription in respect of any claim by the company.[44] The measurement of time to institute or continue with legal proceedings against the company was therefore delayed.

3 *Business rescue*

3.1 Definition

Business rescue is defined as measures enabling the rehabilitation of a financially distressed company, including the temporary supervision of the company and management of its affairs, a temporary moratorium on claims against the company or property in its possession and the implementation of a rescue plan.[45] The rescue plan must maximise the likelihood of the company being restored to solvency or alternatively result in a better return for creditors than would have been received in immediate liquidation.[46]

A company is financially distressed[47] if it is reasonably unlikely that the company will be able to pay all of its debts when they become due and payable within the immediately ensuing six months[48] or it appears reasonably likely that the company will become insolvent within the same period.[49] The definition of "financially distressed" therefore applies to current financial

[40] Blackman *et al* (n 23) at 15-04.
[41] Loubser (n 25) 32.
[42] *Millman v Swartland Huis Meubileerders* (*Edms*) *Bpk* (n 23) 747.
[43] Loubser (n 25) 86.
[44] Delport *et al* (n 23) 932.
[45] s 128(1)(b).
[46] s 128(1)(b)(iii); Smits "Corporate administration: a proposed model" 1999 *De Jure* 80 86.
[47] defined in s 128(1)(f).
[48] The liquidity aspect of the solvency and liquidity test contained in s 4.
[49] The solvency aspect of the solvency and liquidity test contained in s 4.

distress and future distress which may still be suffered, unlike the unfortunate judicial management requirement of immediate distress.[50]

3.2 Procedure

3.2.1 Commencement of business rescue

3.2.1.1 By board resolution

The board of the company may resolve to commence business rescue proceedings if there are reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company as a whole.[51] An affected person may, after the adoption of the resolution but before the adoption of a business rescue plan, apply to court for an order setting aside the resolution, setting aside the appointment of the business rescue practitioner or requiring the practitioner to provide security.[52]

Upon adoption the resolution must be filed with the Companies and Intellectual Properties Commission, which filing date is deemed to be the date upon which business rescue commences.[53] The company must within five days of the filing of the resolution publish notice to every affected person of the adopted resolution, including a sworn statement setting out the grounds upon which the resolution was adopted.[54] Within the same period of five days after filing of the resolution, the company[55] must appoint a business rescue practitioner (meeting the section 138 requirements) who in turn accepted the appointment.[56] The company must file a notice of appointment as business recue practitioner with the Companies and Intellectual Properties Commission within two days after the appointment,[57] which notice must be published to each affected person within a further five days after filing with the Companies and Intellectual Properties Commission.[58] Non-compliance will result in the adopted resolution lapsing and becoming a nullity.[59] The company will be prohibited from

[50] s 427(1)(a) of the 1973 Companies Act.
[51] s 129(1). A "reasonable prospect" only exists if the company or its board pro-actively looked for warning signs of financial distress and obtained independent advice. It is submitted the entire company , and not just its business, must be rescued taking into account the objectives of the 2008 Companies Act and the definition of "business rescue" in s 128(b), which requires the continuing existence of the company on a solvent basis.
[52] s 129 and 152 read with s 130(1)(a)-(c).
[53] According to s 129(2)(b), the resolution will be of no force and effect until it has been filed. See s 132(1)(a)(i) regarding the commencement date when a resolution is filed.
[54] s 129(3)(a).
[55] It is actually the board of the company.
[56] s 129(3)(b).
[57] s 129(4)(a).
[58] s 129(4)(b).
[59] s 129(5)(a) read with s 129(3) and (4); *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronotique et Technologies Embarquées SAS* case no 72522/11 (NGP) (unreported); *Madodza (Pty) Ltd v Absa*

filing a similar notice for a period of three months after the initial resolution was adopted unless the court approves same on good cause shown.[60]

3.2.1.2 By court order

An affected person may apply to court for an order authorising the commencement of business rescue proceedings under section 131.[61] An application may not be launched if the company has already resolved to do so, but may be launched if liquidation proceedings are underway.[62] The application must be served on the company and the Companies and Intellectual Property Commission and notification of such application must be given to each affected person in the prescribed manner.[63] Notification is required as each affected person has the right to participate in the hearing of the application.[64]

The applicant must prove the company is financially distressed and there is a reasonable prospect of rescuing the company. The court may order the commencement of business rescue if it 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, contract or employment-related matters or it is just and equitable for financial reasons, bearing in mind that there is a reasonable prospect of rescuing the company.[65] The court has the discretion to appoint as interim business rescue practitioner the person nominated by the applicant.[66] The court may still refuse to grant the order and grant any other order it deems fit, including a liquidation order.[67]

If the company launches an application to court to obtain consent for the filing of a resolution supporting business rescue, or an affected person applies to court to place the company under supervision, business rescue commences when the relevant person "applies to the court".[68] Section 132(1) is unclear about whether the filing of the application at court or the actual appearance before court constitutes the date upon which the relevant person "applies to the

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Bank Ltd case no 38906/12 (NGP) (unreported) par 23-25; *Vincemus Investment (Pty) Ltd v Louhen Carries* case no 16550/2013 (NGP) (unreported) par 16-17.

[60] s 129(5)(b).

[61] S 128(a) defines an affected person as a shareholder or creditor of the company, registered trade union representing the company's employees and employees individually or their representatives if they are not represented by a trade union (note that the company and its directors are excluded).

[62] s 131(1) and (6). The liquidation proceedings will be suspended until the court has denied the application or business rescue proceedings end (if the court has made the order applied for).

[63] s 131(2)(a) and (b).

[64] s 131(3).

[65] s 131(4)(a)(i) - (iii).

[66] s 131(5). The nominee must meet the s 138 requirements. The final appointment is subject to the ratification by the holders of a majority of the independent creditors' voting interest at the first meeting of creditors.

[67] s 131(4)(b).

[68] s 132(1)(a)(ii) and s 132(1)(b).

court". Section 131 is also problematic as it indicates that an affected person may apply to court to "begin" business rescue proceedings.[69] As such, section 131 creates the impression that business rescue commences on the date that the application is granted, whilst section 132(1) could be interpreted to mean either the date of filing of the application or the date the order is granted. The commencement date of business rescue proceedings is important as it will determine the date upon which the moratorium becomes effective.[70] In *Investec Bank Ltd v Bruyns*[71] the court stated this issue is not free from difficulty and will have to be decided by our courts in due course.[72] The court held it will have to be considered whether – if business rescue proceedings commence upon the filing of the application – the effects of business rescue automatically ensue on the filing of the application or retrospectively after the court order is granted (the court *in casu* submitted it should apply retrospectively). The court further considered, but did not decide upon, the scenario where business rescue commences on filing of the application and the order is not granted by the court, which would result in the company being in business rescue for an interim period. The courts therefore already find it difficult to determine the commencement date.[73]

Comparatively, liquidation proceedings commence when, in voluntary liquidations, a resolution is filed in terms of section 200 of the 1973 Companies Act, or in compulsory liquidations, when the application is filed with the court (providing the court orders the liquidation of the company).[74] The latter would however not be desirable for business rescue as a retrospective court order does not have the retrospective effect of granting the company a moratorium in respect of payment of its debts.[75] Business rescue can also not commence upon the filing of the court application, but only upon the court ordering the commencement thereof.[76]

[69] see heading of s 131.
[70] FHI Cassim *et al* (n 4) 876.
[71] 2012 5 SA 430 (WCC).
[72] see Delport *et al* (n 7) 478.
[73] Beukes (n 12) 35.
[74] s 348 and s 352 of the 1973 Companies Act, as incorporated into the 2008 Companies Act by Item 9 of Schedule 5 to the 2008 Companies Act; *Vermeulen v CC Bauermeister (Edms) Bpk* 1982 4 SA 159 (T) 161–163; *Nel v The Master* 2002 3 SA 354 (SCA) 358; *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 5 SA 425 (SCA) 431-432; *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd* 1983 3 SA (O) 816; *Storti v Nugent* 2001 3 SA 783 (W) 794; *Venter v Farley* 1991 1 SA 316 (W) 320; Delport *et al* (n 23) 740(1) – (2).
[75] Delport *et al* (n 23) 740(2); *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 4 SA 75 (W) 83.
[76] The application is still pending at the time of filing. Loubser "The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1)" 2010 3 *TSAR* 501 513 states "serious complications could arise if business rescue proceedings commence before an order to this effect has been issued and all the legal consequences of such an order come into force, which is what this provision implies. It would, for example,

If the court was in the process of considering an application for liquidation of the company or proceedings to enforce a security interest, business rescue commences when the court orders the commencement of business rescue and immediately places the company under supervision.[77] As soon as the order is granted, the company may not resolve to apply for liquidation until business rescue has terminated.[78] The company must also notify each affected person of the order within five business days of same being granted.

3.2.2 Preparation and implementation of the business rescue plan

Upon the commencement of business rescue, there is a moratorium on legal and/or enforcement proceedings against the company or in relation to any property belonging to the company, or lawfully in its possession, save to the extent permitted.[79] As with judicial management, the section 133 moratorium allows the company the breathing space to rescue itself and restructure its debts.[80] It also specifically allows the practitioner an opportunity to perform and fulfil his duties, *inter alia* performing the required investigations and drafting a business rescue plan.[81]

The practitioner must, after consulting with creditors, affected persons and management of the company, prepare a business rescue plan for consideration and adoption.[82] The underlying approach in involving creditors is to afford them a *quid pro quo*, in the form of a right to influence the regulation of the company's affairs whilst under supervision and a right to vote on the business rescue plan, in return for the moratorium placed on their rights.[83] The rescue plan must contain all the information an affected person may reasonably require to consider the proposed rescue plan.[84] The plan must refer to the background, proposals and

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mean that the general moratorium on legal proceedings that applies "during" the proceedings comes into effect and the directors' authority and powers to manage the company are curbed, but without a practitioner to take over these duties. The obvious further question then is what happens if the court refuses to grant an order for business rescue proceedings after the process has already started." Sharrock *et al Hockly's Insolvency Law* (2012) 280 states that business recue commences when the section 129 resolution is filed, the company applies to court to file another resolution after the first had lapsed (the commencement date being the date of filing of the second resolution), an affected person applies to court (and the order is granted) or when the court orders supervision during liquidation proceedings.

[77] s 132(1)(c).

[78] s 131(8)(a).

[79] s 133(1).

[80] "Rescue" is defined in s 128(1)(h) to mean the achieving of the goals in s 128(1)(b); FHI Cassim *et al* (n 4) 863 and 879.

[81] see s 140 and 141.

[82] s 150(1).

[83] FHI Cassim *et al* (n 4) 902.

[84] s 150(2). In *Commissioner, South African Revenue Services v Beginsel* 2013 1 SA 307 (WCC) 317 Fourie J held that s 150(2) of the 2008 Companies Act prescribed the content of a proposed business rescue plan in general terms. In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investment 386 Ltd* 2012 2 SA 423 (WCC) it was held by Eloff AJ that the court had a discretion to grant a business rescue order, relying

assumptions and conditions, each of which must be divided and discussed separately in the rescue plan.[85] Section 150(2) prescribes the certain minimum content that each of these parts of the business rescue plan must contain, one of which is the nature and duration of any moratorium for which the business rescue plan makes provision.[86] The practitioner has a wide discretion and may extend the duration of the section 133 moratorium for a period beyond the duration of business rescue proceedings.[87] Meskin is of the view that the moratorium contained in the business rescue plan is not a general moratorium like the section 133(1) moratorium, but rather a specific moratorium applying to a specific creditor(s), or to specific situations that justify the extension of a moratorium beyond the duration of the business rescue proceedings.[88] The plan will conclude with a statement from the practitioner, stating that the information appearing in the business rescue plan appears to be accurate, complete and up to date and that projections made in the plan are based on factual information and made in good faith.[89]

The business rescue plan must be published within 25 days of the practitioner's appointment unless the company obtains court approval for an extension or the majority of the creditors (in voting interest) condone an extension.[90] Within ten days of such publication, the practitioner must convene a first meeting wherein the creditors and persons holding a voting interest must consider the business rescue plan.[91] Shareholders may only be present if their rights as security holders in the company have been affected.[92] The business rescue plan becomes binding on all creditors and security holders of the company in terms of section 150(4) if it is adopted. If rejected, the practitioner may request an indulgence from the holders of voting interest to prepare an amended plan, or the company may approach the court to set aside the

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heavily on the requirement that a course of rescue had to be reasonably possible. Eloff AJ held further that a business plan that was unlikely to "achieve anything more than prolong the agony was unlikely to suffice…" and must therefore contain some "concrete and objectively ascertainable details going beyond mere speculation." This was confirmed in *Koen v Wedgewood* 2012 2 SA 378 (WCC). Gamble J held in *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 5 SA 497 (WCC) that an application to court for supervision of a company could be based on flimsy arguments and therefore required sufficient facts, supported by documentary evidence which would enable a court to exercise its discretion and assess the prospects of success of business rescue proceedings. This was also held in *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 5 SA 515 (GSJ).

[85] s 150(2)(a)-(c).

[86] s 150(2)(b)(i).

[87] Delport *et al* (n 7) 478(1).

[88] n 87.

[89] s 150(4)(a) and (b).

[90] s 150(5).

[91] s 151(1).

[92] Sutherland J held in *Absa Bank Ltd v Newcity Group (Pty) Ltd* 2013 All SA 146 (GSJ) that the shareholder's application to place the company under supervision constituted an abuse of the business rescue provisions and consequently the business rescue application failed.

vote if the vote was inappropriate.[93] The practitioner may also be forced to prepare an amended plan if the persons with voting interest demand a revised plan or approach court for such an order.[94]

Business rescue has resulted in fewer liquidation applications being brought to court, directors and practitioners working together to save the company, independent outsiders (*ie* the practitioner) developing a rescue plan, affected persons becoming involved in rescuing the company and a hostile environment becoming calmed.[95] Business rescue is however open for abuse by the company and affected persons,[96] the practitioner does not have to hold any specific qualifications, there is no regulatory authority for practitioners[97] and the duty to notify all affected persons before commencing business rescue is onerous and may hamper the company's chances of being rehabilitated as creditors may lose faith in the company.

3.2.3 Termination of business rescue

Business rescue ends when the court sets aside the resolution that began the business rescue proceedings, the court converts business rescue proceedings to liquidation proceedings, the practitioner files a notice of termination with the Companies and Intellectual Property Commission, a rescue plan is proposed and rejected and no extension is granted for a revised plan to be prepared or the practitioner files a notice of substantial implementation of the business rescue plan with the Companies and Intellectual Property Commission.[98] This differs from the position under judicial management, which procedure could only be terminated on application to court.[99]

According to section 132(3) of the 2008 Companies Act, if business recue proceedings exceed a period of three months (or such longer period allowed by the court on application by the practitioner), the practitioner must prepare monthly reports which are to be delivered to each affected person, the court (if proceedings were commenced with subject to a court order) and the Companies and Intellectual Property Commission. Business rescue, as with judicial

[93] s 153(1)(a).
[94] s 153 (1)(b).
[95] The number of liquidations recorded in the three months ended July 2013 decreased by 17,8% compared with the three months ended July 2012 as referenced in the Statistics South Africa Statistical Release P0043 http://www.statssa.gov.za (27-8-13); S 427 and s 432 of the 1973 Companies Act divested the persons normally responsible for the management of the company of their powers of management, which is not the case with business rescue.
[96] Schoeman "The battle of business rescue" http://bizconnect.standardbank.co.za (15-6-2013).
[97] Reg 132 of the Draft Companies Regulations *GG* 32832 (22-12-2009) provided for a business rescue regulatory board, which would regulate practitioners, including the prescription of qualifications, accreditation and resolving of complaints regarding practitioners.
[98] s 132(2).
[99] Loubser (n 25) 42.

management, therefore also endures for an undetermined period, *ie* until proceedings are terminated.

3.3 The moratorium

3.3.1 Nature and duration

If a section 129 resolution supporting business rescue proceedings is adopted and filed with the Companies and Intellectual Properties Commission, a moratorium is automatically triggered. If an application is launched to court to initiate business rescue, the moratorium is triggered when the court orders the commencement of business rescue.[100] Unlike judicial management where a moratorium prayer had to be included in the application and had to be granted by the court to be triggered, the section 133 moratorium automatically follows the commencement of business rescue.[101] Like judicial management, there is no stay on legal proceedings in the time period between the filing of the application with the court and the date on which the order is granted.

Section 133(1) creates a general moratorium against the commencement or continuation of legal and/or enforcement proceedings against the company (and property belonging to it or lawfully in its possession) during business rescue proceedings.[102] "Legal proceedings" or "enforcement action" is not defined, thus casting the net of protection as wide as possible.[103] The prohibition restricts the initiation or continuation of any legal or similar proceedings against the company in any form, including applications, summonses, execution steps and the like.[104] As such, affected parties are prohibited from enforcing their contractual or other remedies for the duration of the moratorium, providing the essential breathing space for the company to reorganise, which is ultimately in the interest of creditors.[105]

The moratorium does not affect the status of a contract to which the company is a party, *ie* contracts remain valid and binding and the company is still obliged to perform.[106] The practitioner may however cancel or suspend entirely, partially or conditionally any provision of an agreement to which the company is a party at the commencement of business rescue,

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[100] interpreting s 132(1)(a)(ii) and 132(1)(b).
[101] *Madodza (Pty) Ltd v Absa Bank Ltd* (n 59); Loubser (n 25) 86; Burdette "Some initial thoughts on the development of a modern and effective business rescue model for South Africa (part 2)" 2004 16 *SA Merc LJ* 409 414; Loubser (n 10) 154.
[102] FHI Cassim *et al* (n 4) 878.
[103] In *Investec Bank Ltd v Bruyns* (n 71) 434, Rogers AJ described the section 133(1) moratorium as a general provision that affords the company protection against legal action on claims in general; Delport *et al* (n 7) 478.
[104] *Madodza (Pty) Ltd v Absa Bank Ltd* (n 59) specifically referred to the prohibition on execution steps.
[105] Kloppers (n 3) 430.
[106] *Investec Bank Ltd v Bruyns* (n 71) 435-436. FHI Cassim *et al* (n 4) 878-879 states the rights of creditors are not substantially altered, but merely frozen.

but not an agreement of employment.[107] It would seem as if contractual parties and employees of the company are "left to dry" as the moratorium is binding on them and contracts may be suspended/cancelled. Business rescue does however not disregard the contractual parties or employees.[108] Section 133(1) provides that legal and/or enforcement action may be taken with the consent of the practitioner or the court, whereas section 136(1) dictates that employees, save for permitted changes, will continue to be employed by the company.[109] Furthermore, if the practitioner suspends or cancels a contract of the company, section 136(3) confers a right to the contractual party to claim damages.[110] Section 135(3) does however create an order of preference for payment of creditors' claims, *ie* firstly the practitioner's remuneration, followed by claims arising after the commencement of business rescue in terms of employees, secured lenders and then unsecured lenders. As soon as these claims have been addressed, claims arising before the commencement of business rescue in respect of secured lenders, employees and unsecured lenders will follow.[111] This position differs from judicial management, where the court was confined to its limited powers as it could not bind the credit or the company in a manner whereby a preference would be created for the claims of the creditors.[112]

The moratorium not only prohibits legal and/or enforcement action, but may be raised as a defence thereto. In *Investec Bank Ltd v Bruyns*,[113] the court distinguished between two types of defences that may be raised to a claim – a defence *in personam* and a defence *in rem*. The court held a defence *in personam* is "purely personal to the principal debtor", arising from a personal immunity of the debtor in respect of an otherwise valid and existing obligation, whilst a defence *in rem* "attaches to the claim itself", to the effect that if the defence is upheld, it renders the claim invalid, extinguished or discharged.[114] The court held that the section 133 moratorium clearly constituted a defence *in personam*, as the company's obligations as principal debtor are not extinguished or discharged and the validity thereof is not impaired,

[107] s 136(2).
[108] Elliot "Business rescue and franchising" http://www.rmlaw.co.za (8-8-2013) states that the common law principle which determines it is not open to a party that is unable or unwilling to perform to insist that the other party must perform where the parties have reciprocal contractual obligations towards each other, still remains effective; FHI Cassim *et al* (n 4) 886.
[109] Sharrock *et al* (n 76) 282.
[110] FHI Cassim *et al* (n 4) 886; Sharrock *et al* (n 76) 282, although Sharrock *et al* also state that in the case of a reciprocal contract, the other party would also be entitled to rely on the principle of reciprocity and withhold performance.
[111] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* case no 12406/13 (SGJ) (unreported) 9-10.
[112] *Klopper v Die Meester* 1977 2 SA 477 (T) 484-485.
[113] n 71.
[114] at 435 and 436.

and especially as the obligations may still be enforced with the consent of the court or practitioner.[115]

During the judicial management moratorium directors were divested of their powers completely, whilst, under business rescue, they may continue to exercise their functions subject to the practitioner's authority.[116] Shareholders are not affected as directly, save that they qualify as affected persons and would therefore have to be taken into consideration when any decision is made during the moratorium as their rights and interests would be directly affected. They are, however, barred from taking action against the company as a result of the moratorium.

3.3.2 Action prohibited

The section 133(1) moratorium applies to any "legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession". As discussed above, the failure to define "legal proceeding" or "enforcement action" casts the protection of the moratorium very wide.[117] Considering the purpose of business rescue and the absence of the definitions, it would only make sense that any action against the company, including action before bodies like the Consumer Commission, Competition Commission or Council for Conciliation, Mediation and Arbitration, would also be prohibited.[118]

Section 133 requires that property must vest in ownership of the company or be in its lawful possession. In *Madodza (Pty) Ltd v ABSA Bank,*[119] the court had to decide whether a court order granted before the initiation of business rescue, ordering the applicant to return vehicles to the respondent, meant that the vehicles were not "in the lawful possession of the company".[120] It is argued that the minimum requirements of physical control and a specific mental attitude towards an object have to be present to constitute possession, but that the exact content of possession will depend on the context in which and the purpose for which it is used.[121] It was common cause *in casu* that the vehicles belonged to the respondent. The court held the company was not lawfully in possession of the vehicles as the finance agreements were duly cancelled and the applicant had been ordered to return the vehicles

[115] n 114.
[116] see s 428(2)(a) and 432(3)(a) of the 1973 Companies Act and s 137(2) of the 2008 Companies Act.
[117] n 103.
[118] Delport *et al* (n 7) 478(1).
[119] n 59.
[120] par 17 of the judgment.
[121] Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (2006) 273.

prior to the commencement of business rescue. The vehicles were declared to fall outside the ambit of the section 133(1) moratorium.[122] It is submitted that although possession was present *in casu* as there was control of the assets and the respondent had an intention towards controlling the assets, such possession was unlawful considering the cancelled agreements and court order ordering the return thereof.

Apart from the general moratorium in section 133(1), section 133 contains a specific moratorium. A specific moratorium affords definite protection, limited within certain boundaries. Section 133(2) contains a specific moratorium, providing that no legal action or proceedings may be initiated or continued with against the company and/or its assets on the basis of a suretyship or guarantee executed by the company in favour of another. The section 133(2) moratorium is a special provision aimed at protecting a company under supervision against enforcement or legal action arising from a suretyship or guarantee.[123] The special moratorium contained in section 133(2), unlike the general moratorium in section 133(1), does not allow the practitioner to authorise enforcement action based on guarantees and suretyships against the company - only the court is afforded this authority.[124] As it currently reads, section 133(2) applies to the exclusion of section 133(1) insofar as claims based on guarantees and suretyships are concerned.[125] It is a mandatory provision which the parties to a transaction may not agree to otherwise in a contract or similar agreement.[126] It is important to note that the moratorium only applies to the company undergoing business rescue, and not its sureties.[127]

It is unclear why the legislature distinguished between general legal and/or enforcement proceedings[128] and proceedings based on guarantees or suretyships executed by the company.[129] The only difference is that court approval is required in the event of the specific moratorium. The statutory interpretation presumption is that language is not used unnecessarily (*ie* words should not be lightly construed as superfluous).[130] This general rule is however susceptible to exceptions, *eg* where for the sake of emphasis, clarity, certainty, or some other purpose a specific provision for a specific situation is, in any event, covered by a

[122] at par 17.
[123] *Investec Bank Ltd v Bruyns* (n 71) 435.
[124] n 123.
[125] n 123.
[126] FHI Cassim *et al* (n 4) 880.
[127] *Investec Bank Ltd v Bruyns* (n 71); Beukes (n 12) 36.
[128] s 133(1).
[129] s 133(2).
[130] Du Plessis *Interpretation of Statues and the Constitution* (2002) 2C-109; *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 2 SA 1007 (C) 1013.

general provision.[131] Based thereon, it is submitted that the general moratorium does, and should, apply to both types of proceedings. There is no clear indication why only the court has been empowered to consent to further action in the case of the specific moratorium. The practitioner must also be afforded this right as it is the practitioner who is responsible for facilitating the rescue of the company.[132]

3.3.3 Exceptions

Section 133(1)(a)–(f) contains exceptions when legal and/or enforcement proceedings may be continued with or initiated. The section 133 moratorium is therefore not absolute.[133] Legal and/or enforcement proceedings may, for example, be launched or continued with if written consent of the business rescue practitioner or leave of the court is obtained.[134] This consent would, for example, be given in instances where it would be to the benefit of the company to commence or continue with the proceedings. It has been argued that the moratorium may only be lifted prior to the business rescue plan being adopted, although the court has held that it may be lifted at any time during the business rescue process, as is expressly indicated in section 133(1)(a).[135]

Proceedings may still be launched or continued with as a set-off against a claim made by the company in legal proceedings commenced before or after the start of the business rescue proceedings.[136] This is a justifiable exception as it is a well-established principle of law that where mutual debts exist between creditor and debtor, the smaller debt may be set-off against the larger debt to do justice between the parties.[137] It is noticeable that section 133(1)(c) only permits the legal/enforcement action by the affected party to the extent that the company has already claimed from the affected party in "any legal proceedings", which differs from the general rules of set off which do not require legal proceedings.[138] This provision may prove to be an incentive for creditors to intervene in liquidation proceedings (by launching a business rescue application) where they have counter-claims against the company, and which

[131] Du Plessis (n 130) 2C-109 to 2C-110; *Casely v Minister of Defence* 1973 1 SA 630 (A) 639.
[132] Loubser (n 25) 87 supports this argument by saying "a business rescue practitioner should surely be trusted to refuse consent to any proceedings that would be harmful to the rescue process".
[133] in light of the exceptions and as discussed in Rushworth (n 12) 383.
[134] s 133(1)(a) and (b).
[135] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013 6 SA 471 (GNP) 473.
[136] s 133(1)(c).
[137] FHI Cassim *et al* (n 4) 880.
[138] In *Exclusive Access Trading 73 (Pty) Ltd v Lynne* case no 3829/2009 (ECG) (unreported), Revelas J quoted Wille *Principles of Justice* (8th Edition) 483, stating that the requirements for set off is that both debts must be of the same value, liquidated, fully due and payable by and to the same persons in the same capacity. No mention is made of legal proceedings.

they would not be entitled to set-off against their own claims should formal insolvency intervene.[139] This position differs under the insolvency regime, where a set-off that takes place within six months of formal insolvency can be set aside by the trustee or liquidator in certain circumstances.[140] After the liquidation *concursus creditorum* has taken effect, set-off is prohibited.

The establishment of the *concursus* in both liquidation and business rescue is important because it will determine the date on which the creditors' claims are established and because it means conflicting interests (that of the company and creditors) will be weighed up against each other.[141] The liquidation *concursus* is established at the beginning of the compulsory winding-up of the company or when the resolution is filed for voluntary liquidation.[142] In rescue procedures, the case is not so simple. A judicial management order did not create a *concursus*, which lead to an automatic set-off between debts incurred before and after the order, even if a moratorium was placed on claims against the company.[143] Business rescue does not provide for a *concursus* either. Thus, the prohibition against set-off does not apply during the business rescue regime.

Section 131(6) provides that a court may consider a business rescue application if liquidation proceedings have already been instituted by or against the company. The liquidation proceedings will be suspended until the business rescue application has been refused or, if granted, when business rescue terminates.[144] The business rescue moratorium will then replace the liquidation moratorium. The choice of the drafters to state that the business rescue application will "suspend" liquidation proceedings implies that liquidation (and the moratorium thereunder) will relive at a later stage. This is permissible if the business rescue application is refused, but it cannot be the case if the business rescue plan is successfully implemented, otherwise the liquidation moratorium and proceedings relive in respect of an already rescued company. It would also create a second liquidation *concursus*, which will serve no purpose at all as the company has already been rescued.

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[139] Delport *et al* (n 7) 478(2).
[140] s 46 of the Insolvency Act 24 of 1936; Delport (n 7) 478(2).
[141] *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223; Sharrock *et al Hockly's Insolvency Law* (n 76) 254 states that the powers of directors cease (becoming *functus officio*), the company's property is deemed to be in custody and under control of the Master until the trustee is appointed and the company may not continue with its business unless required for beneficial winding up.
[142] ch 2 par 3.2.1.2.
[143] Cilliers (n 24) 484; *Lief v Western Credit (Africa) (Pty) Ltd* 1966 3 SA 344 (W) 348; *Transkei Development Corporation Ltd v Oshkosh Africa (Pty) Ltd* 1986 1 SA 150 (C) 154; *Confrees (Pty) Ltd v Oceanate Investments (Pty) Ltd* 1996 1 SA 759 (C).
[144] Sharrock *et al* (n 76) 279.

The moratorium does not protect the company, or its directors, against criminal proceedings which have been, or may be, launched against them.[145] This enforces the concepts that a company may not trade recklessly and the fiduciary duties of directors.[146] It is however unclear why reference has been made to directors, as business rescue applies to the company, not its directors. If the company exercises the powers of a trustee regarding any property, or right thereover, there is no stay on legal and/or enforcement proceedings against the company.[147] Proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner are also excluded from the moratorium.[148]

3.3.4 Measurement of time

If any right to commence proceedings or assert a claim against the company is subject to a time limit, the measurement of that time must be suspended during the business rescue proceedings.[149] It has been argued that the suspension has the effect of extending the time period irrespective of how long before the completion of prescription business rescue ends, which must be distinguished from circumstances delaying prescription under the Prescription Act 68 of 1969.[150] It is submitted that the wording of this provision is unnecessarily complex. Although it affords more clarity to the management of time during business rescue proceedings, the legislature could have simply stated that business rescue interrupts prescription until the termination of business rescue.[151]

4 *Conclusion*

A developing economy such as South Africa cannot afford that commercial enterprises are run down through winding-up and eventual dissolution due to temporary setbacks, specifically where a moratorium could rather enable its rehabilitation.[152] Companies are vital role players in any economy, and the rescue of a company would therefore be of bigger benefit to the company and the community, than liquidation and/or dissolution.[153] Based thereon, it is submitted that no jurisdiction would be able to justify the absence of rescue

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[145] s 133(1)(d).
[146] see s 20 and s 76.
[147] s 133(1)(e).
[148] s 133(1)(f).
[149] s 133(3).
[150] Sharrock *et al* (n 76) 281.
[151] Loubser (n 25) 87; Delport *et al* (n 7) 478(2) states this provision should have been drafted to align with the South African institution of prescription.
[152] Cilliers *et al* (n 24) 478.
[153] Sharrock *et al* (n 76) 275 states "one of the express purposes of the Companies Act is to facilitate the efficient rescue of financially distressed companies (s7(k))…" which is why "a court will give preference to business rescue over liquidation" where there is a genuine intent to achieve the "aims of the Act".

procedures. Rescue procedures (business rescue *in casu*), in turn, would only succeed if a temporary moratorium is automatically triggered at the commencement thereof, allowing the company to rehabilitate itself whilst all enforcement against the company is "frozen".[154] As business rescue only commences on the filing of the section 129 resolution or the granting of a court order, creditors will hastily launch legal/enforcement proceedings upon receiving notice of the application to commence business rescue and before a moratorium freezes their rights, which may be detrimental to the company.[155] This is why informal creditor workouts are not always successful, because there is no moratorium while negotiations are underway.[156] A provisional moratorium, effective from the application filing date until the business rescue order is granted, may however rectify this problem, with the "normal" moratorium becoming effective only on the granting of the business rescue order.[157]

The fact that a moratorium was not automatically triggered when judicial management was ordered was one reason why judicial management was considered unsuccessful.[158] The fact that there was uncertainty on whether a moratorium existed under the final judicial management order and the limited powers of the court to authorise legal proceedings after the final judicial management order was also unfortunate. Section 133 has rectified this as a moratorium is automatically triggered when business rescue proceedings commence. The fact that the business rescue moratorium is a general moratorium and not absolute is also to be welcomed. Section 133, therefore, is already an improvement on the judicial management moratorium.

The section 133 moratorium not only serves the dual purpose of prohibiting further legal and/or enforcement action (which may cause further distress) and allowing the rescue agent to formulate a strategy to rescue the company, but it also protects the interests of creditors of the company to some extent. Creditors are required to formally submit their claims, to an independent rescue agent, who will organise all claims in such a manner (*ie* in preference) so that the return is maximised. This happens during the moratorium wherein no claims may be enforced. Due to the ranking of claims and the discretion of the practitioner to suspend/cancel

[154] FHI Cassim *et al* (n 4) 879.
[155] n 22.
[156] 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* 241 255.
[157] Beukes (n 12) 36 states the moratorium must apply from the date the business rescue proceedings are launched, not from the date of the court order, as the latter is not in accordance with the 2008 Companies Act. See proposed amendments in ch 4 below.
[158] Loubser (n 23) 163.

contracts, however, it has been argued that the moratorium must be a short period as not to unduly affect creditors' rights.[159]

It has been argued that the moratorium on claims and proceedings against the company is a "vital stage" of business rescue.[160] The moratorium allows the court to hear the business rescue application and the practitioner to function effectively.[161] It is evident that the legislature has gone to great lengths to protect the company undergoing business rescue. Business rescue also goes a long way to protect the interests of affected persons, more specifically the creditors and employees.[162] Section 133 is however not without its faults. Section 132 (especially the duration of business rescue if an application is launched to court) is unclear and section 133 requires amendments regarding the exceptions, the specific moratorium, time measurement and general wording.[163]

Meskin's interpretation that the section 150(2) moratorium (which is included in the business rescue plan) is a special moratorium distinguishable from the section 133 moratorium, is submitted to be correct, as the practitioner utilises his own discretion (with the required consultations) in formulating the rescue plan.[164] The 2008 Companies Act does not prescribe the mechanisms and techniques to be used by the practitioner, and it is therefore submitted that if the practitioner includes/extends the moratorium in the rescue plan, that he has decided to do so out of own accord and for a specific reason, implying a specific moratorium rather than a general moratorium.

[159] Kloppers (n 3) 430.
[160] FHI Cassim *et al* (n 4) 865. It is however submitted that the moratorium applies during the entire business rescue procedure and is therefore not a "stage" but rather a period.
[161] Beukes (n 12) 36.
[162] It was held in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 5 SA 596 (GSJ) that all reasonable steps had to be taken to identify and trace all affected persons to enable service of the application on affected persons, whilst it was held in *Kalahari Resources (Pty) Ltd v Arcelormittal SA* 2012 3 All SA 555 (GSJ) that a business rescue application had to be served on creditors. In *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 5 SA 422 (GNP) Makgoba J held that the interests of the company and its creditors had to be weighed and that the interests of creditors had to prevail. This view was also taken by Claassen J in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 3 SA 273 (GSJ). Claassen J also held that the general aim of business rescue is to preserve the value of a company's business as a going concern and to prevent job losses. Both views of Claassen J were confirmed on appeal by Brand J in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 3 All SA 303 (SCA).
[163] see ch 4 below.
[164] n 88.

It is consequently submitted that the business recue moratorium is a step in the right direction and must, subject to certain amendments, be afforded an opportunity to establish itself and grow.[165] Only thereafter will we be in a position to properly consider the procedure.

[165] This was supported by Francois van Wyk, an attorney from Van Velden-Duffey attorneys, during his speech at the annual general meeting of the North West Attorneys Council on 30 September 2011; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* (n 111) 8.

CHAPTER 3

THE RESCUE MORATORIUM IN ENGLAND

1 *Introduction*

Insolvency in England is currently governed by the Insolvency Act 1986 (c45), as amended.[166] There have been many amendments to the Insolvency Act, *inter alia* the supplementation thereof with certain schedules.[167]

Under the Insolvency Act, there may be four types of moratoria:

a) during the period of administration;[168]
b) an interim moratorium;[169]
c) a moratorium in favour of a small, eligible company, pending a meeting to consider a company voluntary arrangement;[170] and
d) a moratorium under an approved company voluntary arrangement.

This chapter will only discuss the moratorium provisions under the administration procedure (not addressing the procedure itself). Although the English insolvency regime also provides for company voluntary arrangements, which in turn also entails its own moratoria, such will not be discussed herein.

2 *Administration*

2.1 Commencement of administration

If a company is, or is likely to become, unable to pay its debts, it may be placed in administration.[171] In terms of the Insolvency Act, a company is "in administration" while the appointment of an administrator is in force.[172] Administration commences when an administrator is appointed for the company.[173] The administrator is appointed when the court orders the company to be placed under administration or if the holder of a floating charge, the company or its directors appoints and administrator.[174] In the case of an application to court,

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[166] In this chapter called the Insolvency Act.
[167] These schedules will be referred to by number hereinafter, and each reference to a "schedule" will accordingly mean a schedule to the Insolvency Act.
[168] par 42 and 43 of schedule B1.
[169] par 44 of schedule B1.
[170] s 1A of the Insolvency Act; schedule A1 to the Insolvency Act.
[171] par 11(a) and 27(2)(a) of schedule B1.
[172] par 1(2)(a) of schedule B1.
[173] par 1(2)(b) of schedule B1.
[174] par 10, 14 and 22 of schedule B1. According to par 105 of schedule B1 and Bailey and Groves *Corporate Insolvency Law and Practice* (2007) 372, if the directors appoint an administrator, no formal resolution at a board meeting is required, providing a majority supported the decision.

after an applicant[175] files an application and the prescribed supporting documents (all in prescribed form and with due notice) with court to place a company under administration and to appoint the nominated administrator(s), the court will determine a date for the hearing.[176] Administration will commence at the time stipulated in the court order, or if no such time is specified, when the court order appointing the administrator is granted.[177]

In terms of paragraph 22, a person intending to appoint an administrator must give at least five business days' prior written notice (in the prescribed form) of its intention to appoint an administrator to any person entitled to appoint an administrative receiver of the company, as well as to any holder of a floating charge who is, or may be, entitled to appoint an administrator under paragraph 14.[178] The notice to appoint must be accompanied by various prescribed documents, *inter alia* a copy of the company's resolution appointing the administrator (or a record of the decision of the directors to make such an appointment),[179] prescribed statements by the person proposing the appointment of an administrator (*inter alia* that the company is, or is likely to become, unable to pay its debts) and prescribed statements by the administrator (*inter alia* consenting to his appointment). The notice to appoint and supporting documents must be filed with the court as soon as is reasonably practicable.[180] Administration accordingly commences when the administrator is appointed,[181] which is when the prescribed notice of appointment and documents are filed with the court.[182]

2.2 Termination of administration[183]

Firstly, administration automatically terminates one year after the appointment of the administrator became effective.[184] Paragraph 4 of schedule B1 however requires the administrator to perform his duties "as quickly and efficiently as is reasonably practicable". The administrator may extend administration for a specified period (subject to court approval)

[175] The applicant may be the company, its directors or creditors in terms of rules 2.2(2) and 2.2(3) of the amended Insolvency Rules.
[176] rule 2.5 of the amended Insolvency Rules. Pennington *Pennington's Corporate Insolvency* (1997) 336 submits that, although the provisions do not expressly authorise the company to do so by resolution at a general meeting, the reasoning that an application by the company to wind itself up could only be launched if a resolution had been passed at a general meeting or if the articles authorised such powers, applies in equal token to administration. This is echoed by Bailey and Groves (n 174) 352-353.
[177] par 13(2).
[178] par 26(1) of schedule B1.
[179] rule 2.22 of the amended Insolvency Rules.
[180] par 27(1) of schedule B1. If no persons are entitled to receive notice, no notice has to be filed with the court.
[181] par 1(2)(b) of schedule B1. In terms of par 31, the appointment of the administrator under par 22 takes effect when the par 29 requirements are satisfied.
[182] par 29 of schedule B1.
[183] The nine exit methods from administration are also listed in Birds *et al Boyle & Birds' Company Law* (2007) 895-896.
[184] par 76(1) of schedule B1.

or it may be extended for up to six months if all the secured creditors and unsecured creditors holding more than 50% of the unsecured debts of the company consent thereto.[185]

Secondly, administration may be terminated by application to court. The administrator may apply to court for termination before the automatic termination date, which he must do if it appears that the purpose of administration cannot be achieved, it was inappropriate (in his opinion) for the company to enter administration or if he is instructed to do so by a meeting of the company's creditors.[186] If the administrator was appointed by the court, he must apply to court for termination if he thinks that the purpose of administration has been successfully achieved before the automatic termination date.[187] A creditor may also apply to court where it seems the appointment was made for an improper motive.[188]

The administration may terminate upon the filing of prescribed notices. If the company or directors appointed the administrator, the administrator may file a notice with the court and registrar of companies if he feels the purpose of administration has been successfully achieved, which filing date will be deemed the termination date.[189] The administrator may also file a notice with the court and registrar of companies turning administration into a creditors' voluntary winding up if he believes that the total amount payable to all secured creditors has been paid, or set aside, and a distribution will be made to unsecured creditors.[190] If there are no assets to allow a distribution to creditors, the administrator can cause the dissolution of the company by sending a notice to the registrar of companies, which will terminate administration proceedings.[191]

Finally, the court may make an order for the liquidation of the company on public interest grounds, creditors fails to agree to the administrator's proposals or revised proposals and the court makes a termination order and if the court orders that the administrator's actions have unfairly harmed either creditors or members.[192]

2.3 The moratorium

2.3.1 The interim moratorium

[185] par 76(2) of schedule B1.
[186] par 79(1) and (2) of schedule B1.
[187] par 79(3) of schedule B1.
[188] par 81 of schedule B1.
[189] par 80 of schedule B1.
[190] par 83 of schedule B1.
[191] par 84(1) of schedule B1.
[192] Birds *et al* (n 183) 896.

Unlike judicial management and business rescue where a moratorium would only be triggered on the granting of a court order and no interim moratorium exists, provision has been made in England for an interim moratorium. It has been submitted that this interim moratorium is one of the most vital elements of administration.[193]

The interim moratorium is effective in the period when an administration application has been launched but not yet granted or dismissed, in the period between the making of an administration order and it coming into effect, in the period between the filing of a notice by a floating charge holder of the intention to appoint and the appointment coming into effect, in a period of five days from the date of expiry of a notice of intention to appoint filed by a floating charge holder where no administrator has been appointed and in the period between the filing of the notice of intention to appoint by the company or its directors and the appointment taking effect or ten days lapsing without any appointment being made.[194]

The interim moratorium is almost identical to the final moratorium.[195] The interim moratorium has actually been referred to as "Phase I" of the administration moratorium, confirming the similarities between the interim and final moratoria.[196] The only difference is that the court's approval is required under an interim moratorium before any prohibited action may be taken, whilst the administrator's consent is sufficient under the final moratorium. The English moratoria are also similar to the business rescue moratorium in that they do not authorise the postponement of debts, but merely limit enforcement of legal rights.[197]

If there are no persons entitled to receive the notice of intention to appoint an administrator, an interim moratorium is not triggered as no notice of intention to appoint an administrator has to be filed with the court (the latter being the trigger of the interim moratorium).[198]

2.3.2 The final moratorium

2.3.2.1 Nature of the moratorium

Whilst a company is under administration there is an absolute moratorium on the winding up of the company.[199] The court may only make an exception if a petition is presented on public interest grounds or by the Financial Services Authority, without immediate termination of

[193] Hannigan *Company Law* (2009) 620.
[194] par 44 of schedule B1.
[195] par 44(5) of schedule B1, read with par 42 and 43; Parry *Corporate Rescue* (2008) at 56 indicates that the interim moratorium "operates to a large extent in the same way as an ordinary moratorium".
[196] Fletcher *The Law of Insolvency* (2009) 539.
[197] Lightman *et al The Law of Administrators and Receivers of Companies* (2007) par 2-040.
[198] see supporting argument in Loubser (n 25) 193.
[199] par 42 of schedule B1.

administration.[200] It has been submitted that if enforcement action is taken whilst a moratorium is in place (during the interim or final moratorium), the party in breach is liable for damages.[201]

No other legal processes, including any steps to enforce security over the company's property, repossess goods under a hire-purchase agreement, exercise a landlord's right of forfeiture and any other legal process against the company,[202] or its property while the company is in administration,[203] may be taken whilst the moratorium is effective. The prohibition on legal proceedings is very wide, and includes quasi-legal proceedings such as arbitration, is not limited to action taken by creditors and applies to criminal proceedings against the company.[204]

As with business rescue, the final moratorium is triggered automatically and is general in nature.[205] Whilst the moratorium on winding up of the company is absolute, there are instances where the administrator and the court may allow specific legal action against the company to be instituted or continued. The moratorium does not affect the company's capacity (although it is under the administrator's management) to continue to trade and incur liabilities or the contractual rights and obligations of the company.[206] It is merely the enforcement thereof that is frozen.[207]

2.3.2.2 Action prohibited

The final moratorium has the following effects:[208]

a) no resolution may be passed, or order made, for the winding-up of the company, other than on public interest petitions;[209]
b) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the company except with

[200] par 42(4) of schedule B1.
[201] Parry (n 195) 91. This was accepted by both parties in *Euro Commercial Leasing Ltd v Cartwright & Lewis* 1995 BCC 830.
[202] This includes criminal proceedings as per *Environment Agency v Clark (Administrator of Rhondda Waste Disposal Ltd*) 2000 BCC 653 (CA).
[203] par 43 of schedule B1.
[204] Hannigan (n 193) 632.
[205] Parry (n 195) at 85 describes it as giving "very wide protection against various forms of proceedings".
[206] Goode *Principles of Corporate Insolvency Law* (2011) 425; Parry (n 195) 86.
[207] Hannigan (n 193) 769.
[208] Fletcher (n 195) 540-542.
[209] n 199.

the consent of the administrator or court and subject to such conditions the court may impose;[210]

c) no enforcement steps may be taken to enforce security over the company's property, or to repossess goods in the company's possession under a hire purchase agreement, conditional sale agreement, chattel leasing agreement or retention of title agreement, save where permission is obtained from the administrator or the court and subject to conditions the court may impose;[211]
d) no legal process (including all legal proceedings,[212] execution, distress and diligence) may be launched or continued with, save where consent is obtained from the administrator or court and subject to conditions the court may impose;[213] and
e) no administrative receiver of a company may be appointed during administration.[214]

2.3.2.3 Exceptions

As indicated in paragraph 2.3.2.2 above, the veil of the moratorium may be lifted in certain circumstances and steps may be taken against the company and/or its property. In *Re Atlantic Computer Systems Plc*[215] the court identified certain principles which should be considered before consent is given to proceed or institute action, which are:[216]

a) the person seeking leave to take action bears the onus;
b) whether granting leave to a lessor of land or the hirer of goods to exercise his proprietary rights and repossess his land/goods is unlikely to impede the purpose of administration (in which case leave should be granted);
c) if the granting of leave would impede the achievement of the purpose of administration, the court has to balance the legitimate interests of secured creditor (lessor) and that of the other creditors of the company, such balancing act being exercised on judicial judgment;
d) the proprietary interests of the lessor or secured creditor must be ascribed great weight when interests are balanced;

[210] par 43(4), (5), (7) and (8) of schedule B1.
[211] par 43(2), (3) and (7) of schedule B1, read with par 111(1).
[212] Parry (n 195) at 89 states that a wide approach must be taken in interpreting "legal proceedings"; In *Air Ecosse Ltd v Civil Aviation Authority* 1987 3 BCC 492 it was held that it would include legal and quasi-legal proceedings.
[213] par 43(6) of schedule B1.
[214] par 43(6A) of schedule B1.
[215] 1992 Ch 505; 1990 BCC 859.
[216] *Re Atlantic Computer Systems Plc* (n 215) 542-544; Fletcher (n 196) 544-545.

e) if significant loss would be caused to a lessor or secured creditor if leave is not granted, leave must be granted;
f) in assessing the loss, the court must *inter alia* consider the financial position of the company, its ability to pay rental arrears, the administrator's proposals, the period of administration (which has already passed and is still expected), the effect on the applicant if leave is refused, the expected result of administration and the history leading up to the application; and
g) any other relevant factors may also be considered.

3 *Conclusion*

One of the major important advantages of administration is the automatic moratorium that enables the administrator to prepare proposals for the creditors without the pressure of threatening enforcement actions.[217] The moratorium has been hailed as the "most significant feature of administration",[218] which is a statement I agree with. The moratorium is vital to the sustainability of administration, and the fact that it is an automatic moratorium is admirable. The interim moratorium is especially commendable in light of the vulnerability of the company in the period between commencement of the administration process and the appointment taking effect. In this aspect, administration is one step ahead of business rescue, which does not provide for an interim moratorium. A further "significant feature of the administration"[219] is the moratorium on insolvency proceedings, which is an unfortunate oversight in the business rescue provisions. In my opinion the United Kingdom's moratorium provisions regarding rescue are clear and systematic, ensuring maximum security for both the company and the creditors.

[217] Bailey and Groves (n 174) 385; Birds *et al* (n 183) 876.
[218] Finch *Corporate Insolvency Law: Perspectives and Principles* (2009) 22.
[219] Parry (n 195) 84.

CHAPTER 4

CONCLUSION

1 *The need for a rescue moratorium*

The need for such rescue provisions can be summarised as follows:

> "Owners of the capital will stimulate the working class to buy more and more expensive goods, houses, technology, pushing them to take more and more expensive credit, until debt becomes unbearable. The unpaid debt will lead to the bankruptcy of banks, which will have to be nationalised, and the state will have to take the road which will eventually lead to communism."[220]

Rescue procedures must inherently afford protection to the company whilst it is undergoing rescue to enable the rescue agent to propose and implement any rescue actions. The failure to provide for such protection will render any rescue attempts stillborn as the company would not be afforded a reasonable opportunity to reorganise itself to comply with its obligations to third parties. As such, rescue procedures must provide for a stay on all legal and/or enforcement proceedings against the company and its property whilst rescue proceedings are underway. This stay of proceedings will not alter the status of the rights, obligations and capacity of a company or third party, but merely freeze enforcement of such rights and obligations.

2 *The moratorium contained in section 133 of the 2008 Companies Act*

2.1 The successes of section 133

Section 133 of the 2008 Companies Act already improved on the judicial management moratorium insofar as the section 133 moratorium is an automatic moratorium. Judicial management failed in this regard as it required an applicant to include a specific prayer in its application to activate a moratorium. Section 133 also allows the business rescue practitioner an opportunity to work with all the relevant parties, *eg* the directors and creditors, to obtain a mutually beneficial result, it allows the business recue practitioner time to investigate the current affairs of the company and it actually allows for the protection of interests of creditors.

The general moratorium encompassed in section 133(1) is also a great advantage of business rescue, as it protects the company against any legal and/or enforcement action, including

[220] This has been attributed to Marx *Critique of the Political Economy: The Das Kapital* (1867), however the authenticity thereof is disputed. It is a thought provoking statement nonetheless.

quasi-legal proceedings. Another advantage is that section 133 lists certain exceptions when the moratorium may be lifted. It confirms that business rescue is a flexible procedure that is unique in every instance it is implemented.

2.2 The failures of section 133

Firstly, there are inconsistencies in respect of the commencement of business rescue proceedings (especially if an application to court is launched) when sections 131 and 132 are compared. Section 133 unfortunately also lacks in the respect that it does not afford protection whilst a business rescue application is pending before court. In this respect, the administration procedure in England is an excellent example of how the interim moratorium must be formulated. As it is a reality that a moratorium is frequently abused, the limitation of the provisional/interim moratorium to a specific time period would restrict the abuse of the interim moratorium.

I further submit that section 133 must only contain the general moratorium stipulated in section 133(1), and that the specific moratorium in section 133(2) is unnecessary and must be removed. The practitioner must also be afforded the power to lift the moratorium when guarantees/suretyships are concerned. Finally, the absence of specific reference to a prohibition against all insolvency proceedings against the company is also noticeable and must be included. This means an application for the winding up of the company may be brought without the applicant having to terminate or set aside business rescue. The applicant would only have to obtain consent of the business rescue practitioner or the court to proceed, which is not advisable. In this respect, the administration procedure in England is a better example.

3 *Proposed amendments*[221]

3.1 Commencement of business rescue

The provisions of the English Insolvency Act 1986 (c45), as amended, gives greater clarity on the commencement of administration, and I accordingly propose an amendment in line therewith to section 132(1) of the 2008 Companies Act. In accordance with my recommendations, any confusion caused by the interchanging usage of the words "commence" and "begin" are eliminated. The wording of section 132(1)(a) is corrected to refer to the board, and not the company, filing a section 129(3) resolution, whilst section

[221] I shortly summarise the scope of the amendments I propose to the 2008 Companies Act. The amendments are however contained in Annexure "A" hereto.

132(1)(b) is corrected to refer to the court ordering commencement of business rescue in terms of section 131(4)(a), and not 131(1) as originally referenced. My proposed amendment of section 132(1)(b) also makes the current sections 132(1)(a)(ii) and 132(1)(c) redundant and are therefore deleted.

3.2 The moratorium

The moratorium commences on the date that business rescue commences in terms of my proposed amendments above. As discussed in chapter 2, the company requires protection (*ie* a moratorium) against any legal and/or enforcement action whilst the application is pending before court. This is the case in England, which the point of reference I use in support of my proposed amendment of section 133. This "provisional" moratorium would however only find application in the event that a court application is launched to place the company under supervision, as the filing of the resolution under section 129 automatically triggers the moratorium. My proposed amendment would bring about an interim moratorium which may still be lifted in the event that court approval is obtained. It is therefore not an absolute moratorium. I have furthermore removed reference to criminal proceedings against the directors or offices contained in section 133(1)(d) as it has no bearing on the company. In my opinion, the specific moratorium against enforcement of suretyships or guaranties executed by the company already falls under the protection of the general moratorium. I have therefore removed this subsection in my amendment. My proposed amendment now also includes a prohibition on the granting of a winding up order whilst the company is being protected by either the interim moratorium or final moratorium. This I have borrowed from the English legislation. The remainder of the amendments are purely linguistic amendments, which I deem are prudent to give better effect to the contemplated protection of a moratorium.

4 *Final conclusion*

In his consideration of what a reformed judicial management should encompass, Kloppers proposed that the directors of a company are in the best position to decide when a company should enter into rescue and such a decision should be followed by a moratorium or stay on all proceedings against the company.[222] It is in this argument that he concluded, as stated in the introduction herein, that "[t]he moratorium or stay on proceedings is a cornerstone of all business rescue procedures".

[222] Kloppers (n 3) 429.

As discussed in chapter 2, it is clear why the protection of a moratorium is required – a company simply cannot rescue itself if other stakeholders are taking action which will ultimately force the company over the edge and into possible liquidation or dissolution. Section 133 has gone a long way to protect the business, and so to the affected parties, whilst business rescue is underway. To this extent, section 133 is an improvement on the provisions under the 1973 Companies Act. The protection afforded by section 133 is also very wide, which is to be welcomed. It must however be refined to afford proper protection for the relevant parties, and most importantly, the company. The business rescue process is meant to facilitate the rescue of a company close to insolvency, which is achieved *inter alia* as a result of an automatic moratorium.[223] As such, I conclude that section 133 successfully enables the rescue of the company, but that there are prudent amendments which will not only increase the likelihood of rescue, but also bring it in line with international standards regarding rescue moratoria.

[223] FHI Cassim *et al* (n 4) 877-878.

ANNEXURE "A"

PROPOSED AMENDMENTS TO THE 2008 COMPANIES ACT[224]

1 *Section 132(1)*

(1) Business rescue proceedings commence ~~begin~~ when –

(a) the board of directors, on behalf of the company, –

~~(i)~~ files a resolution to place itself under supervision in terms of section 129(3); or

~~(ii) applies to the court for consent to file a resolution in terms of section 129(5)(b);~~

(b) ~~an affected person applies to the~~ court makes an order placing the company under supervision in terms of section 131(4)(a) ~~for an order placing the company under supervision in terms of section 131(1)~~, unless the court orders a specific commencement date.~~; or~~

~~(c) during the course of liquidation proceedings, or proceedings to enforce a security interest, a court makes an order placing the company under supervision.~~

2 *Section 133*

133 The interim and final general moratorium on legal proceedings against company

(1) Any court order providing for the winding up of the company and institution or continuation of legal proceedings, enforcement actions, execution of any writs, summonses and other processes against the company will be prohibited from the moment that an application for the commencement of business rescue proceedings has been filed with the court, until the business rescue proceedings officially commence in terms of section 132(1) or the court has dismissed the application, except if permission of the court is obtained and subject to any conditions the court may impose.

[224] When making proposals, all insertions will be underlined and all deletions will be struck through.

(~~1~~2) ~~During business rescue proceedings~~ For the duration of the business rescue proceedings, no legal proceeding or ~~including~~ enforcement action, including execution of any writs, summonses and other processes 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~~ conditions the court ~~considers~~ ~~suitable~~ may impose;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective 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~~; or

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

(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) For the duration of the business rescue proceedings, no order for the winding up of the company may be granted.

(~~3~~4) ~~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.~~ Prescription on any claim or right against the company

will be interrupted during the periods contemplated in sub-sections (1) or (2).

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