COPYRIGHT AND CITATION CONSIDERATIONS FOR THIS THESIS/ DISSERTATION

How to cite this thesis
INTERPRETATION OF “LIQUIDATION PROCEEDINGS”:
A DISCUSSION OF RICHTER v ABSA BANK LIMITED

by

MUDAU TSHIFHIWA
(Student number: 216079781)

A dissertation submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM (LLM)

in

CORPORATE LAW

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

SUPERVISOR: J CALITZ

February 2018
ACKNOWLEDGMENTS

I would like to thank God almighty for His unfailing love in my life. A special thanks to my supervisor, Professor Juanita Calitz, for opening my eyes in so many ways. She was very instrumental in the completion of this dissertation. Thank you Tebele Tebatso Confidence for encouraging me to study.
# TABLE OF CONTENTS

## CHAPTER 1
1. Introduction  
1.1 Problem statement  

## CHAPTER 2
2. The *Richter* judgment  
2.1 Summary of the facts  
2.2 Judgment of the High Court  
2.3 Judgment of the Supreme Court of Appeal  

## CHAPTER 3
3. Overview of business rescue proceedings  
3.1 Commencement of business rescue proceedings  
3.2 Interpretation of "*liquidation proceedings*" within the context of section 131(6)  
3.3 Discussion of related case law  
3.4 Abuse of business rescue proceedings  
3.5 The status of employees as "affected person" during business rescue proceedings  
3.6 General moratorium during business rescue  

## CHAPTER 4
4. Discussion of the *Richter* judgment  
4.1 The High Court judgment  
4.2 The Supreme Court of Appeal judgment  
4.3 Practical implications of the *Richter* judgment  

## CHAPTER 5
5. Conclusion  

Bibliography
CHAPTER 1: INTRODUCTION

The corporate environment in South Africa has changed with the introduction of business rescue by the Companies Act 71 of 2008.¹ The object of business rescue is to keep a company alive and prolonging the benefits that stakeholders, employees, shareholders and creditors receive from it.² South Africa was in dire need of a workable business rescue program after the judicial management had failed ailing companies with the previous company law regime.³ When a company fails, it does not only affect shareholders and creditors, it also affects employees, suppliers, and communities due to the fact that they also experience socio-economic problems. It is therefore of utmost importance that attempts should be made to rescue companies which are suffering a temporary setback to survive.⁴

One of the main objectives of the 2008 Act is the introduction of business rescue proceedings in Chapter 6 — appropriate to the needs of modern South Africa economy.⁵ It must be acknowledged that effective and well-functioning business rescue proceedings has clear advantages for every country and every type of economy; these advantages are even more relevant in developing countries where the preservation of jobs is of primary concern.⁶

The 2008 Act does not define the concept of “liquidation proceedings”⁷ and various cases have been heard in numerous high courts on this issue. In an attempt to interpret the concept “liquidation proceeding”, divergent conclusions have been reached in the midst of a series of emerging case law – one of these interpretations was provided in the decision of David Jacques Richter v Absa Bank Limited.⁸ The judgment provides clarity on the interpretation of the concept of liquidation proceedings.

¹ Hereinafter referred to as the 2008 Act. It was passed by Parliament on 19 November 2008 and assented to by the President under GG 32121 (Notice 421) of 8 April 2009 and came into force on 1 May 2011.
² Joubert “Reasonable possibility” versus “reasonable prospect”: Did business rescue succeed in creating a better test than judicial management? 2013 THHRH 551.
³ Joubert (n 2) 551.
⁷ Stoop “When does an application for business rescue proceedings suspend liquidation proceedings?” 2014 De Juris 329.
1.1 Problem statement

Since the 2008 Act became functional there has been considerable uncertainty with regard to the interpretation of some of the sections contained in Chapter 6 of the 2008 Act, mainly due to important concepts not being defined in the Act. This uncertainty has extended to the provisions dealing with the interpretation of liquidation proceedings. The interpretation of liquidation proceedings within the context of section 131(6) of the 2008 Act was recently in the limelight when the Supreme Court of Appeal decided the case of Richter v Absa Bank Limited.⁹

The purpose of this dissertation is to analyse the decision in Richter v Absa Bank Limited¹⁰ and to determine whether the judgment of the Supreme Court of Appeal has correctly interpreted the provisions of section 131(6) of the 2008 Act, compared to the judgment of the High Court.¹¹ Furthermore, it determines whether the term liquidation proceeding within the context of section 131(6) of the 2008 Act refers only to a pending application of liquidation order or whether it includes the process of the winding up of a company after a final liquidation order has been granted. This judgment is of utmost importance as it breaks with the preconceived, perhaps misinterpretation, of what liquidation proceedings mean within the context of section 131(6) of the 2008 Act.

Chapter 1 of this dissertation provides a brief background of business rescue and contains the problem statement. Chapter 2 will be a discussion of the facts of the case and looks at the judgments of High Court as well as the Supreme Court of Appeal (SCA). Chapter 3 incorporates a discussion of all related aspects which the courts had to consider in these judgments and all related case law. Chapter 4 deals with the High Court and SCA judgments and considers the practical implication of both judgments. In Chapter 5 final conclusions are drawn.

⁹ Richter v Absa Bank Limited (n 8).
¹⁰ Richter v Absa Bank Limited (n 8).
¹¹ Richter v Bloompro CC and Others 2014 6 SA 38 (GP).
CHAPTER 2: THE RICHTER JUDGMENT

2.1 Summary of the facts

On 17 September 2012, Bloempro CC (the first respondent) was liquidated in the Bloemfontein High Court on the grounds that it was unable to pay its debts. Mr Richter (the applicant), in his capacity as a member of Bloempro, attempted but failed to counter the liquidation proceedings by lodging an application for business rescue.\textsuperscript{12} Furthermore, on 8 April 2013, the Bloemfontein High Court refused leave to appeal the final liquidation order.\textsuperscript{13} Subsequent to the final liquidation order being issued, the applicant’s offices moved to Pretoria, and the applicant who described himself as a general manager of the first respondent brought a business rescue application in terms of section 131 of the 2008 Act.\textsuperscript{14}

Counsel for the first respondent contended that the first respondent was no longer in existence as its existence was terminated by the liquidation order.\textsuperscript{15} ABSA Bank limited (the fourth respondent), intervened to have the business rescue application set aside. The applicant failed to file an opposing affidavit whilst in default, and the fourth respondent was granted leave to intervene in the business rescue application and the application was dismissed.\textsuperscript{16} The applicant applied for rescission of the default judgment in the high court and for an order to proceed with the business rescue application which was dismissed.\textsuperscript{17}

The applicant then brought an appeal application against the judgment handed down by the high court. The Supreme Court of Appeal was tasked with the following question of law, namely, whether it is possible to apply for business rescue after a final liquidation order has been granted against Bloempro in terms of section 131 of the 2008 Act.\textsuperscript{18}

\textsuperscript{12} Richter v Bloempro (n 111) par 1.
\textsuperscript{13} Richter v Bloempro (n 111) par 2.
\textsuperscript{14} Richter v Bloempro (n 111) par 1.
\textsuperscript{15} Richter v Bloempro (n 111) par 10.
\textsuperscript{16} Richter v Bloempro (n 111) par 4.
\textsuperscript{17} Richter v Bloempro (n 111) par 5.
\textsuperscript{18} Richter v Bloempro (n 111) par 1.
2.2 High Court judgment

The High Court had to decide on the following questions of law: firstly, whether a business rescue application can be brought after a final liquidation order has been granted, and, secondly, whether the applicant in this case had locus standi to bring business rescue application where the company has been granted a final liquidation order.\(^{19}\)

Pertaining to the first issue, the court had to decide whether or not an application for business rescue can be brought after a final liquidation order had been granted. The court *a quo* held that business rescue proceedings and a final liquidation order are two different and mutually exclusive concepts which are incompatible.\(^{20}\) A business rescue application is not, in law, possible after a final liquidation order has been made, unless the court order is set aside on appeal.\(^{21}\)

The court held that the legislature intended to provide for business rescue proceedings before a final liquidation order is granted.\(^{22}\) Bam J concluded by stating that the provisions of section 131(6) of the 2008 Act did not have the effect of suspending liquidation proceedings after a final liquidation order is granted for the following reasons:

i. Firstly, the purpose and incidence of business rescue as described in section 128 of the 2008 Act start with reference to companies in financial distress.\(^{23}\)

ii. Secondly, a final liquidation order has the effect of stripping a company of its original legal status, the company itself has no *locus standi* anymore and it cannot operate without an order of a court, or the Master’s rulings or decisions of the liquidators.\(^{24}\)

\(^{19}\) *Richter v Bloempro* (n 11) par 6.

\(^{20}\) *Richter v Bloempro* (n 11) par 17.

\(^{21}\) *Richter v Bloempro* (n 11) par 19.

\(^{22}\) *Richter v Bloempro* (n 11) par 17.

\(^{23}\) *Richter v Bloempro* (n 11) par 18(i).

\(^{24}\) *Richter v Bloempro* (n 11) par 18(ii).
iii. Thirdly, the court pointed out that although section 132(1)(b) of the 2008 Act provides that a business rescue application of a company can be brought during liquidation proceedings, the legislature did not refer to a company that is already under liquidation.25

When assessing the second issue regarding the locus standi of applicant in bringing a business rescue application in respect of a company that has been granted with final liquidation order, the court held that the applicant was an “affected person” in accordance with the definition of affected person in the Act.26 In deciding whether the applicant’s status as an “affected person” was terminated by the granting of a final liquidation order,27 the court used a practical example that it may happen that the liquidators will be entitled, depending on the circumstances, to extend any suspended contract although an employee will have no authorisation, without being instructed or mandated by the liquidators, or the Master of the High Court, to act as an employee of the liquidated company. The employee’s former status will not disappear and cannot be terminated ex post facto.28

The court held that the applicant will remain an “affected person” as contemplated by the 2008 Act although he was apparently not re-appointed as an employee by the liquidators.29 The court noted the principle established in the cases of Insulations Unlimited (Pty) Ltd v Adler and others30 and Secretary for Customs and Excise v Milman31 that upon granting of a provisional liquidation order, the applicant was deprived of any powers he previously enjoyed as an employee or even as manager of the company.

In Richter,32 the court held that before relief may be considered. It is important to consider what the intention of the legislature was with the wording in section 131 of the 2008 Act, more specifically the words “may apply at any time for an order placing the company under supervision and commencing business rescue proceedings”.

25 Richter v Bloempro (n 11) par 18(iii).
26 Section 128 of the 2008 Act.
27 Richter v Bloempro (n 11) par 12.
28 Richter v Bloempro (n 11) 12.
29 Richter v Bloempro (n 11) par 13.
30 1986 4 SA 756 (W).
31 1975 3 SA 544 (AD) 552.
32 Richter v Bloempro (n 11) par 15.
2.3 Judgment of the Supreme Court of Appeal

The decision of the court *a quo* was taken to the Supreme Court of Appeal (SCA). Dambuza AJA was faced with the following question of law, namely, whether it is permissible to apply for business rescue proceedings in terms of section 131(6) of the 2008 Act after a final liquidation order has been granted.33 Section 131(1) of the 2008 Act entitles affected persons to apply to court “at any time” for an order placing the company under supervision and commencing business rescue proceedings.

The court noted that when a final liquidation order is granted the company continues to exist, but control of its affairs is transferred from the directors of the company to the liquidators who will exercise their authority on behalf of the company.34 A company is regarded as being in existence until such time when the Master has filed a certificate of winding up of a company when the affairs of the company has been completely wound up and the commission has recorded the dissolution of the company and /or has removed the company name from the companies register.35 The court went further and stated that liquidation and winding up has been interchangeably been used when dismissing the company. For example, a solvent company can be dissolved by voluntary winding-up36 and liquidation by a court order.37 Section 136(4) of the 2008 Act provides as follows:

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

The court pointed out that the phrase “liquidation proceedings” in any way alters the significance of what is meant by liquidation proceedings.38 The definition of liquidator includes a provisional and a final liquidation, and consequently, the court held that the conversion of liquidation to business rescue even after a final liquidation order has been granted was clearly envisaged by

33 Richter *v* Absa Bank Limited (n 8) par 1.
34 Richter *v* Absa Bank Limited (n 8) par 10.
35 Section 82(1)(2) of the 2008 Act.
36 Section 80 of the 2008 Act.
37 Section 81 of the 2008 Act.
38 Richter *v* Absa Bank Limited (n 8) par 12.
section 136(4) of the 2008 Act.\textsuperscript{39} Importantly, with regard to the business rescue, the 2008 Act refers to the interests of "shareholders" in contrast to the interests of creditors which takes center stage in liquidation proceedings.\textsuperscript{40}

\textsuperscript{39} Richter \textit{v. Absa Bank Limited} (n 8) par 11.

\textsuperscript{40} Section 7(f) of the 2008 Act.
CHAPTER 3: OVERVIEW OF BUSINESS RESCUE PROCEEDINGS

Section 128(b) of the 2008 Act defines business rescue as—

“proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—

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

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

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

In practice, many companies have been successfully rescued in terms of the first part of the definition of business rescue. In the case of Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd the term “business rescue” was held to incorporate not only a plan to restore the company to solvency, as it was under the previous regime, but also scenarios which are aimed solely at securing a better deal for creditors and shareholders than that which they would receive through liquidation. Business rescue is described as—

“it would appear to intimate the restoration of the company to solvency, as was the case under judicial management, but provision is also made for a situation where the ultimate rescue of the company is not possible, that another outcome ensuring a higher return for creditors than they would have received under liquidation”.

Rushworth describe business rescue as “the purpose is to facilitate the rescue and rehabilitation of a company in financial difficulty and in certain other circumstances”. By “rescue” is meant a reorganisation of the company in order to restore it to a profitable entity and thereby to avoid

---

42 2012 3 SA 273 (GSJ) par 27.
43 Meskin Insolvency Law and its Operation in Winding-up (2017) 18-3 at par 18.3.1.
liquidation, the object of business rescue is to keep the company going by resuscitating it instead of shutting it down or putting it under liquidation with a resultant loss of jobs and with creditors and suppliers often being left unpaid.\textsuperscript{45}

One of the main objectives of the 2008 Act is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.\textsuperscript{46} Business rescue has two possible outcomes. The primary objective of business rescue is to facilitate the continued existence of a company in a state of insolvency and the secondary objective is, in the event that the primary objective is not viable, to facilitate a better return for the creditors or shareholders of a company.\textsuperscript{47} The rescue of a company maintains jobs, provides creditors with a greater return based on higher going concern value of the enterprise, potentially produces a return for owners and obtains, for the country, the fruits of the rehabilitated enterprise.\textsuperscript{48}

In \textit{Swart v Beagles Run Investments}\textsuperscript{49} and also in the case of \textit{Southern Palace Investment 265 v Midnight Storm Investments 386 Ltd (Registrar of Banks and another intervening)}\textsuperscript{50} the court noted that if the aim of business rescue is simply to secure a better return for creditors, it must be made clear what resources will be made available to the company and on which terms because, in the absence of such information, it would be more speculation to say that creditors will be better off than they would have been with immediate liquidation. Business rescue proceedings offer a financially distressed company the necessary breathing space to recover from its temporary liquidity difficulties in order to continue with its business activities.\textsuperscript{51}

3.1 \textit{Commencements of business rescue proceedings}

Section 131 of the 2008 Act regulates the commencement of business rescue proceedings which can commence in either one of two ways. Firstly, by a resolution of the board of directors to

\textsuperscript{45} Cassim \textit{et al} \textit{The Practitioner’s Guide to the Companies Act 71 of 2008 (2011) 145.}
\textsuperscript{46} Section 7(4) of the 2008 Act.
\textsuperscript{47} Section 128(1)(b)(iii) of the 2008 Act.
\textsuperscript{49} 2011 5 SA 422 GNP (hereinafter referred to as \textit{Swart}).
\textsuperscript{50} 2012 5 SA 423 (WCC) (hereinafter referred to as \textit{Southern Palace Investment 265}).
\textsuperscript{51} Rosslyn-Smith “Stakeholder expectations of the business rescue plan from a South African perspective” 2015 \textit{SAJESBM} 2.
begin business rescue proceedings if the board has reasonable grounds to believe that the company is in financial distress and there appears to be a prospect of rescuing the company.\textsuperscript{52} The court interpreted the requirement that there be a “reasonable prospect” for rescuing the company to mean that the applicant must evidence reasonable grounds – something more than a \textit{prima facie} case, but less than reasonable probability that the goal of business rescue may be achieved.\textsuperscript{53} It is submitted that if the facts indicate a reasonable possibility of a company being rescued, a court may exercise its discretion in favour of granting an order contemplated in section 131 of the 2008 Act. Loubser expresses her view and states that it would be disastrous for the new procedure if the same high-threshold test used for a judicial management order of reasonable probability is to apply to this provision.\textsuperscript{54}

Secondly, an affected person may approach the court at any time for an order placing the company under supervision and commencing business rescue proceedings.\textsuperscript{55} Section 128 of the 2008 Act defines “affected person” as a shareholder or creditor of the company, registered trade union representing employees of a company, or the representative of the employees not affiliated with a trade union.

An affected person may bring an application to begin business rescue proceedings “at any time” for an order placing the company under supervision, such application may be brought even if the company is under liquidation proceedings.\textsuperscript{56} The court may make an order placing the company under supervision and commencing business rescue proceedings if the court is satisfied that the company is financially distressed.\textsuperscript{57}

A financially distressed company is a company that appears to be reasonably unlikely to be able to pay all its debts as they become due and payable within six months or a company that appears

\textsuperscript{52} Section 129(1) of the 2008 Act.
\textsuperscript{53} In the case of Oudtshoorn Square Properties (Pty) Ltd and Others the Supreme Court of Appeal considered the meaning of “a reasonable prospect” and found that it is a lesser requirement than the “reasonable probability”, which was the yardstick for placing a company under judicial management in terms of the 1973 Act.
\textsuperscript{55} Section 130(1)(a)(i-iii) of the 2008 Act.
\textsuperscript{56} Section 131(1) of the 2008 Act.
\textsuperscript{57} Section 131(4) of the 2008 Act.
to be reasonably likely to become insolvent within the ensuing six months.\textsuperscript{58} The term financially distressed covers the financial reasons for wanting to place a company under business rescue.\textsuperscript{59} Financial reasons relating to all the stakeholders as contemplated in the business rescue provisions are to be considered by the court.\textsuperscript{60} In the case of \textit{Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd}\textsuperscript{61} a company that is insolvent is not financially distressed and cannot be placed under business rescue, however, the court can place it under business rescue if it is just and equitable to do so.

In the \textit{Swart} case,\textsuperscript{62} the court refused to grant an application for business rescue on the grounds that there was no basis for contending that the respondent will be able to carry on business on a solvent basis. Mkgoba J made important remarks by saying that where an application for business rescue entails the weighing-up of the interests of the creditors and the company, the interest of the creditors prevails. Therefore, business rescue procedures will affect the reputation and creditworthiness of a company because it is so often followed by the liquidation of the company.\textsuperscript{63} In the case of \textit{Southern Palace Investment} \textsuperscript{265} the court specifically acknowledged the approach that business rescue is preferred to liquidation and stated that it would be inappropriate for a court to maintain a belief that a creditor was entitled to payment or otherwise the liquidation of the company.

Business rescue has more advantages in that creditors get a better return on their claims than in immediate liquidation, business rescue saves jobs, business rescue does not carry the same stigma as straightforward liquidation,\textsuperscript{65} and business rescue is geared at saving significant costs, thus, among others, enabling financially distressed companies to opt for it as a viable alternative.

\textsuperscript{58} Section 128(1)(f) of the 2008 Act.
\textsuperscript{59} Meskin, Galgot, Kunst, Delport and Vorster \textit{Henoehsberg on the Companies Act 71 of 2008 and Commentary} (October 2017) 480 par 3.
\textsuperscript{60} Loubser “The business rescue proceedings in the companies Act of 2008: Concerns and questions (part 1)” \textit{TSAR} 510.
\textsuperscript{61} 12/1206 10 May 2013 (GSJ).
\textsuperscript{62} \textit{Swart} (n 49) par 41.
\textsuperscript{63} Loubser “Tilting at windmills? The quest for an effective corporate rescue procedure in South African law” \textit{2013 SA Merc LJ} 437.
\textsuperscript{64} \textit{Southern Palace Investment} \textsuperscript{265} (n 50) par 25.
\textsuperscript{65} Loubser (n 63) 447.
to the last resort of liquidation. Rogers AJ pointed out in Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd that business rescue reflects a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction. In the case of Koen & another v Wedgewood Village Golf & Others, Binns-Ward J remarked that “the requirements for a supervision order for business rescue purposes are materially different from those which pertained to judicial management.”

3.2 Interpretation of “liquidation proceedings” within the context of section 131(6)

The 2008 Act does not define the concept of “liquidation proceedings” and various cases have been heard in numerous high courts in an attempt to interpret the concept and as a result divergent conclusions have been reached.

Section 131(6) of the 2008 Act provides as follows:

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

1. the court has adjudicated upon the application; or
2. the business rescue proceedings end, if the court makes the order applied for.”

According to Meskin, the application for winding-up of a company can be superseded by an application placing the company under business rescue. “Liquidation proceedings” is defined as a—

“process of dealing with or administering a company affairs prior to its dissolution by ascertaining and realizing its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue if any among the shareholders of the company in accordance with their rights, this is known as the winding-up or liquidation of the company”.

---

66 Levenstein (n 40) 15.
67 2011 5 SA 600 (WCC).
68 2012 2 SA 378 (WCC).
69 Stoop (n 7) 329.
70 Henochsberg (n 58) 480.
A distinction should be drawn between companies that are solvent and those that are insolvent, which will be decided by the commercial solvency of the company.\textsuperscript{72} The winding up of a solvent company is regulated by sections 79-81 in Part G of chapter 2 of the 2008 Act, while the winding-up of an insolvent company is regulated by chapter XIV of the 1973 Act which continues to apply with regard to the winding-up and liquidation of companies under the 2008 Act, as if the 1973 Act had not been repealed.\textsuperscript{73} In the case of \textit{Natal Joint Municipal Pension Fund v Endumeni Municipality},\textsuperscript{74} Wallis J summarises statutory interpretation as—

"the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production."\textsuperscript{75}

\subsection*{3.3 Discussion of related case law}

The crux of the issue is whether it is competent to bring an application for business rescue in terms of section 131 of the 2008 Act after a final liquidation order has been granted.

The court in the case of \textit{Van Staden v Angel Ozone Products CC and others}\textsuperscript{76} had to determine whether the applicant was entitled to bring the application for business rescue in terms of section 131 of the 2008 Act after a final liquidation order has been granted.\textsuperscript{77} It was argued that liquidation proceedings come to an end when a final liquidation order was granted and that such proceedings should not be confused with the winding-up proceedings which come to an end when the Master of the high court has approved the liquidation and distribution account.\textsuperscript{78}

Legodi J agreed that a distinction should be made between liquidation and winding-up proceedings and held that liquidation is a legal proceeding before a court of law and liquidation proceedings is a process that is concluded once the final liquidation and distribution account is

\textsuperscript{72} Boschpoort Onderneemings (Pty) Ltd v Absa Bank Ltd (936/12) 2013 ZASCA 173 (28 November 2013) 23.
\textsuperscript{73} Cassim, \textit{et al Contemply Company Law} (2012) 913.
\textsuperscript{74} 2012 4 SA 593 (SCA) (hereinafter referred to as \textit{Natal Joint Municipal Pension Fund}).
\textsuperscript{75} \textit{Natal Joint Municipal Pension Fund} (n 74) par 18.
\textsuperscript{76} 2013 4 SA 630 (GNP).
\textsuperscript{77} \textit{Van Staden v Angel Ozone Products CC and others} (n 76) par 3.
\textsuperscript{78} \textit{Van Staden v Angel Ozone Products CC and others} (n 76) par 25.
confirmed by the Master of the high court.\textsuperscript{79} The court in \textit{Van Staden} concluded by stating that sections 131(7) and 135(4) of the 2008 Act contemplate that it is possible to convert liquidation proceedings into business rescue proceedings irrespective of how far advanced the liquidation or the winding-up proceedings might be.\textsuperscript{80}

Meskin explains it as follows:

"The question that arises is whether the term 'at any time during the course of any liquidation proceedings' in section 131(7) of the 2008 Act refers only to the time during which an application for the liquidation of a company is before the court or prior to the court granting a final liquidation order as the reference to 'liquidation proceedings' in subsection (6)."\textsuperscript{81}

In the case of \textit{First Rand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd}\textsuperscript{82} the applicant sought an order provisionally liquidating the respondent on the grounds that the respondent was unable to pay its debts as contemplated by section 345(1).\textsuperscript{83} The court held that "liquidation proceedings" in section 131(6) only relate to the actual process of winding-up following an order of winding-up and excludes the legal proceedings and or substantive application and or steps taken by a creditor to obtain a winding-up order.

In the case of \textit{Absa Bank v Makupa Farm}\textsuperscript{84} the court was tasked with resolving the issue of whether the court is precluded from granting a final winding-up order in view of the suspension of liquidation proceedings.\textsuperscript{85} The court held that "liquidation proceedings" is a reference to the substantive application taken by a creditor to obtain a winding up order or to the liquidation proceedings and processes that follow the grant of such order. Boruchowits J placed reliance on the judgment of Van der Bijl J in the case of \textit{Absa Bank Limited v Summer Lodge}\textsuperscript{86} that a company remains under winding-up whether provisionally or finally and that legal proceedings are not suspended on the launching of a business rescue application. The court held that the aforementioned is an indication that the words "liquidation proceedings" in section 131(6) of the Act

\begin{itemize}
\item \textsuperscript{79} \textit{Van Staden v Angel Ozone Products CC and others} (n 76) par 26.
\item \textsuperscript{80} \textit{Van Staden v Angel Ozone Products CC and others} (n 76) par 35.
\item \textsuperscript{81} Henochsberg on the Companies Act 71 of 2008 (n 59) 474.
\item \textsuperscript{82} 2012 4 SA 266 (KZD) (hereinafter referred to as \textit{Imperial Crown Trading 143 (Pty) Ltd}).
\item \textsuperscript{83} Companies Act 63 of 1973.
\item \textsuperscript{84} 2012 28972 [2013] ZAGPJHC 316.
\item \textsuperscript{85} \textit{Makupa case} (n 84) par 5.
\item \textsuperscript{86} 2014 3 SA 90 (GP).
\end{itemize}
refer to the proceedings that follow the grant of a winding-up order, and not to the application to obtain a winding-up order.\(^{87}\)

Makgoba J in *Absa Bank Limited v Summer Lodge*\(^{88}\) extrapolated on this by stating that the launch of business rescue proceedings does not alter the legal status of the company in liquidation but merely stays the implementation of the winding up order. The manifest purpose of the section 131(6) suspension is to delay implementation of the winding-up order pending the outcome of the business rescue application, but the company remains under winding-up, whether finally or provisionally.\(^{89}\)

This was supported by Van der Bijl AJ in *Summer Lodge (Pty) Limited and others.*\(^{90}\) When interpreting the provision of section 131(6) of the 2008 Act, the court held that liquidation proceedings only commence by the granting of a liquidation order, whether provisional or final, and therefore the mere issue and service of a business rescue application would not suspend legal proceedings in order to obtain a liquidation order.\(^{91}\) The court held that—

> “it is not the intention of the section to render a liquidation order to be set aside or to be discharged by the issue of a business rescue application in terms of section 131(6), but to rather suspend the order so as to delay the implementation of the order, and it can also not have the effect that the company can proceed to carry on business company remains to be finally or provisionally liquidated, as the case may be, until such time as the business rescue proceedings have been finalized.”\(^{92}\)

The words “liquidation proceedings” have been held to refer—

> “to a process that consists of the collection of the assets, realising and reducing them to money, dealing with proof of creditors by admitting or rejecting them, and distributing the net proceeds after providing for costs and expenses by the liquidator to the persons entitled thereto, thus, the words 'liquidation proceedings' have to do with the process that is overseen by the liquidator and the master in winding-up and not the legal proceedings before a court of law in order to obtain such order.”\(^{93}\)

\(^{87}\) *Summer Lodge (Pty) Limited and others* (n 86) par 10.

\(^{88}\) 2013 5 SA 444 (GNP).

\(^{89}\) *Summer Lodge (Pty) Limited and others* (n 86) par 8.

\(^{90}\) *Summer Lodge (Pty) Limited and others* (n 86) par 25.

\(^{91}\) *Summer Lodge (Pty) Limited and others* (n 86) par 3.

\(^{92}\) *Summer Lodge (Pty) Limited and others* (n 86) par 19.

\(^{93}\) *Summer Lodge (Pty) Limited and others* (n 86) par 12.
It submitted that the grammatical interpretation of the word “liquidation” refers to the process of liquidating or of being liquidated which is to determine the liabilities and apportion the assets towards discharging the indebtedness of the debtor, thus clearly suggesting that the words liquidation proceeding in section 131(6) of the 2008 Act is concerned with the actual process of winding-up of the company followed by the liquidator and the approval of the Master of the high court after the winding-up order has been granted. 94 The Interpretation of liquidation proceedings therefore excludes the legal action and or process taken in order to obtain such a state of affairs. 95

The court in the case of Van Zyl v Engelbrecht NO96 held that it is clear from the provisions of section 131(6), read with section 136(4), of the 2008 Act that suspension of liquidation proceedings entails suspension of the office of the liquidator with the result that no collection of, inter alia, assets by the liquidator can take place during that period.97 In Engelbrecht case98 it was held further that all legal proceedings instituted by the liquidator in the liquidation proceedings, which are pending as at the date an application for business rescue proceedings is made against a company under liquidation, get automatically suspended when such an application is made. Any steps taken by the liquidator in such proceedings after such an application is made, are futile and of no legal consequence.

The court further held that such steps may be ratified by the liquidator himself at the end of the suspension period as contemplated by section 131(6)(a) and (b) of the 2008 Act or possibly by the appointed business rescue practitioner where liquidation proceedings were converted into business rescue proceedings.99 Kgomo J was of the contrary view in the case of Janse van Rensburg NO and another v Cardio Fitness Properties (Pty) Ltd and Others100 where it was held that the suspension of liquidation proceedings will not strip the liquidator control over the assets of the company.

---

94 Makana (n 84) 15.
95 Summer Lodge (Pty) Limited and others (n 86) par 10.
96 2014 5 SA 312 (FB) par 14.
97 Engelbrecht case (n 96) par 14.
98 Engelbrecht case (n 96) par 15.
99 Engelbrecht case (n 96) par 15.
100 2014 JOL 31979 (GSJ).
In the case of Makuna Farm CC\textsuperscript{101} it was held that the pivotal question for determination is whether the words “liquidation proceedings”, as they appear in section 131(6) of the 2008 Act, is reference to the substantive application brought by a creditor to obtain a winding-up order, or to the liquidation proceedings and processes that follow the grant of such order. If the reference in this section is to the application proceedings to obtain a winding up order, then clearly the suspension envisaged therein would apply to the grant of a final winding up order. The court further held that “liquidation proceedings” in section 131(6) of the 2008 Act refers to the proceedings that follow the grant of a winding-up order, and not to the application to obtain a winding-up order.

The court in the Richter case\textsuperscript{102} observed that there is no sensible justification for drawing the proverbial line in the sand between pre- and post- final liquidation in circumstances where the prospects of success of business rescue exist, as the legislature did not do so and to restrict business rescue to those cases in which a final winding-up order had not been granted could be inimical to the 2008 Act. It is clear from the various cases discussed above that our courts have adopted the view that an application for business rescue will serve to suspend liquidation proceedings even after a final liquidation order has been granted and the company has been placed in the hand of the liquidator.\textsuperscript{103}

3.4 Abuse of business rescue proceedings

Business rescue proceeding as encapsulated in Chapter 6 of the 2008 Act has been designed to prevent the demise, through the development of business rescue plan, of viable companies by making provision for their possible rescue.\textsuperscript{104} Business rescue procedures play an important role in business rescue. However, in order for it to be regarded as a viable, trustworthy and sustainable manner of restricting a safeguards measure it should be implemented to protect the rights of affected persons who might not have the financial means to go for litigation purposes of preventing the abuse of business rescue. If a business rescue plan is approved, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the

\textsuperscript{101} Makuna case (n 84) par 6.
\textsuperscript{102} David Jacques Richter v Absa Bank Limited (n 8) par 10.
\textsuperscript{103} Stoop (n 7) 333.
\textsuperscript{104} Meskin \textit{et al} Insolvency law (2013) 18 at 18.1.
business rescue process, except to the extent provided for in the business rescue plan of the 1973 Act.\footnote{Section 154 of the 2008 Act.}

It will also be necessary to revisit criticism leveled by the Supreme Court of Appeal in the case of Oakdene Square Properties and Others.\footnote{Oakdene case (n 53) 23.} The court considered the principle laid down in the Southern Place\footnote{Southern Place (n 50) par 21.} judgment relating to the requirements of a reasonable prospect of success as too stringent and held that there should not be a general minimum criterion of what would constitute a reasonable prospect of success. The malicious debtor may apply for the business rescue proceedings fully aware that it is impossible for the company to be rescued, and this opens the door for the abuse of business rescue proceedings.

It was held in the case of Suizer Pumps (South Africa) Pty Ltd v O & M Engineering CC\footnote{(19740/2014) [2015] ZAGPPHC 59 (11 February 2015).} that no court can allow business rescue to be used as an abuse of the court process. Courts therefore have a duty to ensure that the entry into business rescue is not feigned. In Gormley v West City Precinct and (Pty) Ltd Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd\footnote{[2012] ZAWCHC 33 (WCC).} the court was not prepared to give the developers any leeway without a \textit{bona fide} workable restructuring plan, given that rescue proceedings could lend themselves to abuse by company insiders seeking to use these provisions to frustrate creditors’ rights and to slave off liquidation for motives of their own. It is debatable whether the cost and time consuming remedy for obtaining a court order will be used as an effective measure against abuse of business rescue proceedings, but making it easy to reverse a board’s decisions will undermine the success of business rescue proceedings.\footnote{Loubser “The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part1)” 2010 TSAR 505.}

3.5 \textit{The status of employees as an “affected person” during business rescue proceedings}

Section 131 of the 2008 Act makes provision for the company to be placed under business rescue by court order. To begin business rescue proceedings unless a company has adopted a resolution
contemplated in section 129, an affected person may apply to court at any time for an order placing the company under supervision and commencing business rescue proceedings. An “affected person” means a shareholder or creditor of a company, a registered trade union representing employees of the company and each of those employees not represented by a trade union or the representatives of such employees. This wide definition of affected person means that a very wide range of stakeholders are given certain rights in the business rescue process, particularly since it is each individual shareholder or creditor that is given these rights and not just shareholders or creditors as a general or collective body. This means that individual, employee shareholders may apply to the court to place the company under business rescue at any time.

The court held that the application for business rescue proceedings by an affected person must not be an abuse of process and should be brought in good faith and for a proper purpose. During the period of suspension of the contracts, employees are not required to render services and are also not entitled to remuneration in terms of their contracts. The suspended contracts will, however, automatically terminate within 45 days after the date of appointment of a final liquidator, except in respect of those employees who have reached an agreement with the liquidator on their continued employment.

Section 136 of the 2008 Act regulates the interests of employees during business rescue. It provides that employees who were, immediately prior to the institution of business rescue, employees of the company will remain employed by the company on the same terms and conditions on which they were employed prior to the commencement of business rescue proceedings except to the extent that changes occur in the ordinary course of attrition or if different terms and conditions are agreed between the employee and the company in accordance with labour law.

---

111 Section 131 of the 2008 Act.
112 Section 128(1)(a)(i) to (iii) of the 2008 Act.
113 Cassim (n 75) 786.
114 Sibakhulu Construction (Pty) (Ltd) v Wedgewood Village Golf Country Estate (Pty) Ltd 2013 1 SA 191 (WCC) (hereinafter referred to as Sibakhulu Construction (Pty) (Ltd)).
115 Sibakhulu Construction (Pty) (Ltd) (n 114) 71.
116 Section 38(9) of Insolvency Act 24 of 1936.
117 Section 136 of the 2008 Act.
A company which has been placed under supervision in terms of section 131 of the 2008 Act is precluded from adopting a resolution placing itself in liquidation until the business rescue proceedings have ended.\textsuperscript{118} Furthermore, the company is obliged to notify all affected persons about the court order within five days.\textsuperscript{119} One can conclude that affected persons are granted a much wider basis upon which they may initiate business rescue proceedings.\textsuperscript{120} In the Richter case,\textsuperscript{121} the court \textit{a quo} dismissed the application for rescission of judgment and found that the applicant was an affected party as envisaged by section 128 of the 2008 Act, and as a result of a final order of liquidation being granted against the company, it was not open for any affected party to apply for business rescue proceedings.

In Richter,\textsuperscript{122} the applicant, in view of his status as employee of the first respondent, was an affected person in accordance with the definition of affected person in section 128 of the 2008 Act. In practice it may happen that the liquidators will be entitled, depending on the circumstances, to extend any suspended contract, although an employee will have no authorisation, without being instructed or mandated by the liquidator, or the Master, to act as an employee of the liquidated company. The employee’s former status will not disappear and cannot be terminated \textit{ex post facto}, although the employment contract of the applicant was not renewed by liquidator.\textsuperscript{123} In the Richter case\textsuperscript{124} the court \textit{a quo} held that an employee who is suspended in term of section 38(i) of Insolvency Act, retains his or her \textit{locus standi} as an affected person.

### 3.6 General Moratorium

Section 133(1) of the 2008 Act provides that during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property

\begin{footnotesize}
\textsuperscript{118} Section 131(8)(a) of the 2008 Act.
\textsuperscript{119} Section 131(8)(b) of the 2008 Act.
\textsuperscript{120} Rushworth “A critical analysis of the business rescue regime in the Companies Act 71 of 2008” 2010 \textit{Acta Juridica} 375.
\textsuperscript{121} Richter \textit{v} Bloempro (n 11) par 12.
\textsuperscript{122} Richter \textit{v} Bloempro (n 11 ) par 13.
\textsuperscript{123} Richter \textit{v} Bloempro (n 11) 6.
\textsuperscript{124} Richter \textit{v} Bloempro (n 11) 12.
\end{footnotesize}
belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum except with—

i. the written consent of the practitioner;
ii. with the leave of the court and in accordance with any terms the court considers suitable;
iii. as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;
iv. criminal proceedings against the company or any of its directors or officers;
v. proceedings concerning any property or right over which the company exercises the powers of a trustee or;
vi. proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner”.

The moratorium as envisaged by section 133 of the 2008 Act is in place for the duration of business rescue proceedings. Business rescue proceedings clearly extend beyond the adoption of a business rescue plan and for as long as the moratorium is in place, section 133(1)(b) of the 2008 Act permits a court to grant leave to a person to institute legal proceedings.

Section 130(1) of the 2008 Act provides that at any time after the adoption of a resolution in terms of section 129 of the 2008 Act, an affected person may apply to court for an order either setting aside the resolution on the grounds that there was no reasonable basis for believing that the company is financially distressed or there was no reasonable prospect for rescuing the company, or it failed to satisfy the procedural requirements or for an order setting aside the appointment of the practitioner.

In Boovsen v Jonkheer Boere wynmakery (Pty) Ltd and another¹²⁵ the court dealt with the interpretation of the moratorium provision in section 122(1) of the 2008 Act which forms an integral part of the business rescue procedure and the issue of whether or not a business rescue practitioner may reserve himself the right to amend a business rescue plan unilaterally even after it has been adopted in terms of section 152 of the 2008 Act. The court held that the whole scheme of sections 150 and 153 of the 2008 Act is that there is no room for a business rescue practitioner to reserve himself the right to amend a business rescue plan and by doing this it

¹²⁵ 2017 1 All SA 862 (WCC) (henceinafter referred to as Jonkheer Boere wynmakery (Pty) Ltd).
effectively circumvented the procedure as stipulated in the 2008 Act in terms of which claims, which are to be discharged as per the rescue plan, derive their binding force.\textsuperscript{126}

The purpose of a business rescue plan was described in the case of \textit{African Banking Corporation of Botswana v Kariba Furniture Manufactures (Pty) Ltd and Others}\textsuperscript{127} as to throw a lifeline to a company in financial distress to help in keeping it floating in a manner that balances the rights and interests of all relevant stakeholders. Although in the case of \textit{DH Bros Industries v Gribnitz NO},\textsuperscript{128} the court held that the provisions of section 130(1) and (5) of the 2008 Act constitute separate enabling provisions authorising applicants to approach the courts the relief, and the resultant proceedings are therefore not subject to the moratorium provisions in section 133 of the 2008 Act.

In \textit{Safari Thaching Lowveld v Misty Mountain Trading 2 (Pty) Ltd}\textsuperscript{129} the court held that it was open to an applicant in winding-up proceedings, which had commenced prior to a company being placed under business rescue, to thereafter seek leave to proceed with such an application without the need for a substantive and separate application to be made in this regard. Section 133(1) of the 2008 Act provides that during business rescue proceedings, legal proceedings against the company may be commenced or proceeded with, with the leave of the court and in accordance with any terms the court considers suitable. In the case of \textit{Elis Mechanics Building and Civil Engineering Contractors (Pty) Ltd v Steylene Developments (Pty) Ltd and Others}\textsuperscript{130} it was held that the moratorium on legal proceedings against a company resulted in the situation that leave to institute proceedings must be obtained by way of separate proceedings before the commencement of proceedings and not even as part of relief in the main proceedings.

In the case of \textit{Murray v FirstRand Bank Ltd}\textsuperscript{131} the importance of the moratorium was discussed. The court held that it is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing

\begin{itemize}
\item \textsuperscript{126} \textit{Jonkheer Boereymakere (Pty) Ltd (n 125) 67.}
\item \textsuperscript{127} 2013 6 SA 471 (GNP).
\item \textsuperscript{128} 2014 1 SA 103 (KZP).
\item \textsuperscript{129} 2016 3 SA 209 (GP).
\item \textsuperscript{130} 2015 3 SA 483 (KZD)
\item \textsuperscript{131} 2015 3 SA 438 (SCA). The court explained that the phrase “legal proceedings, including enforcement action” indicates that enforcement action is seen as a particular type of legal proceeding, and this meaning is supported by the reference to “commenced or proceeded with in any forum”. The word “forum” usually refers to a court or tribunal.
\end{itemize}
space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process. “Enforcement Action” in section 133(1) of the 2008 Act contemplates formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders through writs of execution or attachment – the provision of this section cannot be stretched to include the unilateral act of cancellation of a contract.
CHAPTER 4: DISCUSSION OF THE RICHTER JUDGMENT

4.1 High Court judgment

In Richter\footnote{Richter v ABSA Bank (n 8).} it was decided that “liquidation proceedings” include court proceedings, and the complete process of winding-up or liquidation of a company. The complete process is suspended by the relevant application for business rescue proceedings in accordance with the provisions of section 131(6) of the 2008 Act. In support of this decision the court relied on a full bench decision in Vermeulen and Another v CC Bauermeister Bpk and Others,\footnote{1982 4 SA 159 (T).} as approved in Kalil v Decotex (Pty) Ltd and Another.\footnote{1988 2 All SA 159 (A).} The court considered the meaning of section 348 of the 1973 Act which provides that “a winding-up of a company by the court shall be deemed to commence at the time application for the winding-up is presented to court.” Bam J differed with the findings in Absa Bank Ltd v Summer Lodge (Pty) Ltd,\footnote{2013 5 SA 44 (GNP).} where Van Der Byl AJ held that it is not the intention of the provisions of section 131(6) of the 2008 Act to render a liquidation order to be set aside or to be discharged by application of business rescue, but rather to suspend the order so as to delay the implementation of the court order, and also not to have the effect that a company can proceed to carry on with business. The company remains finally or provisionally liquidated as the case may be until such time as the business rescue proceedings have been finalised.\footnote{Summer Lodge (Pty) Ltd (n 86) par 19.}

4.2 The Supreme Court of Appeal judgment

The Supreme Court of Appeal was tasked with the following question, namely whether it is permissible to apply for business rescue after a final liquidation order has been granted. The SCA overturned the court a quo’s decision and held that the decision of the court a quo was motivated by erroneous premises in that upon liquidation of the company it ceased to exist and that it was stripped of its original legal status.\footnote{Richter v Absa Bank Limited (n 8) par 10.} The meaning of the phrase “liquidation proceedings” in section 131(6) of the 2008 Act is confined to the actual process of winding-up a company
consequent upon an order of winding-up having been issued by a court.\textsuperscript{138} There is one important difference in the case of liquidation: the new owner does not take liability for claims the employees may have had as the previous owner of the business for unlawful acts.\textsuperscript{129} In the \textit{FirstRand} case\textsuperscript{140} the court held that section 131(6) of the 2008 Act provides that if the application for business rescue, after adjudication, is refused, the suspension of liquidation proceedings is ended. If, however, the application is granted, the suspension of liquidation proceedings endures until the business rescue proceedings end in terms of section 132(2) of the 2008 Act.

In the case of \textit{Van Der Merwe and Others v Zonnekus Mansion (Pty) Ltd and Others}\textsuperscript{141} the court held that the fact that a company has been financially paralyzed and lacking in management and leadership because of the commencement of liquidation proceedings more than two years earlier does not enhance the prospects of there being a successful business rescue. In the \textit{Swart} case,\textsuperscript{142} Makgoba J held that where an application for business rescue entails the weighing-up of the interests of the creditors and the company, the interests of the creditors should carry the day.

The Supreme Court of Appeal, in reaching its decision, was guided and persuaded by the purpose of business rescue as stated in the 2008 Act, which is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.\textsuperscript{143} The general interpretation of the 2008 Act clearly sets out that courts are to interpret and apply the provisions of the Act in a manner that gives effect to the purposes set out in section 7.\textsuperscript{144} The idea is that the company’s problems will be attended to by an independent business rescue practitioner who will propose a plan to rescue its business.\textsuperscript{145} The business rescue procedure is meant to be a flexible, effective process of extending the lifespan of companies and businesses.\textsuperscript{146} However, the court can dismiss any application for

\textsuperscript{138} Richter v Absa Bank Limited (n 8).
\textsuperscript{129} Section 197(2) of the Labour Relations Act 66 of 1995.
\textsuperscript{140} 2012 4 SA 266 (KZD).
\textsuperscript{141} 2015 3 All SA 659 (WCC).
\textsuperscript{142} Swart case (n 49).
\textsuperscript{143} David Jacques Richter v Absa Bank Limited (n 8).
\textsuperscript{144} Section 7(1) of the 2008 Act.
\textsuperscript{145} Sharrock, Van der linde and Smith Hockly’s Insolvency Law (2012) 275.
\textsuperscript{146} Mangolo “An overview of company law reform in South Africa: from the guidelines to the Companies Act 2008” 2010 Acta Juridica sll.
business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved.\textsuperscript{147}

4.3 Practical implications of the Richter judgment

In *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO*\textsuperscript{148} Wallis JA said that business rescue is a process aimed at avoiding liquidation of a company if it is feasible to do so. When one consider the provision of section 131(6) of the 2008 Act, liquidation proceedings stand to be suspended by business rescue at any stage or until business rescue comes to an end. The effect of this judgment is that even in the event of the administration of liquidation proceeding by the liquidator, the company can still be placed under business rescue and the liquidation process be suspended.\textsuperscript{149} The winding-up of a company is complete when the liquidator has realised all the assets and completed his investigations, including any action that has arisen through this, into the affairs of the company, the liquidator then produces a final liquidation and distribution account and makes the final dividend payment to creditors, if any.\textsuperscript{150}

The SCA considered the concerns raised by the applicant that interpretation of section 131(1) of the 2008 Act may have negative results for the liquidation process and the court acknowledged that the concerns were valid. However, the court dealt with this by simply stating that a court can dismiss any application for business rescue that is not genuine and bona fide.\textsuperscript{151}

\textsuperscript{147} David Jacques Richter v Absa Bank Limited (n 8).
\textsuperscript{148} 2015 5 SA 63 (SCA).
\textsuperscript{149} Meskin (n 105) 478.
\textsuperscript{150} The Mercury Effective date of liquidation-and consequences of liquidation of order (25 March 2011).
\textsuperscript{151} David Jacques Richter v Absa Bank Limited (n 8) par 16.
CHAPTER 5: CONCLUSIONS

The Supreme Court of Appeal, in reaching its decision, was guided by purpose of business rescue as stated in the 2008 Act\textsuperscript{152} which provides for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. The interpretation of “liquidation proceedings” contained in section 131(6) of the 2008 Act is that an affected person may apply for business rescue at any time, regardless of whether the company has been finally or provisionally liquidated. The application for business rescue can be brought at any time as long as the company is not yet deregistered — it is within the discretion of our courts to dismiss applications for business rescue which are not \textit{bona fide} in order to avoid an abuse of the business rescue process.

Our courts have adopted the interpretation that an application for business rescue will serve to suspend liquidation proceedings even after a final liquidation order has been granted and the company has been placed in the hand of the liquidator.\textsuperscript{153} However, one must keep in mind that it is not the intention of our courts to clarify what the legislature ought to have envisaged if the Act is not clear, it should be interpreted as such. The court must be applauded for setting out the interpretation of section 131(6) of the 2008 Act so as to give effect to the business rescue process. Although the judgment may negatively affect the insolvency practitioner, it could surely not have been the intention of the legislature to only allow for applications for business rescue to be made at any time before the dissolving of a company.

\textsuperscript{152} Section 7(6) of the 2008 Act.
\textsuperscript{153} Scoop (n 7) 333.
BIBLIOGRAPHY

Textbooks

Journal articles
Joubert “‘Reasonable possibility’ versus ‘reasonable prospect’: Did business rescue succeed in creating a better test than judicial management?” 2013 THRHR 550.
Loubser “The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)” 2010 TSAR 505.
Loubser “‘Tilting at windmills? The quest for an effective corporate rescue procedure in South African law” 2013 SA Merc LJ 437.
Rosslyn-Smith “Stakeholder expectations of the business rescue plan from a South African perspective” 2015 SAJESBM 1.

Smiths “Corporate administration: a proposed model” 1999 De Jure 107.

Stoop “When does an application for business rescue proceedings suspend liquidation proceedings?” 2014 De Jure 329.

**Theses**


Loubser *Some Comparative Aspects of Corporate Rescue in South Africa* (LLD thesis University of South Africa 2010).


**Newspapers and Gazettes**

Government Gazette 32121 (29 April 2009).

The Mercury *Effective date of liquidation and consequences of liquidation of order* (25 March 2011).

**Legislation**

Companies Act 71 of 2008.

Companies Act 63 of 1963.

Insolvency Act 24 of 1935.


**Case law**

*Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2013 5 SA 444 (GNP).


*DHI Bros Industries v Gribnitz NO* 2014 1 SA 103 KZP.
Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others 2015 4 SA 485 (KZD).

FirstRand bank limited v Imperial Crown Trading 143 (Pty) Ltd 2012 4 SA 266 (KZD).

Gormley v West City Precinct (Pty) Ltd Anglo Irish Bank Corporation Ltd v West City Precinct Murray v FirstRand Bank Ltd 2015 3 SA 438 (SCA).

Natal Joint Municipal Pension Fund v Eumupeni Municipality 2012 4 SA 593.


Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd (609/2012) [2013] ZASCA 68 (27 May 2013).

Panamo Properties (Pty) Ltd and Another v Nel and Others NNO 2015 5 SA 63 (SCA).


Rennie v Holzheimer 1989 2 SA 374 (A).


Richter v Bloempro CC and Others 2014 6 SA 38 (GP).

Safari Thatching Lowveld v Misty Mountain Trading 2 (Pty) Ltd 2016 3 SA 209 (GP).

Sibakhulu Construction (Pty) Ltd v Wedgewood Village Gold Country Estate (Pty) (Ltd) 2013 1 SA 191 (WCC).

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 2 SA 423 (WCC).

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 3 SA 273 (GSJ).

Swart v Beagles Run Investments 25 (Pty) Ltd 2011 5 SA 422 (GNP).

Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC & Others 2013 6 SA 141 (KZP).

Union Government v Mack and Favars Estate CLR 1917 AD 731.

Van Der Merwe and Others v Zonnekus Mansion (Pty) Ltd and Others (4653/2015) [2015] ZAWCHC 90 (10 June 2015).

Van Staden v Angel Ozone Products CC 2012 JDR 1945 (GNP).