

King IV and its cavalry: Corporate governance during business rescue

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ABSTRACT

The objective of this mini-dissertation is to research the role that corporate governance plays during business rescue by analysing the duties and obligations the business rescue practitioner is tasked with, and the complex relationships the practitioner is engaged in. In so doing, an analysis of the duties, obligations and powers of the practitioner is undertaken to ultimately create a framework that takes into account accepted principles of corporate governance and international best practice by jurisdictions with similar statutory proceedings.

Key terms:

Business rescue, business rescue practitioner, corporate governance, King IV, Companies Act 71 of 2008.

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ABBREVIATIONS

BRP	Business rescue practitioner;
CIMA	Chartered Institutes for Management Accountants;
CIPC	Companies and Intellectual Property Commission;
IoDSA	Institute of Directors of South Africa;
OECD	Organisation for Economic Cooperation and Development;
LSSA	Law Society of South Africa;
SAICA	South African Institute of Chartered Accountants;
SARIPA	South African Restructuring and Insolvency Practitioners Association;
SCA	Supreme Court of Appeal.

TABLE OF CONTENTS

- ABSTRACT I**
- ACKNOWLEDGEMENTS II**
- ABBREVIATIONS..... III**

- CHAPTER 1 NATURE AND SCOPE OF STUDY 1**
- 1.1 Introduction 1**
- 1.2 Problem statement 2**
- 1.3 Objectives of study..... 3**
- 1.3.1 Primary objective 3
- 1.3.2 Secondary objective 3
- 1.4 Field, scope and boundaries of study..... 3**
- 1.4.1 Field of study 3
- 1.4.2 Scope and boundaries of the study..... 3
- 1.5 Research methodology 4**
- 1.6 Limitations of study..... 4**
- 1.7 Layout of the Study 4**

- CHAPTER 2: AN OVERVIEW OF BUSINESS RESCUE 5**
- 2.1 A brief history of South African corporate rescue culture 5**
- 2.2 Objectives of business rescue 6**
- 2.3 The status of business rescue 7**

- CHAPTER 3: AN OVERVIEW OF CORPORATE GOVERNANCE 10**
- 3.1 Corporate governance defined 11**
- 3.2 King IV and the cavalry: principles of good governance..... 12**
- 3.2.1 Sustainability 13
- 3.2.2 Reporting and accountability..... 14
- 3.2.3 Stakeholder inclusivity 15

3.2.4	Corporate citizenship	16
3.2.5	Cooperation and delegation.....	17
3.2.6	Competency	17
3.3	The role of corporate governance during business rescue	18
 CHAPTER 4: CORPORATE GOVERNANCE DURING BUSINESS RESCUE		19
4.1	Good faith and the practitioner’s duty of care.....	19
4.1.1	‘Good faith’ and Sections 75 to 77 of the Act	19
4.1.2	Gross negligence ‘in accordance with any relevant law’	20
4.1.3	King IV applied to the standard of the practitioner’s conduct.....	21
4.2	Commencing business rescue	23
4.3	Appointment of the business rescue practitioner	26
4.4	Experience, qualifications and regulation of the practitioner	27
4.5	Duties, obligations and powers of the business rescue practitioner	30
4.5.1	Investigation of company affairs	30
4.5.2	Director’s cooperation with practitioners, management of the company and delegation of powers.....	32
4.6	The Business rescue plan.....	35
4.7	Engaging with employees, creditors and shareholders	42
4.7.1	Participation by creditors	42
4.7.2	Employees.....	43
4.7.3	Effect on contracts.....	44
4.7.4	Participation by shareholders and holders of other securities	45
4.8	Conclusion.....	47
 CHAPTER 5: CONCLUSION AND RECOMMENDATIONS		48
5.1	Introduction	48
5.2	Conclusions and recommendations	48
5.3	Achievement of the objectives of the study	48

5.4 Recommendations for future research 49
BIBLIOGRAPHY 50
ADDENDUM A: RELEVANT SECTIONS OF ACTS REFERRED TO 55

CHAPTER 1 NATURE AND SCOPE OF STUDY

1.1 Introduction

Chapter 6 of the Companies Act (71 of 2008) (hereafter “the Act”) introduced the business rescue process, which allows for companies that find themselves in financial distress or trading in insolvent circumstances, to reorganise and restructure the business with the aim of trading more profitably, as opposed to being liquidated. During this process, a business rescue practitioner (“the practitioner”) is appointed to oversee and assist in the process.

Briefly, the role of the practitioner is to enable a company to continue trading by reducing the debt burden, investigate the company’s affairs, business, property and financial situation, and then consider whether there is a reasonable prospect of rescuing the distressed company (Anon., 2015). Furthermore, the practitioner must draw up a business rescue plan that will be put to a vote by creditors. Should the plan be voted in, the “practitioner must implement and oversee the business rescue plan in an attempt to save the company.” (Anon., 2015).

Business rescue, however, being a new process to the South African commercial and legal landscape, is often misunderstood by stakeholders and the practitioners in respect of the duties and role of the practitioner and the process. To add insult to injury, Chapter 6 of the Act is highly criticised in respect of impracticalities, the lack of clarity and contradictions.

Stakeholders often perceive practitioners as opportunists who abuse the process by focusing on making money from an ailing company, instead of “healing” the company (Anon., 2017b; Levenstein, 2015:592). However, a practitioner can more accurately be described as a “miracle worker who is supposed to do what the company's own directors could not do – restore a struggling company to solvency” (Rooth Inc., s.a.). The statutory task of the practitioner is complex and the practitioner is expected to be an officer of the court while having full management of the powers of the company and, simultaneously, having to safeguard the interests of all affected stakeholders (Papaya, 2014). Effectively, Section 128 of the Act requires the practitioner to be “an overseer, facilitator, supervisor and manager during the business rescue period” (Papaya, 2014).

Due to the complexity of the practitioner’s tasks and role, the need for the regulation and adequate qualifications of practitioners is recognised (Papaya, 2014; Levenstein, 2017:10-46 to 10-53); There would be no use in attempting to regulate the practitioner if there is no standard to which they are to be held, however. As mentioned above, the Act sets out certain statutory duties and requires that practitioners be held accountable to the same standard as a director of a company. These duties and standards are not yet codified and, as such, it is essential to have a code to guide practitioners (Meskin *et al*, 2011:287).

Keeping this in mind, the G20/OECD Principles of Corporate Governance (2015) defines corporate governance as the procedures and processes that direct and control organisations. It lays down the rules and procedures for decision-making and how the rights and responsibilities are distributed among participants in the organisation (OECD, 2015). Considering the complex role of the practitioner and Delpont's submission that a code to guide practitioners is essential, corporate governance principles could guide the practitioner in executing their duties and obligations the Act envisages.

1.2 Problem statement

During business rescue, a business rescue practitioner ("the practitioner") steps into the shoes of a company's board and its pre-existing management (Section 140(1a) of the Act). Consequently, broad powers are conferred on the practitioner, who must now supervise the management of the company as a substitute to its board and pre-existing management (Section 128(1)(i) of the Act). The supervision imposed on the company can be referred to as "management control" and the practitioner "would sit alongside the existing directors in the role of a supervisor to the board and the management" (Levenstein, 2015:406). In addition to its supervisory role, the practitioner would be obliged to make important decisions in respect of the obligations mentioned in Chapter 6 of the Act (Levenstein, 2015:406).

Section 140 of the Act also sets out the duties and obligations of practitioners and in terms of Subsection 3, the practitioner is held to the same standard in respect of duty and care as a director of the company. Although one might argue that the duties of the director (and by extension, the practitioner) are codified in the Act, the content of the duties are not entirely defined (Meskin *et al.*, 2011:290(5)). Delpont (Meskin *et al.*, 2011:290(5)) further argues that, where the Act lacks codification, the common law and "a comprehensive code" can serve to guide a director (and by extension, a practitioner).

Practitioners have had a bad rap since the inception of Chapter 6 of the Act for various reasons. Among them is the perception that acting as a practitioner is merely a business opportunity and that the practitioner is not at all bothered by rescuing the company (Omarjee, 2017). Another is that the practitioner may simply be an agent driving the agendas of companies under business rescue in order to delay the inevitable liquidation (Business Essentials, 2015). There is also a perception that practitioners simply have no regard for the opinions of the board and directors who know the business and just manage the company as they see fit (Pretorius, 2016).

In the absence of "a comprehensive code", a practitioner could still fulfil their defined obligations in the Act without applying the proper duty and care as required by the Act (which is not codified), and simply argue that they were acting *bona fide*.

This study will investigate the duties and obligations of the practitioner and further aim to develop practical guidelines that consider corporate governance principles. These guidelines will serve as a best practice framework that business rescue practitioners and stakeholders can use.

The study is aimed at lawyers and non-lawyers who wish to know more about this topic. It endeavours to strike a balance by informing the non-lawyer audience of the topic in an understandable manner while endeavouring to be a point of reference for the legal fraternity, which is more acquainted with the law pertaining to the subject matter.

1.3 Objectives of study

1.3.1 Primary objective

The primary objective of this study is to identify and evaluate the key processes and procedures during business rescue. It will serve as a basis for a framework that takes into account accepted corporate governance principles and sets out the “how to” during business rescue.

1.3.2 Secondary objective

The secondary objective of the study is that the suggested framework may serve as a guideline that other stakeholders can use in the business rescue process to measure their own behaviour and that of the practitioner.

1.4 Field, scope and boundaries of study

1.4.1 Field of study

The field of the study is a practical approach to the exercise of duties and obligations and the role of corporate governance during business rescue proceedings.

1.4.2 Scope and boundaries of the study

The study is limited to a practical approach relating to the duties and obligations of business rescue practitioners and an analysis of the relevant principles found in research, regarding business rescue practice, international best practice and corporate governance principles.

The literature study (Chapters 2 and 3) focuses on the business rescue process, the duties and obligations of the business rescue practitioner and the principles of corporate governance. Chapter 4 focuses on a practical code of conduct that practitioners and stakeholders can use, the principles of which can be inferred from the literature study and international best practice.

1.5 Research methodology

The methodology in this study consists of a theoretical literature study by investigating the relevant legislation, academic opinions (which considers case law) and related research in respect of the research topic.

The theoretical literature study will shed light on:

- An overview of South African corporate rescue culture and corporate governance;
- The duties and obligations of the business rescue practitioner;
- A practical approach to the practitioner's duties and obligations during the business rescue process.

1.6 Limitations of study

Business rescue is a relatively new process, introduced in 2011, and as a result, few sources are available on the subject at hand. Furthermore, the Act itself, as stated above, is vague on the "how to" of the duties and obligations of practitioners. The proposed solution (a comprehensive code of practice) must, therefore, be founded on literature, international best practice in restructuring and the opinions of practitioners and stakeholders. The idea of a comprehensive code of practice for practitioners is novel and the uniqueness of the topic posed a challenge to the study as very little previous research on this specific topic could guide this study.

1.7 Layout of the Study

Chapter 1 – Introduction and problem statement;

Chapter 2 – Literature review: overview of business rescue;

Chapter 3 – Literature review: overview of corporate governance;

Chapter 4 – Corporate governance during business rescue;

Chapter 5 – Conclusion and recommendations.

CHAPTER 2: AN OVERVIEW OF BUSINESS RESCUE

In 2008, Chapter 6 of the Companies Act introduced business rescue as an alternative to liquidation for companies that find themselves trading in financial distress or under insolvent circumstances. Levenstein (2017:1) uses the terms “business rescue” and “corporate rescue” interchangeably and defines it as “a procedure designed either to rescue a company as a going concern or to introduce mechanisms to ensure that creditors receive a better dividend than they would have had, had the company gone into liquidation”.

2.1 A brief history of South African corporate rescue culture

Previously, if a company found itself in financial distress, it would either go into liquidation or be placed under judicial management. These two procedures had various negative aspects to them.

In insolvency, a liquidator sells off assets on a piecemeal basis for under market value, in most instances, and results in job losses (Jones, 2017). Friendly liquidation is often perceived as an “abuse of the system where dishonest applications resulted in the passing of the debt burden to creditors, taxpayers, and the South African economy” (Levenstein, 2015:76).

The alternative judicial management was introduced as a mechanism to rescue a distressed company in 1926. Where the court was satisfied that a company could be turned around to a successful concern, the directors would cease to hold office and the management and control of a financially distressed company would vest in a judicial manager, under the supervision of a court. This aspect of judicial review was “short-sighted” as the directors, at least, had knowledge of the company’s business. It, therefore, made no sense to abandon the accumulated knowledge and it was unrealistic to expect that the judicial manager would be able to make a success of a company they had just walked into (Rooth Inc., s.a.).

A judicial management order was only granted in exceptional circumstances and the application was legally cumbersome, expensive and time-consuming (Jones, 2017). Judicial management required a full turnaround within a short period with no moratorium on legal proceedings against the company (unless specifically requested in an already difficult application) (Jones, 2017). Levenstein (2015:77) submits that judicial management did not consider the realities of debt compromise, the creditors simply didn’t support the procedure and the failure rate was high. The court found, in *Le Roux Hotel Management (Pty) Ltd v E-Rand (Pty) Ltd* (2001), that judicial management was “a system which has barely worked since its initiation”

Historically, the South African approach to insolvency and corporate rescue has been “pro-creditor”, as the aim of both judicial management and insolvency was to extract an advantage to creditors. In the early 2000s, there was a shift from this culture and the primary focus of South African legislation started recognising the debtor as the primary focus in matters relating to

financial distress. That is why the legislature introduced the business rescue process (Levenstein, 2015:23).

2.2 Objectives of business rescue

Section 128(1) of the Act defines the objectives of business rescue. Essentially, business rescue is:

- (i) “the rehabilitation of a financially distressed company by placing the company, the management of its affairs and property under temporary supervision of the practitioner”;
- (ii) “imposing 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 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...”;
- (iv) Should the latter not be possible, the alternative aim is to devise a plan that would result “in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company”.

As far as the outcome in (iii) above is concerned, Levenstein (2015:284) submits that this outcome relates to the rehabilitation of the company and, in support thereof, refers to *Antonie Welman v Marcelle Props 193 CC (2012)* at para 28, where Tsoka J. held that “business rescue proceedings are not for the terminally ill...nor are they for the chronically ill. They are for ailing corporations, which given time will be rescued and become solvent.”

In the second outcome mentioned in (iv) above, Levenstein (2015:285) argues that it results in a “quasi-liquidation” of the company, where the assets or business of the company are sold in an endeavour to result in a return (in the form of a dividend) for creditors. However, such “return” must be better for creditors than the return they would have received if the company were immediately placed under liquidation and effectively results in what could be referred to as “controlled liquidation” (Levenstein, 2015:289).

The test to determine whether a company is financially distressed (envisaged in Section 128(1)(f) of the Act) and eligible for business rescue, can either be commercial and/or factual (Levenstein, 2016):

- (i) Commercial test (the “cash flow test”):

Should it appear to the board of a company that it is reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediately ensuing six-month period, the company is financially distressed; or

(ii) Factual test (the “balance sheet test”):

Should it appear to the board of a company that it is reasonably likely that the company will become insolvent within the immediately ensuing six-month period, then the company is financially distressed.

The company must also be capable of rescue and, hence, there must be “a reasonable prospect of success”. When applying for business rescue, the applicant would have to prove beyond mere speculation that the remedy is reasonable and sustainable (Wassman, 2014).

Once it has been established that a company is in financial distress and eligible for business rescue and that there is a reasonable prospect of success, the company can be placed under business rescue and the practitioner must be appointed.

2.3 The status of business rescue

Current data on the status of business rescue in South Africa is limited. From the inception of the business rescue process in May 2011 to June 2018, 2 953 entities filed for business rescue with the Companies and Intellectual Property Commission (CIPC) and, by 30 June 2018, 1 201 companies were still in business rescue (CIPC, 2018a).

Pretorius (2015:31) found that 90 per cent of filings for business rescue (as at 30 March 2015) were voluntary and, therefore, done by directors of companies. Ten per cent of filings were a result of court applications. In 50 per cent of court applications, the applicants were shareholders of companies; the other 50 per cent were “disgruntled creditors”. However, the court applications were mainly used by major creditors other than banks, high value creditors and shareholders because of the high cost of launching these court applications.

Pretorius (2015:32) could not make a valid finding on how many business rescues were successful because of inconsistent and incomplete data. He attributes the fact that “successful business rescue” is not clearly defined and interpreted differently by different parties (to the procedure), depending on the benefit they derive from it. According to Pretorius (2015:20), the business rescue regime has multiple outcomes and, as a result, “successful business rescue” will have multiple definitions:

(i) Section 128(1bi) of the Act refers to the reorganisation of the company by facilitating the rehabilitation of a financially distressed company and providing for the temporary supervision of the company, the management of its affairs, its business and property. This reorganisation, or rather “turnaround” is the “optimal success” within the business rescue regime.

- (ii) Section 128(1)(b)(ii) of the Act refers to a situation where, should a business not be able to turn around, a restructuring will result in a better return for creditors and shareholders than immediate liquidation and can be pursued as an “alternative success outcome”.
- (iii) Section 155 of the Act refers to a compromise between the companies and their creditors. This option, however, is not available if the entity is already in business rescue. In terms of this, the board of the entity or the liquidator (if the entity is in liquidation) may propose arrangements or a compromise of its financial obligations to creditors.
- (iv) The spirit of the Act makes provision for alternative actions that promote the “benefit of the common”, that consider the business, economic growth and employment protection. These alternatives may include mergers or acquisitions and sale of business.

In all the above, the creditors must vote for a plan (or proposal, as the case may be). Furthermore, another outcome, although not a “success outcome”, is liquidation. Pretorius submits that liquidation serves as the benchmark against which “a better return for creditors” and compromises are to be measured and that alternatives to liquidation must be pursued if they compare favourably with the projected liquidation values.

Pretorius (2015:33; 2015:77) found a 9,4 per cent success rate (compared to the US Chapter 11 rate of five per cent) when considering (i) turnaround; (ii) better return for creditors than in liquidation; and (iii) sale of the business as a going concern, as success outcomes. Pretorius further found that business rescue is perceived to be valuable to society and stakeholders and that it is not seen to be a failed regime like judicial management. However, he conceded that business rescue should be developed further.

A study conducted by Conradie and Lamprecht (2018) investigated the indicators of a successful business rescue, which found the following:

- (i) When considering a company emerging from rescue as a going concern and remaining economically viable as a goal, business rescue would be successful if the plan was successfully and substantially implemented and the company exits the rescue as a going concern and saves as many jobs as possible. When using a public interest score, business rescue points would be saved and the outcome of the rescue would compare well to the estimates in the plan (Conradie and Lamprecht, 2018:10).
- (ii) When evaluating the company after implementation, the rescue would be successful if, after exiting business rescue, it:
 - proves to be profitable in the short- to medium term;
 - proves to be economically viable in the short to medium term, measured by whether the company again files for business rescue;

- performs on par with market expectations (if listed) or matches the performance of peer companies (if not listed) in the long term (Conradie and Lamprecht, 2018:10).
- (iii) When pursuing a better return for creditors than in immediate liquidation as a goal, business rescue would be successful if, after the company's assets are realised and the company deregistered, the approved plan to maximise the return to creditors was substantially implemented and the return proved to be more than if the company had been liquidated (Conradie and Lamprecht, 2018:10-11).

Levenstein (2015:607) submits that business rescue is only successful when a reasonable plan is implemented. This allows a company to continue trading on a solvent basis, either in the same entity on a restructured basis or "where the entity has been sold off to new owners and where such company continues to trade under the helm of such new owners". Levenstein, like Pretorius, submits that the business rescue's success will depend on "the mindset of the particular stakeholders and is measured by the extent to which the business rescue provides such stakeholders with a favourable and lucrative outcome" (Levenstein, 2015:608).

CHAPTER 3: AN OVERVIEW OF CORPORATE GOVERNANCE

Sir Adrian Cadbury (2002:1) defines corporate governance as “a system by which companies are governed and controlled”. Keeping this definition in mind, he goes on to explain that the concept of corporate governance has been around since the inception of the East India Company in 1600. He further explains that the issues the East India Company had faced then are not very different from the issues companies face today – including power and accountability and the ownership and management of companies, where shareholders and directors of companies are far removed from each other, leading to less control by shareholders, the so-called “agency theory”. (Cadbury, 2002:1-5).

Following corporate scandals in the UK and the collapse of UK and multinational companies, the (UK) Financial Reporting Council and the London Stock Exchange set up The Committee on Financial Aspects of Corporate Governance in May 1992, chaired by Sir Adrian Cadbury, to create a code of good practice and, in so doing, strengthen the investors’ confidence (Cadbury, 2002:10).

Following the release of the last-mentioned code (known as the ‘Cadbury Report’), other countries followed suit – South Africa being no exception. In 1993, the Institute of Directors of Southern Africa (‘IoDSA’) commissioned a committee, chaired by Judge Mervyn King (as he was then known) and, in 1994, the first King Report for Corporate Governance in South Africa was published (Naidoo, 2009:2). Since the first King Report, three more have been published, the latest of which was the King IV Report on Corporate Governance for South Africa (hereafter interchangeably referred to as “King IV” or “the King Code”; IoDSA, 2016).

In the foreword to King IV, Mervyn King adequately sums up the relevance of corporate governance by stating that:

New global realities are testing the leadership of organisations...There are greater expectations from stakeholders than ever before...In a similar vein, it is now accepted that organisations operate in the triple context of the economy, society and the environment...governing bodies have the challenge of steering their organisations to create value in a sustainable manner...

and that

...the duty of care has become both more complex and more necessary...a business judgement that does not take account of the impacts of an organisation’s business model on the triple context could lead to a decrease in the organisation’s value...an organisation is a part of society in its own right. It can no longer be seen as existing in its own narrow universe...an organisation is not just those individuals and entities within its narrowly defined value chain, but society as a whole.

3.1 Corporate governance defined

The G20/OECD Principles of Corporate Governance (hereafter “the OECD Principles”), the international standard for corporate governance does not specifically explain the concept of corporate governance in one single definition, however, it does state that (OECD, 2015:9):

Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set and the means of attaining those objectives and monitoring performance are determined.

The OECD (OECD, 2005) further defines corporate governance as the procedures and processes that direct and control organisations. It lays down the rules and procedures for decision-making and how rights and responsibilities are distributed among the participants in the organisation.

In a South African context, King IV further defines corporate governance as “the exercise of ethical and effective leadership by the governing body” in order to achieve an ethical culture, good performance, effective control and legitimacy as governance outcomes (IoDSA, 2016:20).

According to Naidoo (2009:3) corporate governance “regulates the exercise of power (that is, the authority, direction and control) within a company to ensure that the company’s purpose is achieved” and is “the practice by which companies are managed and controlled”. She further submits that the structures, processes and practices used by boards to direct and manage operations of a company, determine how authority is exercised, decisions are made, stakeholders have a say and decision-makers are held to account. The procedures and practices take into account:

- (i) A system of checks and balances that monitors and ensures a balanced exercise of power within a company
- (ii) A system that ensures compliance with legal and regulatory obligations
- (iii) Processes “whereby risks to the sustainability of the company’s business are identified and managed within acceptable parameters” and
- (iv) The development of practices that ensure accountability to stakeholders and the broader society in which the company operates (Naidoo, 2009:3).

Corporate governance is different from other forms of governance, “corporate” being the differentiating term. “Corporate” refers to entities incorporated as legal entities, separate from their founders (IoDSA, 2016:11). A further distinction must be drawn between governance and management:

Those who manage, run the company and govern, ensure that it (the management of company affairs) is done properly. Therefore, “management” refers to the managing of a company by executives by virtue of the powers delegated to them by those who govern – usually the shareholders (Naidoo, 2009:5). According to Naidoo (2009:6), the balancing act of power and accountability is one of the greatest challenges that the pursuit of good governance faces. Management should have enough authority to carry out its functions and reach strategic goals but management must also be sufficiently held to account to ensure that the powers are exercised in the company’s best interest and in such a way that the board does not lose control over steering the company to reach its strategic objectives (Naidoo, 2009:6).

Naidoo (2009:3) very concisely and accurately describes corporate governance as the “*who* is responsible for *what*”.

3.2 King IV and the cavalry: principles of good governance

Corporate governance relates to nearly every aspect of how a company is run. However, a number of themes recur in corporate governance codes of various jurisdictions. The jurisdictions and codes considered include, but are not limited to:

- (i) South Africa: The King Code (IoDSA, 2016);
- (ii) Germany: The German Corporate Governance Code (DCGK, 2017) (hereafter “the German Code”);
- (iii) Australia: Corporate Governance Principles and Recommendations (Australian Stock Exchange (ASX) Corporate Governance Council, 2014) (hereafter “the Australian Code”);
- (iv) United States of America: Commonsense Principles of Corporate Governance (Buffet *et al*, 2018); a code compiled by twenty US corporate and regulatory heavyweights);
- (v) United Kingdom: The UK Corporate Governance Code (FRC, 2018) (hereafter “the UK Code”);
- (vi) Global (G20): OECD Principles of Corporate Governance (OECD, 2015).

As stated above, these codes have recurring themes in common. These include:

- (i) Sustainability of the company (and, in some instances, the environment and economy);
- (ii) Reporting and disclosure, which translate into transparency;
- (iii) Accountability of role players and decision-makers;
- (iv) Stakeholder inclusivity, which considers employees, the community and shareholders;
- (v) Corporate citizenship;
- (vi) Cooperation between boards and management and the delegation of powers;

- (vii) Competency and independence of board members and management (which translates to the ability to deal with conflicts of interest and acting in the best interest of the company).

Another recurring theme throughout these codes is that complying with the specific codes (and the themes mentioned above) will result in value creation for the company and stakeholders alike. These themes will now be discussed in more detail.

3.2.1 Sustainability

King IV (IoDSA, 2016:17) defines sustainability as “the ultimate, long-term goal of sustainable development” and defines “sustainable development” as the organisation’s endeavours to create value over time by an integrated approach that includes the economic viability of the organisation, the natural environment in which it operates, corporate social responsibility (these three concepts forming the triple context) and other considerations upon which the organisation depends for its success (IoDSA, 2016:18). Economic sustainability refers to the organisation’s ability to operate the business over the long term (ASX, 2014:37). Social sustainability refers to the organisation’s ability to conduct its business in “a manner that meets accepted social norms and needs over the long term (ASX, 2014:37). Finally, environmental sustainability refers to the organisation’s ability to conduct its business in “a manner that does not compromise the health of the ecosystem in which it operates over the long term” (ASX, 2014:38).

“Sustainable development”, in a nutshell, is the “development that meets the needs of the present without compromising the ability of future generations to meet their needs” (IoDSA, 2016:26).

King IV advocates for integrated thinking, which takes into account sustainable development as a driver for the organisation’s ability to create value (IoDSA, 2016:24). Management and boards should ensure the continued existence of an organisation and its sustainable value creation, which require compliance with the law and ethically sound and responsible behaviour (Deutscher Corporate Governance Kodex (DCGK), 2017:1). Management should furthermore assume full responsibility for managing the organisation in the best interest of the company, taking into account the needs of shareholders, employees and other stakeholders, which would endeavour to achieve the objective of sustainable value creation (DCGK, 2017:5; Buffet *et al.*, 2016:4). By creating a corporate governance framework that encourages active, wealth-creating cooperation (between corporations and their stakeholders and among stakeholders themselves), the sustainability of the organisation becomes probable (OECD, 2015:37).

Many codes prescribe that remuneration structures, whether performance-related or not, also take into account the sustainable growth of the organisation (DCGK, 2017:7,12; FRC, 2018:13) and should be assessed in a holistic manner – both quantitatively and qualitatively (Buffet *et al.*, 2018:5).

In terms of reporting on sustainability, organisations should report on sustainability risks and opportunities and how they intend to manage those risks or make use of those opportunities. The codes require an assessment of the basis upon which the organisation generates and preserves value and how their strategies impact sustainability within the triple context (ASX, 2014:30; FRC, 2018:4; Buffet *et al.*, 2018:7).

3.2.2 Reporting and accountability

Every code mentioned above has at least one principle dedicated to reporting. Reporting, in terms of these codes, relates to more than just financial reporting – the codes also require reporting on, *inter alia*, governance and applications of the principles (contained in every code), sustainability, remuneration and strategy. Reporting and disclosure provide for accountability on organisational performance (IoDSA, 2016:28).

The UK Code submits that in reporting meaningfully, by setting out the background for decisions, the clear *rationale* for actions and explaining the impact of such decisions (FRC, 2018:2), organisations can demonstrate how their governance contributes to the long-term sustainable success and achieves its objectives (FRC, 2018:1).

The codes have adopted the principle of “integrated reporting”. King IV concisely defines this concept as “a process founded on integrated thinking that results in a periodic integrated report...about the value creation over time” and then also defines integrated thinking as “the active consideration...of the relationships between its various operating and functional units and the capitals that an organisation uses” (i.e. human capital, intellectual capital, etc.) (IoDSA, 2016:13). An integrated report is, therefore, a communication indicating “how an organisation’s strategy, governance, performance and prospects, in the context of its external environment, lead to the creation of value in the short, medium and long term” (IoDSA, 2016:13) and therefore reports on matters that could significantly affect the organisation’s ability to create value (IoDSA, 2016:28).

Timely and accurate disclosure (using the correct channels to disseminate information) to all stakeholders ensures the equitable treatment of stakeholders (OECD, 2015: 41-42). The OECD Code further states that a robust disclosure regime that promotes real transparency is central to the stakeholders’ ability to exercise their rights on an informed basis. Furthermore, “disclosure can be a powerful tool for influencing the behaviour of companies” and “can help attract capital and maintain confidence” (OECD, 2015:41). Conversely, “weak disclosure and non-transparent practices can contribute to unethical behaviour and a loss of market integrity” (OECD, 2015:41).

If reporting ensures transparency, it is also the catalyst for accountability:

The King Code mandates the governing body to oversee and monitor the implementation of policies (of various governance areas) by management and finally ensures accountability for performance with these policies through reporting and disclosure (IoDSA, 2016:21).

Boards are held publicly accountable and, as such, should be able to demonstrate responsibility for decisions. Stakeholders should be able to understand how the board makes decisions and what the board's responsibilities and challenges are, and how the board plans to address these responsibilities and challenges. By demonstrating accountability, through reporting and disclosure, stakeholder trust is gained (Lowe, 2018). Accountability ensures the board's ability to "conduct and present a fair, balanced and understandable assessment of the company's position and prospects" (Lowe, 2018).

In reporting, accountability should be addressed throughout the annual report. It should relate back to the company business model and strategy and how the board is addressing the business risks and viability. The audit committee is particularly important, clearly demonstrating accountability in its reporting on key matters like:

3.2.3 Stakeholder inclusivity

King IV (IoDSA, 2016:17) defines stakeholders as:

Those groups or individuals that can reasonably be expected to be significantly affected by an organisation's business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organisation to create value over time.

The King Code further states that an organisation's ability to create value for itself would depend on its ability to create value for others and, for this reason, the governing body must take into account the legitimate and reasonable needs, interests and expectations of stakeholders in the execution of its duties. The governing body should, therefore, give equal recognition to all sources of value creation, which include relationship capital (provided by stakeholder engagement) and not just the providers of financial capital (IoDSA, 2016:25). The quality of stakeholder relationships is an indicator of how well an organisation is able to strike a balance in decision-making (IoDSA 2016:25; FRC, 2018:4; DCGK, 2017:7).

The OECD Code also advocates for "inclusiveness" (OECD, 2015:3). The OECD's rationale for this approach is that millions of people around the world have their savings in the stock market and that companies employ millions of people. These stakeholders should also be able to participate in wealth creation. The OECD principles support cooperation between these stakeholders and companies and highlight the necessity to recognise the rights of stakeholders (OECD, 2015:5), considering the contribution that stakeholders make to the long-term success of an organisation (OECD, 2015:10; FRC 2018:1; Business Round Table, 2016), and considering that the way in which an organisation conducts its business has an impact on its stakeholders (ASX 2014:30).

3.2.4 Corporate citizenship

Considering that organisations are an integral part of society, they are considered to be corporate citizens. Together with the status as a corporate citizen come rights, obligations and responsibilities towards the society and the natural environment in which the organisation operates. By virtue of the organisation's status as a corporate citizen, it is "licensed" to operate by its stakeholders. (IoDSA, 2016:25). As non-governmental organisations have become more powerful, influential and financially stronger, and as the power of the state has decreased, society is looking to these organisations to become more socially responsible and to put pressure on government leadership to be more responsible. Society relies on these organisations for various social benefits like education and health care for their employees and their families. These organisations have responsibilities that range from economic stability to environmental awareness and social philanthropy. Although these responsibilities are not all required by legislation, these organisations have recognised the usefulness of being a responsible corporate citizen in value creation and have "a civic duty to contribute to the world's well-being, in cooperation with governments and civil society" (Schwab, 2018).

According to Schwab (2018) "a key part of corporate governance is the development and implementation of internal programmes to promote ethics, moral standards and socially acceptable practices". In pursuance of this concept, the King Code makes provision for establishing a "social and ethics committee" that is tasked with "oversight and reporting on the organisation's ethics, responsible corporate citizenship, sustainable development and stakeholder relationships" (IoDSA, 2016:29). The aim of the provision is to "encourage leading practice by having the social and ethics committee progress beyond mere compliance to contribute to the creation of value" (IoDSA, 2016:29).

Globally, The UN Global Compact (signed by 3 000 companies from 120 countries in 1999 and currently boasting 9 894 companies from 161 countries – see www.unglobalcompact.org) contains a framework of 10 principles to guide business behaviour. These principles include concepts like human rights, the environment, labour practices and anti-corruption, and participants are required to report on these matters (or face being delisted) (Schwab, 2018).

The Business Roundtable, a US organisation, the members of which consist of CEOs of leading US companies (like Apple, 3M, 21st Century Fox, to name but a few), advocates for good corporate citizenship in its principles (Business Roundtable, 2016). The principles state that "companies should strive to be good citizens of the local, national and international communities in which they do business" and that companies "should strive to be a good citizen by contributing to the communities in which it operates" (Business Roundtable, 2016).

3.2.5 Cooperation and delegation

The vital role of implementing and executing approved strategy is delegated by the board to management via the CEO to achieve long-term value creation (IoDSA, 2016:29; Business Roundtable, 2016:5). Key functional areas should be headed by competent individuals (IoDSA, 2016:29) and as such, the selection of a competent CEO and monitoring and evaluating the CEO's performance are key functions of the board (Business Roundtable, 2016:5). The setting, managing and execution of the company strategy, which includes risk management and financial reporting, is the responsibility of management, led by the CEO (Business Roundtable, 2016:6; ASX, 2014:8). Management must also provide the board with accurate, clear and timely information to enable it to perform its responsibilities (ASX, 2014:8).

The board furthermore delegates powers within its own structures, which promotes independent judgement and aids in balancing power and effectively discharging the governing body's duties (IoDSA, 2016:29). However, it is important to note that directors are not managers of business operations – they are (or ought to be) “diligent monitors” and exercise oversight of a company's affairs (Business Roundtable, 2016:5).

The board should holistically assess what committees are appropriate, establish same and further holistically assess the allocation of roles and responsibilities (IoDSA, 2016:29; ASX, 2014:8). This holistic approach, as stressed by the OECD principles, which highlight the avoidance of unintentional overlapping, may frustrate the pursuance of corporate governance objectives. For this reason, the OECD principles prescribe that the allocation of responsibilities for supervision, implementation and enforcement across different authorities and roles are clearly articulated. In so doing, the competencies of complimentary committees and authorities are respected and utilised most effectively (OECD, 2015:15) and will aid in managing expectations and avoiding misunderstandings (ASX, 2014:8). Having the board focus on the “big-picture issues” and delegating operational matters to management, a company will be able to attract and retain strong directors (Buffet *et al.*, 2018:2).

3.2.6 Competency

The various codes place strong emphasis throughout on the independence of board members, their duty to act in the best interest of the organisation in which they serve and the evaluation of competencies of CEOs and candidates who serve on the board. The board should be competent to identify and manage conflicts of interest and ensure that independent judgement is not compromised (FRC, 2018:5). It should have enough knowledge, skills and experience and be diverse and independent enough to discharge its role and responsibilities (IoDSA, 2016:28; ASX, 2014:15).

According to the Business Roundtable (2016:12), “independence is critical to effective corporate governance” and “providing objective independent judgement is at the core of the board's

oversight function". Should a director have any direct or indirect relationship with the company, senior managers or other directors that may impair (or appear to impair) his or her independent judgement, then he or she cannot be regarded as independent (Business Roundtable, 2016:12; ASX, 2014:9,16). These relationships include those with other companies that are engaged in significant business relationships with the company (on whose board the relevant director serves) (Business Roundtable, 2016:12; ASX, 2014:16).

The German Code, for instance, requires the management board and supervisory board members to observe the best interest of the company. They should refrain from pursuing personal interests or exploiting business opportunities for themselves in their decision-making, may not demand or accept any inappropriate benefits from third parties and must disclose any conflict of interest immediately as it arises and demonstrate how it is/was resolved (DCGK, 2017:5,13).

3.3 The role of corporate governance during business rescue

As stated above, corporate governance is the processes and procedures by which a company is managed. From the abovementioned themes, it is also clear that, by having and following sound corporate governance policy, stakeholders are assured that best practice is followed transparently. Business rescue should be no exception to the rule and, in fact, by virtue of the processes and procedures contained in Chapter 6 of the Act, corporate governance can be said to be applied during business rescue.

Once a company is placed under business rescue, the business rescue practitioner is in full management control of the company and then supervises the board and management of the company (Levenstein, 2015:406). The practitioner must now delegate responsibilities, powers and functions to the board and management (Section 140(1)(b) of the Act). Chapter 6 of the Act contains provisions that set out obligations that the practitioner must fulfil and even sets out procedures for certain obligations. For example, how and when the first meeting of creditors and employees is conducted. However, as stated before, these duties and obligations are not entirely codified or defined – and especially do not take into account the finer nuances of corporate governance (discussed above) during the decision-making and management of the distressed company.

Corporate governance, therefore, does not stop when the practitioner takes control. If anything, corporate governance policy then becomes essential for the practitioner to soundly and transparently govern, to ensure value creation in the form of a rehabilitated and financially sound company.

CHAPTER 4: CORPORATE GOVERNANCE DURING BUSINESS RESCUE

Below follows a discussion on the duties and obligations of the practitioner. The discussion considers the Act, the corporate governance themes discussed above and other legislative and academic opinions and best practice principles.

Before the abovementioned can be explored, however, it would be prudent to discuss the practitioner's duty of care and skill, as this concept is a core principle relating to the conduct of the practitioner.

4.1 Good faith and the practitioner's duty of care

In accordance with Section 140(3) of the Act, a practitioner, during the persistence of business rescue:

- (b) has the responsibilities, duties and liabilities of a director of the company, as set out in Sections 75 to 77; and
- (c) other than as contemplated in paragraph (b) –
 - (i) is not liable for any act or omission in good faith in the course of exercising the powers and performance of the functions of practitioner; but
 - (ii) may be held liable, in accordance with any relevant law, for the consequences of any act or omission amounting to gross negligence in exercising the powers and performance of the functions of the practitioner.

This section of the Act creates two separate liabilities (Meskin *et al.*, 2011:492(2)), and one could infer that these separate liabilities have different corresponding measures of a practitioner's duty of care and skill:

The first liability (or measure), created in section 140(3)(b), holds the practitioner to the same standard as that of a director of the company as contemplated in sections 75 to 77 of the Act, when fulfilling the duties and obligations of a director of the company. The second, created in section 140(3)(c), holds the practitioner to a standard of duty and care envisaged by any relevant law when fulfilling his duties and obligations as a practitioner.

4.1.1 'Good faith' and Sections 75 to 77 of the Act

Sections 75 to 77 lists the responsibilities and duties of a director. For this chapter, the overarching standard envisaged in section 76(3) of the Act is important as it measures a director's duty of care and skill. When acting in that capacity, a director of a company must exercise the powers and perform the functions of a director in good faith and for a proper purpose. The director

must act in the best interest of the company and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions as those of that director; with the same general knowledge, skill and experience (Section 76(3) of the Act).

The common law rule in respect of the duty of care and diligence is that, should a director fail to exhibit the degree of care, skill and diligence in circumstance that may reasonably be expected from a person of his knowledge and experience, he is liable to the company for damages suffered as a consequence (Meskin *et al.*, 2011:28(8)). Furthermore, the common law also requires a director to act *bona fide* and in the best interest of the company, which principle has been adopted by the Act.

As far as the duty of care and diligence is concerned, an objective test is applied to determine what the reasonable director would have done in the circumstances; and a subjective test is applied, which takes into account the general knowledge, skill and experience of the director (Meskin *et al.*, 2011:295).

When considering whether a director acted *bona fide* or in the company's best interest, one must consider whether there were reasonable grounds for a belief, after having taken diligent steps to become informed, to act in a certain manner. Should there be no reasonable grounds or diligent steps were not taken to be informed, then the director did not act for a proper purpose and the actions taken weren't in the company's best interest (Meskin *et al.*, 2011:297).

"Proper purpose" firstly requires a director not to exceed the limitations of his own authority and that of the company's corporate capacity (Meskin *et al.*, 2011:298(1)). Secondly, a director "must exercise the duties only for the purposes for which they were conferred and not for an 'improper' purpose" (Meskin *et al.*, 2011:298(2)). Simply put, the test is (i) what the power was conferred for; and (ii) whether this power was exercised for that purpose (Meskin *et al.*, 2011:91).

Section 76(4), however, introduces the business judgement rule, which serves as a defence to directors. The rule bars a director's liability in the event that a decision had led to an undesirable result, where the director acted *bona fide*, with care and on an informed basis, which led the director to believe that their actions were in the best interests of the company (Davis, 2011:117).

4.1.2 Gross negligence 'in accordance with any relevant law'

At first glance, it appears that the practitioner can only be held liable in instances of gross negligence. However, as stated above, the Act creates two measures of negligence. Jacobs and Neethling (2017:787) take this argument further and submit that, due to the circumstances surrounding the company under supervision, the practitioner should be held at a higher standard than that of a director. It is for that reason that gross negligence applies as the scope is much narrower than normal negligence.

In applying the above principles to Section 140(3)(c), Jacobs & Neethling (2016:788-798) argue that the objective test is still the primary measure, as the practitioner has to apply the same duty of care and skill as the reasonable practitioner. However, the objective test does not take cognisance of the special circumstances present during business rescue or that the subjective measure must always be applied to assess the reasonableness of the practitioner's actions. The authors further argue that this would imply that, due to the Act's regulations on the qualifications of the practitioner, one must also take cognisance of the practitioner's personal characteristics and qualifications to assess whether the practitioner must be held to a higher standard than the reasonable practitioner.

When applying sections 75 to 77 of the Act, a practitioner is expected to exercise their powers as a practitioner and perform their duties as a practitioner in good faith and for proper purpose (Baatvedt, 2017). The practitioner is not a director and the Act does not expect the practitioner to carry out the duties or do the day-to-day work of a director. The practitioner has full management control and can be sued if he fails to comply with the responsibilities, duties and liabilities of a director during the management process. The practitioner, therefore, "has a mandatory duty to comply with the *standards of conduct* set out for a director" (emphasis added) when acting in his capacity as a practitioner, and his fiduciary duties only extend to his capacity as a practitioner (Baatvedt, 2017).

4.1.3 King IV applied to the standard of the practitioner's conduct

King IV (IoDSA, 2016) contains principles relating to the behaviour of the governing body and places much emphasis on the ethical conduct and independence of members of the governing body (See Principles 1, 2, 7, 8 and 13).

In *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* (2015) (at par 35), the Supreme Court of Appeal (SCA) held that a practitioner is held to a high ethical standard. In this matter, the practitioner also appeared to be partial to the distressed company and the court raised serious concerns in this respect.

If the standard of conduct contained in King IV can be applied to practitioners, the practitioner has a duty to ensure that they conduct themselves ethically and effectively and should ensure that the company in distress is governed as such (Principle 1 of King IV; IoDSA, 2016:43). King IV measures this "ethical and effective" behaviour within the context of the following:

- *Integrity*: This implies that, in accordance with King IV, the practitioner should act in good faith and in the best interest of the distressed company and avoid conflicts of interest. The ethical behaviour of the practitioner goes beyond mere legal compliance and should be the champion of an ethical culture within the distressed company (IoDSA, 2016: 43).

- *Competence*: The practitioner should also ensure that they have sufficient working knowledge of the organisation, the industry of the organisation, the context and the applicable laws, rules, codes and standards in which it operates. The practitioner should act with due care, skill and diligence and must take diligent steps to be informed about a matter before making decisions (IoDSA, 2016: 43).
- *Responsibility*: The practitioner should assume the responsibility of steering and setting the direction of the organisation (so as to ensure that the company emerges successfully from business rescue, measured by the success outcomes discussed in Chapter 2). They should approve policy and planning, oversee and monitor the implementation and execution of the planning and ensure accountability for performance. The practitioner should, in a responsible manner and in the best interest of the organisation, take risks and “capture opportunities”. The practitioner must, furthermore, take the responsibility of anticipating and preventing negative outcomes of the organisation’s activities and devote sufficient time to attending and preparing for meetings (IoDSA, 2016:43).
- *Accountability*: The practitioner should take responsibility for the execution of his actions, even if these responsibilities have been delegated (IoDSA, 2016:43).
- *Fairness*: The practitioner should adopt a stakeholder-inclusive approach during the process and the organisation must be rescued in such a way that it does not adversely affect the natural environment, society or future generations (IoDSA, 2016:44).
- *Transparency*: The practitioner should be transparent in the way in which they conduct their duties and obligations – not only to members of the organisation but to external stakeholders, too (IoDSA, 2016:44).
- While stepping into the shoes of the pre-existing management of the distressed company, the practitioner should govern the ethics of the organisation in such a way that the organisation supports an ethical culture throughout (Principle 2 of King IV; IoDSA, 2016:44).

Principle 7 of King IV requires that the governing body of an organisation should, *inter alia*, be independent, to discharge its role and responsibilities effectively and objectively (IoDSA 2016:50). So, too, should a practitioner be independent, to ensure that they discharge their duties and responsibilities objectively.

King IV describes ‘independence’ (IoDSA 2016:13) as:

...the exercise of objective, unfettered judgement. When used as the measure by which to judge the appearance of independence... it means the absence of an

interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision-making. (See also “conflict of interest”.)

Furthermore, a conflict of interest, as defined by King IV (IoDSA 2016:11):

...occurs when there is a direct or indirect conflict, in fact or in appearance, between the interests of such member and that of the organisation. It applies to financial, economic and other interests in any opportunity from which the organisation may benefit, as well as use of the property of the organisation, including information. It also applies to the member’s related parties holding such interests.

It is recommended (in accordance with Principle 7 of King IV), that the practitioner submits to stakeholders a declaration of the financial, economic and other interests held by themselves and related parties (see definition of “related parties” on p. 16 of King IV) and should always disclose any possible conflict of interest. If the practitioner’s possible conflict of interest can be viewed as such by a reasonable and informed third party who makes the conclusion that the conflict is likely to unduly influence or cause bias in decision-making (IoDSA 2006:51), then it is submitted that the practitioner should either recuse themselves from the conflict or the rescue.

The principles discussed in this section (Chapter 4.1), pertaining to the standard of the practitioner’s actions, can be applied to the practitioner’s conduct throughout the remainder of this chapter, keeping this in mind during the discussion that follows.

4.2 Commencing business rescue

A company can be placed under business rescue by way of two distinct procedures:

(i) In terms of Section 129 of the Act: Voluntary initiation by resolution

A board of directors (of a distressed company) can resolve that the company commence business rescue proceedings, should the board have reasonable grounds to believe that the company is financially distressed, *and* there appears to be a reasonable prospect of rescuing the company; or

(ii) In terms of Section 131 of the Act: Compulsory initiation by court order

An affected person may apply to Court for an order placing the company under supervision. Such an application must satisfy the Court that the company is financially distressed or that the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or that it is otherwise just and equitable to do so for financial reasons; and there is a reasonable prospect of rescuing the company (Meskin *et al.*, 2011:18.4.3).

A company can also be placed under business rescue by a court “upon application for relief from oppressive or prejudicial conduct or conduct that unfairly disregards the interests of the applicant” (Meskin *et al.*, 2011:18.4.3).

The term “financial distress” refers to the situation where a company is reasonably unlikely to pay all its debts (as and when they fall due) within the ensuing six months (referred to as “commercial insolvency” or the “cash flow test”) or where it appears that the company will become insolvent within the ensuing six months (referred to as the “balance sheet test”) (Jones, 2017; Section 128(1)(f) of the Act). Jones (2017) further notes that the balance sheet test has not yet been considered in South African case law. However, foreign case law has taken into consideration the wider commercial context beyond the mere assets and liabilities when considering the balance sheet test.

There is a reasonable prospect of rescuing the company where the affairs of the company are restructured in such a manner that:

- (i) The company will likely be able to continue doing business on a solvent basis; or
- (ii) The creditors will receive a better dividend than they would if the company were to be liquidated (Jones, 2017).

The SCA found in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* that the prospect of rescuing the company must be based on reasonable grounds. In *PropSpec Investments v Specific Coast Investments Limited*, the court further found that there must be a “factual foundation” to believe that there is a reasonable prospect to rescue the company. Jones (2017) efficiently sums it up in stating that “a mere speculative suggestion is not enough” and that “sufficient facts must be placed before the court to ensure that the court can determine whether a reasonable prospect has been shown”.

The “affected person” in Section 131 of the Act, refers to the person having *locus standi* to institute the court proceedings. It could include either a shareholder, creditor, a registered trade union or an employee (Jones, 2017).

Once the company resolution is passed or a court has made an order placing the company under business rescue, the business rescue practitioner is appointed.

Guidance note:

- (i) As discussed above, directors have a duty to act in the best interest of the company, and as such, the board must continuously assess whether the company is in financial distress by applying the balance sheet and cash flow tests, as defined above (IoDSA, 2009:33). By ensuring that business rescue commences sooner rather than later, the degree of financial stress will be reduced, resulting in better chances of a successful business rescue (IoDSA 2009:3);

- (ii) Assessing whether the company is in financial distress, however, goes further than an “after the fact” financial assessment. Other determinants (early warning signs) that may be used by the board and management to assess whether the company is in distress, include considerations relating to (Pretorius & Holtzhausen, 2013:478):
 - (a) Poor management, poor decision-making and the absence of management knowledge. These instances may include blame-shifting, impulsiveness or inflexibility to change, inability of management to recall management information and management’s lack of skill or qualifications.
 - (b) Financial issues, which may include disproportionality in labour cost for the type of business or unrealistic cash flow projections, high risk dependence, dependence on one project, late submission of financial information, sensitivity to tax issues, the absence of internal financial analysis, creative accounting, slowing down and delaying payments to creditors and unjustified executive remuneration and dividend payouts.
 - (c) Strategic issues like overambitious growth strategy, poor strategy for dealing with inefficiencies and the product and market and poor strategy to deal with product life-cycles and decline and the lack of synergy between strategic issues and operations.
 - (d) Operational and marketing issues, which may include lack of knowledge of new technology, failure to respond to competitors and market forces, declining advertising and poor service or products.
 - (e) Banking issues like stop payments on creditor obligations and returned cheques, rounded amounts paid to creditor, overdraft advance funding and funding structures that do not compliment the business model.
- (iii) If found that the company is in financial distress, the board must consider the advantages and disadvantages of either saving the company through workout, sale, merger, compromise with creditors or business rescue (IoDSA, 2009:33). The disadvantage of business rescue is that the process is an expensive avenue, considering costs like legal fees and the fees of the practitioner. The advantage is that the process is formal and official by nature and cannot break down like informal workouts (IoDSA, 2009:2).
- (iv) The board has an obligation to consider business rescue but should it decide not to enter business rescue voluntarily (by passing a resolution to that effect), it must inform the affected persons of its decision and provide an explanation for its decision (Section 129(1) and (7) of the Act; IoDSA, 2009:5). Not entering business rescue, however, may result in an affected party (shareholders, employees or creditors) applying to court to have the company placed under compulsory business rescue or liquidation (IoDSA, 2009:5).

- (v) As stated above, the Act (in Section 129(3)) requires that the company must, within five days of adopting the resolution to place the company under business rescue, publish a notice of the resolution in the prescribed manner to every affected person. The notice must contain the grounds upon which the decision was taken. Should this notice not be published to every affected person or be published later than five days, the resolution automatically lapses and, for the period of three months, the board will not be able to enter business rescue again by resolution (Section 129(5)(a) and (b) of the Act; IoDSA, 2009:6).

4.3 Appointment of the business rescue practitioner

With the appointment of the business rescue practitioner, the business rescue process is set in motion. During the process, the practitioner has obligations and duties imposed on him by the Act to meet the objectives of business rescue envisaged by the Act (Jones, 2017).

Section 128(1)(d) of the Companies Act defines the business rescue practitioner as a person or persons appointed in terms of the Act to “oversee a company during business rescue proceedings”. The practitioner’s “skills set is unique, in that the practitioner must oversee and direct the ongoing conduct of the company while at the same time attend to the restructuring of the affairs and business of the company” (Levenstein, 2015:394). Effectively, the practitioner is put in full management control of the company to finally put forth a business rescue plan (that creditors will approve) and achieve the objectives envisaged by Chapter 6 of the Act (Levenstein, 2015:394).

Section 141(1) of the Act requires a practitioner, once appointed, to immediately commence an investigation into the company’s affairs. The Act requires a practitioner to start with this investigation “as soon as practicable” and then, within 10 days of appointment, the practitioner must report to the creditors and employees on the prospects of rescuing the company.

Only once the practitioner has concluded its investigation, can they decide whether the company can be rescued or not and then act accordingly.

The practitioner is central to the business rescue process and is connected to every step of the rescue process. The practitioner can be described as a “disproportionate influencer” in the outcome of the business rescue process and, consequently, his or her obligations and duties should receive optimal attention (Pretorius, 2015:78).

As business rescue is initiated by way of two separate procedures, it follows that the appointment of the practitioner is initially done by two distinct procedures:

- (i) When the company is voluntarily placed under business rescue, the distressed company must appoint a practitioner within five days after the resolution (to place the company under business rescue) has been adopted. Such a practitioner must also consent in writing to

his/her appointment within the said five days (Section 129(3)(b) of the Act). The appointment must then be ratified by the CIPC.

Should an application be brought to court to set aside the appointment of a practitioner (for reasons set out in Section 130(1)(b) of the Act), the court must appoint an alternative practitioner. Such a practitioner must be recommended by, or be acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court (Section 130(6) of the Act).

- (ii) When the company is placed under compulsory business rescue, the affected party (the applicant) must nominate a practitioner in its application to court and request the court for an order appointing the practitioner as an interim practitioner (Section 131(5) of the Act). The interim practitioner immediately (once court has appointed them as such) holds office until the appointment has been ratified at the first meeting of creditors (Jones, 2017).

Guidance Note:

- (i) When appointing the business rescue practitioner, the board must be careful not to appoint one whom the affected persons may consider to be “friendly” to the distressed company. If so, the practitioner’s appointment may be challenged (Section 130(1) of the Act) or the credibility of the business rescue plan may be affected (IoDSA, 2009:10). Affected parties must regard the practitioner as independent, skilled and objective (IoDSA, 2009:10).
- (ii) Should the practitioner cease to act as such, the company or affected person who nominated them must appoint a new practitioner, subject to the right of an affected person to bring an application to object to such an appointment (Section 139(3) of the Act). This provision only applies when a practitioner was appointed during voluntary business rescue (Meskin *et al.*, 2011:490).
- (iii) Furthermore, “person” is defined by the Act to be a juristic person and, therefore, a company may also be appointed as a practitioner (Meskin *et al.*, 2011:453).

4.4 Experience, qualifications and regulation of the practitioner

Section 138(1) of the Act, *inter alia*, states that:

“A person may be appointed as the business rescue practitioner of a company only if the person

- (a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission;
- (b) has been licensed as such by the Commission in terms of subsection (2)”.

A practitioner qualifies as such by being *either* a member of various accredited professions *or* licensed by the CIPC. The regulations of the Act make it apparent that practitioners, who are members of accredited bodies, do not have to apply to be licensed to act as practitioners (see Regulation 126(1)(b) of 2011 and Levenstein, 2015:397 in this respect).

Previously, a nominated practitioner would apply to the CIPC on an *ad hoc* basis as the practitioner for a company going into business rescue. In instances where a company would be placed under voluntary business rescue, the practitioner would submit to the CIPC an application motivating his appointment. The CIPC would then appoint the practitioner if the application met the requirements of the Act. If the practitioner was appointed by the court in terms of Section 131(5) of the Act, the appointment was an interim appointment and the CIPC would also then appoint the practitioner as an interim practitioner (on the same basis as voluntary rescue). The last-mentioned appointment would then be subject to ratification at the first meeting of creditors (Levenstein, 2015:398).

Since 1 October 2017, attorneys, accountants, liquidators and business management professionals, who wish to practice as business rescue practitioners, must register as such via their (SAQA accredited) professional bodies (like the LSSA, CIMA, SAICA and SARIPA). These professional bodies are required to apply for SAQA accreditation via the CIPC to accredit their members. The last-mentioned application must set out compliance with professional rules and disciplines (Fin24, 2017). The new procedure provides for oversight by these professional bodies to hold practitioners accountable. They are now bound by a professional disciplinary code, whereas a disgruntled party previously had to turn to the courts for assistance (Fin24, 2017).

In clarifying the practitioners' licensing, the CIPC issued a practice note in September 2018. It stated that the Act does not permit the appointment of individuals who are not members in good standing of the legal, accounting and business management professions. As such, only members who are in good standing of these professional bodies will be licensed. However, the practice note also states that non-members' licences will expire as indicated on their licences, unless they affiliate with professional bodies (CIPC, 2018).

The practitioner's experience is somewhat contentious. The Act requires a practitioner to have "some experience of business management" but the question is whether this is enough. Can it be said that if one is qualified as an accountant, attorney or engineer with "some experience in business management" one has the skills set to rescue a distressed company? In fact, research has proven that it takes considerable skill in strategy and business management to develop and implement a business plan successfully (Levenstein, 2015:400).

Furthermore, liquidators may consider business rescue a normal extension of their profession (Levenstein, 2015:401) but Loubser submits that "liquidators are financial undertakers, not rescuers" (Loubser, 2013:137). They are, therefore, skilled in selling off a business on a

piecemeal basis, whereas a practitioner is focused on rescuing a company (Levenstein, 2015:401).

Guidance note:

(i) A practitioner must apply to the CIPC for a licence to act as a business rescue practitioner. Only members who are in good standing with the following professional bodies are eligible to apply for licensing (CIPC 2018):

- The Law Society of the Northern Provinces (LSNP);
- The Law Society of KwaZulu-Natal (KZNLS);
- The Cape Law Society (CLS);
- The Law Society of the Free State (LSFS);
- The Institute of Business Advisors NPC (IBASA);
- Turnaround Management Association (TMA);
- South African Restructuring and Insolvency Practitioners Association NPC (SARIPA);
- The Chartered Institute of Management Accountants (CIMA);
- Institute of Accounting and Commerce (IAC);
- South African Institute of Professional Accountants (SAIPA);
- Southern African Institute for Business Accountants (SAIBA);
- South African Institute of Chartered Accountants (SAICA);
- Association of Chartered Certified Accountants (South Africa) NPC (ACCA).

(ii) When applying for a licence, the applicant is required to submit, *inter alia*, a letter confirming that the practitioner has the capacity to attend to the business rescue proceedings and must further declare that he or she is independent and has no relationship with the company.

The practitioner may not have any direct or indirect relationship with the company, senior management or any director and may not have relationships with any company that is engaged in significant business with the company under business rescue.

The practitioner must, furthermore, have the competency to identify and manage any conflicts of interest and ensure that their independent judgement is not compromised. The practitioner may, therefore, not pursue personal interests or exploit opportunities from the business rescue process. They may also not demand or accept any inappropriate benefits from third parties and must recuse themselves when a conflict of interest is unavoidable (see chapter 3.2.6 and 4.1.3 above).

(iii) The business rescue practitioner's duty of care is similar to that of a director of the company once appointed (see par 4.1 above) and, as such, must act in the best interest of the company under business rescue. For this reason, the practitioner must ensure they have

the capacity to effectively deal with the appointment and not overcommit to too many business rescue processes at the same time.

Further competencies of the practitioner will be discussed below as they relate to the practitioner's various obligations and duties.

4.5 Duties, obligations and powers of the business rescue practitioner

Once appointed, the practitioner must, in a nutshell, immediately investigate the affairs of the distressed company and thereafter hold the first meeting with creditors and employees (during which they inform them whether they believe there is a reasonable prospect of rescuing the company). Most importantly, the practitioner is now in full management control of the distressed company and must delegate their powers. They must also engage with various stakeholders and the existing management of the company to put forward a business rescue plan.

4.5.1 Investigation of company affairs

Section 141(1) of the Act states that

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

As stated above, the practitioner must immediately commence an investigation into the company's affairs. The phrase "as soon as practicable", it is submitted, is a misnomer as the practitioner does not really have much of a choice but to immediately commence this investigation considering that he or she must report on the prospects of rescuing the company to the creditors and employees just 10 days after their appointment. Upon completion of the investigation, the practitioner must make a conclusion as to whether the company is distressed and, if so, whether the company can be rescued or not, and:

- (i) devise a business rescue plan if the company can be rescued;
- (ii) apply to court for the liquidation of the company if the company cannot be rescued; or
- (iii) apply to court to have the business rescue order rescinded, should the practitioner find that the company is not distressed (Meskin *et al.*, 2011:496).

Throughout Chapter 6 of the Act, it mentions "a reasonable prospect". A "reasonable prospect" must be assessed at various stages and by various role players, i.e. by directors in their pre-assessment before filing for business rescue with the CIPC, by practitioners before reporting to creditors and by the court in the event that an interested party applies to court for business rescue (Braadvedt, 2017a). What exactly constitutes a "reasonable prospect" (for success or rescuing

the company, as the case may be,) is still not clear, however, as the Act does not define “a reasonable prospect” (Levenstein, 2015:601). Consequently, the task of defining the same is left to the courts (Meskin *et al.*, 2017:461). In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd and Others* the SCA, held that

I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on ‘reasonable’ – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough.

Braatvedt (2017a) is of the opinion that an assessment into whether a “reasonable prospect” exists requires a subjective approach based on proven objective facts and must be assessed “through the eyes of a reasonable businessman” – whether “a reasonable, experienced businessman in that particular field would conclude that there is a reasonable prospect of success given the objective proved and not disputed facts”. He further submits that the business should be assessed from a venture capital position – would a venture capitalist invest money in the business? One must be able to conclude that there is a reasonable prospect (of the business being able to succeed) and that it would make commercial sense for the business to continue operating.

Guidance note:

Pretorius (2014:8,10) refers to the initial investigation to assess whether there is a reasonable prospect of rescuing the company as a “feasibility analysis”. In assessing whether a reasonable prospect exists, it is advisable for the practitioner to investigate for elements of a potentially viable business. These may include demand, capacity to generate an economically profitable model by virtue of its existing resources, processes and assets, cash generation and the existence of fatal flaws or constraints to the feasibility analysis (Pretorius, 2014:8,10). The analysis also relies on clarity on the reasons for financial distress and the practitioner’s perception of whether operations exist and whether they can be maintained (Pretorius, 2018:10).

Making a judgement call on whether there is a reasonable prospect usually relies on the initial information gathered before the first meeting with creditors, motivating the practitioner’s “perceptions, insights, experience and intuition” (Pretorius, 2014:8 and 2018:10).

A feasibility analysis is often marred by a “data integrity liability”, which can then be verified when the practitioner pursues further due diligence when preparing the business rescue plan (Pretorius, 2014:9,10).

4.5.2 Director's cooperation with practitioners, management of the company and delegation of powers

The practitioner cannot determine whether a company is financially distressed or there is a reasonable prospect of rescuing the company alone. The practitioner requires the assistance of the directors, management and creditors, considering that they must investigate the affairs of the company, the business, property and the company's financial situation. Section 141(2)(c) of the Act also requires the practitioner to reach conclusions in respect of voidable transactions or omissions of any of the directors to perform their duties. They must take the necessary steps to remedy these matters and direct management to take appropriate steps. This necessarily implies that directors cooperate with practitioners.

The practitioner is in full management control of the distressed company. The term "full management control" does not refer to the day-to-day running of the company, however, the "business rescue practitioner would sit alongside the existing directors in the role of supervisor to the board and management" (Levenstein, 2015:406).

Other than the duties and obligations that the Act imposes on the practitioner, the practitioner also has the authority to delegate responsibilities, powers or functions to persons serving on the board or pre-existing management of the company (Section 140(1)(b) of the Act). The authority to delegate is a useful tool during the process as the directors and pre-existing management are familiar with the operations of the company (Delport *et al.*, 2017:491). However, Levenstein (2015:407) warns that:

The problem with this is that the practitioner must delegate what is, in fact, a financial (or technical) disaster to a person who was, in all likelihood, partly responsible for the demise of the company in the first place.

The practitioner has ultimate control over the management of the company's business and that the management of the company is overseen by the practitioner (Levenstein (2015:408)). The existing management and directors of the company are obligated to continue the exercise and functions of director and/or manager. However, this is subject to the approval of, and in accordance with, the reasonable instructions of the practitioner (Sections 137(2)(a) & (b) of the Act).

When exercising any management function in the company (in accordance with the reasonable instructions of the practitioner) as envisaged in Section 137(2)(b), the instructed director is then relieved from their duties contained in Section 76 and their liabilities set out in Section 77, save for Section 77 (3)(a), (b) and (c) (Section 137(2)(d) of the Act), and remains bound by the requirements of Section 75 of the Act concerning their personal financial interests (Section 137(2)(c) of the Act).

Levenstein (2017:418) refers to the business rescue as a “hybrid regime” as the existing board and management remain functional, under the supervision of the practitioner, and the “board conducts ‘business as usual’ but subject to the supervision of the business rescue practitioner” (Levenstein, 2017:419).

Section 66(1) of the Act states that

The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company...

Section 137(2) of the Act recognises a distinction between the functions of a director, based on his office as director (such as the attendance of board meetings), and the functions relating to the management of the company – the so-called “business affairs” or “running of the company”. It is further submitted that, when “acting to the outside, as agents etc.”, these actions amount to “the exercise of management powers” and the removal of these powers is logical (Meskin *et al.*, 2017:482 (57-58)). Delpont further submits and concludes that (Meskin *et al.*, 2011:482(58)):

...if an act is purely an internal act by the directors as an organ of the company, and that act is not subject to the restrictions or conditions of e.g. 137, or exclusively within the powers of the business rescue practitioner...the directors are exercising their functions as directors in terms of sub-s (2)(a)

and that

Actions to the outside, e.g. as agents for the company, will be the management of the company regulated by s 140 and this will be exercised by the business rescue practitioner unless delegated to the directors by the business rescue practitioner.

Should the board or any of the directors take any action on behalf of the company, which action requires approval of the practitioner, the action is void unless approved by the practitioner (Section 137(4) of the Act). In this respect, Levenstein (2015:410) submits that:

The Act does not specify which ‘decisions or actions’ would require practitioner approval. It leaves this open and, strangely, to the discretion of the board. It is submitted that all material decisions (with reference to the memorandum and articles of the company) would require the consent and approval of the practitioner.

Section 137(3) of the Act envisages a general obligation in terms of which the directors of the distressed company “*must* attend to the requests of the practitioner at all times and provide the practitioner with any information about the company's affairs as may reasonably be required.” (Meskin *et al.*, 2017:497). However, whereas Section 137(3) creates a general obligation, Section 142 is more specific about the information that must be provided to the practitioner. This will assist

the practitioner in determining whether the company is, in fact, distressed and whether there is a reasonable prospect of rescuing the company (Meskin *et al.*, 2017:497).

Braatvedt (2017b) submits that the practitioner,

after having received these documents and information, cannot be expected to fully appreciate all the financial nuances of the company and the performance of the company...If the business rescue practitioner (BRP) finds that there are extraordinary items in the financial statements or if the previous or latest audit was qualified, the question arises whether the BRP has a duty to research these factors...the BRP cannot be expected to 'finesse' the hidden information nor can the BRP be expected to wave a magic wand and undo or uncover hidden game-changing financial issues concealed by the pre-business rescue directorate or management (emphasis added).

Unfortunately, Chapter 6 does not make a similar provision to formally interrogate directors and management of the company as can be found in Section 417 of the 1973 Companies Act. This provision allows a creditor or liquidator to convene an enquiry or financial investigation into the affairs of the company. Thus, there is no provision in the (new) Companies Act that enables the practitioner to force directors or management to cooperate or interrogate them formally. This hampers the practitioner's ability to properly determine whether there is a reasonable prospect of rescuing the company (Levenstein, 2015:415). However, should a director fail to comply with any requirement contained in Chapter 6 of the Act, or impede the practitioner from performing their powers and functions, managing the company or the development and/or implementation of the business rescue plan, the practitioner may apply to court for an order to remove the director from office (Section 137(5) of the Act).

Section 140(1)(c)(ii) of the Act permits the practitioner to appoint a person as a member of the management of the company, whether there is a vacancy for such an appointment or not and may appoint an expert in a field as an advisor. These appointments are subject to the independence envisaged in Section 140(2) of the Act. Should such a person have a relationship, of any nature, with the company that might cast doubt on such an adviser's impartiality or integrity, the appointment must be approved by a court.

Levenstein (2015:407) submits that this ability

is fundamental to the successful implementation of the business rescue plan. Practitioners are often faced with a company with either no or dysfunctional management and unreliable or incompetent information. The practitioner, in these circumstances, should act prudently and appoint additional management members, industry specialists, forensic experts and legal advisors as soon as possible.

The practitioner oversees the operations of the company in broad terms and should not attempt to deal personally with every situation that arises during the rescue, as juggling too many situations will inevitably lead to disaster. That is why the practitioner must get an “upfront and categorical commitment and support from the existing directors and management of the company” to assist him in his rescue endeavours before taking on the rescue (Braadtved, 2017b).

Guidance note

According to Pretorius (2018:9-10), “management control” includes variables, which are managerial control and control of the board, financial control, control over employees and clarification of affected parties’ roles. Furthermore, management control is contingent on communication and conference with affected parties and sharing the implementation steps and taking control of the change management process (Pretorius, 2018:9). Therefore,

- (i) The practitioner should consider what responsibilities, powers and functions they will delegate during the rescue and to whom they will be delegated. This necessarily requires a holistic assessment of the key individuals and key functioning areas. If, during such a feasibility analysis, the practitioner realises that certain individuals are adversary in nature or responsible for the financial distress, they will be better able to assess what tasks to delegate and to whom, where they may be hampered and where there is a need to appoint external advisers.

The practitioner should, however, keep in mind that appointing external advisers and filling positions with experts will come at an additional cost to an already distressed company.

This analysis will also assist in avoiding overlapping that may frustrate the process. To this end, the practitioner should clearly articulate everyone’s role. In so doing, misunderstandings are reduced, and expectations can be managed (IoDSA, 2009:13).

4.6 The Business rescue plan

Section 150 of the Act makes provision for the proposal of a business rescue plan. The proposal (at a meeting held in terms of Section 151 of the Act) and implementation of a plan are the most important aspects of the entire process (Meskin *et al.*, 2011:517). However, “the development of a plan cannot be a goal in itself in respect of business rescue, it can only be the means to an end”. The plan, if approved, offers the distressed company a second chance. (Levenstein, 2015:497).

Section 150(1) requires that a practitioner must prepare a plan “after consulting the creditors, other affected persons, and the management of the company”.

The Act does not state what exactly a plan must contain but it does provide a framework (in Section 150(2)) within which a plan can be developed. It also provides for the information to be

contained in such a plan to ensure that the stakeholders can make an informed decision before voting on its acceptance or rejection (Meskin *et al.*, 2011:517-518; Levenstein, 2017:497). Importantly, Section 150 (2)(b)(vi) requires a practitioner to set out the benefits of adopting the plan versus the benefits if the company were to be placed under liquidation. This information is the most fundamental aspect of the plan as creditors would want to be informed of their alternatives with regards to “comparative dividends”, which is crucial for creditors to vote for or against the plan (Levenstein, 2017:500).

Considering that the objectives of business rescue are to either turn the company around or provide a better return to creditors (than in liquidation), it naturally follows that the Act would contemplate two different types of plans, being a turnaround plan or (as Levenstein refers to it) a “controlled wind-down proposal” (2017:503), which is nothing more than a “disguised liquidation”. The turnaround plan, on the other hand, is more in line with the objectives of business rescue, i.e. to save the entity by employing various strategies to achieve such a result. However, this option is obviously more complex than the above-mentioned (Levenstein, 2015:504).

Section 150(5) of the Act states that

- (5) The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by
 - (a) the court, on application by the company; or
 - (b) the holders of a majority of the creditors’ voting interests.

The Act does not lay down any consequences for the failure to publish a plan timeously (Jordaan, 2015). In *D.H. Brothers Industries (Pty) Ltd v Gribnitz N.O. and others*, the court held that the business rescue proceedings are terminated if a plan is not published within the time provided for in the act or an extended time (as the case may be). However, in *Shoprite Checkers (Pty) Ltd v Berry Plum Retailers CC and others*, the court held that a failure to publish the plan would not have the effect of the business rescue proceedings terminating. If that was the legislature’s intention, such an express provision would be included in the Act (Jordaan, 2015).

The Court, in the *Shoprite* matter, further held that holders of the majority of the creditors’ voting interests may consent to an extension of the time frames envisaged in Section 150(5) of the Act and that such an extension *must* be approved by the holders of the majority of the creditors’ voting interests. To this end, the court found in *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd* that “the Act does not expressly require a meeting to be held to extend the time periods for the publication of the business rescue plan” (Jordaan, 2015).

Jordaan (2015) further, and not without merit, submits that

judicial harmony is still to be reached in respect of certain key aspects of the Act... most particularly those pertaining to the consequences of a failure to timeously publish a business rescue plan and the manner and form in which the prescribed publication period can be extended.

Guidance note

- (i) When “consulting”, the practitioner must consult in the true sense of the word and not merely inform by making sufficient information available to the affected party, extending an invitation to give advice and genuinely receive the advice, and not treating this step as a mere formality. They must allow adequate time for the affected party to prepare and make adequate time available for the affected party to give advice and, finally, take adequate time to consider such advice (Meskin *et al.*, 2011:519-520). The courts support the view that “as a precursor to distributions made pursuant to a plan to creditors and shareholders, a proper and effective exchange of information must occur to enable affected persons to properly interpret and consider a proposed business rescue plan” (Levenstein, 2017:498).

Meeting with stakeholders enables the practitioner to take control of the company, clarify the roles of stakeholders, improve collaboration between themselves and stakeholders and pre-existing management and the board and employees. It also opens communication channels between the practitioner and stakeholders. Engaging with stakeholders enables the practitioner to verify contracts and get involved with the operations of the company, too. (Pretorius, 2014:11).

- (ii) Before the practitioner can embark on drafting a rescue plan, he or she should first do a viability analysis (due diligence).

A viability analysis involves reviewing and verifying information pertaining to, *inter alia*, the affairs of the company, the business, property and the company’s financial situation to overcome “data integrity liability” (Pretorius, 2018:10). During this analysis, there must be a comparison with “liquidation benchmarks” (Pretorius, 2018:10) and a review must be done of the “business model (profit), financial model (cash), the balance sheet, legal drivers (contract, securities and any other relevant material factors or caveats) that may influence viability of the rescue plan” (Pretorius, 2013:19). The practitioner should also investigate the company’s management and finances (prior to entering business rescue) and the bank’s role and involvement with the management of the company and whether it would be necessary to employ forensic investigation (Pretorius, 2018:10). The viability analysis verifies the assumptions made during the feasibility analysis (Pretorius, 2018:10).

The findings on whether business rescue is viable for the distressed company must then be incorporated into the business rescue plan to allow stakeholders to make an informed decision when voting on the plan.

- (iii) In preparing the business rescue plan, the practitioner should include all variables, indicate that all alternatives were investigated and meaningfully describe the “point of arrival” (Pretorius, 2018:11). The plan should also contain an appropriate sustainable strategy for addressing the symptoms that had led to the rescue. In addition, the plan should be executable (Pretorius, 2018:11).
- (iv) The business rescue plan should be able to demonstrate the feasibility and serve as a contractual obligation. It should also be a means of communicating with stakeholders, enable transparency and attract and secure post-commencement financing (Rosslyn-Smith, 2014:67). These concepts are discussed in more detail below. This discussion is but a summary of the findings of Rosslyn-Smith (2014), however.
- (a) The plan should serve as a feasibility declaration, in other words, the plan must “explain how the business will remain operational, be successfully reorganised and how implementation of the plan will be supervised, with reference to a timeframe detailing its execution” (Rosslyn-Smith, 2014:68,77). This section of the plan should contain:
- A background of the business that offers insight and context to the company’s financial distress. It must also include the actions already taken by the practitioner and how these actions contribute to the turnaround strategy (Rosslyn-Smith, 2014:77).
 - A feasibility analysis that addresses whether there is still a viable business. The factors critical for success should be identified and the associated risks must also be highlighted. The margins for feasibility must also be highlighted to assist parties in knowing when to terminate the process. The analysis must also assess the market to assist in assessing whether a market still exists and how it can be exploited (Rosslyn-Smith, 2014:78).
 - The turnaround strategy that describes how the plan will be executed. This section must be substantiated by credible sources like source documents and external data (i.e. industry norms and industry benchmarking) (Rosslyn-Smith, 2014:78).
 - A cash flow analysis. Considering that the distressed company is suggestive of cash flow constraints, a cash flow statement will be an integral part of the plan and decision-making in general. A cash flow projection is one of the most important elements of the plan (Rosslyn-Smith, 2014:79).
 - A sensitivity analysis, which accompanies the alternative scenarios incorporated into the cash flow forecasts. This analysis can be done by using various strategic planning tools, such as a SWOT analysis and risk assessments. “Such critical components should be evaluated and incorporated in the sensitivity analysis in order to minimise

the risk foregone by the sure monetary (rand) amount offered in liquidation” (Rosslyn-Smith, 2014:79).

- Addressing the company’s reputation with suppliers, customers and staff, considering the stigma attached to business rescue and the reputational damages following from business rescue. This phenomenon is referred to as ‘business rescue legacy’. The plan should address the mechanisms to be implemented that will counter a negative connotation and, in so doing, ensure long-term partners (Rosslyn-Smith, 2014:80).
 - A section addressing leadership. Addressing leadership relates to the practitioner and the new or pre-existing management and directors. The practitioner should use this opportunity to instil confidence in his position and, therefore, should address the practitioner’s roles and capabilities. As far as the pre-existing management and board are concerned, the practitioner should address unlawful or careless conduct (in terms of Section 141(c) of the Act) and fraud or reckless trading. This section should also include an explanation of leadership roles after substantial implementation of the plan (Rosslyn-Smith, 2014:80).
- (b) The plan should serve as a communication medium for, and provide, adequate information for the decision-making process and should be capable of effective interpretation by all stakeholders so as to make an informed decision on whether or not to vote for the plan (Rosslyn-Smith, 2014:80; Section 150(2) of the Act). The plan should be capable of sufficiently informing creditors and persuading key stakeholders of the potential of the business (Rosslyn-Smith, 2014:68). The following is important for the purposes of the plan serving as a communication medium:
- Engaging with stakeholders before the publishing of the plan assists the practitioner in “assessing the knowledge and expectations of the affected parties beforehand, helps the practitioner to identify the style, language and form to be used.” By engaging, the practitioner will be best able to manage expectations, educate stakeholders and prepare stakeholders for what’s to come (Rosslyn-Smith, 2014:81)
 - The plan will be presented to stakeholders with different levels of knowledge and language skill. Therefore, the executive summary should be understood by these various persons, however, the remainder of the plan should be written as professionally as possible, which may include legal and financial terms and terminology understood by varying relevant industries (Rosslyn-Smith, 2014:81).
 - The plan should communicate a strategic message that finally persuades stakeholders to vote for the plan and its proposed strategy. The plan should highlight key points,

address rumours and areas of concern. The plan should contain a positive strategy yet be realistic (Rosslyn-Smith, 2014:82).

- The plan's intended effects on all stakeholders must be addressed, which include creditors, shareholders and employees. Where employees are concerned, change management and uncertainty should be addressed. As far as creditors are concerned, intricate details shouldn't be discussed unless they have substantial influence on the rescue strategy. Clarification of all claims should be included, however (Rosslyn-Smith, 2014:82).
 - The plan should be easy to read and, as such, should be sectioned and indexed. Helpful and detailed documents, like the minutes of meetings and its relevant documents should also be attached to assist in thorough assessment (Rosslyn-Smith, 2014:83).
- (c) The business plan becomes a binding document upon its approval and, as such, should serve as a contractual obligation. The plan should, therefore, contain all the relevant information for decision-making and to "prevent legal action against the process and the practitioner" (Rosslyn-Smith, 2014:86,68). "The dynamic nature of the plan affords it the ability to legally bind key resources and secure ongoing support and responsibilities from individuals". Considering this, areas of the turnaround strategy can be enforced (Rosslyn-Smith, 2014:86).
- The plan is based on, and should contain, a number of reasonable assumptions, together with the risks associated with these assumptions. Structuring the plan in this manner will mitigate liability concern. Drafting the plan in a manner that makes provision for various scenarios will allow for recourse, without having to default on the primary strategy (Rosslyn-Smith, 2014:87)
 - The plan should offer measurable milestones and objectives so the progress can be monitored. It should facilitate substantial Implementation – it should contain and define performance indicators linked with the feasibility study to indicate whether the rescue is still viable. "Substantial implementation" should also be defined as it can reduce the practitioner's liability (Rosslyn-Smith, 2014:87).
 - During the plan's implementation, the practitioner acts as a facilitator and the stakeholders have to collaborate to achieve the plan's objective. The plan should, therefore, secure the support of these stakeholders by "employing contractual subordination, clarifying relationships and detailing penalties for breach of contract" (Rosslyn-Smith, 2014:88)
- (d) The plan should enable transparency – stakeholders should be able to understand the proceedings and assess their risks, and should reveal relevant information

essential to decision-making. Ensuring transparency will encourage creditor confidence (Rosslyn-Smith, 2014:69,84).

The practitioner may withhold information that may be detrimental to the rehabilitation of the company but it must still contain adequate information to serve as a decision-making document (Rosslyn-Smith, 2014:69 and 84).

The plan must include a certificate that the information contained in it is accurate, complete and up to date. Estimates should also be made in good faith and based on factual information and assumptions. The plan should expose fraudulent activities and misappropriation by directors (or at least mention that it is being dealt with) (Rosslyn-Smith, 2014:85). Corporate governance should be encompassed throughout the plan (Rosslyn-Smith, 2014:86). The plan should:

- be able to attract and secure post-commencement finance the practitioner needs to ensure that the company continues its operations after commencement of business rescue (Rosslyn-Smith, 2014:69,88);
- stipulate the benefits and disadvantages and the effects that funding will have on the business and the interests of affected parties (Rosslyn-Smith, 2014:69);
- include detailed information on the funding required from entering business rescue until the proceedings come to an end (Rosslyn-Smith, 2014:88).
- express funding either in the form of pre-arranged post-commencement finance or funding that must still be secured, and these alternatives will vastly impact the drafting of the plan. Pre-arranged funding will seek the approval of creditors and, as such, the plan should contain information on the workings of the deal. Where funding is not yet secured by publication of the plan, potential financiers will seek clarity on “the viability of the business, underlying business model, independent verification of data, sound and sustainable rescue plan, proper pre-assessment of the business and a thorough analysis of the rescue and liquidation scenario”. It should also include the creditor’s approval for a tender and proof of its ongoing support (Rosslyn-Smith, 2014:89).

Corporate governance themes (discussed in Chapter [3.2](#) above) should be considered when drafting the business rescue plan. These include:

- Sustainability of the plan and of the business once substantial implementation of the plan is completed; and

- Value creation. The plan should be drafted in such a manner that stakeholders and financiers (of post-commencement finance) can realise the value in rescuing the distressed company.

The discussion about the business rescue plan above adequately highlights themes like stakeholder inclusivity, transparency and competency of key figures (i.e. the practitioner) as corporate governance themes.

4.7 Engaging with employees, creditors and shareholders

During business rescue the practitioner is not only faced with managing the distressed company's affairs but must also manage a myriad of relationships, be they with creditors, employees, shareholders or parties to a contractual relationship. This section highlights and briefly discusses the practitioner's duties while managing these relationships.

4.7.1 Participation by creditors

As affected parties, creditors are entitled to participate in the business rescue proceedings – they are entitled to take part in court proceedings, notices of court proceedings, decisions and meetings. Creditors may also informally participate in the proceedings by making suggestions to the practitioner for the business rescue plan (Section 145(1)(a) to (d) of the Act). Creditors (as stated before) vote for the approval of the business rescue plan but may also vote to amend or reject the plan (Section 145(2)(a) and (b) of the Act) and may acquire (by buying-out) dissenting creditors' voting interest (Section 145(2)(b)(ii) of the Act).

The practitioner holds the first meeting with creditors within 10 days of the practitioner's appointment (Section 147 of the Act). During this meeting, the practitioner must inform the creditors whether there is a reasonable prospect of rescuing the company. During this meeting, the practitioner must also obtain proof of creditor's claims (Section 147(1)(a)(ii) of the Act).

Although the Act does not specify the form in which these submissions must be made, the practitioner must examine the claims on their merits and satisfy himself that the claim is valid. Accepting and assessing claims at an early stage has advantages: The practitioner will be able to assess the value of the creditor's vote (in accordance with 145(4) of the Act) and whether the creditors are secured, statutory, preferent or concurrent. Furthermore, submitting these claims is useful to the practitioner in determining the extent of the company's liabilities for the purpose of his viability analysis (Levenstein, 2015:444).

At any meeting of creditors, save for the meeting during which the plan must be voted on, "a decision supported by the holders of a simple majority of the independent creditors' voting interests in a matter, is the decision of the meeting on that matter" (Levenstein, 2015:444; Section 147(3) of the Act). With regards to the voting interest of a creditor, a secured or

unsecured creditor's voting interest is equal to the value of the amount owed by the company to that creditor (Section 145(4)(a) of the Act) and a concurrent creditor, who would be subordinated in liquidation, has a voting interest equal to the amount that that creditor could reasonably expect to receive in liquidation of the company, which value must be determined by an independent expert at the request of the practitioner (Section 145(4)(b) of the Act).

Determining who the independent creditors are is of importance to the practitioner considering that the plan must be approved by 75 per cent of the creditors, of which at least 50 per cent must be votes by independent creditors (Section 152(2) of the Act). Also, only independent creditors can serve on a creditors' committee (Section 149(2)(a) of the Act).

Section 149 of the Act contains provisions relating to the creditors' committee. The committee must act independently from the practitioner and creditors may, through the committee, consult with the practitioner and may be consulted by the practitioner during development of the plan. However, creditors may not instruct or direct the practitioner (Levenstein, 2015:445). The creditors are also entitled to reports relating to the business rescue (Section 149(1)(b) of the Act).

4.7.2 Employees

Employees have the right to (Section 144(3) of the Act), *inter alia*, receive notice of court proceedings, decisions, meetings or other relevant events concerning business rescue; participate in any court proceedings relating to the business rescue; form a committee of employee representatives; be consulted by the practitioner during the development of a business rescue plan and to be afforded sufficient opportunity to review any such plan and prepare submissions, if necessary; be present and make a submissions before voting on acceptance or rejection of the plan; propose development of an alternative plan, should the business rescue plan be rejected; and present an offer to acquire the interests of one or more affected persons. It should be noted that employees, in their capacity as such, cannot vote on the approval of a business rescue plan but may do so in their capacity as creditors, if applicable (Meskin *et al.*, 2011:504).

Employees, as principle stakeholders, have special rights in their capacity as employees, however. They may also qualify and enjoy protection as creditors in terms of Section 144(2) of the Act (Meskin *et al.*, 2011:501-502).

An employee would be a preferred unsecured creditor if the company owed the employee any amount of money prior to commencing business rescue (Section 144(2) of the Act). "Remuneration relating to employment" does not only refer to wages or salary – it also refers to incentives and commission. Any remuneration that is due after commencing business rescue will

be treated as post-commencement finance (Meskin *et al.*, 2011:502). It will, however, rank higher in order than post-commencement finance (Section 135(1) and (3) of the Act).

The preference accorded to employees' claims continues to apply should the rescue proceedings be converted into liquidation (Meskin *et al.*, 2011:482(51)). This may, however, deter providers of post-commencement finance from getting involved in the rescue (Levenstein, 2015:457).

As with creditors, a first meeting is held for employees' representatives (Section 148 of the Act). The purpose of the meeting is to inform employees whether there is a reasonable prospect of rescuing the company and to provide an opportunity to employee representatives to form a committee. Should employees also be creditors, such employees are entitled to attend the first meeting of creditors (Meskin *et al.*, 2011:514).

In terms of Section 136(1)(a) of the Act, employees remain employed on the same terms and conditions, save for the occurrence of changes in the ordinary course of attrition or renegotiation of terms and conditions in accordance with applicable labour laws. The practitioner may also not suspend any employment contract (Section 136(2)(a) of the Act). Should the practitioner retrench any employee, by virtue of the business rescue plan, such retrenchment is subject to procedures set out in Sections 189 and 198A of the Labour Relations Act (1995) and other related labour legislation.

When engineering the business rescue plan, the practitioner should be mindful that selling the business (or a portion thereof) as a going concern will imply that an automatic transfer of employees (to whoever acquires the business) will occur in terms of Section 197 of the Labour Relations Act (1995) (Levenstein, 2011:462), which might make it difficult for the practitioner to find a buyer (Levenstein, 2015:468).

Levenstein (2015:461) submits that "one of the main objectives of the new business rescue legislation is to ensure that job preservation is paramount". Therefore, when restructuring, the practitioner must endeavour to save the company and ensure that it again trades as a solvent entity, thereby ensuring the protection of as many jobs as possible (Levenstein, 2015:461).

4.7.3 Effect on contracts

The practitioner may (for the duration of the rescue proceedings) suspend any obligation of the company that arises under an agreement to which the company was a party at the commencement of the rescue proceedings, or would otherwise become due during the proceedings in its entirety, partially or conditionally (Section 136(2) of the Act). The practitioner may also, if it is just and reasonable to do so in the circumstances, apply to court on an urgent basis to cancel agreements – it is only by court application that agreements can be cancelled. (Section 136(2)(b) of the Act). Any party to an agreement that has been suspended or cancelled,

or any provision which has been suspended or cancelled, may assert a claim against the company only for damages (Section 136(3) of the Act).

This provision gives the practitioner the opportunity to temporarily or permanently disengage from onerous contracts that may prevent the process from being successful (Meskin *et al*, 2011:482(51)). This provision does not preclude the counter party to the contract from cancelling the contract if there were breach of the contract before the commencement of the rescue (Meskin *et al*, 2011:482(52)), however, after the practitioner has delivered a suspension notice, the counter party cannot cancel the agreement as doing so will be unlawful (Levenstein, 2015:470). The counter party may also not interfere with property in the possession of or occupied by the distressed company after delivery of a suspension or cancellation notice as doing so will be contrary to Sections 133(1) and 134(1) of the Act (which provides for the moratorium on legal proceedings and protection of property interests), which will undermine the purpose of business rescue (Levenstein, 2015:470).

4.7.4 Participation by shareholders and holders of other securities

The holders of any issued security of the company is entitled to notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings. They may participate in any court proceedings arising during the business rescue proceedings and formally participate in a company's business rescue proceedings. They may vote to approve or reject a proposed business rescue plan in the manner contemplated, if the plan would alter the rights associated with the class of securities held by that person. If the business rescue plan is rejected, they may propose the development of an alternative plan or present an offer to acquire the interests of any or all of the creditors or other holders of the company's (Section 146 of the Act).

By virtue of the definition of "securities" and "shareholder" in Section 1 of the Act, the holder of securities would be a shareholder of the company (Levenstein, 2015:436). The holder of company securities would also include the holder of a debenture (Section 1 of the Act). Because a debenture is accompanied by a creditor/debtor relationship, the holder of a debenture may also participate in the proceedings as a creditor (Levenstein, 2015:439). As such, a holder may vote for the approval of a business rescue plan but one who is merely a shareholder may only vote if the plan would alter the rights associated with the securities held by that shareholder (Section 146(d) of the Act; Levenstein, 2015:439).

A shareholder is an "affected person" as contemplated in Section 128 of the Act. Though a shareholder's rights to vote on approval of the business rescue plan is limited, the practitioner must consult with the shareholder, as an affected person, prior to publishing the plan and when preparing the plan (Section 150(1) of the Act). Although the practitioner is not bound to the shareholders' submissions about the rescue plan, shareholders would be entitled to interdict the

meeting if the practitioner did not consult with them or even have the publication of the plan set aside (Mahon, s.a.).

Furthermore, an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent that the court directs otherwise or is contemplated in an approved business rescue plan (Section 137(1) of the Act). The alteration in the “classification” of the shares (and other securities) refer to an alteration of the class rights attached to the securities and “status” refers to the continued existence or cancellation of the issued security (Meskin *et al.*, 2011 482(56)).

Guidance note

Engaging with creditors, employees and shareholders amounts to stakeholder inclusivity.

- (i) As stated before, the practitioner should engage with creditors before the first meeting during their feasibility analysis, which will instil creditor confidence in the practitioner. They should also consult with the creditors during his viability analysis about the content and feasibility of the plan to ensure the ongoing support of creditors.
- (ii) When taking claims from creditors, the practitioner should request that the proof of claims is like the proof of claims prescribed by Section 44 of the Insolvency Act (1936). The Insolvency Act (1936) requires that the proof of claim must be in the form of an affidavit, together with relevant documents to substantiate the claim.
- (iii) The practitioner should encourage the formation of committees as doing so will lighten the practitioner’s consultation burden i.e. the practitioner will not have to consult with each creditor of a large group of creditors individually (Meskin *et al.*, 2011:515).
- (iv) When dealing with employees, practitioners should be mindful of job preservation as one of the main objectives of business rescue. The Act acknowledges, by virtue of Section 136 of the Act), that attrition of the employees is an appealing option to alleviate a financial burden but this temptation must be tempered and controlled (Levenstein, 2015:462).
- (v) Practitioners should also be mindful of balancing employee rights against other stakeholders’ rights as “overprotection of employee rights may have the unintended result of being to the detriment of the employees and essentially weaken the underlying efficiency of South Africa’s new corporate rescue mechanism” (Joubert *et al.*, 2009:84).
- (vi) In restructuring the workforce, the practitioner should attempt to retain key personnel and experienced managers as doing so will cause the least disruption when taking management and operational control. Retaining these employees will be of great importance in successfully implementing the plan (Levenstein, 2015:463).

- (vii) Trade unions could apply to court (on behalf of their members) for compulsory business rescue and, in so doing, gain the benefits of superiority status afforded in terms of Sections 134 and 135 of the Act (Levenstein, 2015:465). Practitioners should be wary of abusing the process for the sake of attaining this status, which survives business rescue into liquidation.
- (viii) When dealing with contracts, the practitioner should ascertain at an early stage their nature and effect. From this assessment, the practitioner can decide which contracts should be cancelled or urgently suspended. In this respect, the practitioner should engage with management and directors to make an informed decision (Levenstein, 2015:473).
- (ix) The practitioner should consider the contracts as soon as possible. The longer the practitioner waits, the greater the damages suffered by the company (should the counter party then submit a claim for damages (Levenstein, 2015:469)).

4.8 Conclusion

In Rosslyn-Smith's study (2014), subjects were indecisive as to whether corporate governance played a role in the business rescue plan and indicated that focusing on corporate governance might distract from the intended focus areas. The subjects did, however, indicate that corporate governance should be the "golden thread" throughout the plan. Rosslyn-Smith also submitted that a shortfall in corporate governance is synonymous with distressed ventures (2014:86).

It is submitted that corporate governance should not only be the "golden thread" throughout the plan, but the practitioner should incorporate it into every step of the procedure and it should become a mindset in the practitioner's conduct and when applying their mind during decision-making.

The practitioner should endeavour to rescue the distressed company and, thereby, create value for stakeholders and the society. To do this and, in so doing, creating a company that can once again function as a valuable corporate citizen, the practitioner must engineer a business rescue plan that is sustainable. The company must be able to function sustainably, long after the plan has been implemented and the practitioner is no longer involved. The practitioner can only succeed in doing so by cooperating with stakeholders and the existing management of the company and delegating responsibilities efficiently. To effectively engage, delegate and cooperate, the practitioner must be a suitable candidate with specific competencies and skills. Regularly reporting to and engaging with stakeholders makes the process more transparent and creates accountability on the practitioner's behalf.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter will contain a summary of every chapter, review the research problem and assess whether the research objective was reached. This chapter also concludes this study with recommendations and proposes future research areas.

The objective of this study was to identify and evaluate the key processes and procedures during business rescue from which a framework could be suggested that sets out the “how to” during business rescue and takes into account accepted corporate governance principles. A further objective of the study was that the suggested framework could serve as a guideline to be used by stakeholders in the business rescue process, to measure their own behaviour and that of the practitioner.

5.2 Conclusions and recommendations

This study has identified key corporate governance themes that practitioners should keep in mind when conducting themselves during business rescue. These themes were incorporated into the rescue process. Guidance notes with practical application of the Act (inferred and suggested by literature on the subject) were included after each step in the process or key aspect of the process, which incorporate the corporate governance themes.

It was found that corporate governance is not at the top of the practitioner’s list when dealing with a company in distress. However, it was also found that incorporating sound governance principles into the process would add to value creation and transparency for all parties involved. Not only should the corporate governance themes identified in this study be incorporated into the process, but practitioners (and stakeholders) can look to corporate governance, as a whole, when assessing the behaviour of practitioners during the process.

5.3 Achievement of the objectives of the study

The objectives of the study were only partially achieved. The key processes in the rescue process were identified and guidance was suggested in drafting a framework. The author identified and discussed many risks and “how tos” during the process. However, these were not tested quantitatively, which would have added value to and elaborated on the suggestions of the practical application of the guidance notes. This study can, however, be used as a starting point for stakeholders and practitioners to understand how the practitioner’s behaviour can be measured and how corporate governance can contribute to the business rescue procedure. It also highlights some practical guidance for practitioners.

5.4 Recommendations for future research

This study is limited to existing literature, legislation and case law which, in itself, is somewhat limited, considering business rescue is a relatively new procedure. The sources used in this study might seem abused but a few of the authors whose work was cited, are the experts in the field and the researcher found their work to be sufficient and informative.

For future study, the hypothesis of the study could be tested quantitatively by interviews and distributing questionnaires to practitioners, stakeholders and companies that have successfully emerged from business rescue. In addition to the aspects highlighted in the study, it provides insight from practitioners on practical risks and pitfalls and how they can be overcome through sound corporate governance principles.

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ADDENDUM A: RELEVANT SECTIONS OF ACTS REFERRED TO

THE COMPANIES ACT 71 OF 2008 (AS AMENDED)

THE COMPANIES ACT 71 OF 2008 (AS AMENDED)

75. Director's personal financial interests.—(1) In this section—

- (a) “director” includes—
 - (i) an alternate director;
 - (ii) a prescribed officer; and
 - (iii) a person who is a member of a committee of the board of a company, irrespective of whether the person is also a member of the company's board; and
- (b) “related person”, when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.

[Sub-s. (1) substituted by s. 48 (a) of Act No. 3 of 2011.]

(2) This section does not apply—

- (a) to a director of a company—
 - (i) in respect of a decision that may generally affect—
 - (aa) all of the directors of the company in their capacity as directors; or
 - (bb) a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director; or
 - (ii) in respect of a proposal to remove that director from office as contemplated in section 71; or
 - (b) to a company or its director, if one person—
 - (i) holds all of the beneficial interests of all of the issued securities of the company; and
 - (ii) is the only director of that company.
- (3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not—
- (a) approve or enter into any agreement in which the person or a related person has a personal financial interest; or
 - (b) as a director, determine any other matter in which the person or a related person has a personal financial interest,

unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.

- (4) At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for

the purposes of this section until changed or withdrawn by further written notice from that director.

- (5) If a director of a company, other than a company contemplated in subsection (2) (b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director—
- (a) must disclose the interest and its general nature before the matter is considered at the meeting;
 - (b) must disclose to the meeting any material information relating to the matter, and known to the director;
 - (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
 - (d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);
 - (e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);
 - (f) while absent from the meeting in terms of this subsection—
 - (i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and
 - (ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and
 - (g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.
- (6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.
- (7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, only if—
- (a) it was approved following disclosure of that interest in the manner contemplated in this section; or
 - (b) despite having been approved without disclosure of that interest, it—
 - (i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or
 - (ii) has been declared to be valid by a court in terms of subsection (8).
- [Sub-s. (7) substituted by s. 48 (b) of Act No. 3 of 2011.]
- (8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section.

[Sub-s. (8) substituted by s. 48 (b) of Act No. 3 of 2011.]

- 76. Standards of directors conduct.**—(1) In this section, “director” includes an alternate director, and—
- (a) a prescribed officer; or
 - (b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,
- irrespective of whether or not the person is also a member of the company’s board.
- (2) A director of a company must—
- (a) not use the position of director, or any information obtained while acting in the capacity of a director—
 - (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
 - (ii) to knowingly cause harm to the company or a subsidiary of the company; and
 - (b) communicate to the board at the earliest practicable opportunity any information that comes to the director’s attention, unless the director—
 - (i) reasonably believes that the information is—
 - (aa) immaterial to the company; or
 - (bb) generally available to the public, or known to the other directors; or
 - (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.
- (3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—
- (a) in good faith and for a proper purpose;
 - (b) in the best interests of the company; and
 - (c) with the degree of care, skill and diligence that may reasonably be expected of a person—
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director.
- (4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company—
- (a) will have satisfied the obligations of subsection (3) (b) and (c) if—
 - (i) the director has taken reasonably diligent steps to become informed about the matter;
 - (ii) either—
 - (aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
 - (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and
- the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and

- (b) is entitled to rely on—
 - (i) the performance by any of the persons—
 - (aa) referred to in subsection (5); or
 - (bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and
 - (ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).
- (5) To the extent contemplated in subsection (4) (b), a director is entitled to rely on—
- (a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;
 - (b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters—
 - (i) within the particular person's professional or expert competence; or
 - (ii) as to which the particular person merits confidence; or
 - (c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

77. Liability of directors and prescribed officers.—(1) In this section, “director” includes an alternate director, and—

- (a) a prescribed officer; or
 - (b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,
- irrespective of whether or not the person is also a member of the company's board.
- (2) A director of a company may be held liable—
- (a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b); or
 - (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—
 - (i) a duty contemplated in section 76 (3) (c);
 - (ii) any provision of this Act not otherwise mentioned in this section; or
 - (iii) any provision of the company's Memorandum of Incorporation.
- (3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having—
- (a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;
 - (b) 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);

- (c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;
 - (d) signed, consented to, or authorised, the publication of—
 - (i) any financial statements that were false or misleading in a material respect; or
 - (ii) a prospectus, or a written statement contemplated in section 101, that contained—
 - (aa) an “untrue statement” as defined and described in section 95; or
 - (bb) a statement to the effect that a person had consented to be a director of the company, when no such consent had been given, despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104 (3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or

[Sub-item (bb) substituted by s. 49 (a) of Act No. 3 of 2011.]
 - (e) been present at a meeting, or participated in the making of a decision in terms of section 74, and failed to vote against—
 - (i) the issuing of any unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36;
 - (ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 41;
 - (iii) the granting of options to any person contemplated in section 42 (4), despite knowing that any shares—
 - (aa) for which the options could be exercised; or
 - (bb) into which any securities could be converted, had not been authorised in terms of section 36;
 - (iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 44 or the company’s Memorandum of Incorporation;

[Sub-para. (iv) substituted by s. 49 (b) (i) of Act No. 3 of 2011.]
 - (v) the provision of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company’s Memorandum of Incorporation;

[Sub-para. (v) substituted by s. 49 (b) (i) of Act No. 3 of 2011.]
 - (vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 46, subject to subsection (4);
 - (vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48; or
 - (viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4.

[Sub-para. (viii) substituted by s. 49 (b) (ii) of Act No. 3 of 2011.]
- (4) The liability of a director in terms of subsection (3) (e) (vi) as a consequence of the director having failed to vote against a distribution in contravention of section 46—

- (a) arises only if—
 - (i) immediately after making all of the distribution contemplated in a resolution in terms of section 46, the company does not satisfy the solvency and liquidity test; and
 - (ii) it was unreasonable at the time of the decision to conclude that the company would satisfy the solvency and liquidity test after making the relevant distribution; and
 - (b) does not exceed, in aggregate, the difference between—
 - (i) the amount by which the value of the distribution exceeded the amount that could have been distributed without causing the company to fail to satisfy the solvency and liquidity test; and
 - (ii) the amount, if any, recovered by the company from persons to whom the distribution was made.
- (5) If the board of a company has made a decision in a manner that contravened this Act, as contemplated in subsection (3) (e)—
- (a) the company, or any director who has been or may be held liable in terms of subsection (3) (e), may apply to a court for an order setting aside the decision of the board; and
 - (b) the court may make—
 - (i) an order setting aside the decision in whole or in part, absolutely or conditionally; and
 - (ii) any further order that is just and equitable in the circumstances, including an order—
 - (aa) to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board; and
 - (bb) requiring the company to indemnify any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings under this subsection.
- (6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.
- (7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.
- (8) In addition to the liability set out elsewhere in this section, any person who would be so liable is jointly and severally liable with all other such persons—
- (a) to pay the costs of all parties in the court in a proceeding contemplated in this section unless the proceedings are abandoned, or exculpate that person; and
 - (b) to restore to the company any amount improperly paid by the company as a consequence of the impugned act, and not recoverable in terms of this Act.
- (9) In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that—
- (a) the director is or may be liable, but has acted honestly and reasonably; or
 - (b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.

- (10) A director who has reason to apprehend that a claim may be made alleging that the director is liable, other than for wilful misconduct or wilful breach of trust, may apply to a court for relief, and the court may grant relief to the director on the same grounds as if the matter had come before the court in terms of subsection (9).

128. Application and definitions applicable to Chapter.—(1) In this Chapter—

- (a) **“affected person”**, in relation to a company, means—
- (i) a shareholder or creditor of the company;
 - (ii) any registered trade union representing employees of the company; and
 - (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;
- (b) **“business rescue”** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
 - (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 - (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;
- (c) **“business rescue plan”** means a plan contemplated in section 150;
- (d) **“business rescue practitioner”** means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and “practitioner” has a corresponding meaning;
- (e) **“court”**, depending on the context, means either—
- (i) the High Court that has jurisdiction over the matter; or
 - (ii) either—
 - (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or
 - (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3);
- (f) **“financially distressed”**, in reference to a particular company at any particular time, means that—
- (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
- [Sub-para. (i) substituted by s. 81 (a) of Act No. 3 of 2011 (English only).]
- (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;
- (g) **“independent creditor”** means a person who—

- (i) is a creditor of the company, including an employee of the company who is a creditor in terms of section 144 (2); and
 - (ii) is not related to the company, a director, or the practitioner, subject to subsection (2);
 - (h) **“rescuing the company”** means achieving the goals set out in the definition of “business rescue” in paragraph (b);
 - (i) **“supervision”** means the oversight imposed on a company during its business rescue proceedings; and
 - (j) **“voting interest”** means an interest as recognised, appraised and valued in terms of section 145 (4) to (6).
- (2) For the purpose of subsection (1) (g), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds securities of that company.

[Sub-s. (2) substituted by s. 81 (b) of Act No. 3 of 2011.]

- (3) For the purposes contemplated in subsection (1) (e) or in any other law, the Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.

129. Company resolution to begin business rescue proceedings.—(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

- (a) the company is financially distressed; and
 - (b) there appears to be a reasonable prospect of rescuing the company.
- (2) A resolution contemplated in subsection (1)—
- (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
 - (b) has no force or effect until it has been filed.
- (3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must—
- (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
 - (b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.
- (4) After appointing a practitioner as required by subsection (3) (b), a company must—
- (a) file a notice of the appointment of a practitioner within two business days after making the appointment; and
 - (b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.
- (5) If a company fails to comply with any provision of subsection (3) or (4)—
- (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

- (b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.
- (6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132 (2).
- (7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1) (f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.

[Sub-s. (7) substituted by s. 82 of Act No. 3 of 2011 (English only).]

130. Objections to company resolution.—(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

- (a) setting aside the resolution, on the grounds that—
 - (i) there is no reasonable basis for believing that the company is financially distressed;
 - (ii) there is no reasonable prospect for rescuing the company; or
 - (iii) the company has failed to satisfy the procedural requirements set out in section 129;
 - (b) setting aside the appointment of the practitioner, on the grounds that the practitioner—
 - (i) does not satisfy the requirements of section 138;
 - (ii) is not independent of the company or its management; or
 - (iii) lacks the necessary skills, having regard to the company's circumstances; or
 - (c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.
- (2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of—
- (a) subsection (1) (a) to set aside that resolution; or
 - (b) subsection (1) (b) to set aside the appointment of the practitioner appointed by the company,

unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.

- (3) An applicant in terms of subsection (1) must—
 - (a) serve a copy of the application on the company and the Commission; and
 - (b) notify each affected person of the application in the prescribed manner.
- (4) Each affected person has a right to participate in the hearing of an application in terms of this section.

- (5) When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may—
- (a) set aside the resolution—
 - (i) on any grounds set out in subsection (1); or
 - (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;
 - (b) afford the practitioner sufficient time to form an opinion whether or not—
 - (i) the company appears to be financially distressed; or
 - (ii) there is a reasonable prospect of rescuing the company,
 and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and
 - (c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including—
 - (i) an order placing the company under liquidation; or
 - (ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76 (4) and (5).
- (6) If, after considering an application in terms of subsection (1) (b), the court makes an order setting aside the appointment of a practitioner—
- (a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and
 - (b) the provisions of subsection (5) (b), if relevant, apply to the practitioner appointed in terms of paragraph (a).

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

- (2) An applicant in terms of subsection (1) must—
- (a) serve a copy of the application on the company and the Commission; and
 - (b) notify each affected person of the application in the prescribed manner.
- (3) Each affected person has a right to participate in the hearing of an application in terms of this section.
- (4) After considering an application in terms of subsection (1), the court may—
- (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—
 - (i) the company is financially distressed;

- (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
 - (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or
 - (b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.
- (5) If the court makes an order in terms of subsection (4) (a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.
- (6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until—
- (a) the court has adjudicated upon the application; or
 - (b) the business rescue proceedings end, if the court makes the order applied for.
- (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.
- (8) A company that has been placed under supervision in terms of this section—
- (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132 (2); and
 - (b) must notify each affected person of the order within five business days after the date of the order.

135. Post-commencement finance. —(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee—

- (a) the money is regarded to be post-commencement financing; and
 - (b) will be paid in the order of preference set out in subsection (3) (a).
- (2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing—
- (a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
 - (b) will be paid in the order of preference set out in subsection (3) (b).
- (3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—
- (a) in subsection (1) will be treated equally, but will have preference over—
 - (i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

[Sub-para. (i) substituted by s. 86 (b) of Act No. 3 of 2011 (English only).]

- (ii) all unsecured claims against the company; or
- (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

[Sub-s. (3) amended by s. 86 (a) of Act No. 3 of 2011.]

- (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.

136. Effect of business rescue on employees and contracts.—(1) Despite any provision of an agreement to the contrary—

- (a) during a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—
 - (i) changes occur in the ordinary course of attrition; or
 - (ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and

[Para. (a) amended by s. 87 (a) of Act No. 3 of 2011 (English only).]

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

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

- (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that—
 - (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
 - (ii) would otherwise become due during those proceedings; or
- (b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

[Sub-s. (2) substituted by s. 87 (b) of Act No. 3 of 2011.]

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

- (a) a business rescue practitioner must not suspend any provision of—
 - (i) an employment contract; or
 - (ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), would have applied had the company been liquidated;
- (b) a court may not cancel any provision of—
 - (i) an employment contract, except as contemplated in subsection (1);
 - (ii) an agreement to which section 35A or 35B of the Insolvency Act, (Act No. 24 of 1936), would have applied had the company been liquidated; and
- (c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company

[Sub-s. (2A) inserted by s. 87 (c) of Act No. 3 of 2011.]

- (3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.
- (4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.

137. Effect on shareholders and directors.—(1) During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent—

- (a) that the court otherwise directs; or
 - (b) contemplated in an approved business rescue plan.
- (2) During a company's business rescue proceedings, each director of the company—
- (a) must continue to exercise the functions of director, subject to the authority of the practitioner;
 - (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;
 - (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and
 - (d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77 (3) (a), (b) and (c).
- (3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.
- (4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.
- (5) At any time during the business rescue proceedings, the practitioner may apply to a court for an order removing a director from office on the grounds that the director has—
- (a) failed to comply with a requirement of this Chapter; or
 - (b) by act or omission, has impeded, or is impeding—
 - (i) the practitioner in the performance of the powers and functions of practitioner;
 - (ii) the management of the company by the practitioner; or
 - (iii) the development or implementation of a business rescue plan in accordance with this Chapter.
- (6) Subsection (5) is in addition to any right of a person to apply to a court for an order contemplated in section 162.

138. Qualifications of practitioners.—(1) A person may be appointed as the business rescue practitioner of a company only if the person—

- (a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission;
 - (b) has been licensed as such by the Commission in terms of subsection (2);
 - (c) is not subject to an order of probation in terms of section 162 (7);
 - (d) would not be disqualified from acting as a director of the company in terms of section 69 (8);
 - (e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and
 - (f) is not related to a person who has a relationship contemplated in paragraph (d).
- (2) For the purposes of subsection (1) (a) (ii), the Commission may license any qualified person to practice in terms of this Chapter and may suspend or withdraw any such licence in the prescribed manner.
- (3) The Minister may make regulations prescribing—
- (a) standards and procedures to be followed by the Commission in carrying out its licencing functions and powers in terms of this section; and
 - (b) minimum qualifications for a person to practice as a business rescue practitioner, including different minimum qualifications for different categories of companies.

[S. 138 substituted by s. 88 of Act No. 3 of 2011.]

140. General powers and duties of practitioners.— (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—

- (a) has full management control of the company in substitution for its board and pre-existing management;
 - (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;
 - (c) may—
 - (i) remove from office any person who forms part of the pre-existing management of the company; or
 - (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and
 - (d) is responsible to—
 - (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and
 - (ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.
- (1A) The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.

[Sub-s. (1A) inserted by s. 90 of Act No. 3 of 2011.]

- (2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person—

- (a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or
 - (b) is related to a person who has a relationship contemplated in paragraph (a).
- (3) During a company's business rescue proceedings, the practitioner—
- (a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;
 - (b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and
 - (c) other than as contemplated in paragraph (b)—
 - (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but
 - (ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.
- (4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.

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

- (2) If, at any time during business rescue proceedings, the practitioner concludes that—
- (a) there is no reasonable prospect for the company to be rescued, the practitioner must—
 - (i) so inform the court, the company, and all affected persons in the prescribed manner; and
 - (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;
 - (b) there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and—
 - (i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or
 - (ii) otherwise, file a notice of termination of the business rescue proceedings; or
 - (c) there is evidence, in the dealings of the company before the business rescue proceedings began, of—
 - (i) voidable transactions, or the failure by the company or any director to perform any material obligation relating to the company, the practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps.
 [Sub-para. (i) substituted by s. 91 of Act No. 3 of 2011.]
 - (ii) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must—

- (aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and
 - (bb) direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.
- (3) A court to which an application has been made in terms of subsection (2) (a) (ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances.

144. Rights of employees.—(1) During a company’s business rescue proceedings any employees of the company who are—

- (a) represented by a registered trade union may exercise any rights set out in this Chapter—
 - (i) collectively through their trade union; and
 - (ii) in accordance with applicable labour law; or
 - (b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.
- (2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company’s business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.
- (3) During a company’s business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to—
- (a) notice, which must be given in the prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union, of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

[Para. (a) substituted by s. 94 (a) of Act No. 3 of 2011.]

- (b) participate in any court proceedings arising during the business rescue proceedings;
- (c) form a committee of employees’ representatives;
- (d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152 (1) (c);
- (e) be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152 (1) (c);
- (f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection (2); and

[Para. (f) substituted by s. 94 (b) of Act No. 3 of 2011.]

- (g) if the proposed business rescue plan is rejected, to—
 - (i) propose the development of an alternative plan, in the manner contemplated in section 153; or
 - (ii) present an offer to acquire the interests of one or more affected persons, in the manner contemplated in section 153.

- (4) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of—
- (a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and
 - (b) in the case of a defined benefit pension scheme, the present value at the commencement of the business rescue proceedings of any unfunded liability under that scheme.
- (5) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.

145. Participation by creditors.—(1) Each creditor is entitled to—

- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings;
 - (c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and
 - (d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.
- (2) In addition to the rights set out in subsection (1), each creditor has—
- (a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and
 - (b) if the proposed business rescue plan is rejected, a further right to—
 - (i) propose the development of an alternative plan, in the manner contemplated in section 153; or
 - (ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.
- (3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.
- (4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests—
- (a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and
 - (b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.
- (5) The practitioner of a company must—
- (a) determine whether a creditor is independent for the purposes of this Chapter;
 - (b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4) (b); and
 - (c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151.

- (6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to—
 - (a) review the practitioner’s determination that the person is, or is not, an independent creditor; or
 - (b) review, re-appraise and re-value that person’s voting interest, as determined in terms of subsection (5) (b).

147. First meeting of creditors.—(1) Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of creditors, at which—

- (a) the practitioner—
 - (i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company; and
 - (ii) may receive proof of claims by creditors; and
 - (b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee.
- (2) The practitioner must give notice of the first meeting of creditors to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner, setting out the—
- (a) date, time and place of the meeting; and
 - (b) agenda for the meeting.
- (3) At any meeting of creditors, other than the meeting contemplated in section 151, a decision supported by the holders of a simple majority of the independent creditors’ voting interests voted on a matter, is the decision of the meeting on that matter.

149. Functions, duties and membership of committees of affected persons.—(1) A committee of employees, or of creditors, appointed in terms of section 147 or 148, respectively—

- (a) may consult with the practitioner about any matter relating to the business rescue proceedings, but may not direct or instruct the practitioner;
 - (b) may, on behalf of the general body of creditors or employees, respectively, receive and consider reports relating to the business rescue proceedings; and
 - (c) must act independently of the practitioner to ensure fair and unbiased representation of creditors’ or employees’ interests.
- (2) A person may be a member of a committee of creditors or employees, respectively, only if the person is—
- (a) an independent creditor, or an employee, of the company;
 - (b) an agent, proxy or attorney of an independent creditor or employee, or other person acting under a general power of attorney; or
 - (c) authorised in writing by an independent creditor or employee to be a member.

150. Proposal of business rescue plan.—(1) The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151.

- (2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts, as follows:
- (a) **Part A—Background**, which must include at least—
- (i) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;
 - (ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
 - (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
 - (iv) a complete list of the holders of the company's issued securities;
 - (v) a copy of the written agreement concerning the practitioner's remuneration; and
 - (vi) a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.
- (b) **Part B—Proposals**, which must include at least—
- (i) the nature and duration of any moratorium for which the business rescue plan makes provision;
 - (ii) 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, or another company;
 - (iii) the ongoing role of the company, and the treatment of any existing agreements;
 - (iv) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;
 - (v) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;
 - (vi) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and
 - (vii) the effect that the business rescue plan will have on the holders of each class of the company's issued securities.
- (c) **Part C—Assumptions and conditions**, which must include at least—
- (i) a statement of the conditions that must be satisfied, if any, for the business rescue plan to—
 - (aa) come into operation; and
 - (bb) be fully implemented;
 - (ii) the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;
 - (iii) the circumstances in which the business rescue plan will end; and
 - (iv) a projected—
 - (aa) balance sheet for the company; and
 - (bb) statement of income and expenses for the ensuing three years,

prepared on the assumption that the proposed business plan is adopted.

- (3) The projected balance sheet and statement required by subsection (2) (c) (iv)—
 - (a) must include a notice of any material assumptions on which the projections are based; and
 - (b) may include alternative projections based on varying assumptions and contingencies.
- (4) A proposed business rescue plan must conclude with a certificate by the practitioner stating that any—
 - (a) actual information provided appears to be accurate, complete, and up to date; and
 - (b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.
- (5) The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by—
 - (a) the court, on application by the company; or
 - (b) the holders of a majority of the creditors' voting interests.

152. Consideration of business rescue plan.—(1) At a meeting convened in terms of section 151, the practitioner must—

- (a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

[Para. (a) substituted by s. 96 (a) of Act No. 3 of 2011 (English only).]
 - (b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;
 - (c) provide an opportunity for the employees' representatives to address the meeting;
 - (d) invite discussion, and entertain and conduct a vote, on any motions to—
 - (i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or
 - (ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and
 - (e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).
- (2) In a vote called in terms of subsection (1) (e), the proposed business rescue plan will be approved on a preliminary basis if—
 - (a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and
 - (b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.
 - (3) If a proposed business rescue plan—
 - (a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153;
 - (b) does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or

- (c) does alter the rights of any class of holders of the company's securities—
 - (i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities whose rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and
 - (ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised—
 - (aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or
 - (bb) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153.
- (4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—
 - (a) was present at the meeting;
 - (b) voted in favour of adoption of the plan; or
 - (c) in the case of creditors, had proven their claims against the company.
- (5) The company, under the direction of the practitioner, must take all necessary steps to—
 - (a) attempt to satisfy any conditions on which the business rescue plan is contingent; and
 - (b) implement the plan as adopted.
- (6) To the extent necessary to implement an adopted business rescue plan—
 - (a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 40 to the contrary; and
 - (b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3) (c), the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms of the business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.

[Para. (b) substituted by s. 96 (b) of Act No. 3 of 2011 (English only).]
- (7) Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as contemplated in section 39, does not apply with respect to an issue of shares by the company in terms of the business rescue plan.
- (8) When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.

- 155. Compromise between company and creditors.**—(1) This section applies to a company, irrespective of whether or not it is financially distressed as defined in section 128 (1) (f), unless it is engaged in business rescue proceedings in terms of this Chapter.
- (2) The board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to—

- (a) every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and
 - (b) the Commission.
- (3) A proposal contemplated in subsection (2) must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal, and must be divided into three Parts, as follows—
- (a) **Part A—Background**, which must include at least—
 - (i) a complete list of all the material assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal;
 - (ii) a complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
 - (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
 - (iv) a complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and
 - (v) whether the proposal includes a proposal made informally by a creditor of the company.
 - (b) **Part B—Proposals**, which must include at least—
 - (i) the nature and duration of any proposed debt moratorium;
 - (ii) 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, or another company;
 - (iii) the treatment of contracts and ongoing role of the company;
 - (iv) the property of the company that is proposed to be available to pay creditors' claims;
 - (v) the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and
 - (vi) the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation.
 - (c) **Part C—Assumptions and conditions**, which must include at least—
 - (i) a statement of the conditions that must be satisfied, if any, for the proposal to—
 - (aa) come into operation; and
 - (bb) be fully implemented;
 - (ii) the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment; and
 - (iii) a projected—
 - (aa) balance sheet for the company; and
 - (bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposal is accepted.
- (4) The projected balance sheet and statement required by subsection (3) (c) (iii)—

- (a) must include a notice of any significant assumptions on which the projections are based; and
 - (b) may include alternative projections based on varying assumptions and contingencies.
- (5) A proposal must conclude with a certificate by an authorised director or prescribed officer of the company stating that any—
- (a) factual information provided appears to be accurate, complete, and up to the date; and
 - (b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.
- (6) A proposal contemplated in this section will have been adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by a majority in number, representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose.
- (7) If a proposal is adopted as contemplated in subsection (6)—
- (a) the company may apply to the court for an order approving the proposal; and
 - (b) the court, on an application in terms of paragraph (a) may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to—
 - (i) the number of creditors of any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal; and
 - (ii) in the case of a compromise in respect of a company being wound up, the report of the Master required in terms of the laws contemplated in item 9 of Schedule 5.
- (8) A copy of an order of the court sanctioning a compromise—
- (a) must be filed by the company within five business days;
 - (b) must be attached to each copy of the company's Memorandum of Incorporation that is kept at the company's registered office, or elsewhere as contemplated in section 25; and
 - (c) is final and binding on all of the company's creditors or all of members of the relevant class of creditors, as the case may be, as of the date on which it is filed.
- (9) An arrangement or a compromise contemplated in this section does not affect the liability of any person who is a surety of the company.

COMPANIES ACT 61 OF 1973

417. Summoning and examination of persons as to affairs of company.—(1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

[Sub-s. (1) substituted by s. 9(a) of Act 29 of 1985.]

(1A) Any person summoned under subsection (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.

[Sub-s. (1A) inserted by s. 9(b) of Act 29 of 1985.]

- (2) (a) The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

[Para. (a) substituted by s. 9(c) of Act 29 of 1985.]

- (b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.

[Para. (b) substituted by s. 11(a) of Act 55 of 2002 with effect from 17 January 2003.]

- (c) An incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to—
- (i) the administering or taking of an oath or the administering or making of an affirmation;
 - (ii) the giving of false evidence;
 - (iii) the making of a false statement;
 - (iv) a failure to answer lawful questions fully or satisfactorily.

[Para. (c) added by s. 11(b) of Act 55 of 2002 with effect from 17 January 2003.]

- (3) The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.

[Sub-s. (3) substituted by s. 9(d) of Act 29 of 1985.]

- (4) If any person who has been duly summoned under subsection (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by the Master or the Court, the Master or the Court may cause him to be apprehended and brought before him or it for examination.

[Sub-s. (4) substituted by s. 9(d) of Act 29 of 1985.]

- (5) Any person summoned by the Master under subsection (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.

[Sub-s. (5) added by s. 9(e) of Act 29 of 1985.]

- (6) Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.

[Sub-s. (6) added by s. 9(e) of Act 29 of 1985.]

- (7) Any examination or enquiry under this section or section 418 and any application therefore shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.

[Sub-s. (7) added by s. 9(e) of Act 29 of 1985.]

THE LABOUR RELATIONS ACT 66 of 1995

189. Dismissals based on operational requirements.—(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult—

- (a) any person whom the employer is required to consult in terms of a *collective agreement*;
 - (b) if there is no *collective agreement* that requires consultation—
 - (i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and
 - (ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;
 - (c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or
 - (d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.
- (2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on—
- (a) appropriate measures—
 - (i) to avoid the *dismissals*;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the *dismissals*; and
 - (iv) to mitigate the adverse effects of the *dismissals*;
 - (b) the method for selecting the *employees* to be dismissed; and
 - (c) the severance pay for dismissed *employees*.
- (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—
- (a) the reasons for the proposed *dismissals*;
 - (b) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;
 - (c) the number of *employees* likely to be affected and the job categories in which they are employed;
 - (d) the proposed method for selecting which *employees* to dismiss;
 - (e) the time when, or the period during which, the *dismissals* are likely to take effect;
 - (f) the severance pay proposed;
 - (g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;

- (h) the possibility of the future re-employment of the *employees* who are dismissed;
 - (i) the number of employees employed by the employer; and
 - (j) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.
- (4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).
- (b) In any *dispute* in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.
- (5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed *dismissals*.
- (6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
- (b) If any representation is made in writing the employer must respond in writing.
- (7) The employer must select the *employees* to be dismissed according to selection criteria—
- (a) that have been agreed to by the consulting parties; or
 - (b) if no criteria have been agreed, criteria that are fair and objective.

[S. 189 substituted by s. 44 of Act No. 12 of 2002.]

189A. Dismissals based on operational requirements by employers with more than 50 employees.—(1) This section applies to employers employing more than 50 *employees* if—

- (a) the employer contemplates dismissing by reason of the employer's *operational requirements*, at least—
 - (i) 10 *employees*, if the employer employs up to 200 *employees*;
 - (ii) 20 *employees*, if the employer employs more than 200, but not more than 300, *employees*;
 - (iii) 30 *employees*, if the employer employs more than 300, but not more than 400, *employees*;
 - (iv) 40 *employees*, if the employer employs more than 400, but not more than 500, *employees*; or
 - (v) 50 *employees*, if the employer employs more than 500 *employees*; or
 - (b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's *operational requirements* in the 12 months prior to the employer issuing a notice in terms of section 189 (3), is equal to or exceeds the relevant number specified in paragraph (a).
- (2) In respect of any dismissal covered by this section—
- (a) an employer must give notice of termination of employment in accordance with the provisions of this section;
 - (b) despite section 65 (1) (c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;

- (c) the consulting parties may agree to vary the time periods for facilitation or consultation;
- (d) a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation.

[Para. (d) added by s. 33 (a) of Act No. 6 of 2014.]

- (3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if—
 - (a) the employer has in its notice in terms of section 189 (3) requested facilitation; or
 - (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.
- (4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).
- (5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the *Minister* under subsection (6) for the conduct of such facilitations.
- (6) The *Minister*, after consulting *NEDLAC* and the Commission, may make regulations relating to—
 - (a) the time period, and the variation of time periods, for facilitation;
 - (b) the powers and duties of facilitators;
 - (c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
 - (d) any other matter necessary for the conduct of facilitations.
- (7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189 (3)—
 - (a) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the *Basic Conditions of Employment Act*, and
 - (b) a registered *trade union* or the *employees* who have received notice of termination may either—
 - (i) give notice of a *strike* in terms of section 64 (1) (b) or (d); or
 - (ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191 (11).
- (8) If a facilitator is not appointed—
 - (a) a party may not refer a *dispute* to a *council* or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189 (3); and
 - (b) once the periods mentioned in section 64 (1) (a) have elapsed—
 - (i) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the *Basic Conditions of Employment Act*, and
 - (ii) a registered trade union or the *employees* who have received notice of termination may—
 - (aa) give notice of a *strike* in terms of section 64 (1) (b) or (d); or
 - (bb) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191 (11).

- (9) Notice of the commencement of a *strike* may be given if the employer dismisses or gives notice of *dismissal* before the expiry of the periods referred to in subsections (7) (a) or (8) (b) (i).
- (10) (a) A consulting party may not—
- (i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;
 - (ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.
- (b) If a trade union gives notice of a strike in terms of this section—
- (i) no member of that trade union, and no employee to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23 (1) (d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;
 - (ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made, is deemed to be withdrawn.
- (11) The following provisions of Chapter IV apply to any *strike* or *lock-out* in terms of this section:
- (a) Section 64 (1) and (3) (a) to (d), except that—
 - (i) section 64 (1) (a) does not apply if a facilitator is appointed in terms of this section;
 - (ii) an employer may only *lock out* in respect of a *dispute* in which a *strike* notice has been issued;
 - (b) subsection (2) (a), section 65 (1) and (3);
 - (c) section 66 except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the *strike*;
 - (d) sections 67, 68, 69 and 76.
- (12) (a) During the 14-day period referred to in subsection (11) (c), the *director* must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any *dispute*, between the employer and the party who gave the notice, through conciliation.
- (b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of *employees* to strike on the expiry of the 14-day period.
- (13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—
- (a) compelling the employer to comply with a fair procedure;
 - (b) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;
 - (c) directing the employer to reinstate an *employee* until it has complied with a fair procedure;
 - (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.
- (14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158 (1) (a).

- (15) An award of compensation made to an *employee* in terms of subsection (14) must comply with section 194.
- (16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189 (4) that has been the subject of an arbitration award in terms of section 16.
- (17) (a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the *employee's* services or, if notice is not given, the date on which the *employees* are dismissed.
- (b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).
- (18) The Labour Court may not adjudicate a *dispute* about the procedural fairness of a *dismissal* based on the employer's *operational requirements* in any *dispute* referred to it in terms of section 191 (5) (b) (ii).
- (19)

[Sub-s. (19) deleted by s. 33 (b) of Act No. 6 of 2014.]

- (20) For the purposes of this section, an "employer" in the *public service* is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).

[S. 189A inserted by s. 45 of Act No. 12 of 2002.]

THE INSOLVENCY ACT 24 OF 1936

- 44. Proof of liquidated claims against estate.**—(1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section *one hundred and thirteen*, but subject to the provisions of section *one hundred and four*, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.

- (2)

[Sub-s. (2) deleted by s. 4 of Act No. 101 of 1983.]

- (3) A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim: Provided that the rejection of a claim shall not debar the claimant from proving that claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of section *seventy-five*: and provided further that if a creditor has twenty-four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that meeting the affidavit and other documents mentioned in subsection (4), he shall be deemed to have tendered proof of his claim at that meeting.

[Sub-s. (3) amended by s. 11 (a) of Act No. 99 of 1965.]

- (4) Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim,

whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section *eighty-three*, the amount at which he values the security. The said affidavit or a copy thereof and any documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than twenty-four hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidences of his claim within the prescribed period: Provided that if a creditor has proved an incorrect claim, he may, with the consent in writing of the Master given after consultation with the trustee and on such conditions as the Master may think fit to impose correct his claim or submit a fresh correct claim.

[Sub-s. (4) amended by s. 15 of Act No. 16 of 1943 and substituted by s. 11 (b) of Act No. 99 of 1965.]

- (5) Any document by this section required to be delivered before a meeting of creditors at the office of the officer who is to preside at that meeting, shall be open for inspection at such office during office hours free of charge by any creditor, the trustee or the insolvent or the representative of any of them.
- (6) A claim against an insolvent's estate for payment of the purchase price of goods sold and delivered to the insolvent on an open account shall not be admitted to proof unless a statement is submitted in support of such claim showing the monthly total and a brief description of the purchases and payments for the full period of trading or for the period of twelve months immediately before the date of sequestration, whichever is the lesser.

[Sub-s. (6) substituted by s. 11 (c) of Act No. 99 of 1965.]

- (7) The officer presiding at any meeting of creditors may of his own motion or at the request of the trustee or his agent or at the request of any creditor who has proved his claim, or his agent, call upon any person present at the meeting who wishes to prove or who has at any time proved a claim against the estate to take an oath, to be administered by the said officer, and to submit to interrogation by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, in regard to the said claim.
- (8) If any person wishes to prove or who has at any time proved a claim against the estate is absent from a meeting of creditors the officer who presided or who presides thereat, may summon him in writing to appear before him at a place and time stated in the summons, for the purpose of being interrogated by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, and if he appears in answer to the summons the provisions of subsection (7) shall apply.
- (9) If any such person fails without reasonable excuse to appear in answer to such summons or having appeared or when present at any meeting of creditors refuses to take the oath or to submit to the said interrogation or to answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the Master, and if not yet proved, may be rejected.