

**A COMPARATIVE STUDY INTO THE EFFECTIVENESS OF
BUSINESS RESCUE STRATEGIES IN SOUTH AFRICA AND THE
JUDICIAL MANAGEMENT SYSTEM IN ZIMBABWE.**

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Chapter 1: General introduction

1. Background of the study

The restructuring of companies in financial distress is on the increase globally owing to the general meltdown in most economies, and it is of great importance for a country to have a vibrant company rescue regime for financially ailing companies.¹ A developing economy cannot lightly permit companies which help to comprise its industries and commercial enterprises to be dissipated by winding up and dissolution due to temporary setbacks where, if granted a moratorium, they would be able to overcome their difficulties, discharge their debts and become successful concerns.² The South African department of Trade and Industry promotes the development of a “clear, facilitating, predictable and consistently enforced law”³ to provide “a protective and fertile environment for economic activity”.⁴ A company is an integral part of the community in which it does business, and it has a direct impact on the economic and social well-being of that community through its employees, suppliers and distributors, to mention but a few. Consequently, the failure of a company affects more people than merely its employees and creditors.⁵ Therefore, a business rescue strategy must be able to effectively aid financially distressed but viable companies and to prevent them from going into liquidation or winding up.

Zimbabwe and South Africa both relied on judicial management as a business rescue strategy, although the latter has moved away from this concept. The concept of a formal business rescue regime in modern times can be traced back at least to 1926, when judicial management was introduced in South Africa by the South African Company Law Amendment Act of that year.⁶ The Zimbabwe Companies Act⁷ is the chief legislation and primary source of judicial management as provided for in terms of section 299 of the Act. Subsidiary statutes that provide for judicial

¹ Dzvimbo (2013) 1.

² Cilliers & Benade *Corporate Law* (2000) 478.

³ Delpont, *Henochsberg on the Companies Act 71 of 2008* Durban: LexisNexis, 2015.

⁴ The Department of Trade and Industry, *South African Company law for the 21st century- Guidelines for Corporate Law Reform (“Policy Paper”)* (Government Gazette 26493 of 23 June 2004).

⁵ Cassim *et al Contemporary Company Law* (2011) Juta, South Africa.

⁶ Rajak & Henning “Business Rescue for South Africa” (1999) SALJ 116.

⁷ Act 23 of 2009.

management in Zimbabwe include the Banking Act⁸ and the Reconstruction of State-Indebted Insolvency Act.⁹ The objective of judicial management is to give a company a period of time to re-organise its affairs and to restructure its operations and debts,¹⁰ as it allows the company to undergo rehabilitation and to preserve at least part of the business as a going concern.¹¹ All this is done whilst the company is placed under a moratorium, which means it is shielded from any legal action being taken against it by its creditors. The logic is that if the company is temporarily shielded from its creditors, and given the space it needs to restore itself as a viable going concern, then all of its creditors will benefit fully as opposed to a situation where the company is placed into liquidation and creditors only receive a fraction of what they are owed by the company. In the Zimbabwean context, where unemployment figures are high and the economy is plagued by a severe liquidity crunch and many companies are either closing down or are on the verge of closing down,¹² business rescue measures are even more relevant.

Judicial management as a procedure to rescue financially ailing companies; although probably well intentioned has a very low success rate in Zimbabwe and in other jurisdictions as well. First and foremost, judicial management is a very time cumbersome and costly system to implement¹³ especially for a company that already is in financial distress. It has a “high threshold of proof required”,¹⁴ namely, a reasonable probability for the granting of the order,¹⁵ and a stigma was attached to judicial management. It was labelled as “an extraordinary remedy which infringes on the rights of creditors”.¹⁶ More so, the courts play an instrumental role in granting an order for judicial management but the lack of specialised commercial courts has proved to be costly as a lot of time is wasted before for the application can be

⁸ Act 3 of 2009.

⁹ Act 27 of 2004.

¹⁰ Hofisi *Company Performance under Judicial management*, Presentation at Wits University (2011) 2-3.

¹¹ Kasey & Watson *Judicial management*, (1993) Cambridge University Press.

¹² *The Newsday Zimbabwe* liquidity crisis- an economy under stress' 21 March 2013.

¹³ Chief Justice Allsop AO '*Judicial Case Management and the Problem of Costs*' 9 September 2014.

¹⁴ Joubert “Reasonable possibility” versus “reasonable prospect”: Did business rescue succeed in creating a better test than judicial management? (2013) 551 *THRHR*.

¹⁵ Burdette “Unified insolvency legislation in South Africa: Obstacles in the path of the unification process” (1999) *De Jure* 58 and Smits “Corporate Administration” (1999) *De Jure* 80.

¹⁶ Loubser, *Some comparative aspects of corporate rescue in South African company law* (LLD thesis UNISA 2010) 43; Kloppers “Judicial management – “A corporate rescue mechanism in need of reform” (1999) *Stellenbosch Law Review* 417.

determined because the court has other matters to attend to. The absence of specialised commercial judges has also affected the effectiveness of the judicial management system. Even were judicial management is successful, the creditworthiness of a company is detrimentally affected.¹⁷ I also believe that mismanagement of funds and bad decision making have also negatively impacted on the effectiveness of the system in developing countries like Zimbabwe. More so, the failure of judicial management in Zimbabwe has been exacerbated by the economic climate which has left the country being an unattractive investment site. The harsh economic climate has led to both, external and internal investors being reluctant to invest within the country. Hence, the system has hardly been progressive in Zimbabwe.

Just like in Zimbabwe, judicial management has been part of the South African company law for almost a century, but has never been widely accepted or used, in spite of attempts to improve it by amendments to the relevant legislation.¹⁸ In practice, judicial management has been "a spectacular failure", invariably being followed by the winding up of the company in question with the attendant collateral damage.¹⁹ In the same spirit, Stein and Everingham referred to judicial management as "an abject failure".²⁰ One can appreciate that from the case of *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd*,²¹ the courts expressed their conservative approach as an impediment to the success of judicial management. Legal commentators have also been almost unanimous in their criticism of judicial management, even referring to it as a "dismal failure".²² Furthermore, employees and academics have raised many questions as to whether the strategy of judicial management is a wrong corporate rescue strategy or it is a process that is fraught with short-comings because of its failure to provide a lasting solution to the entity's problems.²³ Judicial management was never regarded as an effective rescue measure for companies in financial distress.²⁴

¹⁷ Cilliers & Benade (2000) 478.

¹⁸ Oliver *Judicial Management in South Africa* (LLD thesis UCT 1980) 4-12.

¹⁹ Smits "Corporate Administration: A proposed Model" (1999) 32 *De Jure* 85.

²⁰ Stein and Everingham *The new Companies Act unlocked* (2011) 409.

²¹ [2001] 1 All SA 223 (C) at 238.

²² Burdette "Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa" (Part2) (2004) 16 *SAMLJ* 409.

²³ Hofisi (2011) 2.

²⁴ Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (LLD dissertation Unisa) 2010 3.

This subsequently led to South Africa's transition from judicial management to business rescue proceedings as the advent of the new Companies Act²⁵ came with it the novel addition of an alternative route to the traditional one of liquidation. An efficient and well-functioning business rescue procedure has clear advantages for every country and every type of economy, but these advantages are even more relevant in developing countries where the preservation of jobs is of primary concern.²⁶

The South African's Companies Act of 2008²⁷ defines business rescue as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of that company and the management of its affairs, business and property as well as a temporary moratorium on the right of claimants against the company or in respect of the property in its possession. The advantages of a business rescue mechanism include; strengthening the company laws of a country into a favourable position, a legislative regime that adequately assists distressed companies through suspending the fulfilment of their credit obligations by means of a temporary moratorium so as to enable them to financially recover. The rights and interests of employees and creditors are sufficiently protected.

The key to business rescue will be the successful development and implementation, if approved by creditors, of a business rescue plan to rescue the company by restructuring its affairs, business, property, debt, other liabilities and equity.²⁸

It is thus against this background that this research seeks to investigate the effectiveness of business rescue proceedings in South Africa and judicial management in Zimbabwe as both are strategies aimed at improving the fortunes of an ailing company.

²⁵ Act 71 of 2008.

²⁶ Loubser & Joubert "The role of Trade Unions and Employees in South Africa's Business Rescue Proceedings" (2015) 36 Jan *ILJ* 21.

²⁷ Section 128(1)(b)(i)(ii) of Act 71 of 2008.

²⁸ Cassim *et al* (2011).

1.1 Scope of the study and problem statement

This research focuses on a comparative investigation into the effectiveness of the judicial management system in Zimbabwe and the South African business rescue model. Judicial management in South Africa and Zimbabwe has revealed significant shortcomings. Against this background, this thesis seeks to address the question whether there is need for Zimbabwe to adopt a similar approach to that of South Africa, and undertake an overhaul of its Companies Act or will it be sufficient to only modify the current judicial management process through amendments to specific statutory provisions in the Act?

A number of states like England, Germany and Australia have moved away from judicial management in favour of company rescue legislation that is modern and effective. It has been a recognised trend across jurisdictions and it is difficult to find a developed economy where there has not been at least some consideration given to implementing a specific updated rescue regime aimed at salvaging the corporate structure in certain circumstances of insolvency.²⁹ The research will therefore recommend the most suitable legislative model that adequately accommodates and caters for the Zimbabwean economy and company law. The proposed model for Zimbabwe will be premised upon the South African business rescue model; however it will be carefully crafted and tailored to meet the Zimbabwean needs so as to avoid adopting the entire South African business rescue regime. Importantly, one must appreciate the dynamics and diversity of insolvency systems from one jurisdiction to another as they reflect the historical, social, economic, cultural, political and legal contexts of the jurisdictions that have adopted and developed them.³⁰

1.2 Research objectives

- To identify and evaluate the legal framework and basis of business rescue proceedings in South Africa and judicial management in Zimbabwe.
- To establish and investigate the strengths and weaknesses of the above mentioned systems.

²⁹ Morrison & Anderson “The Australian Insolvency Regime Revisited: A Precise of the Next Leap Forward” (2008) 83 *International Insolvency Review* Volume 129.

³⁰ Dzimbo (2013) 2.

- To identify suitable and sustainable recommendations for the judicial management system in Zimbabwe.

1.3 Significance of the study

This research seeks to compare the modern day model of business rescue proceedings in South Africa and the traditional model of judicial management in Zimbabwe. The purpose is to enable Zimbabwe to identify itself with the best international practices. In the past years, corporate and business rescues have received considerable attention.³¹ South Africa through its Companies Act 71 of 2008 has since adopted the business rescue procedure through the enactment of a new legislation that is modern, progressive and at par with the international business standards.

The dissertation seeks to address the shortcomings of the judicial management system in Zimbabwe in light of the glaring escalating number of the companies that are going under liquidation due to a failed judicial management attempt.³² Successful attempts to implement a legislative procedure that is competent enough to rehabilitate failing companies will create employment and stabilise the economy of a country.³³ In the same spirit of development, there may then be need for Zimbabwe to consider adopting a business rescue regime that identifies with abovementioned states that have moved in that progressive direction.

1.4 Justification for the comparison between South Africa and Zimbabwe

The main reason for comparing the South African and Zimbabwean jurisdictions is that company law in both countries is based on English law. With respect to company law, the applicable at the Cape of Good Hope was English law. This means that 'the judicial management procedure was adopted from English law, hence the two jurisdictions have identical systems.'³⁴

Both countries common law systems are based on the Roman-Dutch with some measure of English influence, particularly in the areas of company law and

³¹ Kloppers (2001) *SAMLJ* 358.

³² Dzvimbo (2013) 4.

³³ Dzvimbo (2013) 5.

³⁴ Blackman, Jooste, Everingham (2002) 15-1 Volume 3.

insurance.³⁵ Zimbabwean case law acknowledges South African judicial precedents as another source of law, and vice versa.³⁶ The nature and form of statutes from both jurisdictions have relatively similar provisions and clear cut example is the Zimbabwe Companies act which one can say is a carbon copy of the South Africa Companies Act of 1973. Hence, it is without doubt that a comparative analysis of these two jurisdictions will yield more accurate results and reasonably feasible statistics for the purposes of this research.

1.5 Research methodology

The research is qualitative. The research will provide an in-depth analysis of the Zimbabwe Companies Act so as to discern the legislatures' intentions in relation to judicial management. The research methods include collection of data through study of primary sources such as statutes and case law, secondary documents i.e. authoritative texts and journals.

1.6 Chapter summary

Chapter one gives a detailed background of the study, lays out the scope and problem statement of the research. The definitions of the concept of judicial management and business rescue proceedings are briefly given. The chapter proceeds to discuss the justification for the study and proffers reasons for comparing the South African and Zimbabwean jurisdictions.

Chapter two focuses on the concept of business rescue proceedings in terms of chapter 6 of the South African Companies Act 71 of 2008. With the aid of relevant case law, an evaluation of the business rescue provisions is made so as to establish the effectiveness of this model.

Chapter three gives an in-depth description of the model of judicial management as provided by the Zimbabwean Companies Act. It outlines the model's origins in the South African law and how it was then adopted and domesticated in Zimbabwe. This chapter reveals an outline of the procedure for judicial management under the Companies Act of Zimbabwe. With the aid of relevant case law, the chapter exposes

³⁵ Mongalo "The emergence of corporate governance as a fundamental research topic in South Africa" (2002) 173-191 *SALJ*.

³⁶ Madhuku "An Introduction to Zimbabwean Law" (2010) 17, Weaver Press Harare.

the strengths and shortcomings of judicial management in Zimbabwe. The chapter proceeds to evaluate and ascertain legal scholarly views as to why judicial management failed in the South African context, and perhaps draw lessons for Zimbabwe in this respect.

Chapter four provides a thorough comparative analysis of the legislative framework of business rescue proceedings in South Africa against that of the judicial management system in Zimbabwe. The purpose is to determine whether the intentions of the legislature have been achieved from the transition from judicial management to business rescue. The primary objective is to find out if in South Africa's context, business rescue really is a significant improvement from judicial management as a company rescue procedure, and if so, how.

Chapter five is the conclusion to the research. It proffers recommendations for both jurisdictions. Firstly, and in respect of South Africa; whether there are any loop holes in its model of business rescue proceedings and whether they are always consolidating the system. Secondly, the chapter will provide recommendations for legislature regime and reform that is best suited for the Zimbabwean context, taking into consideration its economic status.

CHAPTER 2:

Business rescue proceedings in South Africa in terms of the Companies Act 71 of 2008

2. Background of the study

This chapter is an investigation into the business rescue provisions as provided for in terms of the Companies Act 71 of 2008. With the aid of relevant case law and authorities, the concept of business rescue proceedings will be explained in depth, revealing its distinctive divergences from that which was previously enacted in the former Companies Act of 1973. Judicial management had been part of South African company law since the Companies Act of 1926. There is general consensus that judicial management was a good idea in theory but that, in practice, for a company to be put under judicial management usually turned out to be the ‘kiss of death’.³⁷ The company was regarded as doomed, its credibility in the marketplace was irreparably damaged, and no-one wanted to do business with it. There is no doubt that the business rescue regime of the new Companies Act is a significant advance over judicial management and since the drafters of the Act looked far and wide at international best practice it is probably as good as any business rescue regime anywhere in the world.³⁸ This is premised in the preamble of Companies Act 71 of 2008, read together with section 7 which states that, the purpose of the Act is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”.³⁹ The importance of section 7 is also reiterated in the general interpretation of the Act.⁴⁰

2.1 Concept of business rescue

When the legislature drafted the Companies Act 71 of 2008, the main intention was to create an effective system of ‘corporate rescue proceedings that identifies with the modern economy of South Africa.’⁴¹ The ‘business rescue’ provisions in the

³⁷ Roodt Inc. Attorneys South Africa “*The strengths and weaknesses of business rescue under the new Companies Act*”, htm.www.roodtinc.com/newsletter78.asp 2016.

³⁸ Roodt Inc. Attorneys South Africa “*The strengths and weaknesses of business rescue under the new Companies Act*”, htm.www.roodtinc.com/newsletter78.asp 2016.

³⁹ Section 7(k).

⁴⁰ Section 5(1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.

⁴¹ The Department of Trade and Industry policy paper, 23 June 2004.

Companies Act of 2008 replaced those of the judicial management in the Companies Act of 1973. The concept of “business rescue proceedings” is defined in the Companies act 71 of 2008⁴² which is the primary source of business rescue law, and then followed by the definitions put forward by the courts.⁴³ Business rescue is defined in the Act as follows:

“Business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

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

Meskin goes further to give a fourth description of business rescue proceedings as “a plan that would achieve a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.”⁴⁴

Business rescue, as the definition proclaims or explains, is a regime which is largely self-administered by the company, under independent supervision within the constraints set out in Chapter 6 of the Act, and subject to court intervention at any time on application by any of its stakeholders.⁴⁵

The objective with business rescue is to keep companies alive and prolong the benefits that so many stakeholders, employees, shareholders and creditors, receive

⁴² Section 128(b).

⁴³ Delpont, *Henochsberg* (2015) 443.

⁴⁴ Meskin, *Insolvency law and its operation in winding up* (2015) 18-7.

⁴⁵ *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* SAHCJ 18486/2013.

from it.⁴⁶ Business rescue, as the definition proclaims or explains, is a regime which is largely self-administered by the company, under independent supervision within the constraints set out in Chapter 6 of the Act, and subject to court intervention at any time on application by any of its stakeholders.⁴⁷

In the case of *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others*,⁴⁸ business rescue proceedings were defined as the legal process to commence business rescue. More so, the concept of business rescue was adopted from the American Bankruptcy Code - chapter 11,⁴⁹ Bankruptcy Reform Act 1978 whose aim is to help financially distressed companies through monetary aid as well as a moratorium on proceedings against the company.⁵⁰

In terms of section 7(k), one of the purposes of the Act is to “provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders”.⁵¹ The case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*⁵² best illustrates the shift in approach. The Supreme Court of Appeal ruled that liquidation is not the only option for a financially distressed company. The case involved a proposed business rescue of Oakdene Square Properties, owner of the Kyalami racetrack complex. In this instance the Supreme Court of Appeal upheld the South Gauteng high court ruling that the liquidation of Oakdene was the only option. But, importantly, the Supreme Court of Appeal also provided clarity on applications for business rescue which it ruled hinged on the best potential outcome for creditors and shareholders. The Supreme Court of Appeal, ruled that a business rescue application should be granted if an applicant could show either restoring a company to health or a managed liquidation of its assets would provide a better return to creditors or shareholders than its immediate liquidation.

Section 427(1) of the Companies Act requires that there must be a reasonable probability that the company will be able to pay its debts and meet its obligations if

⁴⁶ Joubert (2013) 550.

⁴⁷ *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd* SAHCJ 13/12406.

⁴⁸ 2013 (6) SA 471 (GNP).

⁴⁹ Dzvimbo (2013) 23.

⁵⁰ Cassim *et al* (2011) 861.

⁵¹ Delpport, *Henochsberg* (2015) 447.

⁵² 2013 ZASCA 68.

the order for business rescue proceedings is granted. In *Noordkaap Lewende Hawe Ko-op Bpk v Schreuder*,⁵³ the honourable court confirmed the requirement that there must be a reasonable probability and not merely a reasonable possibility, which shall be discussed in detail later in the dissertation.

Although the Companies Act 71 of 2008 makes use of the term “business rescue”, the concept can also be regarded as a corporate rescue procedure because the purpose is not only to rescue the business as a whole but also entities of the business.⁵⁴ According to Loubser, the definition refers “to the rehabilitation of a company and a plan to rescue the company in a manner that maximises its chances of surviving in a solvent state”.⁵⁵ In this respect, Loubser further propounds that business rescue resembles judicial management, except to the extent that survival of the whole company is the only acceptable outcome of judicial management unlike with business rescue proceedings where the intention is to save part or whole of the company.⁵⁶

In the case of *NLRB v Bilisco*,⁵⁷ the court held that the purpose of a business rescue is to prevent a company from going into liquidation with an attendant loss of jobs and possible misuse of economic resources.⁵⁸ The mechanism is designed to balance the interests of debtors and creditors.⁵⁹ It must also be borne in mind that the purpose of a business rescue regime is *not necessarily* to save the business and return it to its former profitable status.⁶⁰ One of the spin-offs of a business rescue regime is that even if the business cannot be restored to a solvent and profitable status, the return to creditors in the long-run will be much higher.⁶¹

The business rescue provisions enable a company which is “financially distressed” to place itself under the supervision of a business rescue practitioner⁶² who will attempt to assist the company to make a financial recovery such that it continues to exist on

⁵³ 1974 3 SA 102 (A).

⁵⁴ Davis *et al*, *Companies and Other Business Structures in South Africa: Business Rescue Proceedings and Companies* (2009) 165 University of Cape Town research office South Africa.

⁵⁵ Loubser (2010) 45.

⁵⁶ Loubser (2010) 45.

⁵⁷ 465 US 513 (1983) 528.

⁵⁸ Dzvimbo (2013) 23.

⁵⁹ Rushworth “A Critical Analysis of Business Rescue in the Companies Act 71 of 2008- Part III” (2010) 376 *Acta Juridica* 375.

⁶⁰ Burdette *et al* (2002) 2.

⁶¹ Dzvimbo (2013) 23.

⁶² An independent turnaround professional with accounting, legal or business experience.

a “solvent basis”.⁶³ The supervision of the company may commence either by a resolution passed by its directors or by an application to court brought by an “affected person”, namely, a shareholder, creditor or employee of the company or the employees’ trade union.⁶⁴ According to Meskin, an application for business rescue may be aimed at either of the two goals set out in section 128 (1) (b), namely (a) the primary aim of rescuing the company; or (b) the secondary aim of securing a better return for the creditors than the immediate winding-up of the company.⁶⁵

An important point made by Harmer,⁶⁶ is that a business rescue regime has a far better chance of succeeding if the insolvency system in which it is applied is debtor-friendly, as opposed to a creditor-friendly system of insolvency where business rescue regimes are not applied as successfully.⁶⁷ This is certainly true of South Africa. South Africa has a creditor-friendly insolvency system, and it is submitted that the fact that the courts take a very conservative approach to insolvency and judicial management is a contributing factor in the failure of judicial management as a business rescue regime in South Africa.⁶⁸

2.2.1 Voluntary business rescue

As provided for by section 129 of the Companies Act 71 of 2008, the board of directors of a company may place the company in business rescue through the passing of a resolution to do so.⁶⁹ The resolution must be filed with the Company's Intellectual Property Commission (the Commission), within five working days following which the company must publish a notice of the resolution to every affected person in the company.⁷⁰ Affected persons, including employees or trade unions, do not have a right to initiate this process.⁷¹ However, all affected persons must be notified within five business days after the company has filed a resolution to commence business rescue proceedings.⁷² This notice must be accompanied by a

⁶³ Loubser and Joubert (2015) 23.

⁶⁴ Loubser and Joubert (2015) 23.

⁶⁵ Meskin (2015) 18-7.

⁶⁶ Harmer 147.

⁶⁷ Harmer 147 refers to the United States as an example of a debtor-friendly insolvency system where business rescue has a very high success rate, as opposed to Australia with a low rate of success due to its creditor friendly insolvency system.

⁶⁸ Burdette *et al* (2002) 3.

⁶⁹ Dzvimbo (2013) 24.

⁷⁰ Meskin (2015) 18-15.

⁷¹ Loubser and Joubert (2015) 36.

⁷² Section 129(3)(a).

sworn statement setting out the facts constituting the grounds on which the board based its resolution and the trade unions and employees will thus be made aware of the financial situation and problems of the company at a fairly early stage, which in turn will enable them to take informed decisions during the business rescue procedure.

As a statutory requirement, the board of directors is expected to present reasonable grounds with which they believe the company to be financially distressed⁷³ and there must be a reasonable prospect of rescuing the company.⁷⁴ A company may not institute business rescue if it has already started going through liquidation.⁷⁵ These powers afforded to the board of directors are a significant improvement from the system of judicial management as the procedure is faster and cheaper to commence.

There is no court involvement at this stage of the proceedings whereas with judicial management, an application to the High Court had to be made first.⁷⁶ Significantly, a director who believes that the company is in potential financial distress but has been outvoted by other directors, may not apply to the court in their individual capacity as a director even though he or she may face criminal and personal liability for trading in an insolvent state,⁷⁷ thereby placing the director in a compromised position as their hands are tied short in as far as approaching the court is concerned. The procedure appears unduly harsh and accordingly it is recommended that, the director's liability in such an instance should be mitigated and the law, in terms of regulations should be rectified and subsequently amended to allow an individual director in such capacity to have access to be heard before the court.

2.2.2 Business rescue by court order

The Companies Act 71 of 2008 empowers an affected person to make an application to the court requesting for business rescue to be initiated against the company and

⁷³ Section 129(1).

⁷⁴ Dzvimbo (2013) 24.

⁷⁵ *Ibid.*

⁷⁶ Loubser (2010) 51.

⁷⁷ Loubser (2010) 52 ; This is in terms of sections 22(1)(b) that prohibits the trading of a company in an insolvent state; Section 77(3)(b) that places liability on the director of loss or damage or cost sustained by the company as a direct or indirect consequence of the director having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1); and Section 214 (1)(c) that places criminal liability on any director who was knowingly party to conduct prohibited by section 22(1).

supervision of the company's affairs.⁷⁸ An affected person in relation to a company is classified as:⁷⁹

- (i) A shareholder or creditor of the company,
- (ii) Any registered trade union representing employees of the company, and
- (iii) If any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representative.

This right provides trade unions and employees with a powerful instrument not only to prevent liquidation of the company by having it placed in business rescue but also to halt liquidation proceedings that have already begun since the mere making of an application for business rescue proceedings will suspend the liquidation proceedings until the court refuses the business rescue application or, if the court does grant the order, until the business rescue proceedings end.⁸⁰ Even during the suspension of an employment contract as a result of a (provisional) liquidation order,⁸¹ an employee is not deprived of his or her status as an affected person and such an employee will therefore still have locus standi to apply for a business rescue order.⁸²

In passing an order, the jurisdiction of the court is a factor to consider. The term "court" means: (i) the High Court that has jurisdiction over the matter;⁸³ or (ii) either a designated judge of the High Court that has jurisdiction over the matter.⁸⁴ The court in *Sibakhulu Construction (Pty) Ltd v Wedge-wood Village Golf Country Estate*⁸⁵ ruled that; the jurisdiction of the court will be determined by the registered office of the company.⁸⁶ Furthermore, in the case of *De Bruyn v Grandselect 101 (Pty) Ltd and Another*⁸⁷ the court found that it had jurisdiction in the business rescue proceedings on the basis that the company conducted its business in the court's jurisdiction, despite the fact that the company's registered office was in Cape Town and should therefore have fallen under the jurisdiction of the Western Cape High

⁷⁸ Dzvimbo (2013) 26.

⁷⁹ Section 128(1).

⁸⁰ Section 136(6).

⁸¹ Section 38 of the Insolvency Act.

⁸² *Richter v Bloempro CC* GNP 14 March 2014 case no 69531/2012 unreported.

⁸³ Section 128(1)(e).

⁸⁴ Meskin (2015) 18-13.

⁸⁵ (2012) JOL 28484 (WCC).

⁸⁶ Meskin (2015) 18-15.

⁸⁷ (2014) ZANCHC 3.

court. The Judge President of the High court may, for the purposes of section 128 (1) (e), designate a judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.⁸⁸

It must be noted that no other comparable legal system gives authority to an individual that holds securities to apply for business rescue proceedings. It is particularly significant that the locus standi to apply for the institution of business rescue proceedings has been extended to the employee. The extension of the rights to employees or their representatives was an advancement of the Act's stated aims to provide greater protection for workers and operates in their best interests.⁸⁹ The Act goes further as to grant trade unions and employees access to financial statements of companies at any moment.⁹⁰ Trade unions must, through the Commission and under conditions as determined by the Commission, be given access to company financial statements for purposes of imitating a business rescue process.

The application must be served on the company and the Commission.⁹¹ The applicant must notify all persons affected by the application⁹² who may be present during the hearing of the application.⁹³ The Companies Act places the onus upon the affected person⁹⁴ to prove that the company is in financial distress⁹⁵ and as a result, has not been able to meet its obligations,⁹⁶ hence it is in the best interests of the company to do so for financial reasons⁹⁷ and there are reasonable prospects as to its recovery.⁹⁸ The aspect of reasonable prospect of success was deliberated at length in the case of *Southern Palace Investment v Midnight Storm investment*⁹⁹ in which the court demanded among others the grounds for reasonable prospects of success in the application for business rescue. This approach was welcomed with great enthusiasm as it was then adopted in about six other cases that followed.

⁸⁸ Section 128(3).

⁸⁹ Museta (2011) 25.

⁹⁰ Section 31.

⁹¹ Section 131(2)(a).

⁹² Section 131(2)(b).

⁹³ Section 131(3).

⁹⁴ Dzvimo (2013) 26.

⁹⁵ Section 131(4)(a)(i).

⁹⁶ Section 131(4)(a)(ii).

⁹⁷ Section 131(4)(a)(iii).

⁹⁸ Section 134(4)(a)(iv).

⁹⁹ 2012 (2) SA 423 WCC.

Despite the fact that Eloff JA acknowledged that every case must be judged on its own merits (para 24) he created a checklist that must be used before a Court should grant a business rescue application. The aspects that need to be proved to a Court that a reasonable prospect exists regarding the company's ability to continue in existence are:

- the cause of the financial needs to be addressed;
- a remedy for the failure needs to be offered;
- there is a reasonable prospect that the remedy advanced will be sustainable;
and
- the above aspects prove, based on “concrete and objective ascertainable details beyond mere speculation”, that the remedy is sustainable.

If one evaluates the checklist established by Eloff AJ in *Southern Palace*, it is clear that these details may not always be available when the business rescue application is brought before a Court. The *Southern Palace* case is important as it was the first case in South African company law to substantially deal with business rescue and the unfortunate manner in which the recovery requirement was dealt with, that being the high bar being placed on establishing a reasonable prospect of rescuing a company.

However, the stringent checklist approach introduced by Eloff AJ in the *Southern Palace* case to enable a court to determine what requirements must be met and proved for the reasonable prospect of rescuing a company to be present was later criticised by other judges of the High Court. The factors that go beyond looking at a mere possibility of success or the providing of information “that goes beyond mere speculation or conjecture”,¹⁰⁰ were criticised by the judgment in *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd*¹⁰¹ and authors as putting the “benchmark too high”.¹⁰²

The certainty of what is required for a reasonable prospect of rescuing a company was found in the *Prospec* case. Van der Merwe J like many others before him turned

¹⁰⁰ Delpont, *Henochsberg* (2015) 464.

¹⁰¹ [2013] 1 SA 542 (FB).

¹⁰² Delpont, *Henochsberg* (2015) 442.

to the interpretation of the phrase “reasonable prospect” by Eloff AJ in *Southern Palace* and he agreed with Eloff AJ that the Act required something less than the Old Act.¹⁰³ Van der Merwe J however expressed in his judgment that Eloff AJ in *Southern Palace* as well as Binns-Ward J in *Koen* expected too much of the applicants in order to prove to the Court that a reasonable prospect did indeed exist.¹⁰⁴ Ultimately Van der Merwe J established a new test for the recovery requirement by stating that “a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds”.¹⁰⁵ Therefore Van der Merwe J deemed it unnecessary to establish a stringent checklist to satisfy the recovery requirement, *albeit*, Van Der Merwe J did seem to lower the burden of proof required.

In the case of *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd*,¹⁰⁶ Binns-Ward J, in dealing with the recovery requirement for a compulsory application for business rescue, started off by stating that the information needed to prove the existence of a reasonable prospect will depend on the object of the business rescue. This reference to the different objects contained in section 128(a)(iii), namely, to rehabilitate a company to continue business on a solvent basis or to provide a better return for creditors of the company, means that the information needed to prove the recovery requirement contained in section 131(4)(a) will differ.¹⁰⁷ Binns-Ward J immediately thereafter continued by stating:

“Whatever the object of the proposed business rescue, however, in order to succeed in the application the applicant must be able to place before the court a cogent, evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved.”¹⁰⁸

Eventually the Supreme Court of Appeal had the opportune occasion of interpreting the much debated recovery requirement in *Oakdene Square Properties*. In this case Brand JA considered the judgment in *Southern Palace* and specifically the checklist approach constructed by Eloff JA. Brand J rejected this checklist approach to the

¹⁰³ Para 8.

¹⁰⁴ Para 11.

¹⁰⁵ Para 12.

¹⁰⁶ 2012 2 SA 378 (WCC).

¹⁰⁷ Joubert (2013) 558.

¹⁰⁸ 10 para 17.

recovery requirement by stating that it would not be “practical nor prudent” to support such an approach.¹⁰⁹ According to Brand J, the emphasis must not be on the prospect alone, but rather on the reasonable, thus a “prospect based on reasonable grounds”.¹¹⁰ Brand J went further and held that “reasonable prospect” does not necessarily mean reasonable possibility; however, it means a prospect based on reasonable grounds and not speculative suggestions or averments, meaning an applicant is required to place before the Court a factual foundation for the existence of a reasonable prospect that business rescue will achieve the primary or secondary object of business rescue.¹¹¹ Brand J indicated his agreement with the decision and judgment handed down by Van der Merwe J in *Prospec*, expressing that the applicant is not required to set out a detailed business rescue plan but rather must establish grounds for a reasonable prospect of achieving one of the two objectives in section 128(1) (b) of the Act.

The South African legal system operates on the principle that a decision of the Supreme Court of Appeal is binding on all lower Courts (*stare decisis*), meaning that the decision of the Supreme Court of Appeal in *Oakdene* will set the foundation of what is meant by the “reasonable prospect of rescuing a company” and will be followed by subsequent High Courts when granting business rescue orders, specifically when interpreting the meaning of “reasonable prospect of rescuing a company”.

Therefore, if the application is granted, the court then proceeds to appoint a business rescue practitioner based on the recommendation of the applicant; however the holders of a majority of the independent creditors at the first meeting of the creditors must approve.¹¹² On the contrary, if the court is unsatisfied with the reasons provided, it may dismiss the application and place the company under liquidation.¹¹³ The effect of such an application for business rescue is that it suspends liquidation proceedings that may have been instituted against the company until the court has finalised the application or when the business rescue procedure comes to an end.¹¹⁴

¹⁰⁹ Para 30.

¹¹⁰ Para 29.

¹¹¹ Para 29-31.

¹¹² Section 131(5).

¹¹³ Section 131(4)(b).

¹¹⁴ Dzimbo (2013) 26.

2.2.3 Business rescue by conversion of liquidation proceedings

Business rescue proceedings can be implemented when liquidation or winding-up proceedings are converted, no matter how far these proceedings might have progressed.¹¹⁵ This was reiterated in a judgement for business rescue which was handed down in the North Gauteng High Court by Legodi J in the matter between *P T van Staden v Angel Ozone Products CC (In Liquidation) & others*.¹¹⁶ The Judge echoed the views of Henochsberg on the Companies Act 71 of 2008 that “liquidation proceedings or winding-up proceedings can be converted into business rescue proceedings no matter how far these proceedings might have progressed.” Such contemplated business rescue proceedings being a better option than the current liquidation/winding-up proceedings. The Judge was furthermore of the view that liquidation proceedings do not end when a final liquidation order is granted, but only once a final Liquidation and Distribution Account has been confirmed by the Master of the High Court as it was originally the case in Section 408 of the old Companies Act, Act 61 of 1973 ("old Act"). The Judge concluded that Item 10(2) of Schedule 5 to the old act makes it clear that an order granted in terms of the Companies Act 61 of 1973 is subject to any further order that could be made under the current Companies Act.

2.3 General moratorium

A moratorium on the company is provided for by business rescue during the course of proceedings. This means that, no legal proceeding, including enforcement action, against the company or in relation to any property belonging to the company or lawfully in its possession may be commenced or proceeded with in any forum.¹¹⁷ It is designed to provide the company with breathing space while the business rescue practitioner attempts to rescue the company by formulating and implementing a business rescue plan.¹¹⁸ The only exceptions allowed are set out in provisions (a) to (f) of subsection (1) of section 133.¹¹⁹ Only in exceptional circumstances may the court permit litigation against a business rescue plan or related thereto. The objective of the new Companies Act in this regard is to provide for efficient rescue of

¹¹⁵ Delpont, *Henochsberg* (2015) 442.

¹¹⁶ 2013 (4) SA 630 (GNP).

¹¹⁷ Section 133 (1).

¹¹⁸ Meskin (2015) 18-6.

¹¹⁹ *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* SAHCJ 18486/2013.

financially distressed companies in an atmosphere that is not hindered or cluttered with or by litigation.¹²⁰

Noteworthy, this moratorium is automatic unlike with judicial management in which a separate application must be made to the court when an application for judicial management has been granted. The Act provides for exceptions to the moratorium, if there is a written consent of the practitioner¹²¹ with the leave of the court.¹²² This will be a set off against any claim made by the company in any legal proceedings,¹²³ irrespective of whether those proceedings commenced before or after the business rescue proceedings¹²⁴ criminal proceedings against the company or any of its directors or officers, proceedings concerning any property or right over which the company exercises the powers of a trustee¹²⁵ and proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.¹²⁶ The practitioner has a wide discretion and may extend the duration of the section 133 moratorium for a period beyond the duration of the business rescue proceedings.¹²⁷

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.¹²⁸ Meskin's interpretation that the section 150 (2) moratorium which is incorporated 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 in formulating the rescue plan.¹²⁹

More so, no person except with the leave of the court may enforce a guarantee or surety by a company in their favour during business rescue proceedings.¹³⁰ The

¹²⁰ Preamble of the Companies Act 71 of 2008.

¹²¹ Section 133(1)(a).

¹²² Section 133(1)(b).

¹²³ Dzvimbo (2013) 27.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Delpport, *Henochnberg* (2015) 478.

¹²⁸ Section 22(1)(b).

¹²⁹ Section 131(1).

¹³⁰ Section 133(2).

rights to institute proceedings or bring any claim against the company during business rescue are suspended.¹³¹ The moratorium is thus wide and will be effective throughout the procedure.¹³²

2.4 The time frame of business rescue

Business rescue proceedings begin when-

- (a) 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);¹³³

Commencement of business rescue proceedings automatically implies that the moratorium on the company comes into effect.¹³⁴ Generally, business rescue proceedings are expected to last for three months or as directed by the court. However, if the business rescue proceedings don't end within three months or such a time as the court has designated, the business practitioner must take it upon himself to prepare a report on the progress of proceedings and update it monthly until the end of such proceedings,¹³⁵ for each affected person and by mandate make a delivery of the report to the courts.¹³⁶

Business rescue proceedings end when-

- (a) the court-
 - (i) sets aside the resolution or order that began those proceedings; or
 - (ii) has converted the proceedings to liquidation proceedings;¹³⁷ or
- b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings¹³⁸

¹³¹ Section 133(1)(f).

¹³² Loubser (2010) 206.

¹³³ Section 132(1).

¹³⁴ Cassim *et al* (2011) 876.

¹³⁵ Dzvimbo (2013) 27.

¹³⁶ Cassim *et al* (2011) 792.

¹³⁷ Section 132(2)(a).

If a proposed business rescue plan has been rejected and no affected person has acted to extend the proceedings in terms of section 153, business rescue comes to an end.¹³⁹ The last possible avenue for termination of business rescue proceedings is when the practitioner has subsequently filed a notice of substantial implementation of that plan.¹⁴⁰

2.5 Business rescue practitioner's appointment and qualifications

The appointment and functions of the business rescue practitioner are canvassed in terms of section 138 of the Companies Act 71 of 2008 as well as the Companies regulations.¹⁴¹ According to this section, the minister designates an individual with good standing in the profession, who is not subject to an order in terms of section 162(7) of the Companies Act of 2008 and has an independent relationship with the company and would not therefore be compromised in terms of his or her integrity and impartiality.¹⁴² The practitioner must be a member of a legal, accounting or business management profession accredited by the Commission¹⁴³ and practitioners must be licenced as such by the Commission.¹⁴⁴

Furthermore, the Minister prescribes minimum qualifications for a person to practise as a business rescue practitioner, including different minimum qualifications for different categories of companies.¹⁴⁵ The Minister has also imposed standards and procedures to be followed by the Commission in carrying out its licensing functions and powers.¹⁴⁶ The Minister has the discretion to direct the Commission on how to issue licences as well as the requirements for admission as a business rescue practitioner.¹⁴⁷ The regulations provide that, the Commission may issue a licence to a business rescue practitioner if it is satisfied that, the applicant is of good character and integrity.¹⁴⁸

¹³⁸ Section 132 (2)(b).

¹³⁹ Section 132(c)(i).

¹⁴⁰ Section 132(c)(ii).

¹⁴¹ Dzimbo (2013) 32.

¹⁴² Section 138(1).

¹⁴³ Section 138(1)(a).

¹⁴⁴ Section 138(1)(b).

¹⁴⁵ Section 138(3)(b) of the Companies Amendment Act of 2011 Government Gazette 20 April 2011. Hereinafter referred to as the Companies Amendment Act of 2011.

¹⁴⁶ Section 138(3)(a).

¹⁴⁷ Dzimbo (2013) 32.

¹⁴⁸ Reg. 126(4)(a) of Insolvency Practitioners Regulations 2009/3081.

2.5.1 Business rescue practitioner's duties and powers

Once appointed, the business rescue practitioner has full managerial control of the company¹⁴⁹ in substitution of its board and pre-existing management.¹⁵⁰ The practitioner has a statutory duty to investigate the affairs of the company in terms of s141 of the Companies Act 71 of 2008.¹⁵¹ The investigation into the affairs extends to the financial status of the company and its properties as this will guide him in making a determination as to whether there are any prospects of the company being rescued.¹⁵²

If there are no prospects that the company can become a viable concern again, then the business rescue practitioner must report the findings to the court, the company and all affected persons.¹⁵³ Subsequently, the practitioner must then make an application for an order placing the company under liquidation.¹⁵⁴

On the other hand, if the company is no longer financial crippled, the practitioner must inform all the relevant stakeholders in the company then proceed to terminate business rescue.¹⁵⁵ The duties of the practitioner also extend to the correction of mistakes that would have been made by the previous management of the company.¹⁵⁶ Any evidence that may purport illegal acts committed by the company under the previous management must be reported to the relevant authorities so that they can pursue the investigation and prosecute the responsible persons.¹⁵⁷

The business rescue practitioner may delegate any power¹⁵⁸ he or she maintains to any person who was part of the board or the pre-existing management.¹⁵⁹ The practitioner also maintains a responsibility to develop and implement any business plan that has been adopted¹⁶⁰ for the duration of the proceedings; the practitioner has the obligation to report back to the court.¹⁶¹ The business rescue practitioner also

¹⁴⁹ Meskin (2015) 18-8.

¹⁵⁰ Section 140(1)(a).

¹⁵¹ Dzvambo (2013) 34.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Section 141(2)(a).

¹⁵⁵ Dzvambo (2013) 34.

¹⁵⁶ *Ibid.*

¹⁵⁷ Section 141(2)(c)(ii).

¹⁵⁸ Dzvambo (2013) 34.

¹⁵⁹ Section 140(1)(b).

¹⁶⁰ Section 140(1)(d)(i-ii).

¹⁶¹ Dzvambo (2013) 34.

holds the responsibilities of duties and liabilities of the directors set out in sections 75 to 77 of the Companies Act 71 of 2008. The directors will continue to exercise their functions as directors during the proceedings, subject to the authority of the practitioner, providing information and at tending to any business need the practitioner may have.¹⁶²

The business rescue practitioner in accordance with section 140 of the Companies Act of 71 2008 has the authority to remove from office any member of the management and to make appointments to the management of the company.¹⁶³ There is no “one size fits all approach” employed by the business rescue practitioner as there are no clear guidelines that may be adopted in the appointments to management that the practitioner she can effect. The Companies Act 71 of 2008 does not prescribe the manner in selection criteria.

According to the Companies Act 71 of 2008, the business rescue practitioner may be removed from office by a court order on the request of an affected person on the following grounds;

- i. Incompetence or failure to perform duties;
- ii. Failure to exercise a proper degree of care in performance of the business rescue practitioner functions;
- iii. Engaging in illegal acts or conduct;
- iv. Where he/she no longer satisfies the qualification requirements;
- v. Where there is a conflict of interest and he/she cannot act independently;
- vi. Where he/she is incapacitated and is unable to perform their functions in office¹⁶⁴

2.5.2 Business rescue practitioner’s remuneration

The fees payable to the business rescue practitioner must be in accordance with the tariffs prescribed by the Companies Act and set out in the regulations.¹⁶⁵ According

¹⁶² Rushworth (2010).

¹⁶³ Section 140(1)-(2).

¹⁶⁴ Harvey (2011) 83.

¹⁶⁵ Dzvimbo (2013) 35.

to Regulation 128, the fees may not exceed R1 250 per hour to a maximum of R15 625 per day in the case of a small company.¹⁶⁶ In the case of a medium company, the fees are R1500 per hour to a maximum of R18 750 per day,¹⁶⁷ whilst for large companies, R2 000 per hour to a maximum of R25 000 per day.¹⁶⁸ The business rescue practitioner in accordance with section 143 (1) is entitled to propose for an agreement for additional fees from the company for duties he performed during business rescue proceedings.¹⁶⁹ In order to have a legally binding agreement, the majority of the creditors with voting rights in the company,¹⁷⁰ together with shareholders who also possess such rights¹⁷¹ must approve. Any disgruntled creditors or shareholders who are in objection to the practitioner's remuneration fee agreement may apply to the court for nullification of the agreement if it is not just and equitable¹⁷² or that the fees required are in excess and the company will not be able to meet them. If the company fails to pay the business rescue practitioner his fees, the fee claim will be given preference over all secured and unsecured creditors to the company.¹⁷³

2.6 Security of property interests

During the proceedings of business rescue, a company may not dispose of any of its properties in its possession except if it is in the ordinary course of its business.¹⁷⁴ According to s134 (1) (a) (ii) there must be a *bona fide* reason for the disposal of property; the consent of the business rescue practitioner is a prerequisite.¹⁷⁵ The practitioner is not permitted to unreasonably deny consent; consideration must be made for the purpose of business rescue, the circumstances of the company as well as the nature of the property rights claimed in respect of it.¹⁷⁶ The disposal of assets

¹⁶⁶ Regulation 128(1)(a).

¹⁶⁷ Regulation 128(1)(b).

¹⁶⁸ Dzvimo (2013) 35.

¹⁶⁹ *Ibid.*

¹⁷⁰ Section 143(3)(a).

¹⁷¹ Section 143(3)(b).

¹⁷² Dzvimo (2013) 35.

¹⁷³ *Ibid.*

¹⁷⁴ Dzvimo (2013) 28.

¹⁷⁵ *Ibid.*

¹⁷⁶ Section 134(2).

during business rescue occurs if the transaction is part of the implementation of the business rescue plan.¹⁷⁷

Once the rescue plan has been adopted by the company, no person who has a legally binding agreement with the company may exercise their right against the company with regard to property in its possession except with the approval of the practitioner.¹⁷⁸ When a company intends to dispose of property over which a third party has security or minimal interest, it must do so only in agreement with the person except when convinced that the amount recovered from the sale of such property will sufficiently pay off the persons debt or interest. As provided for in terms of section 134 (3), immediately after the property disposal, the company must pay in full the amount it owes or it must provide surety that is reasonably sufficient for whatever amount it is indebted to the person.¹⁷⁹

2.7 Post- commencement finance

Post-commencement finance refers to a process whereby the company is enabled to secure additional finance after the commencement of business rescue.¹⁸⁰ Similar to moratorium, this concept is of importance to business rescue process because it is expected for banks, financial institutions or creditors to be hesitant to finance an ailing company for fear of not being paid back their money. A company undergoing business rescue definitely requires more financing to maximise its chances of successfully becoming a viable entity again.¹⁸¹ It is worthy to appreciate that post-commencement finance takes preference over all other creditor claims irrespective of whether or not they are secured.¹⁸² Nevertheless, it is more favourable to secured creditors as they rank above unsecured creditors.¹⁸³ Section 364 of the United States Bankruptcy Code provides that any credit extended to the company during business rescue enjoys priority over unsecured claims incurred before the rescue process.¹⁸⁴ According to the Act, any employee monies due from the company in the

¹⁷⁷ Section 134(1)(a)(iii).

¹⁷⁸ Dzvambo (2013) 28.

¹⁷⁹ Dzvambo (2013) 29.

¹⁸⁰ Dzvambo (2013) 29.

¹⁸¹ Hutchinson A Business Rescue: How secure is the secured creditor? (2011) *unpublished Article 24*. https://open.uct.ac.za/bitstream/item/12661/thesis_law_2012_kaulungombe_k.pdf

¹⁸² Section 135(3)(a).

¹⁸³ Dzvambo (2013) 29.

¹⁸⁴ Cassim *et al* (2013) 882.

form of remunerations, reimbursements, expenses or any other amount of money relating to employment, that must be paid but the company fails to so during business rescue proceedings, becomes post-commencement finance¹⁸⁵ and the pay-out will be done in preference according to terms set out for business rescue.¹⁸⁶

Section 135 (2) allows the company to seek financing from other financial institutions.¹⁸⁷ The creditors to the company may utilise a company's asset to the extent that it is not encumbered.¹⁸⁸ After paying the practitioner's fees and any other costs of the business rescue procedure, all other debts that are owed by the company will rank equally but will be attended to first before secured and unsecured claims against the company.¹⁸⁹ If the business rescue turns into liquidation, the same preference remains in force.¹⁹⁰

2.8 Order of preference

Section 135 of the Act provides for the ranking of creditors' claims.¹⁹¹ It provides among others¹⁹² that after payment of the practitioner's remuneration and expenses as set out or referred to in section 143 as well as other claims arising out of the costs of the business rescue proceedings

“... all claims contemplated in –

- (a) s. 135(1) (amounts due and payable to employees during the business rescue proceedings) will be treated equally but will have preference over all unsecured claims against the company and all claims contemplated in s. 135(2), irrespective whether or not they are secured. An employee is also a preferred unsecured creditor for any remuneration, reimbursement of expenses or other employment – related amount which became due and payable by the company at any time before business rescue proceedings began, and had not been

¹⁸⁵ Dzvimo (2013) 29.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Section 135(2)(a).

¹⁸⁹ Dzvimo (2013) 29.

¹⁹⁰ Section 135(4).

¹⁹¹ *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd* SAHCJ 13/12406.

¹⁹² Section 135(3).

paid to the employee immediately before those business rescue proceedings began;¹⁹³ or

- (b) s. 135(2) (third party financing) will have preference in the order in which they were incurred over the unsecured claims.”¹⁹⁴

In the same spirit with the Merchant West Working Capital Solutions case, claims have been ranked in the following order of preference:¹⁹⁵

1. The practitioner, for remuneration and expenses, and other persons (including legal and other professionals) for costs of business rescue proceedings.
2. Employees for any remuneration which became due and payable after business rescue proceedings began.
3. Secured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. post-commencement finance.
4. Unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. post-commencement finance.
5. Secured lenders or other creditors for any loan or supply made before business rescue proceedings began.
6. Employees for any remuneration which became due and payable before business rescue proceedings began.
7. Unsecured lenders or other creditors for any loan or supply made before business rescue proceedings began.

In the event that business rescue proceedings are superseded by a liquidation order, the above preference will remain in force except to the extent of any claims arising out of the costs of that liquidation.¹⁹⁶

¹⁹³ Section 144(2).

¹⁹⁴ Stein & Everingham: *New Companies Act*, Unlocked, *op cit*, pp 420-421.

¹⁹⁵ *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* SAHCJ 18486/2013.

¹⁹⁶ Section 135(4).

2.9 Business rescue's effect on employees and contracts

Section 128 of the Companies Act 71 of 2008 advocates for equal treatment of all stakeholders' interests; this has a bearing upon the effect of business rescue on the employees and their contracts. Despite any provision of an agreement to the contrary; during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions,¹⁹⁷ except to the extent that-

- (i) changes occur in the ordinary course of attrition;¹⁹⁸ or
- (ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions;¹⁹⁹

Any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995²⁰⁰ and other applicable employment related legislation.²⁰¹

During the course of business rescue, the practitioner, in spite of any agreements to the contrary entirely, partially or conditionally suspend, for the duration of the business rescue any obligation of the company²⁰² that arises under an agreement to which the company was a party at the commencement of the business rescue²⁰³ and would otherwise become due during those proceedings²⁰⁴ or apply urgently to a court to entirely, partially or conditionally cancel on any terms that are just and reasonable in the circumstances, any obligation of the company.²⁰⁵ This standpoint was deliberated and upheld in the case of *Motor Racing Enterprises v NPC Electronics*.²⁰⁶ Once this is done, the court in the case of *Smith v Van der Heever*²⁰⁷ held that "the only available recourse for any creditor is damages only".

¹⁹⁷ Section 136(1)(a).

¹⁹⁸ Section 136(1)(a)(i)

¹⁹⁹ Section 136(1)(a)(ii)

²⁰⁰ No. 66 of 1995

²⁰¹ Section 136(b).

²⁰² Dzvimbo (2013) 30.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ 1996 (4) SA 601.

²⁰⁷ 1997 (3) SA 140.

The business rescue practitioner is not permitted to suspend any provision of any contract of employment²⁰⁸ or any arrangement in a way that conflicts with the Insolvency Act 24 of 1936.²⁰⁹ More so, the court may not terminate any contact of employment.²¹⁰ In the event that a practitioner suspends an agreement with regard to security given by the company, that agreement remains effective in matters concerning any proposed property disposal by the company.²¹¹ A claim for damages is the remedy available to an individual whose contract with the company has been suspended or terminated.²¹² If the company had first commenced liquidation before opting for business rescue, the liquidator becomes a creditor of the company,²¹³ to the extent of the total monies for his work that is owed by the company or expenses incurred before the commencement of business rescue.²¹⁴

2.10 Business rescue's effect on shareholders and company directors

The classification of issued securities of a company may only be done by way of transfer of securities in the ordinary course of business²¹⁵ except where a different method of alteration has been directed by a court²¹⁶ or is contemplated in an approved business rescue plan.²¹⁷ The office of the director does not cease to function during business rescue,²¹⁸ this is however contingent upon the authority of the practitioner.²¹⁹

Furthermore, a practitioner may instruct a director to exercise any management duty within the company.²²⁰ A director is permitted to disclose personal financial interest in the company in advance by a written notice to the board or shareholders stating

²⁰⁸ Section 136(2A)(a)(i).

²⁰⁹ Section 136(2A)(a)(ii).

²¹⁰ Section 136(2A)(b)(i).

²¹¹ Dzvambo (2013) 30.

²¹² Section 136(3).

²¹³ Dzvambo (2013) 31.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Section 137(2)(a).

²¹⁹ Dzvambo (2013) 31.

²²⁰ Section 137(2)(b).

the nature and extent of the interest.²²¹ At all times,²²² directors are mandated to attend to the requests of the practitioner.²²³

If a director acts without the approval of the practitioner, such an act is void.²²⁴ If a director fails to comply with a requirement of business rescue and their actions compromise the functions and duties of the business rescue practitioner and affects the management of the company and proper execution of a successful business rescue plan, then an application may be made to the court by the business rescue practitioner in terms of section 137 (5) requesting that the director in question be removed from office.²²⁵

2.11 Affected persons' rights during business rescue proceedings

The expression “affected person” is defined in chapter 6,²²⁶ as:

- (i) a shareholder or creditor of the company;
- (ii) any registered trade union representing employees of the company;
and;
- (iii) If any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

This generic term is used throughout Chapter 6 to describe the principal stakeholders in the business rescue proceedings, which are the creditors, shareholders and employees of the relevant company.²²⁷ These persons are closely connected to the company and thus directly affected by the company being placed under supervision.²²⁸ The court in *Employees Solar Spectrum Trading v AFGRI Operations and Another*²²⁹ discussed that “rights of affected persons and in the company must be promoted and the persons afforded an opportunity to air their views in the running of the business rescue procedure as well as made know of the

²²¹ Section 75(4).

²²² Dzvimo (2013) 31.

²²³ Section 137(3).

²²⁴ Section 137(4).

²²⁵ Dzvimo (2013) 31.

²²⁶ Section 128(1)(a).

²²⁷ Delpont, *Henochoberg* (2015) 444.

²²⁸ Loubser & Joubert (2015) 24.

²²⁹ 6418/11.

implications the procedure is going to have on them.” This standpoint is echoed in terms of section 7(k) of the Companies Act 71 of 2008, which propounds “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”.²³⁰ The approach promotes the tenets of natural justice.

2.12.1 The status of employees

In the Memorandum on the objects of the Companies Bill of 2008 it was stated that the new chapter 6 ‘recognises the interests of shareholders, creditors and employees’.²³¹ The specific interests of workers protected in chapter 6 were listed as:²³²

1. Employees are recognised as creditors of the company that have a voting right in respect of any part of unpaid remuneration due before commencement of the business rescue proceedings.
2. Employees must be consulted in the development of the business rescue plan
3. Employees are given the opportunity to address creditors at their meeting before they vote on the business rescue plan.
4. Employees have the right to buy out dissenting creditors or shareholders who have voted against the approval of the business rescue plan.

During business rescue it is critical to strike a balance between the needs of employees and creditors to the company; the Act aims to ensure the protection of employee rights. It has been said that employees are the lost souls of insolvency law.²³³ Although section 7(k) of the Companies Act of 2008 states that one of the purposes of the Act is ‘to provide for the efficient rescue and recovery of financially distressed companies, in a manner that *balances the rights and interests of all relevant stakeholders*’²³⁴ it is clear that employees are regarded as important stakeholders in business rescue proceedings and-mainly through their trade unions-have been given a specific role and extensive rights to influence the process.

²³⁰ Section 7(k).

²³¹ Item 10 entitled ‘Business Rescue’c192. The memorandum was attached to the Companies Bill (B 61D-2008).

²³² Loubser & Joubert (2015) 36.

²³³ Vanessa (2004) 778.

²³⁴ Loubser & Joubert (2015) 22.

According to statute, an employee may be represented by a registered trade union²³⁵ or may exercise the right prescribed by the act by proxy, an employee committee or organisation.²³⁶ Some of the employee's rights include the right to participate during necessary meetings, right to vote, right to legal representation in any matter as well as oppose or approve the business rescue resolution.²³⁷ If an employee was owed monies by the company that were not paid before business rescue commenced, that employee will be treated as an unsecured creditor.²³⁸

The practitioner must notify a union representing employees during business rescue in the prescribed manner.²³⁹ A Union representing employees is permitted to participate in the court proceedings during business rescue.²⁴⁰ The union must be consulted by the practitioner regarding the business rescue plan and must be afforded adequate time to acquaint themselves with the plan.²⁴¹ Voting rights are awarded to the union with respect to considerations on the adoption of the business rescue plan.²⁴² The Union may vote with creditors on a motion to approve a proposed business rescue plan if the said employee is a creditor of to the company.²⁴³ If a business rescue plan fails, the union is permitted to actively participate in the development of a new business rescue plan.

2.12.2 Contribution by creditors

The creditors of the company have a right to approve or reject a business rescue plan and the main reason being that the moratorium placed over the company alters the rights that the creditors may have had over the company.²⁴⁴ It is therefore imperative for them to participate during business rescue. Notice of each court proceeding or any other meeting in relation to the company during business rescue must be given to all creditors.²⁴⁵ Creditors may participate in court proceedings²⁴⁶ and may formally contribute in the business rescue proceedings subject to the

²³⁵ Dzvimo (2013) 36.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ Section 144(2).

²³⁹ Section 144(3)(a).

²⁴⁰ Section 144(3)(b).

²⁴¹ Section 144(3)(d).

²⁴² Section 144(3)(e).

²⁴³ Section 144(3)(f).

²⁴⁴ Dzvimo (2013) 36.

²⁴⁵ Section 145(a).

²⁴⁶ Section 145(1)(b).

provisions of the Act.²⁴⁷ Furthermore, the creditors have the right to amend, approve or reject a proposed plan.²⁴⁸ In the event that the business rescue plan is rejected, creditors may recommend a new business rescue plan or offer to acquire the interests of all the other creditors who voted against the business rescue plan.²⁴⁹ They may form their own independent committee.²⁵⁰

Creditors' voting rights whether secured or unsecured are contingent upon the total monies owed to them by the company.²⁵¹ A concurrent creditor who would be subordinated in liquidation has voting interest equal to the amount that the creditor could reasonably expect to be awarded if the company goes into liquidation.²⁵² It appears that the aim of business rescue is to add rather than detract from creditors' rights thereby amplifying creditor rights over shareholder rights.²⁵³

2.12.3 Contribution by holders of company's securities

Shareholders' interests are generally regarded subordinate to other stakeholders during business rescue.²⁵⁴ Their interests have been regarded to be the least, 'at the back of the queue' during business rescue.²⁵⁵ However each holder of company securities must be given notice of court proceedings²⁵⁶ as well as participate in the said court proceeding during business rescue.²⁵⁷ Shareholders may decide to vote in favour of or reject the business rescue plan if they are of the belief that it will in any way infringe on their rights in terms of their class of shares. in accordance with the provisions of section 146 (d).²⁵⁸ If the business rescue plan is rejected, they may propose the adoption of a new plan²⁵⁹ or present an offer to acquire the interests of

²⁴⁷ Section 145(1)(c).

²⁴⁸ Section 145(2)(a).

²⁴⁹ Section 145(2)(b).

²⁵⁰ Section 145(3).

²⁵¹ Dzvimo (2013) 37.

²⁵² Section 145(4)(b).

²⁵³ Bradstreet Business rescue proves to be creditor friendly: C J Classen J's analysis of the new business rescue procedure in Oakdene Square Properties 7, (2013) 130 SALJ 44-52.

²⁵⁴ Dzvimo (2013) 37.

²⁵⁵ Bradstreet (2010) 8.

²⁵⁶ Section 146(a).

²⁵⁷ Section 146(b).

²⁵⁸ Dzvimo (2013) 37.

²⁵⁹ Section 146(e)(i).

any or all the creditors who would have voted against the approval of the business rescue plan.²⁶⁰

2.13 Consultations during business rescue

As defined in terms of section 128 of the Companies act 71 of 2008, all affected persons in the company have the right to hold meetings and be present at all meetings, separately, in which they will be briefed by the business rescue practitioner on the prospects of success of the rescue plan as well as the pertinent information regarding the company's financial status and general affairs.²⁶¹ The meetings of creditors, employees and their representatives must take place within 10 business days after the practitioner takes office.²⁶² The creditors have a right to know if there is a reasonable prospect of rescuing the company²⁶³ as well as present to the practitioner proof of their claims.²⁶⁴ Creditors may at this point deliberate on forming a committee and appoint members to it.²⁶⁵ Every creditor in the company must receive appropriate notice of the first meeting from the practitioner with information such as the date, time and place²⁶⁶ of the meeting as well as its agenda.²⁶⁷

The same applies for employee representatives, this can be a legitimate Union, they command the same rights as creditors when it comes to holding meetings with the practitioner.²⁶⁸ A decision at the said meeting will be termed approved if the majority of the creditors, independent, with voting rights agree to the decision.²⁶⁹

2.14 Roles and membership of committees of affected persons

One of the purposes of the Act as discussed above 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. Chief among others, the objective of business rescue is to involve all stakeholders of the company through facilitating their participation and contribution throughout the entire process. As

²⁶⁰ Section 146(e)(ii).

²⁶¹ Dzvimo (2013) 38.

²⁶² Section 147.

²⁶³ Dzvimo (2013) 38.

²⁶⁴ Section 147(1)(a)(ii).

²⁶⁵ Section 147(1)(b).

²⁶⁶ Dzvimo (2013) 28.

²⁶⁷ *Ibid.*

²⁶⁸ Section 148.

²⁶⁹ Section 147(3).

revealed earlier in the chapter, the Act defines an ‘affected person’ in relation to the company as a shareholder or creditor of the company,²⁷⁰ any registered Trade Union representing employees of the company,²⁷¹ and each employee in their own capacity if they are not represented.²⁷² A person is entitled to be a member of a committee of creditors or employees²⁷³ if they are an independent creditor or employee of the company²⁷⁴ an agent, proxy or attorney of an independent creditor or employee or any person acting under a general power of attorney²⁷⁵ authorised in writing by an independent creditor or employee to be a member.²⁷⁶

A committee of employees or creditors may consult with the practitioner about any matter relating to business rescue but may not instruct the practitioner.²⁷⁷ As prescribed in terms of section 149 (1) (b), the committees act on behalf of all the creditors and employees in the company and may receive and consider reports on business rescue on their behalf.²⁷⁸ The committee, in executing its duties is mandated to exercise an objective and independent mind to ensure fair and unbiased representation of creditors or employees interests.²⁷⁹

2.15 The establishment and consent of the business rescue plan

The core business of the practitioner is to proficiently establish and implement a business rescue plan that will effectively and successfully assist a financially ailing company. After consultation with the creditors, all affected persons and the management of the company,²⁸⁰ the practitioner must formulate a plan with all relevant information pertaining to the company's current affairs and future plans that will make it possible for the affected persons to decide whether or not to accept or reject the plan.²⁸¹ The plan must be in three parts, that is, the background, proposals coupled with assumptions and conditions.²⁸²

²⁷⁰ Section 128(1)(a)(i).

²⁷¹ Section 128(1)(a)(ii).

²⁷² Section 128(1)(a)(iii).

²⁷³ Dzvimo (2013) 38.

²⁷⁴ Section 149(2)(a).

²⁷⁵ Section 149(2)(b).

²⁷⁶ Section 149(2)(c).

²⁷⁷ Section 149(1)(a).

²⁷⁸ Dzvimo (2013) 38.

²⁷⁹ Section 149(1)(c).

²⁸⁰ Section 150(1).

²⁸¹ Section 150(2).

²⁸² Dzvimo (2013) 39.

The background must include a list of all company assets²⁸³ including those that are not in its possession,²⁸⁴ a creditors list with an outline of which ones would be qualified, preferred, those who have proved their claims all subject to the laws of insolvency,²⁸⁵ an estimate of the dividend that creditors are likely to receive if the company goes into liquidation,²⁸⁶ a list of the holders of companies securities,²⁸⁷ a copy of the agreement; which must be written, with regard to the practitioners fees²⁸⁸ and lastly, a statement showing if the business rescue plan has an informal proposal submitted by a creditor of the company.²⁸⁹

The business rescue proposal must contain information on the nature and duration of any moratorium to be placed on the company during business rescue.²⁹⁰ More so, the proposal must show the extent to which the company is to be released from the payment of its debts and the extent to which any debt is proposed to be converted to equity in the company.²⁹¹ The proposal should also outline the company's possible future,²⁹² that is its on-going role and how existing agreements are going to be treated.²⁹³ The practitioner then must state if there is any property of the company that is available to pay creditors' claims during business rescue²⁹⁴ as well as the preference order of creditors' in terms of who will be paid first.²⁹⁵ The proposal must articulate the benefits of business rescue to creditors compared to liquidation.²⁹⁶ The proposal must also outline how the business rescue plan is probably going to affect the shareholders classes of shares.²⁹⁷

The third and final part of the proposal must contain the assumptions and conditions of business rescue.²⁹⁸ It must include the conditions which must be met for business

²⁸³ Dzvimo (2013) 39.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ Section 150(2)(b)(i).

²⁹¹ Dzvimo (2013) 40.

²⁹² *Ibid.*

²⁹³ Section 150(2)(b)(iii).

²⁹⁴ Dzvimo (2013) 40.

²⁹⁵ *Ibid.*

²⁹⁶ Section 150(2)(b)(vi).

²⁹⁷ Section 150(2)(b)(vii).

²⁹⁸ Dzvimo (2013) 40.

rescue to come into operation²⁹⁹ and to be fully implemented.³⁰⁰ It should contemplate the likely effects business rescue will have on employees and their contracts of employment.³⁰¹ The conditions in which the business rescue plan will conclude must³⁰² be incorporated in addition to the probable balance sheet of the company³⁰³ together with its statement of income and expenses for the next three years.³⁰⁴ The business rescue proposal must conclude with a certificate issued by the practitioner verifying that all information provided is precise, thorough and up to date.³⁰⁵ The proposal must contain an outline that the projections provided by the practitioner must be estimate calculations made in good faith.³⁰⁶

The company is required to publish the business rescue plan within 25 business days from the date of the practitioner's appointment.³⁰⁷ However, there are exceptions whereby an extension to the time will be provided for by a court upon application by the company³⁰⁸ or by a majority of creditors with voting interests.³⁰⁹

2.16 The deliberation of the business rescue plan

The approval of the business rescue plan is the most critical aspect about business rescue. It is a prerequisite that the business rescue practitioner first calls for a meeting with affected persons in the company.³¹⁰ The aim of the meeting is to ascertain the future of the company,³¹¹ and the meeting must be held within 10 days after publishing the plan for business rescue³¹² and creditors and all those with voting interests must be present at the meeting. At least a five day notice must be given prior to the meeting to affected persons who will be present at the meeting.³¹³ The notice must reveal the time, date and place of the meeting,³¹⁴ the agenda³¹⁵ as

²⁹⁹ Section 150(2)(c)(i)(aa).

³⁰⁰ Dzvimo (2013) 40.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ Section 150(4)(a).

³⁰⁶ Section 150(4)(b).

³⁰⁷ Section 150(5).

³⁰⁸ Section 150(5)(a).

³⁰⁹ Dzvimo (2013) 41.

³¹⁰ Section 151.

³¹¹ Dzvimo (2013) 41.

³¹² *Ibid.*

³¹³ Section 151 (2).

³¹⁴ Dzvimo (2013) 41.

³¹⁵ *Ibid.*

well as a summary of the rights of affected persons to participate in and vote at the meeting.³¹⁶

In terms of the proposed business rescue plan, a vote that has been supported by more than 75 per cent of creditors with voting interest³¹⁷ and at least 50 per cent of the independent creditors voting interest³¹⁸ has the effect of preliminarily approving the plan.³¹⁹ An independent creditor is defined by the Act as a person who is a creditor of the company including an employee who is also a creditor in terms of section 144 (2) of the Act.³²⁰ It further states that, the creditor must not be related to the company, a director or a practitioner.³²¹

A revised plan may be prepared and published only if the proposed business rescue plan has been rejected and the practitioner seeks a vote of approval.³²² Section 152 (3) (b) states that, if the proposed plan does not alter the rights of any class of securities holders in the company, the preliminary approval of such plan signifies the final adoption of the plan.³²³

2.17 Failure to approve the business rescue plan

Once a business rescue plan has been rejected, the practitioner may seek a vote of approval from the holders of company securities to prepare a revised plan³²⁴ or must advise them of his intention to apply to the court to set aside the result of the vote.³²⁵ If a business rescue plan does neither of the above, any affected persons who were present at the meeting may initiate a vote of approval from the holders of company securities calling for the practitioner to prepare and publish a revised plan,³²⁶ make a court application for the setting aside of the vote on the basis that it was inappropriate³²⁷ and make a binding offer to purchase, at a fair and reasonable value determinable by an independent expert, the voting interests of the persons who

³¹⁶ Dzvimo (2013) 41.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² Section 153(1)(i).

³²³ Dzvimo (2013) 42.

³²⁴ Section 153(1)(a)(i).

³²⁵ Dzvimo (2013) 43.

³²⁶ Section 153(1)(b)(i)(aa).

³²⁷ Section 153(1)(b)(i)(bb).

rejected the business rescue plan.³²⁸ If affected persons do not request the practitioner to prepare a revised business rescue plan, the practitioner must immediately file a notice that will signify the termination of the business rescue proceedings.³²⁹

2.18 Discharge of debts and claims

A business rescue plan may contain a condition that if it is implemented in a manner that is not contrary to its terms and conditions, a creditor who had consented to the discharge of all or part of a debt that the company owes to them, is not permitted to exercise their rights over the said debt,³³⁰ it is not enforceable.³³¹ A creditor is not allowed to enforce a debt owed by the company immediately before the beginning of the business rescue process as long it is in accordance with the with the provisions of the Act.³³²

2.19 Conclusion and evaluation of business rescue proceedings

In conclusion, the new business rescue proceedings afforded the legislature with an opportunity to design a rescue procedure that would avoid all the pitfalls and weaknesses that had been identified not only in judicial management but also in comparable procedures such as administration in England. It is certain the afore-given outline that, business rescue provisions in chapter six of the Companies Act 71 of 2008 have tremendously evolved from the 1973 era of judicial management to present day. The legislation has been successful in its efforts to address the shortcomings of judicial management through the enactment of several new innovations to business rescue that are absent in traditional system of judicial management. Chief among these new innovations include;

1. The Act adopts a wide approach as to who may institute business rescue proceedings and the ways of placing a company under business rescue. It recognises the presence of all stakeholders within a company. The possibility for a company board to commence a formal rescue procedure by simply filing a resolution to that effect and without having to obtain a court order is

³²⁸ Dzvimbo (2013) 43.

³²⁹ Section 153(5).

³³⁰ Dzvimbo (2013) 43.

³³¹ *Ibid.*

³³² Section 154(2).

completely new to South Africa and a major improvement as it will save considerable time and costs.³³³

2. Another improvement is that the required circumstances in which such a resolution may be taken are not as onerous as those for judicial management: the test throughout is one of a reasonable belief or reasonable likelihood, rather than a probability.³³⁴
3. The provision for a qualified business rescue practitioner is a significant development as this creates confidence in the business rescue culture as capable professionals with a mission to rescue the company will be in charge of the rescue proceedings.³³⁵
4. The act prescribes the qualifications for a business rescue practitioner thereby ensuring that only competent people will be tasked with successfully turning around the fortunes of a financially ailing company.
5. There is an automatic moratorium under business rescue which effectively stays off all legal actions against the company. This saves time as no separate application has to be made to the court. The business rescue practitioner is afforded adequate time to establish a viable rescue plan without any Interference from creditors who pursue their claims.
6. The concept of post- commencement finance is of great significance and its effect cannot be undermined. The catch behind this period is that the claims by post-commencement finance creditors rank above the rest of other creditors therefore investors and creditors are prepared to lend money to an ailing company.
7. The act has increased protection of employee rights and their contribution during business rescue proceedings. As discussed above, their employment status does not change during the entire course of business rescue. Employees have been granted hands on approach during business rescue in which they actively participate at every stage of business rescue, right from

³³³ Loubser (2010) 156.

³³⁴ Loubser (2010) 157.

³³⁵ Dzvimbo (2013) 44.

the approval of the company to be placed under business rescue, the appointment of the practitioner and the implementation of the business rescue plan.³³⁶

8. The provisions of the act as far as the development and implementation of a business rescue plan are sufficient. The provisions clearly set out the contents of the plan, and also they stipulate that all relevant stakeholders must participate in its development and implementation.
9. Section 139 of the act outlines the powers and duties of directors.

The Companies Act 71 of 2008 aims to identify and maintain a good modern corporate rescue regime that is in line with international corporate governance.

However, there are many unclear provisions and a lot of unnecessary administrative duties, such as notification to all affected persons of every development. Chapter 6 of the 2008 Act uses the term ‘reasonable prospect’ as a new description for the “recovery requirement”,³³⁷ which is required as part of the burden of proof for an order for business rescue to be granted.³³⁸ There is no definition of the phrase “reasonable prospect of rescuing a company” in section 128 of the 2008 Act. Although various other phrases and words used in Chapter 6 are defined in section 128, “rehabilitation” is not defined. It is unfortunate that, despite the abundance of criticism regarding judicial management and especially the use of the requirement of reasonable probability, the legislature overlooked the need for a clearly formulated burden of proof in the new business rescue regime.³³⁹

Furthermore, there are inconsistencies in respect of the commencement of business rescue proceedings (especially if an application to the court is launched) when sections 131 and 132 are compared.³⁴⁰ Section 133 unfortunately also lacks in the respect that it does not afford protection whilst a business rescue application is pending before the court. In this respect, the administration procedure in England is an excellent example of how the interim moratorium must be formulated. More so, the preference rights given to employees may also present problems and it remains

³³⁶ Dzvimbo (2013) 44.

³³⁷ The reference used by Eloff AJ in *Southern Palace* when he referred to the burden of proof.

³³⁸ Joubert (2013) 553.

³³⁹ Joubert (2013) 553.

³⁴⁰ Van Huyssteen (2014) 37.

to be seen whether company boards will embrace the new procedure or choose other options, such as informal arrangements or even liquidation, exactly as they have done before.³⁴¹ The new procedure has many positive aspects, but these may be overshadowed by the negative ones unless they are rectified in time.

³⁴¹ Loubser (2010) 157.

CHAPTER 3:

Judicial management in Zimbabwe in terms of the Companies Act 23 of 2009

3. Background of the study

This chapter discusses the origins and historical development of judicial management in the Zimbabwean context. With the aid of case law and authoritative texts, the chapter outlines the concept of judicial management in terms of the Zimbabwean Companies Act 23 of 2009.

3.1 Historical background of Zimbabwe's economic position

Since the past years, drawing attention to the period when Zimbabwe adopted the multi-currency regime, several companies have folded largely due to lack of funding.³⁴² Owing to harsh economic conditions many companies are struggling to survive and applications for judicial management are on the increase.³⁴³

I am convinced that the dollarization has conceived liquidity challenges which continue to pose serious economic threats to companies in Zimbabwe. The concept of dollarization is when a country uses foreign currency in parallel to or instead of its domestic currency as a store of value, unit of account and or medium of exchange within the domestic economy.³⁴⁴ In the Zimbabwean context, the substitution of currency from the Zimbabwean dollar to the United States dollar meant that the Zimbabwean dollar was no longer recognised as local legal tender.³⁴⁵ Due to the impact of the dollarization on companies, most of them are now utilising the judicial management procedure to financially recover and be able to continue normal and profitable business operations.³⁴⁶

More so, it is my own view that the harsh economic climate in Zimbabwe has been further heightened by the externalization of funds by shareholders and the economic sanctions placed upon the country by the European Union and United States of America. These sanctions have negatively affected the image and reputation of the

³⁴² Dzvimbo (2013) 8.

³⁴³ Justice George Chiweshe "Zim firms abusing judicial management system" 2014.

³⁴⁴ Savastano, Miguel (1996) WP/96/4: (iii) in Dzvimbo (2013) 9.

³⁴⁵ Dzvimbo (2013) 9.

³⁴⁶ *The Herald Newspaper Zimbabwe* 12 October 2012.

country, leaving the country as an unattractive investment site. This means that no investors are willing to invest in Zimbabwe and as a result, no funding is available for companies.

3.2 The definition and motive of judicial management

The definition provided for by the Zimbabwean legislation is the same as the one given in terms of the South African companies' legislation prior to the 2008 Act. The Zimbabwean High courts have also in their rulings defined the concept of judicial management. Malaba J in the case of *Feigenbaum & Anor v Germanis NO & Others*³⁴⁷ defined judicial management as an “*extraordinary procedure made available to a company by the court in special circumstances and for statutorily prescribed purposes. It is only adopted when the court is satisfied that there is a reasonable possibility that, if placed under judicial management, a company which is unable to pay its debts will be able to do so in full, meet its obligations and become a successful concern*”. This definition was echoed in another ruling by Sandura JA in the case of *Cosmos Cellular (Pvt) Ltd v PTC*,³⁴⁸ in which the learned judge stated that “The objective of judicial management is to obviate a company being placed in liquidation if there is some reasonable probability that, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on”.

In *Silverman v Doornhoek Mines Ltd*³⁴⁹ judicial management was referred to as “an extra ordinary procedure the purpose of which is to obviate a company being placed in liquidation whereby proper management or by proper conservation of its resources it will be able to meet its obligations, remove any occasion for winding up and become a successful concern.”

In *Ben-Tovim v Ben-Tovim and Others*³⁵⁰ the court stated that; it is clear from these definitions that judicial management has only one primary purpose, namely the rescue of the company as a whole. The rescue of only its business or a viable part thereof is not an acceptable outcome and neither is a better return for creditors of

³⁴⁷ 1998 (1) ZLR 286 (HC).

³⁴⁸ 77/04 (ZHSC).

³⁴⁹ 1935 TPD 353.

³⁵⁰ 2000 (3) SA 325 (C) at 332.

shareholders, as was revealed in the case of *Millman NO v Swartland Huis Meubileerders (Edms) Bpk Repfin Acceptances Ltd intervening*.³⁵¹

3.3 Commencement of judicial management in Zimbabwe

Section 299 of the Zimbabwean companies' act 23 of 2009 outlines the procedure for judicial management. Before an application for judicial management is filed with the court, a copy of the application, including the supporting affidavits and other documents, shall be lodged with the Master who may report to the court on any circumstances which appear to him to justify the court in postponing or dismissing the application, and in such event the Master shall transmit a copy of his report to the applicant.³⁵² If the application is successful, there are two identified types of judicial management orders that may be granted by the courts, and these are provisional judicial management order and the final judicial management order.³⁵³

3.4 Judicial management by order of the court

A company can be placed under judicial management pursuant to a court application by the creditors of the company.³⁵⁴ The legislature has also crafted the Reconstruction of State Indebted Insolvent Companies Act³⁵⁵ which applies to companies indebted to the state and empowers the Minister of Justice to place them under reconstruction. This was revealed in the case of *Shabanie, Mashava, Mines v Mawere & Another*³⁵⁶ in which the mines had continuously borrowed money from the Government of Zimbabwe due to none remittals of sales profits by its related South African based sister company which marketed its products in South Africa.

An application for judicial management can be instituted by any person entitled to make such an application.³⁵⁷ Entitled persons include the creditors of any director empowered through a resolution passed in a meeting. The company itself can also apply for judicial management as well as plead judicial management as a defence against an application for winding up. According to section 300 (a) of the Act, an application for judicial management must satisfy the following grounds; (i) that by

³⁵¹ 1972 (1) SA 741 (C) at 744-745.

³⁵² Section 299(2).

³⁵³ Cronje (2010) 4-5.

³⁵⁴ Bailey *et al* (2007) 345.

³⁵⁵ Act 27 of 2004.

³⁵⁶ [2012] ZAGP JHC 186.

³⁵⁷ Section 299(1)(a).

reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and (ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and (iii) that it would be just and equitable to do so.

According to the standards set out in *Pienaar v Thusano*,³⁵⁸ the application must state with a fair degree of certainty the extent and scope of the company's business, its assets and liabilities, and the nature of its difficulties so that the courts can determine whether the company has a reasonable prospect of becoming a success. It is critical for one to establish the prospects of the company's viability and the prospect of ultimate solvency.³⁵⁹ More so, it was held in *Ex parte Onus (Edms) Bpk*³⁶⁰ that '*It is important to ascertain the reasons for the company's 'incapacity and failure'*'. In *Pax Clothing Co Ltd v Vaskis Tailoring (Pty) Ltd*,³⁶¹ the courts held that judicial management is a 'special privilege' given in favour of a company and will be authorised in very special circumstances.³⁶²

From the foregoing discussion it is clear that a company in Zimbabwe qualifies for judicial management; if by reason of mismanagement or any other cause, the company fails to pay debts; if there is reasonable probability that if put under judicial management it can pay debts and if It is just and equitable to do so. Furthermore, the application for judicial management can be initiated by the creditors, the company itself, the employees, shareholders as well as the State for those companies that are will be perceived to be heavily indebted to the state.

3.5 Court order for provisional judicial management

According to section 299 (1) (a), a provisional judicial management order can be obtained by way of direct court application and this was upheld in *Ex parte National Overseas and Grindlay's Bank Ltd*³⁶³ which permitted the issue of a final order in

³⁵⁸ 1992 (2) SA 552 (BGD) 585.

³⁵⁹ *Millman v Swartland Huismeubeleerders (Edms) Bpk* 1972 (1) (SA) 741 (C) 744.

³⁶⁰ 1980 (4) SA 63 (O) 66.

³⁶¹ 1953 2 PH E13 (T).

³⁶² Dzvimbo (2013) 10.

³⁶³ 1958 R & N 421.

certain circumstances.³⁶⁴ Section 207 (1) allows for the application to be made by persons who are entitled in terms of the Act to apply for the winding up of the company, and such persons are the company itself, its creditors and employees.

Another alternative route for one to obtain a provisional order is in terms of section 299(1) (b); where one can apply for judicial management during the winding up of the company. The onus is upon the applicant to prove that they have a right to request for judicial management.³⁶⁵ The court may grant a provisional judicial management order after making an enquiry into the application for judicial management. However, the court has a wide discretion in deciding whether to issue a provisional judicial management order as per *Clarke v Protein Foods (Pvt) Ltd*³⁶⁶ and in exercising this discretion it will be reluctant to grant an order from which shareholders seek to benefit by keeping creditors waiting a long time for payment.³⁶⁷

It is the duty of the Master of the High Court to appoint a provisional judicial manager as soon as a provisional judicial management order has been issued.³⁶⁸ The master is the most suitable to play such a pivotal role in the judicial management procedures as he is impartial and unbiased to any party. The Master is presumed to be the custodian of all companies placed under judicial management; hence a company placed under judicial management becomes his responsibility before he appoints a provisional judicial manager.³⁶⁹

Contents of the order must include the return day which must not be more than 60 days from the grant of the provisional judicial management order³⁷⁰ and directions that the company shall be subject to the supervision of the court under the management of a provisional judicial manager.³⁷¹ The provisional judicial manager will assume all the powers of the managers of the company. Any other necessary management orders within the company may be made by the court.

³⁶⁴ Christie (1998) 423.

³⁶⁵ Dzvambo (2013) 10.

³⁶⁶ 1970 (2) RLR 278.

³⁶⁷ Dzvambo (2013) 11.

³⁶⁸ Bailey (2008).

³⁶⁹ Hofisi "Judicial Management explained" 20 November 2011.

³⁷⁰ Section 301(1)(a).

³⁷¹ Dzvambo (2013) 11.

The provisional judicial manager may have other powers conferred upon him³⁷² for example raise money without the authority of the shareholders subject to the rights of the creditors.³⁷³ The order may contain a moratorium, which has the effect that; while the company is under judicial management, all legal processes against it may be stayed and not be proceeded with without the leave of the court.³⁷⁴ The order may also be varied or discharged on the application of the applicant or a creditor, a member of the company, the provisional judicial manager or the Master of the court.³⁷⁵

3.5.1 The effects of the provisional judicial management order

Once the court grants an order for provisional judicial management, the Master of the High Court immediately assumes control over the property of the company.³⁷⁶ The property is placed under the custody of the Master to prevent the directors from disposing of company assets during the inevitable delay between the issuing of the provisional judicial management order and the appointment of the provisional judicial manager.

When the provisional judicial manager is appointed, he officially takes over the management of the company, becoming the custodian of the company's assets.³⁷⁷ The Master shall without delay,³⁷⁸ appoint a provisional judicial manager³⁷⁹ who must be a qualified liquidator.³⁸⁰ The provisional judicial manager is required to give security for the proper performance of his duties as instructed by the Master.³⁸¹ The purpose of the bond of security is to compensate mainly shareholders from non-performance by the judicial manager. The Master must also convene separate meetings of creditors, members of the company and debenture holders of the company to consider the report of the provisional judicial manager.³⁸² A *concurso creditorium* is not established by a judicial management order.³⁸³ The concept of

³⁷² Dzvimo (2013) 12.

³⁷³ Section 301(1)(c).

³⁷⁴ *Ibid.*

³⁷⁵ Dzvimo (2013) 12.

³⁷⁶ Section 302(1).

³⁷⁷ Dzvimo (2013) 12.

³⁷⁸ Section 302(1)(b).

³⁷⁹ Section 302(1)(b)(i).

³⁸⁰ Dzvimo (2013) 12.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ Blackman (2002) 15-20.

concursum creditorium was defined in *Walker v Syfret*³⁸⁴ to mean no preferential preference conferred on the creditors for the duration of the judicial management order.” In *Ellerine Brothers (Pty) Ltd and Another In re: Ellerine Brothers (Pty) Ltd v McCarthy Ltd*³⁸⁵ the court added at paragraph 7.2 that “the *concursum creditorium* freezes creditors’ rights as at date of the commencement of judicial management...”

One of the consequences is that set-off between debts incurred prior to and after the granting of the order takes place automatically *ipso iure* in spite of a direction in the order that all legal processes against the company are stayed.³⁸⁶ It is a requirement for any company under judicial management to state in their company name that it is under such an order.

3.5.2 Provisional judicial manager’s responsibilities and duties

Once appointed by the Master of the High Court, the provisional judicial manager must assume the management of the company.³⁸⁷ First and foremost, the manager must recover any property that may not be in the company’s possession and take into possession the entire company assets³⁸⁸ and within seven days inform the Registrar of his appointment.³⁸⁹ The provisional judicial manager must be independent, and exercise impartiality. More so, the manager must prepare a report on the financial status of the company and issue it to all affected persons.

In this report, the manager must give a detailed account of the affairs of the company³⁹⁰ provide sufficient reasons as to the failure of the company to pay its debts and meet its financial obligations or as to why it is failing to become a successful concern again.³⁹¹ Furthermore, the manager must prepare a statement of the company assets and liabilities,³⁹² a precise creditors list which distinguishes contingent and prospective creditors as well as the amounts and nature of the claim of each creditor.³⁹³ The list must also contain details of any source from which

³⁸⁴ 1911 AD 141.

³⁸⁵ [2013] ZAGPPHC 44.

³⁸⁶ Dzvambo (2013) 12.

³⁸⁷ Section 303(a).

³⁸⁸ Dzvambo (2013) 13.

³⁸⁹ Section 303(b).

³⁹⁰ Section 303(c)(i).

³⁹¹ Section 303(c)(ii).

³⁹² Section 303(c)(iii).

³⁹³ Section 303(c)(iv).

money has or is to be raised for purposes of proceeding with the day to day business of the company³⁹⁴. Lastly, the provisional manager must give his own opinion with regards to the prospects of success that the company has on turning around its fortunes and becoming a successful concern again.³⁹⁵

3.5.3 Consultations of creditors and members

The meetings between the members of the company creditors³⁹⁶ and any debenture holders are held separately.³⁹⁷ During these meetings, the provisional judicial manager presents the report on the current affairs of the company. The meetings are held under the chairmanship of the Master or the magistrate who has local jurisdiction to preside over the matter.³⁹⁸ During the meetings, the provincial judicial manager's report is analysed and deliberated upon, ascertaining the practicality and desirability of placing the ailing company under judicial management, bearing cognisance its prospects of success to become financially vibrant once again.³⁹⁹ Affected persons may, during the course of meetings, recommend person(s) as the final judicial manager(s) and submit their names to the Master of the High Court for consideration and final appointment.⁴⁰⁰ More so, claims by creditors against the company are also proved.⁴⁰¹

A resolution granting preference to liabilities incurred by the provisional judicial manager in executing his duties must be considered and approved at such meetings.⁴⁰² An auditor of the same company or any person prohibited in terms of the Act shall not be recommended for consideration and/or appointment as a final judicial manager.⁴⁰³ A report to the court must be stating the proceedings of the meetings, with the main focus being justification as to why judicial management was proposed or rejected in the best interest of the company.⁴⁰⁴

³⁹⁴ Section 303(c)(v).

³⁹⁵ Section 303(c)(vi).

³⁹⁶ Section 304(1)(a).

³⁹⁷ Dzvimbo (2013) 13.

³⁹⁸ Dzvimbo (2013) 13.

³⁹⁹ Section 304(2)(a).

⁴⁰⁰ Section 304(2)(b).

⁴⁰¹ Section 304(2)(c).

⁴⁰² Section 304(2)(d).

⁴⁰³ Section 304(3).

⁴⁰⁴ Cilliers & Benade (2000) 485.

3.5.4 The provisional judicial management order's return day

According to section 301 (2) of the Act, the return day of the provisional judicial management order should not be in excess of the stipulated 60 days from the date the order was granted.⁴⁰⁵ However, the court may exercise its discretion to prolong the time provided that the claim is *bona fide*. The court further uses its discretion to deliberate upon the views and demands of the affected persons and the creditors to the company,⁴⁰⁶ as well as the report by the provisional judicial manager in terms of section 303, the number of claims not proved by creditors in the first meetings and the value and extent of the claims⁴⁰⁷ combined with the Master⁴⁰⁸ and the Registrar's⁴⁰⁹ reports.

The court may then grant a final judicial management order against the company. Notably, only if it is in the best interest of the company, being just and equitable and made precise from the report that if the company is placed under judicial management, it has prospects to become a successful concern that a final order may be granted.⁴¹⁰ Creditors have a right to reject a judicial management order and apply for the winding up of the company on the return day.⁴¹¹

3.5.5 Provisional judicial manager's remuneration

The remuneration of the provisional judicial manager is decided by the Master of the court.⁴¹² When determining the remuneration of the provisional judicial manager, the Master takes into account the manager's conduct, his execution of duties, being guided by recommendations from creditors and affected persons with in the company.⁴¹³

⁴⁰⁵ Dzvimo (2013) 14.

⁴⁰⁶ Section 305(1)(a).

⁴⁰⁷ Section 305(1)(c).

⁴⁰⁸ Section 305(1)(d).

⁴⁰⁹ Section 305(1)(e).

⁴¹⁰ Section 305(1)(e).

⁴¹¹ Dzvimo (2013) 14.

⁴¹² Section 308(1).

⁴¹³ Section 308(2).

3.6 Court order for final judicial management

Following a provisional order, the court, as it deems necessary, may grant a final judicial management order.⁴¹⁴ Three important aspects which are to be considered by the court in the determination of whether a final order may be granted were listed by Erasmus J in *Ladybrand Hotel (Pvt) Ltd v Segal and Another*,⁴¹⁵ as;

- “(i) information brought before the court,
- (ii) the merits of the application,
- (iii) and lastly the affidavits of the provisional judicial manager”.

The instructions of the court must be clear for vesting company management under the control of the final judicial manager subject to the supervision of the court.⁴¹⁶ More so, the final judicial manager may be granted more powers by the court; conditional on the rights of the creditors of the company, to raise money in any way without the authority of the shareholders as the court considers necessary.⁴¹⁷ It was revealed in *Klopper v Die Meester*,⁴¹⁸ that; ‘the court may not authorise the judicial manager to bind the credit or the company in a manner whereby a preference would be created for the claims of the creditors concerned’. In the event that the judicial manager, the Master or creditors in the form of a majority resolution apply to the court that an order for judicial management be varied or discharged, then the court that awarded the order may do so.⁴¹⁹

3.6.1 Final judicial manager’s duties and responsibilities

The court in, *In Re Idstein (Pty) Ltd*⁴²⁰ named a judicial manager an officer of the court. The manager is independent from the company, as he was regarded not to be an officer of the company as was held in *Rennie v Holzman*.⁴²¹ The manager must have regards to the Memorandum and Articles of association of the company and the terms of the judicial management order subject to the supervision of the court.⁴²²

⁴¹⁴ Dzvambo (2013) 15.

⁴¹⁵ 1975 (2) SA 357 (O).

⁴¹⁶ Section 305(2)(a).

⁴¹⁷ Dzvambo (2013) 15.

⁴¹⁸ 1977 (2) SA 477 (T) 484.

⁴¹⁹ Dzvambo (2013) 15.

⁴²⁰ 1957 (1) SA 640 (W).

⁴²¹ 1987 (4) SA 938 (C).

⁴²² Dzvambo (2013) 16.

The final judicial manager must be independent, acting without bias or prejudice and exercise unfettered discretion and failure to comply with these requirements amounts to reasonable grounds for one not to be appointed as a judicial manager.⁴²³ It was stated in *Venter v Williams*⁴²⁴ that “a final judicial manager is required to exercise an independent mind, ‘neither the members or the creditors or any other person can compel the judicial manager to take any particular act in his administration of the company’”. Similar to a director, the judicial manager owes fiduciary duties to the company, its members and creditors.⁴²⁵

The Act prescribes that chief among others, the manager’s duties include to take over from the provisional judicial manager and assume management of the company,⁴²⁶ manage the company subject to any order of the court in such a manner as he may consider most economic and most likely to promote the interests of members and creditors of the company,⁴²⁷ comply with the direction of the court made in the final judicial management order⁴²⁸ and he must lodge with the Registrar a copy of the judicial management order and the Masters letter of appointment under the cover of the prescribed Form CM 40.⁴²⁹

According to section 306 (d) (ii) in the event of the final judicial management order being cancelled, the manager must lodge with the Registrar a copy of the order cancelling it within seven days from the date of cancellation.⁴³⁰ Financial records must be kept and prepared by the judicial manager as well as annual financial statements that the company would have been obliged to comply had it not been under judicial management.⁴³¹ All the necessary meetings including the annual general meeting and meetings of members must be convened by the judicial manager.⁴³² During his meeting with creditors, the judicial manager must submit reports showing the assets and liabilities of the company and its debts and commitments confirmed by the auditor of the company, and essential information to

⁴²³ *Theron v Natal Marksagente* 1978 (4) SA 898 (N).

⁴²⁴ 1982 (2) SA 706 (A).

⁴²⁵ Blackman (2002)15-24.

⁴²⁶ Dzvimbo (2013) 16.

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ Dzvimbo (2013) 16.

⁴³¹ Section 306(f).

⁴³² Section 306(g).

assist the creditors to identify themselves with the position of the company as at the closure of the financial year or the period covered by such interim report, and in the case of a private company as at the date six months after the end of its financial year.⁴³³ The manager must also lodge with the Master, copies of all documents submitted to the meetings of members and meetings of creditors.⁴³⁴

The judicial manager is also required to examine the affairs of the company before the commencement of judicial management to ascertain whether any officer of past officer of the company has contravened or appears to have contravened any provision of the Act and within six months from the date of his appointment shall report to the Master a report on any such contravention or offence.⁴³⁵ Before the commencement of judicial management, the manager must examine the affairs of the company in order to ascertain whether any officer or past officer of the company appears to be personally liable to pay damages for compensation to the company or is personally liable for any liabilities of the company and within six months from the date of appointment submit a report containing full particulars of any such liability to the Master and to the next succeeding meeting of members and creditors of the company.⁴³⁶

If at any time, the judicial manager is convinced that the continuation of judicial management will not assist the company to become a successful concern, he may make an application to the court to cancel the order for judicial management and replace with an order for winding up of the company, and this application must be filed after not less than 14 days' notice by registered post to all affected persons and creditors of the company.⁴³⁷

3.7 General moratorium

A provisional judicial management order provides that all actions, proceedings, execution of all writs, summonses and other legal processes against the company are stayed during judicial management and may only proceed with the leave of the

⁴³³ Section 306(i).

⁴³⁴ Dzvimbo (2013) 17.

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*

⁴³⁷ Section 306(m).

court.⁴³⁸ According to section 209 of the Companies Act, a separate court application for stay of proceedings against the company is filed with the court that grants an order for judicial management. Significantly, the general moratorium is not limited to civil actions, as it includes a stay on criminal actions against the company.

However, the Companies Act is silent on the aspect of moratorium for a final judicial management order. Section 305 (3) does not provide for a moratorium in the event that a final judicial management order is granted, but one may assume that it may automatically be included if a provisional order containing a moratorium is made final.

3.8 The presentation of assets during judicial management proceedings

No company assets shall be sold or disposed by the judicial manager without leave of the court, with the only exception if it is during the ordinary course of business.⁴³⁹ The court in *Joosab v Ensor NO*⁴⁴⁰ held that the test for determining whether or not the transaction was in the ordinary course of business is an objective one.⁴⁴¹ It must be that having regard to the terms of the transaction, it would have normally been entered into by solvent business men.⁴⁴² Any monies of the company becoming available to him shall be for the payment of the costs judicial management, conducting the company business according to the judicial management order payment and creditors' payments before commencement of judicial management.⁴⁴³

Furthermore, section 307 (3) states that the costs of judicial management and claims of creditors of the company shall be paid *mutatis mutandis* in accordance with the law relating to insolvency as if those costs were for sequestration of an estate and those claims were against an insolvent estate.⁴⁴⁴

3.9 Cancellation of the judicial management order

Unfortunately, the Companies Act does not prescribe a period for the duration of judicial management, and as practise, the order is granted for an indefinite period. In

⁴³⁸ *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W).

⁴³⁹ Section 307(1).

⁴⁴⁰ 1966 (1) (SA) 319 (A).

⁴⁴¹ Dzvimbo (2013) 17.

⁴⁴² *Ibid.*

⁴⁴³ Dzvimbo (2013) 18.

⁴⁴⁴ *Ibid.*

the South African case, De Villiers AJ in *Keens Electrical (Jhb) (Edms) Bpk en 'n Ander v Lightman Wholesalers (Edms) Bpk*⁴⁴⁵ stated that “the Court had discretion to determine a fixed period for judicial management but that it was usually undesirable to do so”. The courts have however made it clear, that judicial management must fulfil its purpose within a reasonable time, as creditors should not be expected to wait indefinitely for payment of their claims.⁴⁴⁶

The judicial manager or any other interested party can apply to the court to cancel the order.⁴⁴⁷ The judicial manager has to prove that ‘it appears to the court that the purpose of the final judicial management order has been fulfilled or that for any reason it is undesirable that the order should remain in force’. The application for cancellation must be *bona fide*; it must be premised on the fact that judicial management will not help the company to recover, if there is no prospect that the company can be rescued then it should be wound up.⁴⁴⁸ All affected persons and creditors must be notified of such termination within 14 days by the judicial manager. Section 314 (2) states that; ‘In cancelling any final judicial management order the court shall give such directions as may be necessary for the resumption of the management and control of the company by the officers thereof, including directions for the convening of a general meeting of members for the purpose of electing directors of the company’.⁴⁴⁹

3.10 Miscellaneous provisions

There are noteworthy provisions in the Act that relate to the conduct of company directors prior to and during the course of judicial management. Indeed, there is need to regulate the conduct of directors especially during the execution of their duties because they owe a fiduciary duty to the company. Any fraudulent activities by directors and other affected persons are prohibited by statute.⁴⁵⁰ If any evidence surfaces to the effect that company directors executed their duties in bad faith,⁴⁵¹ with total negligence⁴⁵² or with intent to defraud any person or for any fraud

⁴⁴⁵ 1979 (4) SA 186 (T) at 189.

⁴⁴⁶ Dzvimo (2013) 18.

⁴⁴⁷ Section 314(1).

⁴⁴⁸ Dzvimo (2013) 18.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Section 318.

⁴⁵¹ Section 318(1)(a).

⁴⁵² Section 318(1)(b).

purpose,⁴⁵³ the Master, judicial manager, liquidator or creditor to the company may apply to the court which may hold those responsible personally liable for any debts or liabilities of the company.⁴⁵⁴

The prosecution of criminally liable directors and other persons in the company is in terms of section 319 of the Act. If it appears during the course of judicial management that any past or present officers or members of the company have been guilty of criminal conduct under the Act, or in relation to creditors or the company under common law, the judicial manager shall report to the Attorney-General.⁴⁵⁵ Therefore, it is of importance to constantly regulate the conduct of people in positions of power and influence.

3.11 Conclusion and evaluation of judicial management as a rescue procedure

Deducing from the above provisions of the Zimbabwean Companies Act; the primary aim of judicial management is to resuscitate financially distressed companies into viable concerns again. In Zimbabwe, though condemned, judicial management has also been greatly commended by some who view the procedure as an efficient rescue mechanism that works. During an interview with an expert in the field, Mr Gwaradzimba, who is a chartered accountant and has been a judicial manager in a number of cases within Zimbabwe is of the view that, overall, judicial management has effective legal frame work and is an effective tool for the rehabilitation of financially ailing companies.

In the same spirit, Mr Knowledge Hofisi, another judicial management expert in Zimbabwe, submits that there is need to realign the legislative framework with contemporary business practices.⁴⁵⁶

However, It is clear that the failure of judicial management to function as a viable business rescue regime is at least partly due to the fact that judicial management has always been regarded as an extraordinary remedy which infringes on the rights of creditors and should consequently be available only under very special circumstances.⁴⁵⁷ This approach ignores the fact that the rescue of a company would

⁴⁵³ Section 318(1)(c).

⁴⁵⁴ Dzvimbo (2013) 19.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Herald business 'Trustee' 11 October 2012, The Zimbabwean Herald, www.herald.co.zw.

⁴⁵⁷ Loubser (2010) 43.

have benefits extending much further than the company's immediate creditors. Judicial management system has a number of inherent flaws discussed below that render it ineffective a mechanism for assisting financially distressed companies. Therefore, this chapter has revealed the most significant disadvantages of judicial management in order to substantiate the view that is an inadequate company rescue procedure and they are as follows:

1. Some companies abuse this process. It is now common for companies under financial distress to file applications for judiciary management as a way of escaping civil actions for debts accrued. Thereafter they do nothing to ensure that a judicial manager is appointed.⁴⁵⁸
2. A serious practical disadvantage of judicial management is that a judicial management order affects the creditworthiness of a company detrimentally, even if the judicial management order is later set aside.⁴⁵⁹ The company will be stained because it once experienced financial trouble. Even if in future it becomes a success, the damage to its credibility will already be done.⁴⁶⁰
3. The process seems heavily influenced by the courts because their role is too central to the whole procedure, as they enjoy a wide discretion with regard to granting or dismissing judicial management orders. One of the drawbacks of the process has been said to be that the court is too involved in the process,⁴⁶¹ there is a great imbalance as the power is centralised in the judiciary, the company or its affected persons are hardly involved in the decision making process.⁴⁶²
4. Lack of specialized commercial judges and commercial courts in Zimbabwe has been another great set back. Firstly, the court handles many matters, some of which are none commercial and this means that an application for judicial management may not be awarded the urgency it requires as the attention of the courts will be focused on other matters. Secondly, most

⁴⁵⁸ Loubser (2010) 43.

⁴⁵⁹ See Cilliers & Benade *Corporate Law* par 26.03 480 who states that "the disadvantage of judicial management is that it affects the creditworthiness of the company, even if the order is later set aside".

⁴⁶⁰ Dzvimo (2013) 20.

⁴⁶¹ Herald business 'Trustee' 11 October 2012, The Zimbabwean Herald, www.herald.co.zw.

⁴⁶² Dzvimo (2013) 20.

judges do not have postgraduate qualifications let alone in the area of commercial law hence when they are called upon to make business decisions of such intensity, they more often than not fall short.

5. Another serious disadvantage is the excessively stringent requirements for both a provisional and a final judicial management order and the burden of proof on the applicant which is almost impossible to discharge. The benchmark of the burden of proof placed upon an applicant seems rather too high and out of reach for most companies bearing cognisance that already there are in financial distress. The requirement for an almost certain probability that the company can become a successful concern places a great burden of proof on applicants. In *Millman v Swartland Huismeubeleerders (Edms) Bpk*,⁴⁶³ the court ruled that the applicant must establish the prospect of the company's viability and from this viability, the prospect of ultimate solvency.⁴⁶⁴ This discourages financially ailing companies with a genuine possibility of success from revamping their companies through judicial management as it is cumbersome to proffer water tight proof that the company will once again become totally solvent and financially stable.
6. The use of liquidators during the judicial management procedure obscures the intention of judicial management which is to rescue companies.⁴⁶⁵ Liquidators are concerned with liquidating companies and disposing of its assets, whilst judicial managers are meant to rescue the company and preserve its assets; hence it is impossible to reconcile the two. Right from the onset, the impression created is that judicial management is meant to inevitably result in winding up or liquidation of the company. It is logical to appoint an expert with the relevant and sufficient training to turn around a financially ailing company to become a successful concern.
7. Judicial management is a very costly, time consuming and cumbersome procedure⁴⁶⁶ especially for a company that is already in financial distress. Due to its potential to be expensive, small companies are reluctant to adopt judicial

⁴⁶³ 1972 (1) SA 741 (C).

⁴⁶⁴ Dzvimbo (2013) 20.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Loubser (2010) 43.

management as a company rescue option because they fail to meet the monetary requirements. More so, the procedure is time consuming as the court may only make an order for initial provisional judicial management. The applicants will have to go to court frequently; in the process spending money and wasting time. The company pays the provisional and final judicial managers fees, which is costly.

8. Another setback to the success of judicial management is that, at the time of the granting of the order, there is no proper and reliable assessment of the likelihood of the rehabilitation of the company.⁴⁶⁷ The test should be whether or not the company will be able to overcome its present difficulties and become a viable company.⁴⁶⁸
9. The absence in the act for an 'express' provision for an automatic moratorium on all actions and all proceedings against the company during judicial management leads to uncertainty⁴⁶⁹ as there is no guarantee for the company and its members as well as affected parties that the court will grant a judicial management order that will include a moratorium.⁴⁷⁰ This means that a separate application from that of judicial management must be made and brought before the court for determination, and as such becomes time consuming. There must be a definite provision that provides for such as a moratorium is a necessity for the company to have breathing space while rehabilitating.
10. One of the most important and serious defects in judicial management is the complete lack of regulatory control and qualifications for judicial managers.⁴⁷¹ There must be a body of law that makes certain that qualified and competent people who have been trained for the job are recruited.⁴⁷² An appointed judicial manager should at least be a lawyer in the commercial field or a chartered accountant. This will positively influence the likely hood of the company financially recovering because it will be guided by someone who is

⁴⁶⁷ Dzvimo (2013) 21.

⁴⁶⁸ Shrand (1974) 305.

⁴⁶⁹ Loubser (2010) 54.

⁴⁷⁰ Dzvimo (2013) 21.

⁴⁷¹ Loubser (2010) 54.

⁴⁷² Dzvimo (2013) 21.

competent and qualified enough to know when and how to implement the required company rescue plan.⁴⁷³

11. The rights of, or effect on, employees of a company under judicial management are not specifically addressed and it is more often than not left to labour law to regulate their position.⁴⁷⁴

12. The final defect of judicial management is the absence of a provision in the Act for the removal of judicial managers in cases of incompetence or abuse. This means that a judicial manager may be appointed without having the necessary experience or expertise, and is then left to carry out his functions without any real oversight or control. It also opens the door to abuse of the process through the control of a judicial manager by a major creditor who is not really interested in a rescue of the company or the business.

Conclusively, it is imperative for Zimbabwe to adopt a company rescue procedure that is practical and effective in practice.⁴⁷⁵ Judicial management though it has been used relatively often in the past decade in Zimbabwe, it will suit the company law regime best to be up to date with the ever evolving corporate world standards and become a powerful modern day tool for rehabilitating financially distressed companies.⁴⁷⁶ Through the domestication of the business rescue procedure that identifies with international best corporate governance, a greater number of companies will realise better chances of becoming successful viable concerns again. The aforementioned shortcomings of judicial management in Zimbabwe stated above clearly can be addressed through the adoption of business rescue as a company rescue procedure.

⁴⁷³ Dzvimo (2013) 21.

⁴⁷⁴ Loubser & Joubert (2015) 21.

⁴⁷⁵ Dzvimo (2013) 21.

⁴⁷⁶ *Ibid.*

CHAPTER 4:

Comparison between business rescue proceedings in South Africa and judicial management system in Zimbabwe

4. Background of the study

The main focus of this chapter centres on the comparison between the provisions for business rescue in South African company law against those of the judicial management in Zimbabwe.

Having outlined the concept of business rescue in chapter two, and judicial management in chapter three, chapter four seeks to reveal the weaknesses of judicial management in comparison to business rescue. The comparative analysis will ascertain if the Zimbabwean company law legislation is in dire need of a complete overhaul, and adopt the South African model of business rescue procedure. However, the chapter does not intend to address all the issues regarding judicial management and business rescue, but rather only seeks to focus on the striking and most significant differences between the two systems.

For the purposes of comparing and contrasting, the following aspects of both procedures shall be discussed in detail:

- the definitions and purpose of both procedures
- how proceedings are initiated
- General moratorium
- Roles and responsibilities of the business rescue practitioner against those of the judicial manager
- the rescue plan
- affected persons rights, particularly employees
- cancellation of both rescue regimes
- outcomes and effects

Corporate rescue proceedings afford another avenue to using insolvency laws to convert a debtor company's assets to cash by reorganising the financial structure of the debtor company through the issuance of new debt and equity in accordance with the claimant's priorities.⁴⁷⁷

4.1 The definitions and purpose of both procedures

Business rescue and judicial management are both corporate rescue mechanisms intended to aid financially distressed companies.⁴⁷⁸ The primary aim of judicial management is 'to circumvent the last and extreme remedy of winding up a financially ailing company as a result of bad management or some other cause, where there is a reasonable probability that under more carefully supervised management it will turn around its misfortunes.'⁴⁷⁹ The aforementioned purpose gives the impression that judicial management has a singular purpose and that it rescuing the company as whole.⁴⁸⁰ This notion is premised in the *Ben-Tovim* case (*supra*), in which the courts remarked that the rescue of only its business or a viable part is an unacceptable outcome and neither is a better return for creditors and shareholders.⁴⁸¹ Therefore, the acceptable outcome of a corporate rescue mechanism should be to at least rescue part of the entire business if it is unable to, so that it remains financially viable and have a better chance of complete financial recovery.⁴⁸²

Deductively, both systems of judicial management and business rescue share a common objective that is to aid viable but financially ailing companies. However, judicial management differs from business rescue in that it focuses on the rescue of the company as a whole whilst business rescue will draw attention where a part of the business may be salvaged while the rest of the company may not.⁴⁸³ Now and then, the outcome of business rescue may be a management buyout or a takeover of the financially ailing company.⁴⁸⁴

⁴⁷⁷ Smits (1999) 81.

⁴⁷⁸ Dzvambo (2013) 47.

⁴⁷⁹ Christie (1998) 422.

⁴⁸⁰ Dzvambo (2013) 47.

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ Milman and Durrant (1999).

⁴⁸⁴ Cassim *et al* (2011) 863.

4.2 How proceedings are initiated

Business rescue proceedings can be commenced voluntarily or by a court order whilst judicial management is only by court order.

The power given to company boards to voluntarily commence business rescue proceedings by filing a resolution to this effect is a major improvement on judicial management and could do much to encourage boards to use the procedure.⁴⁸⁵ The legislature intends to minimise the role of the courts. The process may be initiated by any of the affected persons but however, cannot be instituted where a company is already insolvent⁴⁸⁶ hence it is in the best interest of the company if directors resort to this mechanism at the earliest possible time that they realise financial distress. This is one of the aspects differentiating business rescue from judicial management: Proceedings can be initiated six months in advance when the tell-tale signs are starting to appear.

On the other hand, a court application for judicial management can only be made by specific persons prescribed by the Act, thereby leaving out the aspect of “all affected persons. It seems the participation of employees is very limited if not none. More so, the application seems to have rigid requirements which seem to make the mechanism less attractive for directors. The onus is placed upon the applicant and as such the requirement for mismanagement of the company as a ground for an application for judicial management perpetuates the notion that the company's management is always to blame for the company being placed under judicial management.⁴⁸⁷ This often leads the directors to refrain from applying for judicial management due to the stigma attached to it.⁴⁸⁸

4.3 General moratorium

Section 133 of the Companies Act 71 of 2008 already is an improvement on the judicial management moratorium insofar as the section provides for an automatic moratorium under business rescue proceedings.⁴⁸⁹ On the other hand, an order for

⁴⁸⁵ Loubser (2010) 340.

⁴⁸⁶ *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company* SAHCJ 13/12406.

⁴⁸⁷ Dzvimbo (2013) 47.

⁴⁸⁸ Loubser (2010) 21.

⁴⁸⁹ Van Huyssteen (2014) 36.

provisional judicial does not afford an automatic moratorium as the applicant must then file another separate application for such.⁴⁹⁰ In both procedures, the moratorium instructs that all current and/or future legal actions and proceedings be stayed and not proceeded with without the leave of the court.⁴⁹¹

The general moratorium canvassed in section 133 (1) is also a great advantage of business rescue, as it affords protection to the company against any legal and/or enforcement action, including quasi-legal proceedings.⁴⁹² The general moratorium extends to property and assets of the company and on the exercise of the rights of the creditors.⁴⁹³

Another significant advantage of section 133 is that it 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.⁴⁹⁴ The moratorium remains in effect until termination of business rescue. The moratorium is of fundamental significance because it affords an ailing company the vital breathing space or a period of respite during which it can restructure and rearrange its debts and obligations.⁴⁹⁵ This enables the formulation of an effective business rescue plan and it applies to all types of creditors and ensures that creditor claims are dealt with in a fair manner.⁴⁹⁶ It is very challenging to rehabilitate a company when there is no stay on proceedings against it.

On the other hand, the provisional judicial management order in terms of the Zimbabwean companies act 'usually' contains directions that while a company is under judicial management all actions and proceedings against the company be stayed and not be proceeded with without the leave of the court.⁴⁹⁷ According to the court in *Agree and Sons Ltd v Lever Bros (Pvt) Ltd*,⁴⁹⁸ it was stated that "this applies to all current as well as future pending obligations and may be for a court fixed period or indefinite, the court should consider whether or not a party permitted to

⁴⁹⁰ Section 318(1)(b).

⁴⁹¹ Dzvimo (2013) 48.

⁴⁹² Van Huyssteen (2014) 36-37.

⁴⁹³ Cassim *et al* (2011) 878.

⁴⁹⁴ Van Huyssteen (2014) 37.

⁴⁹⁵ Cassim *et al* (2011) 879.

⁴⁹⁶ Dzvimo (2013) 49.

⁴⁹⁷ Blackman (2002) 15-21.

⁴⁹⁸ 1981 ZLR 537.

proceed against the company would thereby be granted a preference over other creditors and whether other remedies are available to them.”⁴⁹⁹ It was also held in *Western Bank Ltd v Laurie Fossatti Construction (Pty) Ltd*⁵⁰⁰ that the court’s discretion must be exercised judicially and not arbitrarily having the entire salient and material features of the case.⁵⁰¹ In *New Union Goldfields Ltd v Cohen*⁵⁰² the court held that the fact that the proceedings against the company have been stayed does not entitle the company to delay performance of its obligations. ⁵⁰³

One of the major weaknesses of judicial management as a company rescue mechanism is that the company is vulnerable to the enforcement of actions against it, considering that it may take considerable time before the application is heard by the court as the court has many other commitments to attend to. In consideration of what a reformed judicial management order should constitute, 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.⁵⁰⁴ It is in this argument that he concluded that the moratorium or stay in proceedings is a cornerstone of all business rescue procedures”.⁵⁰⁵

4.4 Roles and responsibilities of the business rescue practitioner against those of the judicial manager

Although the previous chapters have discussed the roles and responsibilities of the practitioner and manager, a rundown shall be given for purposes of comparison.

In the *Theron v Natal Markagente (Edms) Bpk* case, it was held that the need for impartiality, independence and want of interest applies especially in the case of a provisional judicial manager because, in addition to the ordinary functions, he bears the peculiar responsibility of advising the creditors and the court whether judicial management itself should ensue.⁵⁰⁶ This is also relevant to the business rescue practitioner.

⁴⁹⁹ Dzvimbo (2013) 48.

⁵⁰⁰ 1974 (4) SA 607.

⁵⁰¹ Dzvimbo (2013) 48.

⁵⁰² 1954 (2) SA 397 (A).

⁵⁰³ Dzvimbo (2013) 48.

⁵⁰⁴ Kloppers (1999) 429.

⁵⁰⁵ Van Huyssteen (2014) 38.

⁵⁰⁶ Dzvimbo (2013) 49.

Chapter 2 of this dissertation has revealed the business rescue practitioner's duties and powers. The practitioners are given extensive powers to manage the company's affairs and to deal with its assets in order to rescue the business hence the Act imposes a great deal of responsibility on them.⁵⁰⁷ The legislature is right in imposing responsibility on both the practitioners and judicial managers because the success of the procedure is to ensure that a successful rescue is effected.⁵⁰⁸

4.5 Shortcomings of judicial management

The legislation on judicial management in Zimbabwe lacks an express provision that regulates the qualifications of the judicial manager. It only provides that the person must not be an auditor of the company or a person disqualified from holding office as a director under the section 272 of the Act.⁵⁰⁹ More often than not, 'usually an accountant or an experienced person in the company's day to day business or joint managers having with them expertise will be appointed.⁵¹⁰ From the *Theron v Natal Markagente (Edms) Bpk (supra)* case, it seems that the only required qualification of a judicial manager is that they must be disinterested and able to act independently and impartially.⁵¹¹ The absence of precise, clear cut requirements for the qualifications of managers leaves a lot to be desired and a gap in the law. More so, there is no legislation barring the judicial manager from taking up as a liquidator in the unfortunate event that judicial management fails and the court gives an order for the winding up of the company.

On the contrary, the legislation on business rescue provides for the requirements for one to be practitioner.⁵¹² The practitioner must be a member in a good standing legal, accounting or business management profession accredited by the Commission.⁵¹³ This provision is a remarkable improvement on judicial management as it creates certainty as to the intention of the legislature regarding who qualifies to take charge of the company, something that is absent in judicial management.⁵¹⁴

⁵⁰⁷ Cassim *et al* (2011) 893.

⁵⁰⁸ Dzvimbo (2013) 49.

⁵⁰⁹ Dzvimbo (2013) 50.

⁵¹⁰ Christie (1998) 423.

⁵¹¹ Dzvimbo (2013) 50.

⁵¹² Section 138.

⁵¹³ Dzvimbo (2013) 50.

⁵¹⁴ *Ibid.*

Furthermore, the introduction of the business rescue plan by the legislature is a significant improvement from judicial management. The legislature promotes transparency as the practitioner is required to reveal his turnaround strategy to rescue the financially ailing company.

The practicality of a business rescue plan can be determined and ascertained by the practitioner as well as all affected persons within the company. The creditors and affected persons must first approve the business rescue plan before the practitioner may initiate it. As discussed in previous chapters, the rescue plan sets out the manner in which the plan will be implemented as well as the time frame. This enables the company to act without the pressures and interference from creditors.

The protection of the rights and interests of employees is a central objective of business rescue procedure.⁵¹⁵ It is appreciated that 'one of the central tenets of effective business rescue proceedings is the just and equitable treatment of employees in a financially ailing company.'⁵¹⁶ Section 136 (1) (a) states that 'protect the employees from loss of employment or any alterations to their employee contracts, which they do not agree to and are contrary to provisions of labour law, this includes retrenchments.' Contrary to judicial management where employee rights are minimal, business rescue strives to afford employees recognition by involving them throughout the process of the procedure. This is a welcome development as employees are also an essential part of the company.⁵¹⁷

4.6 Conclusion

Conclusively, business rescue proceedings are a marked improvement on the archaic judicial management system as it has managed to modernise its provisions so as to identify with international corporate standards. The judicial management process in South Africa before business rescue was said to be failing the economy due to its low success rate.⁵¹⁸ In summary, business rescue has notable advantages over its predecessor judicial management as a corporate rescue mechanism and some of them are:

⁵¹⁵ Dzvimbo (2013) 51.

⁵¹⁶ Cassim *et al* (2011) 884.

⁵¹⁷ Dzvimbo (2013) 51.

⁵¹⁸ Mongalo (2002) 173.

1. The board of the company through a resolution can voluntarily commence a formal rescue procedure without having to seek a court order to do as such as was done under judicial management.⁵¹⁹ This saves time and money for the already struggling company and it enables board of the company to determine and ascertain prospects of the future.
2. Business rescue procedure discards the requirement for a 'reasonable probability' that the company will be will become a successful concern.⁵²⁰ A reasonable belief that the company will be rescued suffices as a requirement.⁵²¹ The benchmark for the burden of proof is set lower for any affected persons or directors hoping to commence proceedings, thereby encouraging them to employ the rescue mechanism at the earliest possible time.
3. The provisions of business rescue include the plan of the procedure that should have the background, the proposal and the assumptions and conditions sections.⁵²² This increases the confidence of all stakeholders as the procedure becomes more transparent, thereby enabling them to have greater appreciation of the affairs of the company when voting and deliberating on matters. More so, stakeholders will have a better understanding of how the practitioner intends to rescue the financially ailing company. However, there is no such provision in judicial management and this is one of the main shortcomings of the mechanism as a formal rescue plan.
4. Business rescue seizes to be cumbersome as it is not granted in two parts; that is provisional and final orders as is the case with judicial management. With business rescue, commencement takes place voluntarily or by a court order and the company will commence business rescue.

⁵¹⁹ Dzvimbo (2013) 52.

⁵²⁰ *Ibid.*

⁵²¹ Section 129.

⁵²² Dzvimbo (2013) 52.

CHAPTER 5:

Conclusions and recommendations for the business rescue proceedings in South Africa and judicial management system in Zimbabwe

5. Background Information

This is chapter is the conclusion to the dissertation. It therefore proposes recommendations for both procedures, firstly, business rescue in South Africa and then judicial management in Zimbabwe. The business rescue proceedings in South Africa have been a great initiative and have been welcomed in the country, but like any other system, there are a number of *lacunas* that still need to be addressed. On the other hand, it has been clearly revealed in the previous chapters that the Zimbabwean company law legislation is outdated and undoubtedly requires an overhaul.

It is imperative for a company law regime to have an effective mechanism in place that will manage to successfully aid struggling but viable companies out of debt to enable them to become viable concerns. If Zimbabwe is to achieve international standards in as far company law is concerned, it must implement legislation that is competent enough to resuscitate financially distressed companies as this will create employment and stabilise the economy. Additionally, this will boost investor confidence in Zimbabwe's economy, and will at least ideally, attract direct foreign investment. Lessons for Zimbabwe can be drawn from other jurisdictions besides South Africa, such as England and Germany which have amended their laws to incorporate modern and progressive regimes. A progressive regime that positively affects ailing companies has a bearing on the economy of that country as companies contribute to the economy of a country through tax paying. The conservative approach of the courts and the unrealistic requirements that are laid down by the Companies Act, have not allowed judicial management to develop as an effective means of saving financially distressed companies in Zimbabwe.⁵²³

⁵²³ Harmer 149 is of the opinion that judicial management (or official management as it was known in Australia) does not work because it is used in a conservative creditor-friendly environment, and secondly because it requires the company's debts to be paid in full.

Kloppers is of the opinion that judicial management does not need to be abolished, but merely modernised by means of a few legislative amendments.⁵²⁴ However, considering the considerable volume of case law restricting the use of judicial management in practice and the negative connotation⁵²⁵ that can be attached to it, it may be more sensible to introduce an entirely revised form of business rescue into Zimbabwe, a system that can be devised specifically with the Zimbabwean economy. There is an urgent need for a complete overhaul of Zimbabwean business rescue mechanisms generally.

5.1 Recommendations

After much consideration, critical analysis and comparison of the aforementioned systems of business rescue in both jurisdictions, I hereby propose recommendations that will improve the positions of the two countries;

5.1.2 South Africa

In terms of the South African context, the method of business rescue proceedings has undoubtedly proved to be effective as it has been greatly welcomed through the inception of the Companies Act 71 of 2008. However, like any other system, business rescue still has some loop holes which prevent the system from reaching its full potential. As discussed in the conclusion in chapter 2, the most critical *lacuna* is created from the concept of the moratorium in terms of section 132 of the Companies Act of 2008. In the same spirit with Van Huyssteen from his thesis, I recommend that:

1. The phrase “reasonable prospect of rescuing a company” in section 128 of the 2008 Act must be defined so as to have certainty of the law.
2. Section 133 must only contain the general moratorium stipulated in section 133 (1, and that the specific moratorium in section 133 (2) is of no significance and must be deleted.

⁵²⁴ Kloppers “*Judicial Management Reform*” 378-379 actually makes proposals for the amendment of judicial management.

⁵²⁵ See Cilliers & Benade *Corporate Law* par 26.03 480 who state that the disadvantage of judicial management is that it affects the creditworthiness of the company, even if the order is later set aside. This negative connotation is not something that can be remedied by legislative amendments, but requires a change of attitude by all the stakeholders, a view shared by Kloppers “*Judicial Management Reform*” 377-378.

3. The business rescue practitioner must also be afforded the power to lift the moratorium when guarantees or suretyships are concerned.

5.1.3 Zimbabwe

The preceding discussion of the problems experienced with judicial management as a business rescue regime shows that Zimbabwe is in dire need of a revised system that can effectively regulate this important aspect of insolvency law. Zimbabwe needs a total overhaul of its companies' act, with particular reference to laws regulating business rescue. I therefore recommend that judicial management system in Zimbabwe be repealed and replaced with the business rescue procedures. Although the business rescue regime in South Africa has not yet reached its full potential, it is the most ideal model that Zimbabwe may adopt and modify to suit its economy but maintaining international recognised standards.

Thus, an overhaul of the legislation is the chief recommendation and from it will stem subsidiary aspects that suit the Zimbabwean economic position and these are:

1. The drafters of the proposed business rescue mechanism for Zimbabwe should be professionals in the commercial field, familiar with the country's corporate sector history and development, its corporate culture as well as the former and current economic status. This will help the drafters to draft a business rescue model that will reflect the state of Zimbabwe and ultimately be easier to implement.
2. Zimbabwe should have commercial specialised courts, manned by commercial judges so that all matters directed to the court may receive the attention they require.
3. An applicant for business rescue must be *bona fide*, must have *locus standi* and prove that such an application to commence business rescue is in the best interests of the company.
4. The scope of the company rescue procedure; the South African Companies Act stipulates that business rescue applies to companies that are registered under the Act. I suggest that the same provisions be incorporated in the Zimbabwean proposed business rescue model. It should be able to be utilised

by small and medium companies as they play an important role in the economy of developing and developed countries.

5. Business rescue proceedings are a cost effective mechanism. A company rescue mechanism should be inexpensive to implement so as to encourage financially ailing companies to voluntarily apply for business rescue at the earliest possible time, bearing cognisance that the corporations that opt for business rescue will already be financially troubled hence the need for an affordable procedure. Therefore, my proposed company rescue mechanism should scrape away the two way commencement of first acquiring a provisional order then a final order as is under judicial management.
6. Company directors should be permitted to institute business rescue at the earliest possible date when the company starts showing signs of financial trouble rather than waiting for the company to plunge into dire financial ruin.
7. There must be clear guidelines as to the qualifications of a business rescue practitioner so as to ensure that only competent people are tasked with improving the welfare and fortunes of financially ailing companies.
8. There must be an automatic moratorium which comes into force once an ailing company declares business rescue. This saves the company finances and time as there will be no need for a separate application to the court. Such an amendment affords the business rescue practitioner ample time to draft and develop a rescue plan without any interference from creditors who pursue their claims as there will be a stay of all legal actions against the company.
9. There must be post-commencement finance. This will allow the ailing company to achieve financial viability as investors and creditors will be willing to lend money to the company because post-commencement finance creditor claims will rank above other creditor claims. However, creditors tend to abuse this concept as they may consider it as an opportunity to provide for additional new financing on condition that their pre-existing claims are secured.⁵²⁶ In light of the above, I propose that the Zimbabwean business rescue model tie up this loophole by inserting a provision that prohibits the creditors from

⁵²⁶ Cassim *et al* (2011) 884.

abusing the procedure. The provision should state that only post commencement finance will receive the special preference status not the claims before business rescue commenced.

10. There must be adequate protection of employee rights and the employees must actively participate during business rescue. This means that, the employment status does not change during the entire course of business rescue, they have a right to file for an order placing the company under business rescue and if the company owes them money, their claims must rank equally with that of the creditors in the company.
11. There must be a clear time frame as to the duration of business rescue, after which an extension of time may be applied for and termination of business rescue to be included.

5.2 Final Conclusion

To this extent, it has been revealed that business rescue proceedings are more effective than judicial management. The transition by South Africa from judicial management to business rescue proceedings has been a milestone in improving the company law legislation and has been greatly welcomed within the country. A few sections must however be refined as discussed above to afford proper protection for the relevant parties, and most importantly, the company. On the other hand, judicial management has proved to be ineffective and therefore should be repealed, and an overhaul of the Companies Act must be done by the Zimbabwean legislature.

As such, I conclude that business rescue proceedings effectively and successfully enables the rescue of the company in line with international best standards and that it is the ideal model to be adopted by Zimbabwe.

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