



**SHOULD THE ZIMBABWEAN COMPANIES ACT MOVE AWAY
FROM JUDICIAL MANAGEMENT AND ADOPT BUSINESS
RESCUE?**

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DZVRAT001

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DEDICATION

To my Grandfather Lambert Tusha Takwena Dzvimbo, a great man who lived a long fulfilling life, you are sadly missed...

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CHAPTER ONE: INTRODUCTION

This chapter will define the concept of judicial management in brief. The chapter further discusses the reasons why the dissertation topic was selected as well as the reasons for comparing the Zimbabwean and South African jurisdictions.

1.1 Background information

It is imperative that a state has an effective company rescue regime that will cater to financially distressed companies

‘A developing economy cannot lightly permit companies which help to comprise its industries and commercial enterprises to be dissipated by winding up and dissolution due to sake temporary setback in cases where there is a reasonable probability that they would, if granted a moratorium, be able to overcome their difficulties, discharge their debts and become successful concerns.’¹

A company is an essential component of an economy of a country. It is beneficial to the government of a country as well as its people to ensure that financially troubled companies that contribute to the economy and society are given a second chance. This can be achieved by financially assisting the struggling companies so that they can be able to trade profitably be stable and viable concerns.

It is undeniable that there are brutal side effects experienced by the affected persons who have an interest in a particular company after the failure of the once successful corporate concern. ‘The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.’² The demise of a company in addition to rendering people jobless and disgruntling creditors, shareholders, and the society at large through loss of service delivery, also hugely disrupts the economy of the country. Judicial management is used to help financially troubled but viable companies to stop them from going into liquidation or winding up.

¹ Cilliers, Benade *Corporate Law* 3ed (2000) 478.

² FH Cassim *Contemporary Company Law* 2ed (2012) 862.

Currently judicial management is the only tool available to failing companies which need help to get back on their feet again in Zimbabwe. Judicial management has vast shortcomings; most companies placed under judicial management end up getting liquidated. It is therefore important for Zimbabwe to consider incorporating the business rescue procedure into the Companies Act instead of judicial management in the process. Most states have in the past implemented company rescue legislation that is modern and effective.

‘It has been a recognisable trend across jurisdictions and it is difficult to find a developed economy where there has not been at least some consideration given to implementing a specific updated rescue regime aimed at salvaging the corporate structure in certain circumstances of insolvency.’³

1.2 Research question and scope

This dissertation will focus on the judicial management procedure in Zimbabwe and the South African business rescue model. It primarily dwells on the current judicial management system in Zimbabwe by focusing on its shortcomings in accordance with the available statistics of failed companies’ rehabilitation under judicial management.

The dissertation will recommend the proposed legislative model that best suits the Zimbabwean Company law and its economy as a whole. It will adopt a model strongly based on the South African business rescue model and at the same time avoiding adopting the whole business rescue regime as it is- word for word. It is important to realise that insolvency systems reflect the legal, historical, political and cultural contexts of the countries that have developed and adopted them.

The question then is does Zimbabwe need to adopt business rescue? Or it will be enough to just modify the current judicial management process through amendments to certain provisions? Does it need a complete overhaul of the current company rescue provisions? Is business rescue going to be more effective than judicial management considering the fact that the country is still recovering from an economic meltdown? It is thus critical for Zimbabwe to consider all the above factors when adopting the new business rescue procedure. The danger of

³ Collin Anderson and David Morrison ‘The Commencement of the Company Rescue: How and when does it start’ in P J Omar (Ed) *International Insolvency Law: Themes and Perspectives* (2008) 83.

transplanting a legislative framework of another country as it is and incorporating it into a statute is that certain provisions may not be well suited to a particular state in terms of its economy, company structures. The proposed business rescue concept for Zimbabwe will adopt the best parts of South Africa's legislative framework and modify them to best suit the Zimbabwean company law environment and economic status.

As business rescue is already in practice in South Africa, this dissertation will evaluate it according to different scholarly views and propose that Zimbabwe avoid making the same mistakes that would weaken its effectiveness as a procedure for rehabilitating financially distressed companies.

1.3 The Concept of Judicial Management

Judicial management is a process whereby the principles of company law regarding the management of a normal company, as well as the principles appertaining to the liquidation of a company are combined to ensure the optimum benefit of creditors and members.⁴ The object of judicial management is to avoid the drastic remedy of winding up when a company is in financial difficulties due to mismanagement or some other cause but there is a reasonable probability that under more carefully controlled management it will surmount its difficulties.⁵ The onus rests on the applicant to prove their right to be granted the order by the court.

In Zimbabwe the procedure is governed by ss 299-321 of the Companies Act 24:03. Stakeholder participation and involvement during the procedure is very low. Judicial management as a procedure; although probably well intentioned has a very low success rate in Zimbabwe. Since the adoption of the multi-currency system, most companies are under capitalised and are struggling to pay their bills.⁶ Zimbabwe National Chamber of Commerce President Mr Trust Chikohora submitted that the reason has been attributed to the fact that the country was coming out of an economic meltdown and the multi-currency system meant that most companies were not able to manage their balance sheets properly.

⁴ Cilliers, Benade (note 1) at 479.

⁵ RH Christie *Business Law in Zimbabwe* 2ed (1998) 422.

⁶ Lance Mambondiani, 'Trustee', 21 March 2013, *The Newsday*, last accessed May 2013.

This is evidenced by the number of companies in Zimbabwe that have attempted to revive their financial status and failed by proceeding to liquidation. At present in Bulawayo; the second largest city in the country, in the year 2011 alone, documents at the High Court of Bulawayo showed that of the eight companies that were placed under judicial management, by the end of that year seven were liquidated.⁷

1.4 The concept of business rescue

Business Rescue under South Africa's Companies Act of 2008 is defined as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of that company and the management of its affairs, business and property as well as a temporary moratorium on the right of claimants against the company or in respect of the property in its possession.⁸ A qualified Business Rescue Practitioner takes charge of the company's management for the entire duration of the rescue process. Since its implementation, a lot South African companies have utilised the procedure and this maybe an indication that the procedure is effective.⁹

1.5 Justification for the study

Zimbabwe lacks an efficient regulatory framework that deals with the effective rehabilitation of a company that is in financial distress. The aim is to bring Zimbabwe more in line with the global trend of restructuring companies which are in financial distress. Corporate and business rescues received considerable attention in the last few days.¹⁰ Recently the South African Companies Act adopted the business rescue procedure through the enactment of a new legislation that is modern, progressive and at par with the international business standards.

This dissertation addresses the shortcomings of the judicial management system in Zimbabwe in light of the glaring escalating number of the companies that are

⁷ Oliver Kadzunga, 'Trustee', 26 June 2013, The Zimbabwean, last accessed 12 July 2013.

⁸ S 128 1 (b) (i) (ii).

⁹ The Companies Intellectual Property Commission statistics as at November 2012 reveal that 740 companies had instituted business rescue.

¹⁰ Pieter Kloppers *Judicial Management Reform- steps to initiate a Business Rescue* (2001) SA Mercantile LJ 358.

going under liquidation due to a failed judicial management attempt. A serious practical disadvantage of judicial management is that it affects the creditworthiness of a company detrimentally, even if the judicial management order is later set aside.¹¹ Implementing a legislative procedure that is competent enough to rehabilitate failing companies will create employment and stabilise the economy of a country. Zimbabwe should adopt business rescue regime to be at par with other states that have moved in that progressive direction. Modern day company law is synonymous with good corporate governance, countries like and South Africa, Australia and the United States have incorporated the principles of good corporate governance into their legislative frameworks.

Advantages of a company rescue mechanism are that it strengthens and puts the company law of a country into a favourable position. A legislative regime that financially assists distressed companies and suspends the fulfilment of their credit obligations through a temporary moratorium so that they financially recover enables the companies to contribute to the economy by paying taxes to the government. It also protects employees and creditor's interests.

1.6 Reason for comparing the Zimbabwean and South African jurisdictions

The primary reason for comparing the Zimbabwean and South African jurisdictions is because 'the judicial management procedure is peculiar to South Africa and Zimbabwe'¹² that is before South Africa adopted the business rescue regime as a company rescue procedure.

The source of law for both Zimbabwe and South Africa is Roman Dutch Law therefore a comparative analysis between the two states would yield a more accurate result and reasonably feasible statistics for the purposes of this research. However at present, South African company law is now largely based on United States, Australian, Canadian and New Zealand laws. This is because the Companies Act of 2008, whose main drafter was a Canadian¹³, is largely based on

¹¹ Cilliers, Benade (note 1) at 478.

¹² Blackman, Jooste, Everingham *Commentary on the Companies Act Volume 3* 2002 15-1.

¹³ Tshepo H Mongalo *Modern Company Law for a Competitive South African Economy* (2010) xvi.

Chapter 11 of the American Bankruptcy Act.¹⁴ Regardless of these factors, English law still remains a source of law in the two jurisdictions.

In terms of case law, the Zimbabwean judiciary heavily relies on the South African courts for judicial precedents.¹⁵ Most of the statutes of both countries have relatively similar provisions and it is safe to state that the current Zimbabwean Companies Act is a carbon copy of the former South African Companies Act of 1973.

The South African business rescue provisions has been borrowed from several jurisdictions so it is in actual fact a compact document that represents several legislative jurisdictions of progressive first world countries and these include Canada, United States of America, and Australia.

1.7 Methodological overview

The primary source of information will be the relevant judicial management provisions in the Companies Act of Zimbabwe and the South African Companies Act business rescue provisions.

The dissertation will analyse the provisions in the Zimbabwean Companies Act in order to discern the legislatures intended purpose and meaning in relation to judicial management and in South Africa's case, business rescue.

Research methods will be collection of data through study of available secondary documents such as relevant case laws reports and statutes; published texts such as books and journal articles will be used in this desk study.

1.8 Chapter synopsis

Chapter one lays out the scope of the dissertation. It defines the concept of judicial management in brief. The chapter discusses the justification for the study and the reasons for comparing the Zimbabwean and the South African jurisdictions.

¹⁴ Jonathan Rushworth 'A critical analysis of the Business Rescue regime in the Companies Act 71 of 2008' in Tshepo Mongalo *Modern Company Law for a Competitive South African Economy* 376.

¹⁵ L Madhuku *An Introduction to Zimbabwean Law* 17.

Further, the significance of the study as well as the scope of the research question is discussed.

Chapter two defines the concept of judicial management in Zimbabwe and its origins in both the South African and Zimbabwean jurisdictions'. The chapter forwards submissions on the shortcomings of judicial management in Zimbabwe. The chapter further evaluates legal scholarly views as to why judicial management failed in South African context. It outlines the procedure for judicial management under the Companies Act of Zimbabwe.

Chapter three introduces the concept of business rescue under the South African Companies Act. It evaluates the business rescue provisions to ascertain if it is effective in practice. An analysis of case law on business rescue will be done to evaluate the effectiveness of the provisions

Chapter four is a critical analysis of the Zimbabwean case law on judicial management to show the demise of judicial management as a procedure by analysing the cases of companies that went under liquidation following a failed attempt by judicial management to rehabilitate the companies concerned.

Chapter five is a comparison of the legislative framework of judicial management in Zimbabwe to the business rescue provisions in the South African. The aim is to unveil if the legislature has achieved its purpose of moving away from judicial management to business rescue. It seeks to find out if in South Africa's case, business rescue really is a significant improvement on judicial management as a company rescue procedure

Chapter six is the conclusion to the study. It evaluates business rescue provisions and makes recommendations for legislature reform that is suited to Zimbabwe by taking into consideration its economic status.

CHAPTER TWO: JUDICIAL MANAGEMENT PROCEDURE IN ZIMBABWE AND SOUTH AFRICA

This chapter discusses the origins and historical development of judicial management in both the Zimbabwean and South African jurisdictions. The chapter outlines the procedure for implementing the judicial management process under the Zimbabwean Companies Act and the previous Companies Act of 1973 in South Africa.

2.1 The origins of Judicial Management in Zimbabwe and South Africa

The laws governing business entities in Zimbabwe have their origins in Roman Dutch Law, borrowing from English Law where necessary. As a result Zimbabwe law contains much of English Mercantile, Company and Insolvency Law. In many cases, legislation has been strengthened by the persuasive authority of English and other judicial precedents.¹⁶

South African company law was based on foundations which were put in place in Victorian England in the middle of the nineteenth century. Since the introduction of the 1926 Companies Act, there has been a significant review of the Act which was initiated in 1963 and culminated into the Companies Act of 1973 was based on general principles of English Law.¹⁷

To date, South Africa has reviewed its company law through the enactment of the Companies Act of 2008

2.2 A brief background on the economic status of Zimbabwe

In the past decade, particularly when Zimbabwe turned to the use of multiple currencies, several companies have folded largely due to lack of funding. The dollarisation has brought liquidity challenges which continue posing a serious threat to companies. The introduction of the new currency led to the instability of the economy. The process of dollarisation occurs when a country uses foreign

¹⁶ Deloitte: *Doing business in Zimbabwe*, The Jewel of Africa 5.

¹⁷ The Department of Trade and Industry Notice 1183 of 2004 3.

currency in parallel to or instead of the domestic currency as a store of value, unit of account and or medium of exchange within the domestic economy.¹⁸ In the case of Zimbabwe, the currency substitution to the United States dollar was complete and it meant that the Zimbabwean dollar was no longer recognised as local legal tender. Due to the impact of the dollarization on companies, most of them are now utilising the judicial management procedure to financially recover and be able to continue normal and profitable business operations. The figures from the Zimbabwe National Statistics Agency show that for the first six months of the year 2013 the year on year rate of inflation in Zimbabwe has been fluctuating between 1.87 per cent and 2.98 per cent.

2.3 The purpose of judicial management

The purpose of judicial management is to enable companies suffering a temporary setback due to mismanagement or other special circumstances, to become successful concerns.¹⁹ In *Silverman v Doornhoek Mines Ltd*²⁰ judicial management was referred to as an extra ordinary procedure the purpose of which is to obviate a company being placed in liquidation whereby proper management or by proper conservation of its resources it will be able to meet its obligations, remove any occasion for winding up and become a successful concern.²¹

2.4 The procedure for Judicial Management under Zimbabwean and South African legislation in detail

The South African provisions relating to judicial management in its previous Act are similar to the current Zimbabwean Companies Act provisions on judicial management. This is because the system of judicial management was imported from South Africa.²¹ The provisions to be discussed are from the Zimbabwean Act. However reference will be made to South Africa where necessary to reveal the similarities between the legislative frameworks.

¹⁸ Savastano, Miguel (1996) *Dollarization in Latin America: Recent Evidence and Some Policy Issues IMF Working Paper WP/96/4*:iii.

¹⁹ Cilliers, Benade (note 1) at 478.

²⁰ 1935 TPD 353.

²¹ Christie (note 5) at 421.

Judicial management under the previous South African Companies Act was governed by Chapter XV (ss 427-440). In South Africa judicial management was rarely used by companies in financial distress with most of them opting to wind up and liquidate; it was deemed a dismal failure. In *Le Roux Hotel Management (Pty) Ltd*²² judicial management was referred to as a system which has barely worked since its initiation in 1926. Despite its low success rate, the procedure was retained in the Companies Act of 1973, it was argued that the fact that it was utilised in some instances justified its retention. In Zimbabwe, though condemned, judicial management has also been commended by some who view the procedure as an efficient rescue mechanism. However, it has been submitted that there is need to align the legislative framework with contemporary business practices.

2.5 How a company can qualify for judicial management

The applicant must establish that the company is unable to pay its debts or meet its obligations.²³ The application must state with a fair degree of certainty the extent and scope of the company's business, its assets and liabilities, and the nature of its difficulties²⁴ so that the courts can determine whether the company has a reasonable prospect of becoming a success. In *Millman v Swartland Huismeubeleerders (Edms) Bpk*²⁵ it was held that one must establish the prospect of the company's viability and the prospect of ultimate solvency. It is important to ascertain the reasons for the company's 'incapacity and failure' as held in *Ex parte Onus (Edms) Bpk*.²⁶ The judicial management order is granted if the court considers it just and equitable to do so. In *Pax Clothing Co Ltd v Vaskis Tailoring (Pty) Ltd*²⁷ the courts held that judicial management is a special privilege given in favour of a company and will be authorised in very special circumstances. A moratorium affects the rights of creditors because it alters the terms of their debt repayment. The courts will not refuse judicial management on the sole basis that a

²² 2000 (1) SA 223 (C).

²³ Blackman (note 11) at 15-5.

²⁴ *Pienaar v Thusano* 1992 (2) SA 552 (BGD) 585.

²⁵ 1972 (1) (SA) 741 (C) 744.

²⁶ 1980 (4) SA 63 (O) 66.

²⁷ 1953 2 PH E13 (T).

creditor's payment will be delayed as stated in *Irvin and Johnson Ltd v Oelofse Fisheries Ltd*²⁸

The court will grant a provisional judicial management order if a company by reason of mismanagement, or for any other cause, is unable or probably unable to pay its debts and has not become or is prevented from being a successful concern²⁹; there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern³⁰ and it will be just and equitable to do so.³¹

2.6 The Provisional Judicial Management Order

A provisional judicial management order can be obtained by way of a court application in accordance to section 299 (1) (a). The application is made by persons who are entitled to apply for the winding up of the company as provided for by s 207 (1), such persons are the company, its creditors and members. The second route is in s 299(1) (b) where one can apply for judicial management during the winding up of the company. The onus is on the applicant to prove that they have a right to request for judicial management. After hearing the application for an order of judicial management, the court may grant a provisional judicial management order. In *Clarke v Protein Foods (Pvt) Ltd*³² it was held that the courts have a wide discretion in deciding whether or not to grant a provisional judicial management order and are reluctant to grant an order from which shareholders seek to benefit by keeping creditors waiting a long time for payment.

The order must contain the return day which must not be more than 60 days from the grant of the provisional judicial management order,³³ directions that the company shall subject to the supervision of the court under the management of a provisional judicial manager.³⁴ The current managers of the company will divest all their powers in the provisional judicial manager. The court may make any other necessary order with regard to company's management. The provisional judicial

²⁸ 1954 (1) SA 231 (E) 237.

²⁹ S 300 (a) (i).

³⁰ S 300 (a) (ii).

³¹ S 300 (a) (iii).

³² 1970 (2) RLR 278.

³³ S 301 (1) (a).

³⁴ S 301 (1) (b).

manager may have other powers conferred upon him for example raise money without the authority of the shareholders subject to the rights of the creditors.³⁵

The order may contain directions that while the company is under judicial management, all legal processes against it may be stayed and not be proceeded with without the leave of the court³⁶. The order may also be changed or discharged on the application of the applicant or a creditor, a member of the company, the provisional judicial manager or the Master of the court.

2.7 Effect of the provisional order

When the provisional judicial management order is granted, the property of the company will be under the control of the Master of the court.³⁷ When the provisional judicial manager officially takes over the management of the company he becomes the custodian of the property. The Master shall without delay,³⁸ appoint a provisional judicial manager³⁹ who must be a qualified liquidator. The provisional judicial manager is required to give security for the proper performance of his duties as instructed by the Master.⁴⁰ The Master must also convene separate meetings of creditors, members of the company and debenture holders of the company to consider the report of the provisional judicial manager⁴¹. A judicial management order does not create a *concursum creditorium*.⁴² One of the consequences is that set-off between debts incurred prior to and after the granting of the order takes place automatically *ipso iure* in spite of a direction in the order that all legal processes against the company are stayed.⁴³ Any company under judicial management must state that it is under such an order by adding it to their company name.

³⁵ S 301 (1) (c).

³⁶ Ibid.

³⁷ S 302 (1).

³⁸ S 302 (1) (b).

³⁹ S 302 (1) (b) (i).

⁴⁰ Ibid.

⁴¹ S 302 (1) (b) (ii).

⁴² Blackman (note 11) at 15-20.

⁴³ Ibid.

2.8 Duties of the provisional judicial manager

The provisional judicial manager must assume the management of the company as soon as he assumes his duty.⁴⁴ The manager must recover any property that may not be in the company's possession and take into possession the entire company assets⁴⁵ and within seven days inform the Registrar of his appointment.⁴⁶ He must act without bias and exercise unfettered discretion. The crucial task is the report on the financial status of the company to the affected parties. The report must contain an account of the general state of affairs of the company,⁴⁷ reasons why the company is unable to pay its debts or meet its financial obligations or has not been or prevented from being a successful concern,⁴⁸ a statement of the company assets as well as its liabilities,⁴⁹ a complete list of all the creditors including contingent and prospective creditors and the amounts and nature of the claim of each creditor.⁵⁰ It must also contain particulars as to any source from which money has or is to be raised for purposes of carrying on the business of the company⁵¹ and the provisional manager's opinion as to the prospects of the company becoming a successful concern plus the removal of the facts and circumstances which prevent the company from becoming a successful concern.⁵²

2.9 Meetings of creditors and members

The meetings between the members of the company creditors⁵³ and any debenture holders are held separately.⁵⁴ The provisional judicial manager presents the report on the company's affairs. They are held under the chairmanship of the Master or the magistrate who has local jurisdiction to preside over the matter. The purpose of the meetings is to consider the report of the provincial judicial manager and to deliberate on the desirability of placing the company under judicial management taking into account the prospects of the company becoming a successful

⁴⁴ S 303 (a).

⁴⁵ Ibid.

⁴⁶ S 303 (b).

⁴⁷ S 303 (c) (i).

⁴⁸ S 303 (c) (ii).

⁴⁹ S 303 (c) (iii).

⁵⁰ S 303 (c) (iv).

⁵¹ S 303 (c) (v).

⁵² S 303 (c) (vi).

⁵³ S 304 (1) (a).

⁵⁴ S 304 (1) (b).

concern.⁵⁵ During the meetings, the affected persons may nominate person/persons as the final judicial manager and submit the names to the Master for appointment.⁵⁶ Creditors are required to prove their claims against the company.⁵⁷

The meetings must consider the passing of a resolution granting preference to liabilities incurred by the provisional judicial manager in the conduct of the company's business.⁵⁸ A person shall not be nominated for appointment as a final judicial manager if he is an auditor of the said company or is disqualified under the provisions of the Act.⁵⁹ The chairman of the meetings must report to the court on what transpired during the meetings with particular weight given to the reason why judicial management was proposed or rejected for the concerned company.⁶⁰

2.10 Return day of the provisional judicial management order

The return day of the provisional judicial management order should not be in excess of the stipulated 60 days from the date the order was granted. The court may extend the time if the claim is *bona fide*. The court considers the opinions and wishes of the company members and the creditors to the company,⁶¹ the provisional judicial managers' report in terms of section 303, the number of creditors who did not prove their claims during the first meetings and the amounts and nature of their claims⁶² and the Master's⁶³ the Registrar's⁶⁴ report.

The court may grant a final judicial management order. The order is only granted if it appears from the report that if placed under judicial management the company will be enabled to become a successful concern and that it is just and equitable to do so.⁶⁵ Creditors have a right to reject a judicial management order and apply for the winding up of the company on the return day.

⁵⁵ S 304 (2) (a).

⁵⁶ S 304 (2) (b).

⁵⁷ S 304 (2) (c).

⁵⁸ S 304 (2) (d).

⁵⁹ S 304 (3).

⁶⁰ Cilliers, Benade (note 1) at 485.

⁶¹ S 305 (1) (a).

⁶² S 305 (1) (c).

⁶³ S 305 (1) (d).

⁶⁴ S 305 (1) (e).

⁶⁵ S 305 (1) (e).

2.11 Remuneration of the provisional judicial manager

This is decided by the Master of the court.⁶⁶ The Master considers how the manager performed his duty and any recommendations by the creditors and members of the company in relation to the remuneration of the provisional judicial manager.⁶⁷

2.12 The final judicial management order

Following a provisional order, the court may grant a final judicial management order as it deems fit. The order must contain directions for the vesting of the management of the company in the final judicial manager subject to the supervision of the court.⁶⁸ The court may order any directions as to the management of the company.⁶⁹ Further, the court may confer powers upon the final judicial manager; subject to the rights of the creditors of the company, to raise money in any way without the authority of the shareholders as the court considers necessary.⁷⁰ The court may not for instance authorise the judicial manager to bind the credit or the company in a manner whereby a preference would be created for the claims of the creditors concerned.⁷¹ A judicial management order may be varied by the court that awarded it if the judicial manager, the Master or creditors in the form of a majority resolution apply to the court that it may be so varied.

2.13 Duties of the final judicial manager

A judicial manager was termed an officer of the court in *Re Idstein (Pty) Ltd.*⁷² Case law further states that the manager is not an officer of the company as held in *Rennie v Holzman*.⁷³ The manager must not disregard the Memorandum and Articles of association of the company and the terms of the judicial management

⁶⁶ S 308 (1).

⁶⁷ S 308 (2).

⁶⁸ S 305 (2) (a).

⁶⁹ S 305 (2) (b).

⁷⁰ *Ibid.*

⁷¹ *Klopper v Die Meester* 1977 (2) SA 477 (T) 484.

⁷² 1957 (1) SA 640 (W).

⁷³ 1987 (4) SA 938 (C).

order subject to the supervision of the court.⁷⁴ In *Theron v Natal Marksagente*⁷⁵ the courts held that a person who is unable to act without bias towards the company and exercise unfettered discretion should not be appointed judicial manager. A final judicial manager is required to exercise an independent mind, ‘neither the members or the creditors or any other person can compel the judicial manager to take any particular act in his administration of the company.’⁷⁶ Like a director, the manager stands in a fiduciary relationship with the company, its members and creditors⁷⁷.

The manager’s duties according to the Act are taking over from the provisional judicial manager and assume management of the company,⁷⁸ manage the company subject to any order of the court in such a manner as he may consider most economic and most likely to promote the interests of members and creditors of the company,⁷⁹ comply with the direction of the court made in the final judicial management order⁸⁰ and he must lodge with the Registrar a copy of the judicial management order and the Masters letter of appointment under the cover of the prescribed Form CM 40.⁸¹

Further, in the event of the final judicial management order being cancelled, he must lodge with the Registrar a copy of the order cancelling it within seven days from the date of cancellation.⁸² He must keep financial records and prepare annual financial statements as the company would have been obliged to comply had it not been under judicial management.⁸³ The manager must convene all the necessary meetings including the annual general meeting and meetings of members.⁸⁴ He is required to convene meetings of creditors, in the case of a private company, not later than six months after the end of the financial year.⁸⁵ The judicial manager during the meetings of creditors must submit reports showing the assets and liabilities of the company and its debts and obligations verified by the auditor of

⁷⁴ S 306.

⁷⁵ 1978 (4) SA 898 (N).

⁷⁶ *Venter v Williams* 1982 (2) SA 706 (A).

⁷⁷ Blackman (note 11) at 15-24.

⁷⁸ S 306 (a).

⁷⁹ S 306 (b).

⁸⁰ S 306 (c).

⁸¹ S 306 (d) (i).

⁸² S 306 (d) (ii).

⁸³ S 306 (f).

⁸⁴ S 306 (g).

⁸⁵ S 306 (h).

the company, and necessary information to enable the creditors to know the company's position as at the end of the financial year or the period covered by such interim report, in the case of a private company as at the date six months after the end of its financial year.⁸⁶ He must lodge with the Master copies of all documents submitted to the meetings of members and meetings of creditors.⁸⁷ The judicial manager is also required to examine the affairs of the company before the commencement of judicial management to ascertain whether any officer of past officer of the company has contravened or appears to have contravened any provision of the Act and within six months from the date of his appointment shall report to the Master a report on any such contravention or offence.⁸⁸

He must examine the affairs of the company before the commencement of judicial management in order to ascertain whether any officer of past officer of the company appears to be personally liable to pay damages for compensation to the company or is personally liable for any liabilities of the company and within six months from the date of appointment submit a report containing full particulars of any such liability to the Master and to the next succeeding meeting of members and creditors of the company.⁸⁹ The manager may to apply to the court to cancel the judicial management order and issue an order for winding up of the company if, at any time he is of the opinion that the continuation of judicial management will not enable the company to become a successful concern, this must be done after not less than 14 days' notice by registered post to all members and creditors of the company.⁹⁰

2.14 The application of assets during judicial management

In accordance with s 307 (1) of the Act, a judicial manager shall not without the leave of the court sell or dispose the company's assets except if it is during the ordinary course of business. In *Joosab v Ensor NO*⁹¹ it was held that the test for determining whether or not the transaction was in the ordinary course of business is an objective one. It must be that having regard to the terms of the transaction, it

⁸⁶ S 306 (i).

⁸⁷ S 306 (j).

⁸⁸ S 306 (k).

⁸⁹ S 306 (l).

⁹⁰ S 306 (m).

⁹¹ 1966 (1) (SA) 319 (A).

would have normally been entered into by solvent business men. Any monies of the company becoming available to him shall be for the payment of the costs judicial management, conducting the company business according to the judicial management order payment and creditors' payments before commencement of judicial management.

Additionally, the costs of the judicial management and the claims of creditors of the company shall be paid *mutatis mutandis* in accordance with the law relating to insolvency as if those costs were for sequestration of an estate and those claims were against an insolvent estate.⁹²

2.15 The grounds for cancellation of the Judicial Management Order

Apart from the judicial manager, an affected person can also apply to the court that granted the judicial management order to cancel the order.⁹³ It must appear to the court that the purpose of judicial management has been fulfilled or for any reason is undesirable that the order should remain in force.⁹⁴ The application for cancellation must not be *mala fide*; it must be premised on the fact that judicial management will not help the company to recover, if there is no prospect that the company can be rescued then it should be wound up. A judicial manager must notify members and creditors by registered post, they must be given 14 days' notice. The court shall give necessary directions for the resumption of the management and control of the company by the officers including convening of a general meeting of members for the purpose of electing directors of the company.⁹⁵

2.16 Miscellaneous provisions

Other notable provisions in the Act are those relating to the conduct of directors of the company prior to and during judicial management. Directors owe a fiduciary duty to the company hence the need to regulate their conduct in relation to company affairs. The statute provides for the responsibility of directors and other

⁹² S 307 (3).

⁹³ S 314 (1).

⁹⁴ Ibid.

⁹⁵ S 314 (2).

persons for fraudulent conduct of business.⁹⁶ If it appears that company was being managed recklessly,⁹⁷ with gross negligence,⁹⁸ or with intent to defraud any person or any fraud purpose,⁹⁹ the Master, judicial manager, liquidator or creditor to the company may apply to the court which may hold those responsible personally liable for any debts or liabilities of the company.¹⁰⁰

Section 319 provides for the prosecution of delinquent directors and other persons in the company. If it appears during the course of judicial management that any past or present officers or members of the company have been guilty of criminal conduct under the Act, or in relation to creditors or the company under common law, the judicial manager shall report to the Attorney-General. People in a position of power in a company should have their conduct regulated to ensure that they do not abuse it.

2.17 Drawbacks of judicial management as a rescue procedure

Deducing from the above provisions of both the Zimbabwean and former South African Companies Act; the purpose of judicial management is to help financially distressed companies. In Zimbabwe, though condemned, judicial management has also been commended by some who view the procedure as an efficient rescue mechanism that works, however, it has been submitted by Mr Knowledge Hofisi a judicial management expert in Zimbabwe that there is need to realign the legislative framework with contemporary business practices and the writer agrees with this assertion.¹⁰¹ Judicial management has a number of inherent flaws that render it ineffective a mechanism for assisting financially distressed companies. This chapter has unearthed eight key disadvantages of judicial management in order to substantiate the view that is an inadequate company rescue procedure and they are as follows:

1. 'A serious practical disadvantage of judicial management is that a judicial management order affects the creditworthiness of a company detrimentally, even if

⁹⁶ S 318.

⁹⁷ S 318 (1) (a).

⁹⁸ S 318 (1) (b).

⁹⁹ S 318 (1) (c).

¹⁰⁰ S 318 (1).

¹⁰¹ Herald business 'Trustee' 11 October 2012, The Zimbabwean Herald, www.herald.co.zw last accessed 5 May 2013.

the judicial management order is later set aside.¹⁰² The company will be stained because it once experienced financial trouble. Even if in future it becomes a success, the damage to its credibility will already be done.

2. The court appears to have too much influence and wide discretion with regard to granting a judicial management order. One of the drawbacks of the process has been said to be that the court is too involved in the process, there is a great imbalance as the power is centralised in the judiciary, the company or its affected persons are hardly involved in the decision making process.

3. A requirement for an almost certain probability that the company can become a successful concern; places too much of a burden of proof on applicants. In the case of *Millman v Swartland Huismeubeleerders (Edms) Bpk*¹⁰³ it was held that the applicant must establish the prospect of the company's viability and from this viability, the prospect of ultimate solvency. This deters financially distressed companies with a genuine possibility of success from rehabilitating their companies through judicial management because it is difficult to provide concrete proof that the company will become totally solvent and financially viable.

4. The use of liquidators during the judicial management procedure obscures the intention of judicial management which is to rescue companies. Liquidators are concerned with liquidating companies and disposing of its assets, it is hard to reconcile the two. It seems as if from the onset, judicial management was meant to inevitably lead to winding up or liquidation. It is logical to appoint someone with adequate and relevant training to be able to expertly help the company to turn around its financial misfortunes and become a viable concern.

5. Another disadvantage of judicial management is that it is a costly procedure and for a company that is already financially distressed, it appears to be an almost out of reach solution to its problems. Because of its potential to be expensive, it deters small companies to utilise judicial management as a company rescue option because they cannot afford it. Additionally it is time consuming as the court may only make an order for initial provisional judicial management. The applicants will have to go to court frequently; in the process spending money and

¹⁰² Cilliers, Benade (note 1) at 478.

¹⁰³ 1972 (1) SA 741 (C).

wasting time. The company pays the provisional and final judicial managers fees, which is costly.

6. Another setback to the success of judicial management is that, at the time of the granting of the order, there is no proper and reliable assessment of the likelihood of the rehabilitation of the company. The test should be whether or not the company will be able to overcome its present difficulties and become a viable company.¹⁰⁴

7. The absence of an 'express' provision for an automatic moratorium on all actions and all proceedings against the company during judicial management leads to uncertainty¹⁰⁵ as there is no guarantee for the company and its members as well as affected parties that the court will grant a judicial management order that will include a moratorium. There must be a definite provision that provides for such as a moratorium is a necessity for the company to have breathing space while rehabilitating.

8. Another disadvantage of judicial management procedure is that there is no provision for the governing and qualifications of the judicial managers.¹⁰⁶ There must be a body of law that makes certain that qualified and competent people who have been trained for the job are recruited. This will effectively increase the chances of the company financially recovering because it will be guided by someone who is competent and qualified enough to know when and how to implement the required company rescue plan.

In conclusion, it is imperative for Zimbabwe to adopt a company rescue procedure that is practical and effective in practice. Judicial management though it has been used relatively often in the past decade in Zimbabwe, it will suit the company law regime best to be up to date with the ever evolving corporate world

¹⁰⁴ Shrand, Keeton *Company Law and Company Taxation in South Africa* (1974) 305.

¹⁰⁵ A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* LLD (UNISA) 54.

¹⁰⁶ Ibid.

standards and become a powerful modern day tool for rehabilitating financially distressed companies. By adopting the business rescue procedure that is in line with corporate governance requirements like South Africa, more companies will have a better chance of becoming successful viable concerns. The disadvantages of judicial management stated above indicate that there are shortcomings in the procedure and the Zimbabwean company law will be enriched through the implementation and adaptation of business rescue as a company rescue procedure.

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CHAPTER THREE: SOME STUDY ON BUSINESS RESCUE PROVISIONS IN SOUTH AFRICA

This chapter discusses the concept of business rescue procedure under the South African Companies Act. Having outlined the concept of judicial management in chapter two, this chapter seeks to highlight the differences between judicial management and business rescue to reveal that business rescue is a better company rescue mechanism compared to judicial management. It further discusses the impact that business rescue has had so far in South African company law. Case law pertaining to business rescue will be discussed.

3.1 Business rescue

One of the major themes of the Companies Act of 2008 is the creation of a system of ‘corporate rescue appropriate to the needs of a modern South African economy.’¹⁰⁷ It is a necessity for every state to have an effective regime that will be able to help companies that are financially distressed due to lack of resources or poor management.

The South African concept of business rescue is largely based on Chapter 11 of the American Bankruptcy Code, Bankruptcy Reform Act 1978 whose aim is to help financially distressed companies through monetary aid as well as a moratorium on the company.¹⁰⁸

In *NLRB v Bilisco*¹⁰⁹ it was held that the purpose of a business rescue is to prevent a company from going into liquidation with an attendant loss of jobs and possible misuse of economic resources. It is intended to balance debtors and creditors interests.¹¹⁰ If a country’s company law legislation lacks proper mechanisms for company rescue, the economy of that state will deteriorate due to loss of tax payments that viable companies contribute towards the economy as a whole.

¹⁰⁷ The Department of Trade and Industry policy paper ‘*South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*’ GN 1183 of 23 June 2004.

¹⁰⁸ Cassim (note 2) at 861.

¹⁰⁹ 465 US 513 (1983) 528.

¹¹⁰ Rushworth (note 13) at 376.

However it must be observed that the commencement of business rescue proceedings against a company is not a guarantee that the company is going to be revived to its former successful state. Sometimes a portion of the company is salvaged while the rest is sold out or merged with interested companies.

3.2.1 Voluntary business rescue

In terms of s 129 of the Companies Act, the board of directors of a company places the company in business rescue through the passing of a resolution to do so.

The legal requirement is that the board must have reasonable grounds to believe that the company is financially distressed¹¹¹ and there appears to be a reasonable prospect of rescuing the company.¹¹² A company may not institute business rescue if it has already started going through liquidation.¹¹³ The board resolution must be filed with the Company's Intellectual Property Commission hereinafter referred to as the Commission, within five working days following which the company must publish a notice of the resolution to every affected person in the company. At this stage a qualified business rescue practitioner is appointed by the company and must accept the offer in writing and takes over the management of the company. According to s129, the notice of appointment of the practitioner must be filed within two days after making the appointment and announced to all the affected persons in the company within five working days since the filing of the notice. The company is expected to meet all the requirements, if it fails the resolution to begin business rescue proceedings lapses and is a nullity.¹¹⁴ The company may not file a further resolution for a period of three months after the date on which the lapsed resolution was adopted unless a court, on good grounds shown on an *ex parte* application approves the company filing another resolution.¹¹⁵

Affected persons opposing the adoption of the resolution to place the company under business rescue are entitled to object to the resolution in terms of s 130. The court application must be made on the grounds that there is no reasonable basis for

¹¹¹ S 129 (1).

¹¹² S 129 (1) (a).

¹¹³ S 129 (2) (a).

¹¹⁴ S 129 (5) (a).

¹¹⁵ S 129 (5) (b).

believing that the company is financially distressed,¹¹⁶ there is no reasonable prospect for rescuing the company¹¹⁷ or that the company has failed to satisfy the procedural requirements for business rescue.¹¹⁸

An affected person may apply to the court for the setting aside of the appointment of the business rescue practitioner if the person does not have the required qualifications. The court may set aside the company's resolution if it is satisfied that the reasons advanced are reasonable. Additionally if the practitioner has a personal interest in the company, is biased or they do not have the appropriate skills needed the resolution to commence business rescue may be set aside.¹¹⁹

If the application is successful the court may make an order setting aside the appointment of the practitioner if it considers it just and equitable to do so¹²⁰ and appoint an alternate practitioner recommended by majority of creditors with voting interests.¹²¹ Affected persons are entitled to request the practitioner to provide surety so that the best interests of the company and theirs are protected.¹²² The practitioner is also given enough time to form an opinion on whether or not the company appears to be financially distressed¹²³ or there is a reasonable prospect of rescuing the company,¹²⁴ if not, the court may set aside the company's resolution¹²⁵ and place the company under liquidation.¹²⁶ The court application by an affected person must be served on the company as well as the Commission¹²⁷ and on all affected person in the company.¹²⁸

3.2.2 Business rescue proceedings by the order of the court

If a financially distressed company fails to adopt business rescue, an affected person may apply to the court to request for such proceedings to commence against

¹¹⁶ S 130 (1) (a) (i).

¹¹⁷ S 130 (1) (a) (ii).

¹¹⁸ S 130 (1) (a) (iii).

¹¹⁹ S 130 (1) (b).

¹²⁰ S 130 (5) (a) (ii).

¹²¹ S 130 (6) (a).

¹²² S 130 (1) (c).

¹²³ S 130 (5) (b) (i).

¹²⁴ S 130 (5) (b) (ii).

¹²⁵ Ibid.

¹²⁶ S 130 (5) (c) (i).

¹²⁷ S 130 (3) (a).

¹²⁸ S 130 (3) (b).

the company plus supervision of the company's affairs.¹²⁹ The application must be served on the company and the Commission.¹³⁰ The applicant must notify all affected persons of the application,¹³¹ who may be present during the hearing of the application.¹³²

The affected person must prove that the company is in financial distress¹³³ has not been able to meet its obligations,¹³⁴ it is just and equitable to do so for financial reasons¹³⁵ and there are reasonable prospects as to its recovery.¹³⁶ If the application is successful, the court may appoint a practitioner based on the recommendation of the applicant; however the holders of a majority of the independent creditors at the first meeting of the creditors must approve.¹³⁷ If the reasons are unsatisfactory, the court may dismiss the application and place the company under liquidation.¹³⁸

An application for business rescue suspends liquidation proceedings that may have been started against the company until the court has finished deliberating on the application or when the business rescue procedure comes to an end.

3.3 The Duration of business rescue

The date of the start of business rescue signifies that the moratorium on the company has come into effect.¹³⁹ Business rescue begins when the company files a resolution to place itself under such in accordance with s 129 (3)¹⁴⁰ or applies to the court for consent to file a resolution in terms of s 129 (5) (b).¹⁴¹ An affected person can also apply to the court for an order placing the company under business rescue.¹⁴² Additionally, a court may place the company under supervision during

¹²⁹ S 131 (1).

¹³⁰ S 131 (2) (a).

¹³¹ S 131 (2) (b).

¹³² S 131 (3).

¹³³ S 131 (4) (a) (i).

¹³⁴ S 131 (4) (a) (ii).

¹³⁵ S 131 (4) (a) (iii).

¹³⁶ S 134 (4) (a) (iv).

¹³⁷ S 131 (5).

¹³⁸ S 131 (4) (b).

¹³⁹ Cassim (note 2) at 876.

¹⁴⁰ S 132 (1) (a) (i).

¹⁴¹ S 132 (1) (a) (ii).

¹⁴² S 132 (1) (b).

liquidation or any proceedings enforcing a security interest in accordance with s 131 (7).¹⁴³

Business rescue ends when the court sets aside the resolution¹⁴⁴ or converts the proceedings to liquidation.¹⁴⁵ The practitioner may file a notice of the termination of the proceedings with the Commission.¹⁴⁶ If a proposed business rescue plan has been rejected and no affected person has acted to extend the proceedings in terms of s 153, business rescue comes to an end.¹⁴⁷ Should business rescue extend beyond the stipulated three months, the practitioner must prepare a report on the progress of the proceedings and update it monthly until the end of such proceedings.¹⁴⁸ The practitioner is required to deliver the report and updates to affected persons and to the court or the Commission.¹⁴⁹

3.4 The general moratorium on legal proceedings

As with judicial management discussed in the previous chapter, business rescue also provides for a moratorium on the company during the process. When business rescue commences, no legal proceeding, including enforcement action, against the company or in relation to any property belonging to the company or lawfully in its possession may be commenced or proceeded with in any forum.¹⁵⁰ Exceptions to the moratorium on the company are possible if there is a written consent of the practitioner,¹⁵¹ with the leave of the court,¹⁵² as a set off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings,¹⁵³ criminal proceedings against the company or any of its directors or officers, proceedings concerning any property or right over which the company exercises the powers of a

¹⁴³ S 132 (1) (c).

¹⁴⁴ S 132 (2) (a) (i).

¹⁴⁵ S 132 (2) (a) (ii).

¹⁴⁶ S 132 (2) (b).

¹⁴⁷ S 132 (c) (i).

¹⁴⁸ S 132 (3) (a).

¹⁴⁹ S 312 (3) (b).

¹⁵⁰ S 133 (1).

¹⁵¹ S 133 (1) (a).

¹⁵² S 133 (1) (b).

¹⁵³ S 133 (1) (c).

trustee¹⁵⁴ and proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.¹⁵⁵

In addition; s 133 (2) states that, except with the leave of the court, no person may enforce a guarantee or surety by a company in their favour during business rescue proceedings. The rights to institute proceedings or bring any claim against the company during business rescue are suspended.¹⁵⁶ The moratorium is thus wide and will be effective throughout the procedure.¹⁵⁷

3.5 Protection of property interests

During business rescue, a company may not dispose of any of its properties in its possession except if it is in the ordinary course of its business.¹⁵⁸ S134 (1) (a) (ii) states that there must be a *bona fide* reason for the disposal of property; the consent of the business rescue practitioner is a prerequisite. The disposal of assets during business rescue occurs if the transaction is part of the implementation of the business rescue plan.¹⁵⁹

When the rescue plan has been adopted by the company, no person who has a legally binding agreement with the company may exercise their right against the company with regard to property in its possession except with the approval of the practitioner.¹⁶⁰ It does not matter whether or not the said property is owned by the company. The business rescue practitioner is not permitted to unreasonably deny consent; he must consider the purpose of business rescue, the circumstances of the company as well as the nature of the property rights claimed in respect of it.¹⁶¹

A company that is under business rescue and intends to dispose of property over which a third party has security or minimal interest, must do so only after securing prior consent of the person except where it is certain that the amount recovered from the sale of such property will be sufficient to pay off the persons debt or interest. S 134 (3) prescribes that immediately after the property disposal, the

¹⁵⁴ S 133 (1) (d).

¹⁵⁵ S133 (1) (e).

¹⁵⁶ S 133 (1) (f).

¹⁵⁷ Loubser (note 105) at 206.

¹⁵⁸ S 134 (1) (a) (i).

¹⁵⁹ S 134 (1) (a) (iii).

¹⁶⁰ S 134 (1) (b).

¹⁶¹ S 134 (2).

company must pay the person the amount it owes or it must provide surety that is reasonably sufficient for whatever amount it is indebted to the person.

3.6 Post- commencement finance

Post-commencement finance refers to a process whereby the company is enabled to secure additional finance after the commencement of business rescue. Like the moratorium, it is central to business rescue process because the banks or creditors will naturally be reluctant to finance a company that is in financial distress for fear of not being paid back their debts. A company under business rescue will need even more financing to maximise its chances of successfully turning itself around. Post-commencement finance takes preference over all other creditor claims irrespective of whether or not they are secured.¹⁶² However it is more favourable to secured creditors as they rank above unsecured creditors.¹⁶³ Section 364 of the United States Bankruptcy Code provides that any credit extended to the company during business rescue enjoys priority over unsecured claims incurred before the rescue process.¹⁶⁴

In terms of the Act, any employee monies due from the company in the form of remunerations, reimbursements, expenses or any other amount of money relating to employment, that must be paid but the company fails to so during business rescue proceedings, becomes post-commencement finance¹⁶⁵ and the pay-out will be done in preference according to terms set out for business rescue.¹⁶⁶

The company may seek financing from other sources in terms of s 135 (2). The creditors to the company may utilise a company's asset to the extent that it is not encumbered.¹⁶⁷ All debts that are owed by the company after paying the practitioner's fees and any other costs of the business rescue procedure will rank equally but will be attended to first before secured and unsecured claims against the company.¹⁶⁸ The same preference will remain in force even if the business

¹⁶² S 135 (3) (a).

¹⁶³ Andrew Hutchinson *Business Rescue: How secure is the secured creditor?* 2011 unpublished Article 24.

¹⁶⁴ Cassim (note 2) at 882.

¹⁶⁵ S 135 (1) (a).

¹⁶⁶ S 135 (1) (b).

¹⁶⁷ S 135 (2) (a).

¹⁶⁸ S 135 (2) (b).

rescue turns into liquidation.¹⁶⁹

3.7 The effect of business rescue on employees and contracts

The terms of employee contracts do not change during business rescue. They continue to be employed by the company as prior to the commencement of business rescue.¹⁷⁰ However the exceptions are if the changes occur during the ordinary course of attrition¹⁷¹ or there was a mutual agreement between the employees and the company to change the terms of the contract that is not contrary to any labour law.¹⁷² The retrenchment of the employees during business rescue must comply with the labour laws provisions.¹⁷³

During business rescue, the practitioner, in spite of any agreements to the contrary entirely, partially or conditionally suspend, for the duration of the business rescue any obligation of the company¹⁷⁴ that arises under an agreement to which the company was a party at the commencement of the business rescue¹⁷⁵ and would otherwise become due during those proceedings¹⁷⁶ or apply urgently to a court to entirely, partially or conditionally cancel on any terms that are just and reasonable in the circumstances, any obligation of the company.¹⁷⁷

A practitioner may not suspend any provision of a contract of employment¹⁷⁸ or any agreement in a manner that is contrary to the Insolvency Act 24 of 1936.¹⁷⁹ The court is not permitted to cancel any contract of employment.¹⁸⁰ If a practitioner suspends an agreement with regard to security given by the company, the agreement remains effective in matters concerning any proposed property disposal by the company.¹⁸¹ A person who has a contract with the company that has been cancelled or suspended may claim damages from the company.¹⁸² If the company

¹⁶⁹ S 135 (4).

¹⁷⁰ S 136 (1) (a).

¹⁷¹ S 136 (1) (a) (i).

¹⁷² S 136 (1) (a) (ii).

¹⁷³ S 136 (b).

¹⁷⁴ S 136 (2) (a).

¹⁷⁵ S 136 (2) (a) (i).

¹⁷⁶ S 136 (2) (a) (ii).

¹⁷⁷ S 136 (2) (b).

¹⁷⁸ S 136 (2A) (a) (i).

¹⁷⁹ S 136 (2A) (a) (ii).

¹⁸⁰ S 136 (2A) (b) (i).

¹⁸¹ S 136 (2A) (C).

¹⁸² S 136 (3).

had first commenced liquidation before opting for business rescue, the liquidator becomes a creditor of the company to the extent of the total monies for his work that is owed by the company or expenses incurred before the commencement of business rescue.¹⁸³

3.8 The effect of business rescue proceedings on shareholders and directors of the company

The classification of issued securities of a company may only be done by way of transfer of securities in the ordinary course of business save where a different method of alteration has been directed by a court¹⁸⁴ or is contemplated in an approved business rescue plan.¹⁸⁵ S 137 (2) (a) provides that the office of the director does not cease to function during business rescue, this is however contingent upon the authority of the practitioner. S 137 (2) (b) further provides that a director may exercise any management duty within the company as instructed by the practitioner. Each director may disclose a personal financial interest in the company in advance by a written notice to the board or shareholders stating the nature and extent of the interest as stipulated by s 75 (4) of the Act. Directors are also mandated to attend to the requests of the practitioner at all times.¹⁸⁶ Any action taken by the director without the approval of the practitioner is void as prescribed by s 137 (4).

An application may be made to the court by the business rescue practitioner in terms of s 137 (5) requesting that a director be removed for office if they failed to comply with a requirement of business rescue and their actions or inactions compromised the functions and duties of the business rescue practitioner and affected the management of the company and properly executing a successful business rescue plan.

¹⁸³ S 136 (4).

¹⁸⁴ S 137 (1) (a).

¹⁸⁵ S 137 (1) (b).

¹⁸⁶ S 137 (3).

3.9 Qualifications of business rescue practitioners

The law requires the person who is tasked with undertaking business rescue to be qualified and competent. The accreditation of business rescue practitioners is also prescribed by the companies' regulations. The Commission must have due regard to the qualifications and experience that are set as conditions for membership of any such profession, and the ability of such profession to discipline its members. The Commission may revoke the accreditation if it has any reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members.¹⁸⁷

In terms of s138 (1) one must be a member of an accredited profession for instance the accounting field, the legal profession or have business management attributes.¹⁸⁸ Practitioners must be licenced by the Commission.¹⁸⁹ He must be able to act objectively without prejudice,¹⁹⁰ if a person has a relationship with a member of the company they are not permitted to be appointed as a practitioner to take of the company during business rescue.¹⁹¹

The Minister has the discretion to direct the Commission on how to issue licences as well as the requirements for admission as a business rescue practitioner. In terms of the regulations, the Commission may issue a licence to a business rescue practitioner if it is satisfied that, the applicant if of good character and integrity.¹⁹² The applicant must be sufficiently educated and experienced enough to perform the functions of a business rescue practitioner.¹⁹³

The Commission must not licence an applicant who is disqualified from appointment as a practitioner in terms of s 138 (1) (c) or (d).¹⁹⁴ The Commission may issue a licence,¹⁹⁵ or a conditional licence on reasonable terms according the applicants educational qualifications and experience¹⁹⁶ or it may issue a written

¹⁸⁷ Reg 126 (1) (a).

¹⁸⁸ S 138 (1) (a).

¹⁸⁹ S 138 (1) (b).

¹⁹⁰ S 138 (1) (e).

¹⁹¹ S 138 (1) (f).

¹⁹² Reg 126 (4) (a).

¹⁹³ Reg 126 (4) (b).

¹⁹⁴ Reg 126 (5).

¹⁹⁵ Reg 126 (6) (a).

¹⁹⁶ Reg 126 (6) (b).

notice to the applicant of its reasons for refusal to issue the licence.¹⁹⁷ Disqualification from appointment as a business rescue practitioner licencing by the Commission leads to licence revocation through a written notice.¹⁹⁸ Additionally the Commission may suspend or revoke a licence if there are reasonable grounds to believe that the person is no longer qualified to be licenced or has contravened conditions of the licence.¹⁹⁹ Regulation 126 (8) provides that an applicant who has been refused a licence, been issued with a conditional licence, has had their licence revoked or suspended may apply to the Tribunal for review of the Commission's decision. The Tribunal may partially or entirely confirm or set aside the Commission's decision.

A practitioner may be discharged from office by means of a court order²⁰⁰ or upon request from an affected person or the company itself.²⁰¹ The grounds for removal are incompetence,²⁰² lacking care and skill in the exercise of duty,²⁰³ participating in engagements that are illegal at law,²⁰⁴ lacking independence and existence of conflict of interest.²⁰⁵ If the practitioner fails to effectively perform the duties that are required of him²⁰⁶ they may be removed from office and a new practitioner may be elected by the affected person who requested the removal and the same applies if the practitioner dies.²⁰⁷

3.10 The general duties and powers of practitioners

There is need for guidelines that regulates the conduct of business rescue practitioners in office. A practitioner takes charges of the company once business rescue commences and must do so in a competent manner. He must give notice to all relevant authoritative bodies when business rescue commences. The duties, which are prescribed by s140 (1) of the Act may be summarised as follows. He assumes total control of the company by taking over from the company's

¹⁹⁷ Reg 126 (6) (c).

¹⁹⁸ Reg 126 (7) (a).

¹⁹⁹ Reg 126 (7) (b).

²⁰⁰ S 139 (1) (a).

²⁰¹ S 139 (1) (b).

²⁰² S 139 (2) (a).

²⁰³ S 139 (2) (b).

²⁰⁴ S 139 (2) (c).

²⁰⁵ S 139 (2) (e).

²⁰⁶ S 139 (2) (f).

²⁰⁷ S 139 (3).

management as well as the board of directors. The practitioner is permitted to delegate any power or function to a person who was part of the board or the pre-existing management of the company. He must be able to develop and implement an effective business rescue plan that is not in contravention to provisions in the Act

Subject to the approval of the court, the practitioner may not appoint any person who has a relationship with the company such that an independent mind would conclude that the ‘integrity, impartiality or objectivity’²⁰⁸ of that person is compromised due to the relationship they have with that company.

During business rescue, the practitioner is an officer of the court and must at all times inform the court of his dealings.²⁰⁹ He assumes the office of a director and the liabilities and duties attached to the said office.²¹⁰ The exceptions to his liabilities are set out in s 140 (3) (c) which states that one is not liable for any act or omission in good faith in performing duties. The practitioner may be liable for acts tantamount to gross negligence.²¹¹ If the business rescue plan fails and leads to liquidation, the practitioner is not eligible to be the liquidator of the said company.²¹²

The practitioner has a duty to investigate the company’s affairs as soon as he takes office in terms of s141. The investigation of the affairs extends to the financial status of the company and its properties as this will help him determine if the company has any hope of being rescued. If the company cannot become a viable concern, he must report the findings to the court, the company and all affected persons. The practitioner must apply for an order placing the company under liquidation.²¹³ If the company is no longer in a threatening financial situation, the practitioner must inform all the relevant stakeholders in the company then proceed to terminate business rescue proceedings.²¹⁴ In terms of s141 (2) (c) (i), the duties also extend to the practitioner correcting the mistakes that were made by the previous management of the company. If there is evidence to suggest that

²⁰⁸ S 140 (2) (a).

²⁰⁹ S 140 (3) (a).

²¹⁰ S 140 (3) (b).

²¹¹ S 140 (3) (c) (ii).

²¹² S 140 (4).

²¹³ S 141 (2) (a).

²¹⁴ S 141 (2) (b).

there were illegal acts perpetrated by the company, he must report to the responsible authorities so that they can pursue the investigation or prosecute the responsible persons.²¹⁵

3.11 The remuneration of the practitioner

The business rescue practitioner's fees must be in accordance with the tariffs prescribed by the Act and set out in the regulations. Regulation 128 provides that the fees may not exceed R1 250 per hour to a maximum of R15 625 per day in the case of a small company.²¹⁶ For a medium company the fees are R1500 per hour to a maximum of R18 750 per day²¹⁷ and for a large company, R2 000 per hour to a maximum of R25 000 per day.²¹⁸ He is entitled to propose for an agreement for additional fees from the company for duties he performed during business rescue proceedings, this is in accordance with s 143 (1). For the agreement to become binding, it must be approved by the majority of creditors who have voting rights in the company²¹⁹ as well as shareholders who also possess such rights.²²⁰ Creditors or shareholders who were in objection to the practitioner's remuneration fee agreement may apply to the court for nullification of the agreement if it is not just and equitable²²¹ or that the fees required are in excess and the company will not be able to meet them. If the company fails to pay the business rescue practitioner his fees, the fee claim will be given preference over all secured and unsecured creditors to the company.²²²

3.12 The rights of affected persons during business rescue proceedings

All affected persons in the company are entitled to have a say in the running of the business rescue procedure as well as the implications the procedure is going to have on them.

²¹⁵ S 141 (2) (c) (ii).

²¹⁶ Reg 128 (1) (a).

²¹⁷ Reg 128 (1) (b).

²¹⁸ Reg 128 (1) (c).

²¹⁹ S 143 (3) (a).

²²⁰ S 143 (3) (b).

²²¹ S 143 (4) (a).

²²² S 143 (4) (b).

3.12.1 Employee rights

During business rescue it is critical to strike a balance between the needs of employees and creditors to the company; the Act aims to ensure the protection of employee rights. It has been said that employees are the lost souls of insolvency law.²²³

An employee may be represented by a registered trade union²²⁴ or may exercise the right prescribed by the act by proxy, an employee committee or organisation.²²⁵ Some of the rights include the right to vote, participate during necessary meetings as well as oppose or approve the business rescue resolution. If an employee was owed monies by the company that were not paid before business rescue commenced, that employee will be treated as an unsecured creditor.²²⁶ A Union that will be representing the employees during business rescue must be notified by the practitioner in a manner prescribed by the Act.²²⁷ A Union, in accordance with s144 (3) (b) may participate in the court proceedings during business rescue. The practitioner is required consult the Union with regard to the business rescue plan as well as give them ample time to familiarise themselves with the plan as prescribed by subsection (3) (d). A Union has voting rights with regard to the deliberations on the adoption of the business rescue plan.²²⁸ A Union is permitted to vote with creditors on a motion to approve a proposed business rescue plan if the said employee is a creditor of to the company.²²⁹ Unions may contribute to the development of a new business rescue plan if the current one fails.

3.12.2 Participation by creditors

The creditors of the company have a right to approve or reject a business rescue plan. The main reason is because of the moratorium placed over the company, it alters the rights the creditors may have had over the company. It is imperative for them to participate during business rescue. All creditors must be given notice of each court proceeding or any meeting in relation to the company during business

²²³ Vanessa Finch *Corporate Insolvency Law: Perspectives and Principles* 2ed (2004) 778.

²²⁴ S 144 (1) (a).

²²⁵ S 144 (1) (b).

²²⁶ S 144 (2).

²²⁷ S 144 (3) (a).

²²⁸ S 144 (3) (e).

²²⁹ S 144 (3) (f).

rescue in terms of s145 (a). They may take part in the court proceedings.²³⁰ Creditors may formally participate in the business rescue proceedings subject to the provisions of the Act.²³¹ Creditors may amend, approve or reject a proposed plan.²³² If the business rescue plan is rejected, the creditors may propose a new plan or offer to acquire the interests of all the other creditors who voted against the business rescue plan.²³³ They may form their own independent committee.²³⁴ The voting rights of creditors whether secured or unsecured are contingent upon the total monies owed to them by the company. A concurrent creditor who would be subordinated in liquidation has voting interest equal to the amount that the creditor could reasonably expect to be awarded if the company goes into liquidation.²³⁵ It appears the aim of business rescue is to add rather than detract from creditors' rights. It amplifies creditor rights over shareholder rights.²³⁶

3.12.3 Participation by holders of company's securities

Shareholders' interests are generally regarded subordinate to other stakeholders during business rescue.²³⁷ Their interests have been said to be 'at the back of the queue' during business rescue.²³⁸ However each holder of company securities must be given notice of court proceedings²³⁹ as well as participate in the said court proceeding during business rescue.²⁴⁰ They may participate in the process. They may vote in favour of or disprove the business rescue plan if it will in any way infringe on their rights in terms of their class of shares in accordance with the provisions of s146 (d). If the business rescue plan is rejected, they may propose the implementation of a new plan²⁴¹ or present an offer to acquire the interests of any or all the creditor who voted against the approval of the business rescue plan.²⁴²

²³⁰ S 145 (1) (b).

²³¹ S 145 (1) (c).

²³² S 145 (2) (a).

²³³ S 145 (2) (b).

²³⁴ S 145 (3).

²³⁵ S 145 (4) (b).

²³⁶ Richard Bradstreet *Business rescue proves to be creditor friendly: C J Classen J's analysis of the new business rescue procedure in Oakdene Square Properties 7.*

²³⁷ Cassim (note 2) at 904.

²³⁸ Bradstreet (note 232) at 8.

²³⁹ S 146 (a).

²⁴⁰ S146 (b).

²⁴¹ S 146 (e) (i).

²⁴² S 146 (e) (ii).

3.13 Meetings during business rescue

All affected persons in the company have the right to hold meetings, separately, in which they will be briefed by the business rescue practitioner on the prospects of success of the rescue plan as well as the pertinent information regarding the company's financial status and general affairs.

According to s 147 of the Act, the meetings of creditors, employees and their representatives must take place within 10 business days after the practitioner takes office. The creditors have a right to know if there is a reasonable prospect of rescuing the company²⁴³ as well as present to the practitioner proof of their claims.²⁴⁴ Creditors may at this point deliberate on forming a committee and appoint members to it.²⁴⁵

Every creditor in the company must receive appropriate notice of the first meeting from the practitioner with information such as the date, time and place²⁴⁶ of the meeting as well as its agenda.²⁴⁷ The same applies for employee representatives, this can be a legitimate Union, they command the same rights as creditors when it comes to holding meetings with the practitioner as evidenced by section 148. A decision at the said meeting will be termed approved if the majority of the creditors, independent, with voting rights agree to the decision.²⁴⁸

3.14 Functions, duties and membership of committees of affected persons

Business rescue aims to involve all stakeholders in the company through facilitating their participation and input throughout the process. An 'affected person' in relation to the company has been defined by the Act as a shareholder or creditor of the company,²⁴⁹ any registered Trade Union representing employees of the company²⁵⁰ and each employee in their own capacity if they are not represented.²⁵¹ In terms of s149, a person is eligible to be a member of a committee

²⁴³ S 147 (1) (a) (i).

²⁴⁴ S 147 (1) (a) (ii).

²⁴⁵ S 147 (1) (b).

²⁴⁶ S 147 (2) (a).

²⁴⁷ S 147 (2) (b).

²⁴⁸ S 147 (3).

²⁴⁹ S 128 (1) (a) (i).

²⁵⁰ S 128 (1) (a) (ii).

²⁵¹ S 128 (1) (a) (iii).

of creditors or employees if they are an independent creditor or employee of the company,²⁵² an agent, proxy or attorney of an independent creditor or employee or any person acting under a general power of attorney²⁵³ authorised in writing by an independent creditor or employee to be a member.²⁵⁴

A committee of employees or creditors may consult with the practitioner about any matter relating to business rescue but may not instruct the practitioner.²⁵⁵ The committees act on behalf of all the creditors and employees in the company and may receive and consider reports on business rescue on their behalf, this is in accordance with s 149 (1) (b). In the execution of its duties, a committee is required to exercise an independent mind to ensure fair and unbiased representation of creditors or employees interests.²⁵⁶

3.15 The development and approval of the business rescue plan

The prime duty of the practitioner is to competently develop a plan that will rescue a company that is in financial distress. After consulting with creditors, affected persons and the management in the company,²⁵⁷ the practitioner must formulate a plan with all relevant information pertaining to the company's affairs and future plans that will make it possible for the affected persons to decide whether or not to accept or reject the plan.²⁵⁸ In terms of s150, the plan must be in three parts that is the background, proposals plus assumptions and conditions. The background must be inclusive of a list of all company assets including those that are not in its possession,²⁵⁹ a creditors list with an outline of which ones would be qualified, preferred, those who have proved their claims all subject to the laws of insolvency,²⁶⁰ an estimate of the dividend that creditors are likely to receive if the company goes into liquidation,²⁶¹ a list of the holders of companies securities,²⁶² a copy of the agreement; which must be written, with regard to the practitioners

²⁵² S 149 (2) (a).

²⁵³ S 149 (2) (b).

²⁵⁴ S 149 (2) (c).

²⁵⁵ S 149 (1) (a).

²⁵⁶ S 149 (1) (c).

²⁵⁷ S 150 (1).

²⁵⁸ S 150 (2).

²⁵⁹ S 150 (2) (a) (i).

²⁶⁰ S 150 (2) (a) (ii).

²⁶¹ S 150 (2) (a) (iii).

²⁶² S 150 (2) (a) (iv).

fees²⁶³ and a statement showing if the business rescue plan has an informal proposal submitted by a creditor of the company.²⁶⁴

The business rescue proposal must contain information on the nature and duration of any moratorium to be placed on the company during business rescue.²⁶⁵ The proposal must show the extent to which the company is to be released from the payment of its debts and the extent to which any debt is proposed to be converted to equity in the company.²⁶⁶ It should also outline the company's possible future, that is its on-going role and how existing agreements are going to be treated.²⁶⁷ The practitioner must state if there is any property of the company that is available to pay creditors' claims during business rescue²⁶⁸ as well as the preference order of creditors' in terms of who will be paid first.²⁶⁹ The proposal must articulate the benefits of business rescue to creditors compared to liquidation.²⁷⁰ It must also outline how the business rescue plan is probably going to affect the shareholders classes of shares.²⁷¹

The third part of the proposal must contain the assumptions and conditions of business rescue. It must include the conditions which must be met for business rescue to come into operation²⁷² and to be fully implemented.²⁷³ It should contemplate the likely effects business rescue will have on employees and their contracts of employment.²⁷⁴ The circumstances in which the business rescue plan will end must²⁷⁵ be included in addition to the probable balance sheet of the company²⁷⁶ together with its statement of income and expenses for the next three years.²⁷⁷ A business rescue proposal must end with a certificate by the practitioner attesting to the information provided as accurate, complete and up to date.²⁷⁸ The

²⁶³ S150 (2) (a) (v).

²⁶⁴ S 150 (2) (a) (vi).

²⁶⁵ S 150 (2) (b) (i).

²⁶⁶ S 150 (2) (b) (ii).

²⁶⁷ S 150 (2) (b) (iii).

²⁶⁸ S 150 (2) (b) (iv).

²⁶⁹ S 150 (2) (b) (v).

²⁷⁰ S 150 (2) (b) (vi).

²⁷¹ S 150 (2) (b) (vii).

²⁷² S 150 (2) (c) (i) (aa).

²⁷³ S 150 (2) (c) (i) (bb).

²⁷⁴ S 150 (2) (c) (ii).

²⁷⁵ S 150 (2) (c) (iii).

²⁷⁶ S 150 (2) (c) (iv) (aa).

²⁷⁷ S 150 (2) (c) (iv) (bb).

²⁷⁸ S 150 (4) (a).

proposal must contain an outline that the projections provided by the practitioner must be estimate calculations made in good faith.²⁷⁹

The company is mandated to publish the business rescue plan within 25 business days from the date of the practitioner's appointment.²⁸⁰ There are however exceptions whereby an extension to the time will be provided for by a court upon application by the company²⁸¹ or by a majority of creditors with voting interests.²⁸²

3.16 The consideration of the business rescue plan

An important aspect of business rescue is the approval of the business rescue plan. The practitioner is required to first hold a meeting with affected persons in the company in terms of s151 of the Act. The purpose of the meeting is to determine the future of the company. It must be held within 10 days after publishing the plan for business rescue²⁸³ and creditors and all those with voting interests must be present at the meeting. Those to be present at the meeting must be given notice at least 5 days before the meeting by the practitioner as stipulated by s151 (2). The notice must include the time, date and place of the meeting,²⁸⁴ its agenda²⁸⁵ as well as a summary of the rights of affected persons to participate in and vote at the meeting.²⁸⁶

In terms of the proposed business rescue plan, a vote that has been supported by more than 75 per cent of creditors with voting interest²⁸⁷ plus at least 50 per cent of the independent creditors voting interest²⁸⁸ has the effect of preliminarily approving the plan. An independent creditor is defined by the Act as a person who is a creditor of the company including an employee who is also a creditor in terms of s 144 (2) of the Act. It further states that, the creditor must not be related to the company, a director of a practitioner.²⁸⁹

²⁷⁹ S 150 (4) (b).

²⁸⁰ S 150 (5).

²⁸¹ S 150 (5) (a).

²⁸² S 150 (5) (b).

²⁸³ S 151 (1).

²⁸⁴ S 151 (2) (a).

²⁸⁵ S 151 (2) (b).

²⁸⁶ S 151 (2) (c).

²⁸⁷ S 152 (2) (a).

²⁸⁸ S 152 (2) (b).

²⁸⁹ S 128 (1) (g).

If the proposed business rescue plan is rejected, the practitioner may seek a vote of approval to prepare and publish a revised plan.²⁹⁰ If the proposed plan does not alter the rights of any class of securities holders in the company, the preliminary approval of such plan signifies the final adoption of the plan as contemplated in s152 (3) (b).

If a business rescue plan alters the rights of any class of holders of the company's securities, the practitioner is mandated to immediately hold a meeting of those affected and give them a chance to vote for the approval and adoption of the proposed business rescue plan.²⁹¹ If the plan is rejected it may only be put up for further consideration after the practitioner has sought approval in accordance with s153. A business rescue plan that has been consented to is binding on the company as well as its creditors and holders of company securities in accordance with s152 (4). Absence from the meeting,²⁹² or did not vote in favour²⁹³ the plan is irrelevant. For creditors, whether or not they had proved their claims against the company is also immaterial.²⁹⁴ This means that the creditors are bound against their own will to consent to the business rescue plan. The advantage is it progressive because it ensures that creditors who are *mala fide*; especially if there are a few of them, do not reject the plan for purposes of advancing their own interests for example getting their debts repaid even though the business rescue plan is an effective one.

If the plan alters shareholders rights, the practitioner must amend the company's Memorandum of Incorporation to approve the preferences, rights, limitations and terms of securities.²⁹⁵ Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company is not applicable to issuing of shares during business rescue.²⁹⁶

²⁹⁰ S 153 (1) (i).

²⁹¹ S 153 (3) (c) (i).

²⁹² S 152 (4) (a).

²⁹³ S 152 (4) (b).

²⁹⁴ S 152 (4) (c).

²⁹⁵ S 152 (6) (b).

²⁹⁶ S 152 (7).

3.17 Failure to adopt a business rescue plan

If a business rescue plan is rejected, the practitioner may seek a vote of approval from the holders of company securities to prepare a revised plan²⁹⁷ or must advise them of his intention to apply to the court to set aside the result of the vote.²⁹⁸ If a business rescue plan does neither of the above, any affected persons who were present at the meeting may initiate a vote of approval from the holders of company securities calling for the practitioner to prepare and publish a revised plan,²⁹⁹ make a court application for the setting aside of the vote on the basis that it was inappropriate³⁰⁰ and make a binding offer to purchase, at a fair and reasonable value determinable by an independent expert, the voting interests of the persons who rejected the business rescue plan.³⁰¹

If affected persons do not request the practitioner to prepare a revised business rescue plan, the practitioner must immediately file a notice that will signify the termination of the business rescue proceedings.³⁰²

3.18 Discharge of debts and claims

A business rescue plan may contain a condition that if it is implemented in a manner that is not contrary to its terms and conditions, a creditor who had consented to the discharge of all or part of a debt that the company owes to them, is not permitted to exercise their rights over the said debt, it is not enforceable.³⁰³ A creditor is not allowed to enforce a debt owed by the company immediately before the beginning of the business rescue process as long it is in accordance with the with the provisions of the Act.³⁰⁴

3.19 Conclusion

To conclude, the business rescue provisions in chapter six of the Companies Act have significantly evolved from the era of judicial management. The legislation attempts to address the shortcomings of judicial management through the

²⁹⁷ S 153 (1) (a) (i).

²⁹⁸ S 153 (1) (a) (ii).

²⁹⁹ S 153 (1) (b) (i) (aa).

³⁰⁰ S 153 (1) (b) (i) (bb).

³⁰¹ S 153 (1) (b) (ii).

³⁰² S 153 (5).

³⁰³ S 154 (1).

³⁰⁴ S 154 (2).

enactment of several new innovations to business rescue that are absent in judicial management. These include:

1. The importance of post- commencement finance provisions under business rescue cannot be overemphasised. This gives the company an even greater chance at financial viability as the creditors will become more willing to lend the company because post-commencement finance creditor claims will rank above other creditor claims
2. The provision for a qualified business rescue practitioner is a significant development as it moves away from the use of liquidators that was under judicial management. It restores confidence in the business rescue culture as trained professionals with a mission to rescue the company will be in charge during the process
3. The qualifications for a business rescue practitioner are explicitly provided for by the Act ensures that only competent people will be charged with successfully turning around the company's financial difficulties
4. Increased protection and participation for employees of the company during business rescue which was not there under business rescue. Their employment status does not change during the course of business rescue. They literally participate during every crucial stage of business rescue from the approval of the practitioner, the implementation of the business rescue plan as well as applying for an order placing the company under business rescue or the termination of such an order
5. The provision for a the development and implementation of a business rescue plan, the Act states what is to be contained in the plan as well as stipulating that all relevant stakeholders must participate in its development and implementation
6. The moratorium under business rescue is automatic. It has significant restrictions against any actions by a third party against the company to give the practitioner ample time to develop a plan for financially rescuing the company without worrying about satisfying creditor claims

7. Under business rescue, the Act makes it clear what happens to the powers and duties of directors in s 139. This is a marked improvement from judicial management where the position of directors was not clear during the process.

The Act strives to keep up with other modern corporate rescue regimes that are in line with good corporate governance which is progressive. On this note, it is critical that Zimbabwe, like South Africa, adopt business rescue in its Companies Act in order to implement legislation that will enable financially distressed companies to successfully get out debt and become financially viable satisfactory basis.

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CHAPTER FOUR: COMPARISON OF JUDICIAL MANAGEMENT AND BUSINESS RESCUE

This chapter compares the current judicial management system in Zimbabwe to the South African business rescue provisions. Having discussed the concept of business rescue in the previous chapter, this chapter aims to reveal the weaknesses of judicial management in comparison to business rescue. The comparative analysis in this chapter will help determine if Zimbabwe needs to amend its company laws relating to corporate rescue by adopting the business rescue procedure. It should be noted that this chapter does not attempt to examine every issue of judicial management and business rescue but only seeks to highlight the differences between the two procedures.

For purposes of comparison and contrasting, the chapter will focus on the most pertinent aspects of both procedures in detail and these will be:

- the objectives of both procedures
- commencement
- the moratorium
- the roles of the practitioner and liquidator
- the rehabilitation plan
- the rights of affected persons with particular reference to employees and
- The termination of the procedure.

As mentioned in the previous chapter, ‘corporate rescue provides an alternative to using insolvency laws to convert a debtors assets to cash by restructuring the financial structure of the debtor involving the issuance of new debt and equity in accordance with the claimants priorities.’³⁰⁵

³⁰⁵ C A Smits *Corporate Administration: A proposed Model* 1999 (32) 81.

4.1 The object of both procedures

Both judicial management and business rescue are corporate rescue mechanisms meant to help companies that are in financial distress. The object of judicial management is

‘ to avoid the drastic remedy of winding up when a company is in financial difficulties due to mismanagement or some other cause, but there is a reasonable probability that under more carefully controlled management it will surmount its difficulties.’³⁰⁶

Judicial management appears to have a singular purpose and that of rescuing the company as a whole. This is supported by the sentiments in *Ben-Tovim v Ben-Tovim and others*³⁰⁷ where the courts held that the rescue of only its business or a viable part is an unacceptable outcome and neither is a better return for creditors and shareholders. The acceptable purpose of a corporate rescue mechanism should be to manage to rescue at least a portion of its entire business if it is unable to do so that it remains financially viable and has a better chance of complete financial recovery.

Deducing from the above submissions on both judicial management and business rescue, the object of both procedures is to assist viable but financially troubled companies. The two procedures differ in that judicial management seems focused on the total rescue of the whole company unlike business rescue where a part of the business may be salvaged while the rest of the company may not. Sometimes the result of a business rescue process may be a management buyout or a takeover of the distressed company.³⁰⁸

4.2 Commencement of proceedings

Business rescue unlike judicial management can be commenced voluntarily or by a court order. There is an attempt to keep the role of the courts to a minimum. The requirement for mismanagement of the company as a ground for an application for judicial management perpetuates the notion that the company's management is always to blame for the company being placed under judicial management. This leads the directors to refrain from applying for judicial management due to the

³⁰⁶ Christie (note 5) at 422.

³⁰⁷ 2000 (3) SA 325 (C).

³⁰⁸ Cassim (note 2) at 863.

stigma attached to it.³⁰⁹ With business rescue, the directors are encouraged to seek help at the earliest signs of financial distress of the company as they are the best persons in the company with the acute knowledge of whether the company is financially stable.

4.3 The moratorium

A provisional judicial management order usually contains directions that while a company is under judicial management all actions and proceedings against the company be stayed and not be proceeded with without the leave of the court.³¹⁰ It applies to current as well as future pending obligations and may be for a court fixed period or indefinite, the court should consider whether or not a party permitted to proceed against the company would thereby be granted a preference over other creditors and whether other remedies are available to them.³¹¹ The court's discretion must be exercised judicially and not arbitrarily having all the salient and material features of the case.³¹² In *New Union Goldfields Ltd v Cohen*³¹³ it was held that the fact that the proceedings against the company have been stayed does not entitle the company to delay performance of its obligations. The moratorium on actions against the company is not automatic in judicial management but it is actually applied for and the courts have the discretion to grant the application. This is one of the weaknesses of judicial management as a company rescue mechanism as the company is vulnerable to the enforcement of actions against it.

The business rescue mechanism has an automatic and general moratorium on legal proceeding or executions against the company, its property and assets and on the exercise of the rights of the creditors.³¹⁴ It appears to be effective until the business rescue ends. The moratorium is of cardinal importance since it provides the crucial breathing space or a period of respite during which the company is given an opportunity reorganise and reschedule its debts and obligations.³¹⁵ It enables the formulation of an effective business rescue plan and it applies to all

³⁰⁹ Loubser (note 105) at 21.

³¹⁰ Blackman (note 11) at 15-21.

³¹¹ *Agree and Sons Ltd v Lever Bros (Pvt) Ltd*

³¹² *Western Bank Ltd v Laurie Fossatti Construction (Pty) Ltd* 1974 (4) SA 607.

³¹³ 1954 (2) SA 397 (A).

³¹⁴ Cassim (note 2) 878.

³¹⁵ *Ibid* at 879.

types of creditors and ensures that creditor claims are dealt with in a fair manner. A company's rehabilitation is difficult if there is no stay on proceedings against it.

4.4 Duties, functions and powers of the judicial manager and the business rescue practitioner

The duties of judicial managers have been discussed in chapter two of this dissertation. For comparisons sake, they will be discussed briefly. In *Theron v Natal Markagente (Edms) Bpk*³¹⁶ it was held that the need for impartiality, independence and want of interest applies especially in the case of a provisional judicial manager because, in addition to the ordinary functions, he bears the peculiar responsibility of advising the creditors and the court whether the judicial management itself should ensue. This in my view is also applicable to the business rescue practitioner.

The business rescue practitioner's duties and powers have been discussed in chapter three of this dissertation. The practitioners are given extensive powers to manage the company's affairs and to deal with its assets in order to rescue the business hence the Act imposes a great deal of responsibility on them.³¹⁷ The legislature is right in imposing responsibility on both the practitioners and judicial managers because the success of the procedure cardinal in ensuring that a successful rescue is effected.³¹⁸

4.5 The provisions that are lacking in judicial management but are of crucial importance to a corporate rescue procedure

The judicial management system in Zimbabwe lacks a provision that regulates the qualifications of the judicial manager. It only provides that the person must not be

³¹⁶ 1978 (4) SA 898 (N) 900.

³¹⁷ Cassim (note 2) at 893.

³¹⁸ Richard Bradstreet *The leak in the Chapter 6 Life Boat: Inadequate regulation of Business Rescue Practitioner may adversely affect Landers willingness and the growth of the Economy* (2010) SA Mercantile LJ 201

an auditor of the company or a person disqualified from holding office as a director under the s 272 of the Act. It has been noted that ‘usually an accountant or a person experienced in the company's business or joint managers having between them both types of expertise will be appointed.’³¹⁹ In *Theron v Natal Marksagente (Edms) Bpk*³²⁰, the court held that a person may not be appointed as a judicial manager unless they are disinterested and free to act independently and impartially. This appears to be the only ‘qualification’ that is required for one to take over the management of a company that is in financial difficulty. The lack of provisions for the qualifications of managers is worrisome. A judicial manager is also not excluded from becoming a liquidator of the company in the event that judicial management fails and the company is wound up. The failure of judicial management could even serve as a financial advantage for the manager.

Business rescue in s 138 sets out the qualifications needed of a practitioner. He must be a member in a good standing legal, accounting or business management profession accredited by the Commission.³²¹ This provision is a major improvement on judicial management. S 138 creates a certainty as to the intention of the legislature regarding who qualifies to take charge of the company, something that was absent in judicial management.

Another notable improvement from the judicial management is the provision for the business rescue plan. This creates a transparent roadmap of what the practitioner intends to do to rescue the company from financial distress. The practitioner and affected persons will be able to determine if it is practically possible to create a strategic business rescue plan that will work for the company. The practitioner may initiate the plan subject to the approval of creditors and affected members of the company as well as the current management. The plan includes the nature and the duration of the moratorium on the company. This has the effect of adding more room for the company to act without the heavy burden of worrying about the debts and obligations they have to fulfil while financially distressed.

³¹⁹ Christie (note 5) at 423.

³²⁰ 1978 (4) SA 898 (N) 900.

³²¹ S 138 (1) (a).

The protection of employees and their interests has been one of the major highlights in business rescue procedure. It has been noted that ‘one of the primary goals of a good business rescue process is the fair and equitable treatment of employees in financially distressed companies.’³²² S136 (1) (a) protect the employees from loss of employment or any alterations to their employee contracts, which they do not agree to and are contrary to provisions of labour law, this includes retrenchments.

Employees are prioritised during business rescue as discussed in chapter three of this dissertation. They are afforded protection throughout the entire business rescue procedure. The provisions are laudable to a larger extent as employees under judicial management were hardly afforded protection; business rescue strives to actively involve them in almost all stages of the procedure as they the affected persons in the company. However it has been pointed out that giving the employees the right to apply for business rescue to commence against the company will prove problematic.

Post-commencement finance is another significant aspect of business rescue. It is critical to the success of a business rescue plan. Potential financiers of the company, with good reason are reluctant to provide monetary aid to a company that is in financial distress and under business rescue. S 364 of the United States Bankruptcy Act provides that any credit extended to the company during the reorganisation or rescue process enjoys priority over unsecured claims incurred before the procedure. This ensures that the company will manage to secure financial aid during the moratorium. The priority that is given to post commencement financiers does not lapse even if the business rescue procedure itself fails. This encourages the potential financiers to feel secure and hence they will be able to lend the company the loans it requires knowing that they will be given preferential treatment when being paid back their monies even if the company is liquidated. However practically, the general concerns with regard to post-commencement finance are the willingness of banks to lend companies that are undergoing the business rescue procedure money.

³²² Cassim (note 2) at 884.

4.6 Conclusion

In conclusion, business rescue improves on the judicial management system by modernising its provisions to keep up with the evolving corporate world. The judicial management process in South Africa before business rescue was said to be failing the economy due to its low success rate.³²³ In summary, business rescue has advantages over its predecessor as a corporate rescue mechanism and some of the advantages or improvements are as follows:

1. The board of the company can voluntarily commence a formal rescue procedure without having to seek a court order to do as such as was done under judicial management. This gives the board of the company power to determine the running of the company as well as determine its future prospects.
2. Business rescue discards the requirements for a 'reasonable probability' that the company will become a successful concern. Under business rescue, the Act only requires there to be a reasonable belief that the company will be rescued in terms of s129 (1). The Act by omitting the 'probability' requirement places less onerous burden on the company or persons who will institute business rescue, it encourages the directors of a company to opt for business rescue if the company gets into financial trouble.
3. The provisions of business rescue include the plan of the procedure that should have the background, the proposal and the assumptions and conditions sections. This makes the process more transparent as all stakeholders are able to see where the company is going and vote and deliberate on it and how the practitioner is going to formulate a plan to turn the company into a profitable entity. This provision is not provided for in judicial management and is one of its shortcomings as a formal plan is crucial to any proposed strategy that is proposed to rescue the business
4. The board of a company that has been voluntarily placed under business rescue has the discretion to appoint a business rescue practitioner of their choice rather than waiting to accept one that has been suggested or nominated by the

³²³ Mongalo (note 12) at xviii.

creditors of the company as was prevalent under judicial management. This gives the board a bit of independence to act of their own volition.

5. Unlike judicial management where employee rights are minimal, business rescue strives to afford employees recognition by involving them throughout the process of the procedure. This is a welcome development as employees are also an essential part of the company.

6. Another notable improvement from judicial management is that the company no longer has to initiate a rescue procedure only after providing proof that the company is unable to pay its debts. Under business rescue, the company is able to commence business rescue at the earliest signs of financial distress.

7. The business rescue procedure provides for the qualifications that are required for one to be able to be eligible to become a business rescue practitioner as set out in s138 of the Act. This provision does not exist under judicial management. This is a significant improvement as one is required to have at least an experience or qualification that will enable them to manage the company in distress and turn it into a financially viable business.

8. Business rescue is less cumbersome in the sense that it is not granted in two parts like judicial management where the court first grants the provisional order and final judicial management order after it is satisfied that the company qualifies to go under judicial management. With business rescue, commencement takes place voluntarily or by a court order and the company will commence business rescue.

CHAPTER FIVE: A CRITICAL ANALYSIS OF ZIMBABWEAN CASE LAW ON JUDICIAL MANAGEMENT

This chapter critically analyses the limited Zimbabwean case law on judicial management. The chapter will look at the facts and attempt to reveal the weaknesses of judicial management and the reasons why it is failing to successfully rescue companies that are in financial trouble.

It is important to note that the financial trouble that is being experienced by several companies in Zimbabwe cannot all be attributed to the failure of judicial management. The dire economic status of the country at the moment has meant that every sector has been affected and the industrial sector appears to be the one that is being hit the most.

5.1 The concept of liquidation

Liquidation or winding up may be defined as a legal process by which a company terminates its business. It may be voluntary whereby the board of the company initiates the liquidation process or it can be involuntary where the courts order the company to go under liquidation upon an application by an affected person. In Zimbabwe, the procedure is governed by part (v) of the Companies Act. The effect of the procedure is that the company's assets are disposed or sold in order to satisfy the claims of the creditors. It is also the last resort for businesses that are no longer financially viable and owe amounts of money to their creditors but have no way of satisfying the debts in question.

The main reasons for liquidating a company are that there might be a loss of the market for the company's products, the company may have failed to pay its taxes, the management of the company may have failed to execute their duties by under capitalising the business, excessive overheads and poor planning of the company's affairs and to end the overwhelming stress of continued trade and the harassment of creditors seeking payment.

5.2 Case law

In affirmation of the failure of judicial management the few cases available on the subject show that the procedure has not been utilised as it was intended to be. The thesis will focus on selective cases in Zimbabwe of companies that started off under judicial management but went on to get liquidated after the rescue procedure was not effective enough to stage a turnaround of the business fortunes. The cases will be indicative of the failure of judicial management. The goal is to show that judicial management is not very effective as a company rescue procedure.

The case law on judicial management in Zimbabwe dates back as far as the fifties when the country was still Rhodesia as evidenced by the case of *Ex Parte Lion Transport Co (Pvt) Ltd*³²⁴ in which the courts outlined which parties were entitled to apply for judicial management. The procedure has been in use for a long time with no amendments or significant improvements to it to enhance its effectiveness. This affirms that the need for change is long overdue, the country needs to move away from judicial management and move on to business rescue. The corporate world is moving on with the time, countries like South Africa have amended their company law statutes to suit the modern demands of good corporate governance; Zimbabwe should not be an exception.

5.3 The Steelnet case

Recently, the once lucrative steel company *Steelnet (Zimbabwe) Ltd* was placed under final liquidation by the courts under unreported case number HC 746/13. The financially troubled company had initially been placed under judicial management but this failed. The court held that it was just and equitable for the company to be placed under judicial management to allow working capital to be put into the company and revive the fortunes of the company rather than letting individual creditors to sell in execution items or properties so far attached at the expense of other creditors. The factors that led to the winding of the company were said to be that the company's finances dwindled due to the liquidity crunch that was brought about by the dollarisation era and it failed to raise funds through borrowing from financial institutions because of the inflated interest rates.

³²⁴ 1954 SR 135.

Steelnet was a large company which until 2008 was listed on the Zimbabwean Stock Exchange. The company contributed immensely to the growth of the economy through paying taxes, and had a large number of employees. This case reaffirms the need for an effective company rescue regime. It is my submission that had there been an effective company rescue mechanism in place the company would have been able to have an immediate automatic moratorium placed on it to protect it from creditors and any legal action against it thereby giving it enough room and time to breathe.

The company would have solved its lack of funding by utilising the post commencement finance mechanism under business rescue. The financial lending institutions would have funded it knowing that they would be preferred secured creditors who would get paid first in the event of the discharge of business rescue or even if the company proceeded to get liquidated. This would have served as an incentive and assurance to the potential creditors and secure the company the financing it needed.

A qualified business rescue practitioner would have taken charge of the company; this suggestion takes nothing away from the presiding liquidator's competence. The submission stems from the fact under business rescue, the practitioner is required to be a member of an esteemed profession with a background of business management. *Steelnet* was a large company hence it needed a qualified person to properly take charge of the complexities of turning it from a bankrupt into a financially stable company.

Additionally, under business rescue, the practitioner would have prepared a business rescue plan as provided for in the Companies Act. This would have ensured transparency and granted the practitioner to create a realistic and reasonable rescue plan guided by the provisions of the Act with the background, the intended proposals to fix the company's financial distress, as well as the assumptions and conditions that are to be met to ensure the success of the procedure as discussed in Chapter three of this dissertation.

It is my submission that had the company been under an effective business rescue mechanism, at least one of its subsidiary companies would have managed to

survive liquidation. The company also operated three other companies that were also liquidated along with it.

Any company rescue procedure must be able to facilitate for effective financial revival of viable but debt ridden companies. Steelnet's financial woes were exacerbated by the dilapidating economy at that moment. The company appeared to have the potential to be financially viable, with a proper rescue mechanism; it is possible that it might have been saved and in turn preserves employment and continue contributing to the economy of the country.

5.4 The Shagelok Chemicals case

*Shagelok Chemicals (Pvt) Ltd v International Financial Corporation*³²⁵ is another case whose facts and circumstances are similar to the Steelnet case. The company had applied for judicial management and the matter was dismissed by the courts. Its appeal to the Supreme Court was dismissed. The company's business was mainly the production of sodium silicate. It was the sole manufacture of the chemical in Zimbabwe. However the appellant conceded that the company started experiencing viability problems and these were attributed to the consequent failure to service its debts, prevalent economic conditions at that time like the devaluation of the dollar, shortage of fuel as well as the constant power cuts, financial mismanagement on the part of the company; and the manufacturing plant that they bought was malfunctioned.

The court held that the appellant owed millions to its creditors and had failed to show how it would manage to repay them. At page seven of the judgement, the liquidator told the court his findings that the company was an unprofitable entity in spite of its apparent monopoly on the local supply of sodium silicate to the local market and a large potential profitable market. He however conceded that under the right conditions, the company could become a viable entity. The court held that the company showed no concrete trend towards recovery and attacked the business plan by the appellant saying it was not in the best interests of the creditors therefore it was not just and equitable to make them wait longer than they had for their money. The appeal was dismissed.

³²⁵ S .C. 1224/02.

It is not disputable that the company was in financial ruins and that its debts were accruing by the day. The company experienced all these difficulties not because it was not viable but because of the earlier mentioned problems it listed as contributory factors to its financial downfall. Had the company started trading under normal circumstances with a well-functioning plant I do not doubt that it would have been successful. It enjoyed a monopoly in the market where it was the sole supplier of its product in the country.

With all these factors into consideration, I am of the view that the courts should have reached a different conclusion. Had the company been under a modern rescue mechanism like the business rescue regime in South Africa, it would have been able to utilise the post commencement finance provision discussed in the Steelnet case. With that funding, it would have bought another plant and resumed business normally especially considering the fact that it was the sole manufacturer of the sodium silicate chemical and while under the cover of a moratorium, in time it would have managed to trade profitably again and gradually manage to repay its debts in due course.

Shagelok Chemicals in my view should have been saved from winding up. As the sole manufacturer of the chemical, it meant that there was a viable market for its products. It also meant that the country would not have to rely on imports but just have to procure the product locally. For business and economic growth, I believe that companies like these that have the potential to trade profitably again should be given a second chance. A company law rescue regime as mentioned earlier must be able to give deserving companies a chance at profit trading again.

At present in Zimbabwe, the renowned economist Dr Eric Bloch suggested that companies that are under judicial management in Bulawayo merge to avoid liquidation. He stated that the only alternative for viability-troubled companies to survive were to merge and consolidate with others or source new investment although opportunities to do so are limited.³²⁶ This is my view should not be the only option available to ailing companies in this modern era. It is evident that judicial management is failing at great length to provide a safe haven for financially troubled companies as its success is alarmingly low. There is now an

³²⁶ Thokozani Ndlovu 'Trustee', 7 July 2013, The Sunday News, last accessed 5 August 2013.

urgent need for Zimbabwe to emulate South Africa by moving away from this procedure and adopting business rescue.

5.5 The Air Zimbabwe case

The country's airline has since 2003 been experiencing financial trouble. The repercussions of the plunging of the Zimbabwean economy did not spare the airline. Air Zimbabwe enjoyed a monopoly as the country's sole airline. In 2012 Air Zimbabwe employees applied to the courts for the company to be placed under provisional judicial management. In *National Airways Workers Union v The Minister of Transport, Communication and Infrastructure Development NO and others*³²⁷ the court granted the provisional judicial management after being satisfied that the employees were *bona fide* and that their claims were legitimate. The employees according to the courts were owed USD 35 415 731 in union dues and salary arrears from January 2009 to December 2011. The courts held that the right sought to be protected was clear and *prima facie* established and there was a well-grounded apprehension of irreparable harm if the relief sought was not granted. The company provisional judicial management order was discharged. At present, a large number of employees have been sent on forced leave and their salaries have been reduced, even for the remaining workers. The aim is to reduce operational costs until its financial situation significantly gets better.

The media currently is awash with news of Air Zimbabwe's financial distress. A plethora of news articles have been written about the airlines spiralling downfall. Examples are the article 'Air Zimbabwe facing liquidation' published in the *Sunday Mail* of 21 January 2102 and 'Air Zimbabwe plane impounded in London' published in the *Zimbabwean* of 12 December 2011.

It is my submission that if a company is to go under successful business rescue the chances of its rehabilitation increase hence the reason why I maintain that Zimbabwe should incorporate business rescue in its company law regime and move away from judicial management. I propose that under a company rescue regime like business rescue the Airline will have an automatic moratorium placed upon it in order to give it sufficient time to recover without worrying about its financial

³²⁷ HC 3783/12.

obligations. One of the aims of business rescue is to protect the employee rights and this will be achieved, it will save employment and thereby avoid prejudicing the employees in question. The company will be able to utilise the post commencement finance provisions because even with the moratorium placed upon it, it will still need an additional financial assistance after commencing business rescue. Because business rescue is concerned with ensuring a better return for the creditors, the creditors will benefit if the airline becomes fully operational and starts making profits especially considering the monopoly it enjoys as the sole national airline. A competent business rescue practitioner must be appointed to take over the management of the airline. Securing financial assistance is the first priority because at present, the government of Zimbabwe has assumed the debt of the financially distressed company. I suggest that rescuing the national airline should be made a priority to restore the country's image as well as preserve employment.

5.6 The Zimbabwe International Trade Fair Company case

In *Zimbabwe International Trade Fair Company v Viking Plastics (Pvt) (Ltd) and Bongani Ndlovu N.O* under High Court case number HC 3387/11 the applicants sought to have the provisional judicial management order that had been granted grant the defendant discharged. It was observed that the economic challenges and cash viability problems were contributing factors to *Viking Plastics (Pvt) Ltd* company experience financial distress. The courts granted the company's application for judicial management. However the company failed to take steps to legitimise and enforce the provisional judicial management order and left it dormant. The motive behind the judicial management was thus questionable. At paragraph seven the judge held that the object of judicial management was not to experiment to see whether or not the company may be financially rescued.

In the current case, the judge further held that, the defendant's precarious financial position and the failure to put the judicial management machinery into motion showed that no reasonable probability existed that the company would be able to pay its debts and become a successful concern. It was held that the conduct of the respondents prove that they were not in good faith but to delay payment of debts to creditors. The judge condemned abuse of legal processes. The provisional

judicial management order was discharged. The case affirms the principle that judges are not willing to entertain a case whereby a party acts in bad faith. It also exposes one of the weaknesses of judicial management which is the lack of a rescue plan that will show how the company intends to financially assist the company to get out of debt.

5.7 South African Case Law on Business Rescue

In South Africa, the first business rescue case was *Swart v Beagles (Pty) Ltd*³²⁸ where the applicant sought to place the company under the procedure because it was failing to pay its debts and fulfil its financial obligations. The company alleged financial distress.³²⁹ The application was opposed by creditors who alleged that the company had no reasonable prospects of success and that the applicant was seeking business rescue as a way of escaping financial obligations. The court held that the applicant had been in financial trouble but had done nothing to improve the situation for example selling assets to raise capital. It held that the interests of the creditors when weighed up against the interests of the company, the creditors interests always prevail. It is interesting to note that the court alluded to judicial management in making the former statement. The application for business rescue was declined. The court concerned itself with the good faith of the applicant during business rescue, the case highlights that a *mala fide* application will unlikely be entertained by at law.

In *Southern Palace Investments (Pty) Ltd v Midnight Storm*³³⁰ the company's application for business rescue was dismissed after the company's business rescue plan was said to be not comprehensive enough show that there were strategies in place to secure financial assistance as well as the necessary resources required to successfully turnaround the company. At paragraph 24 the judge held that 'a business rescue plan which is unlikely to achieve anything more than prolong the agony for example by substituting one debt for another without there being light at the end of a not too lengthy tunnel is unlikely to suffice..' The courts in the present case highlighted that it was not justifiable for the judiciary to maintain the old

³²⁸ 2011 (5) SA 422.

³²⁹ S 128 (1) (f).

³³⁰ 2012 (2) SA 423.

approach that a creditor was entitled *ex debito justitiae* to be paid or to have the company liquidated. The courts placed the company under provisional winding up and maintained that the company was not precluded in the future to bring a fresh application for business rescue with a much more detailed plan.

In *Wedgewood Golf and Country Estate (Pty) Ltd (In Liquidation) v Nedbank Ltd* under case number 19599/2012, the courts dealt extensively with a number of issues with regard to business rescue. In this case, the applicants company was in liquidation but there were reasonable prospects that it could be a success. Some of the important aspects of business rescue stated by the court were that

In ascertaining whether the applicant has provided evidence to show that the company will be successful once again, the judge, at paragraph 42 stated that ‘the bar should not be raised too high to serve as a barrier to business rescue.’ The judge went further submitting that the legislatures intention for business rescue was so that it could be ‘utilised as substantial measure to promote the development of South African economy and to encourage entrepreneurship and enterprise efficiency’ as stated in s 7 (b) (i) of the Companies Act.

The legislatures aim was to come to the rescue of financially distressed companies. At paragraph 53 the court went on to say that preserving employment was one of the objects of business rescue. In the present case there no employees but business rescue would contribute to the creation of jobs thereby meeting the primary objectives of the Act.

There are lessons to be learnt from South African case law on business rescue that will be of importance to Zimbabwe. First and foremost, it is imperative for a business rescue applicant to be *bona fide*, from the South African case law discussed above; the courts are not going to entertain applications whereby business rescue will be sought as a way to escape debts and obligations by a company that is hopelessly insolvent. This was stated in *ABSA v New City Bank* case number 45670/2011, in which at paragraph 22 the judge said that ‘.... There is considerable evidence from which to draw to argue that it is not a genuine application.’ This was after the applicant admitted that the first business rescue application had been a ‘ruse’ and that the present one was conditional.

The second aspect is that the business rescue practitioner must be competent. The object of business rescue, as enunciated in *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd*³³¹ at paragraph 4 is to secure a better return for creditors and shareholders. An applicant for business rescue must ‘provide concrete factual details of the source, nature and extent of the resources that are likely to be available to the company as well as the basis and terms on which such resources will be available.’

In *Southern Palace (Pty) (Ltd) v Midnight Storm*,³³² the judge at paragraph 21 held that ‘the mind-set reflected in various cases dealing judicial management applications in respect of the recovery regulations was that *prima facie* the creditor was entitled to a liquidation order and that only in exceptional circumstances would a judicial management order be granted. The significant references to judicial management affirm the position that Zimbabwe needs to adopt the business rescue model into its Company Law regime. The approach to business rescue is the opposite- business rescue is preferred to liquidation. The case goes on to reiterate that the substantive test on whether or not the company can achieve the rescuing the business now has lower threshold. In terms of s 427 (1) of the Companies Act of 1973 the company was required to show that there was a reasonable probability of success. Under business rescue in s 131 (4) the Act requires that there be a reasonable prospect of success. It held that the use of a different language is indicative of the fact ‘something less is required than that the recovery should be a reasonable probability.’ This is my view is an improvement from the onerous burden of proof that is demanded from the company under business rescue.

A number of companies in South Africa are utilising the procedure. Statistics as at November 2012 prove that a number of companies that apply for liquidation have decreased as business rescue is now a practical option. Statistics SA show that liquidations significantly reduced to 35.3 per cent after a 28.5 per cent decline in September from 20.2 per cent in August. The Companies Intellectual Property Commission stated that as at November 2012, 740 companies had instituted business rescue and of these, 82 per cent was a voluntary decision by the board of the concerned companies. Of the companies that went through the entire business

³³¹ 2012 (5) SA 515.

³³² 2012 (2) SA 423.

rescue process, 55 per cent were successful. This is enough evidence that indeed business rescue is a marked improvement from judicial management considering the fact that under the latter, it was hardly ever utilised at all as companies merely opted for liquidation.

5.8 Conclusion

In conclusion, as mentioned in Chapter three, the purpose of business rescue is to ‘provide for the efficient recovery and rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders’.³³³ Judicial management has clearly failed to emulate the latter submissions. The analysed Zimbabwean case law in this chapter on judicial management is testimony to the fact that there is need for a more developed business rescue mechanism that actually serves the purpose it was created to—financially rehabilitate distressed companies. A company rescue regime that fails to help companies in financial distress but rather facilitates for their liquidation is in my opinion a failure. Companies must be afforded protection under the legislation in the event that they go bankrupt but have the potential to successfully turn around through financial injection and a moratorium on its property and assets. Zimbabwe needs to adopt business rescue and repeal the judicial management provisions. At present the country’s sole airline is reeling under debt and international ridicule due to lack of an effective company rescue regime.

³³³ S 7 (k).

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

This chapter is the conclusion to the dissertation. It will recommend that the judicial management system in Zimbabwe be repealed and instead adopt the business rescue procedure like South Africa.

It is imperative for a company law regime to have an effective mechanism in place that will manage to successfully aid struggling but viable companies out of debt to enable them to become viable concerns. The economy of a country, the market for a certain business as well as the profit and losses are always changing, there is going to be a few companies that are going to be hit by any one of the abovementioned factors which will negatively affect its business. Because of this, the need for a modern business rescue procedure cannot be over emphasised.

In the past decade, Zimbabwe went from being the bread basket of Africa to having one of the worst economies on the African continent and possibly in the world. The economy was characterised by hyperinflation from around 2000 up to 2009 when dollarisation took place. The economy is slowly stabilising at present and there is even more need for a company rescue system that will be utilised to ensure that the companies survive financial distress, contribute to the economy through taxes, create employment, improve the society and ultimately ensure that the economy improves.

With all these factors into consideration, Zimbabwe should adopt a business rescue system that will be able to work in a developing economy and be detailed enough to provide for a system of rehabilitating financially troubled companies in a cost effective manner. I propose that the business rescue procedure be strongly modelled on the South African current model. However, the provisions should not be a carbon copy but should be moulded to fit in with the economy of the country as Zimbabwe and South Africa are worlds apart in terms of development for example in economic and infrastructural development. South Africa has more large international corporations compared to Zimbabwe hence there is a need to create a business rescue procedure that will be affordable to the type of companies that are prevalent in Zimbabwe. I recommend a company rescue mechanism that

will be inexpensive to implement so that companies are not deterred from utilising it. It is critical to remember that the corporations that opt for business rescue will already be financially troubled hence the need for an affordable procedure.

The South African business rescue mechanism is a great improvement on judicial management. I recommend that the drafters of the proposed business rescue for Zimbabwe be professionals who are familiar with the Zimbabwean law, its corporate sector history and development, its corporate culture as well as the former and current economic status. This will help the drafters to draft a business rescue model that will reflect the state of Zimbabwe and ultimately be easier to implement. The proposed provisions for Zimbabwe are discussed below.

6.1 Voluntary commencement

Firstly, as a cost effective measure, the new company rescue mechanism should scrape away the two way commencement of first getting a provisional order then a final order as is under judicial management. It is cumbersome and expensive. This dissertation recommends that company directors be permitted to institute business rescue at the earliest possible date when the company starts showing signs of financial trouble rather than waiting for the company to plunge into dire financial ruin. The earlier the company gets rescued, the better its chance of recovering. I suggest that judicial management be repealed; there should not be a heavy burden of proof on the companies to make certain that the company will definitely be rehabilitated.

6.2 The person in charge of rescuing the company

Judicial management is overseen by a liquidator. It is ironic that the person tasked with rescuing a company in financial trouble is one who has been trained to dismantle the company. This in my view psychologically affects the credibility and effectiveness of judicial management as a company rescue organ because it appears as though from the onset, the company is expected to fail. My recommendation is that like the South African business rescue model, there must be a provision for the qualifications of a business rescue practitioner. Turning around a financially distressed company into a profitable entity is a mammoth task and therefore must

be done by someone who is competent to deal with the challenge. The creditors and all affected persons need to have faith in the rescue process and having a properly qualified person will pacify them and allay their doubts and fears. The South African model states that the person must belong to a professional body and must either be legal practitioner, accountant, or a business manager who has a background on company rescue procedures. This attaches a level a confidence in the system, the rescuing of the company will be carried out a person specifically trained to do as such.

6.3 The moratorium

A moratorium on the company gives it a life line and breathing space from the claims and demands of the creditors thereby ensuring that the company commences business rescue on a clean slate. I recommend that there be a provision that provides for the moratorium to be automatic immediately after the commencement of the proceedings. This will eliminate the uncertainty that currently is around the judicial management moratorium as it is only provided for under provisional judicial management, it is presumed to be carried over to the final judicial management even though no provision provides for this.

6.4 The rights of affected parties

Under judicial management, the rights of employees are not protected. The South African business rescue provisions provide for the rights of employees and amongst them are that they have a right to file for an order placing the company under business rescue, their employee status is not altered during the process and that if they are owed monies by the company, their claims will rank equally with that of the creditors in the company. It is important for the employees to be recognised and exercise certain rights because they are an integral part of the company. I recommend that the applicant for business rescue must prove that they are *bona fide*, have the *locus standi* and that it's in the best interests of the company to commence business rescue.

Shareholders under business rescue have the right to commence the procedure if they have a reasonable belief that the company is in financial distress. Again as

mentioned above in relation to employees, I suggest that there be the same measures put in place to ensure that this provision is not abused by disgruntled shareholders. It will ensure that the process will only be utilised by affected persons with a legitimate claim.

6.5 The company rescue plan

One of the commendable innovations of the business rescue is that it provides for a business rescue plan, its contents and structure and how it's supposed to be effected. This ensures transparency and all affected persons in the company will be able to physically inspect the plan and know what plans the practitioner has in mind for the company, how they are going to be effected and if the plan that will help the company. I suggest that Zimbabwe adopts this in its proposed business rescue provisions. A model rescue plan allows for uniformity and the supervision business rescue will become easier because the roadmap will be there. It is also a chance for the affected persons see if the practitioner is competent enough to carry out the task by scrutinising the proposed plan and approving it if it is satisfactory.

6.6 The scope of the company rescue procedure

The South African Companies Act stipulates that business rescue applies to companies that are registered under the Act. I suggest that the same provisions be incorporated in the Zimbabwean proposed business rescue model. It should be able to be utilised by small and medium companies as they play an important role in the economy of developing and developed countries.³³⁴

6.7 Court involvement during the procedure

The main reason why judicial management has been labelled as a failure by critics is because there is too much meddling by the courts. The courts have wide powers and discretion from commencement throughout to the conclusion of judicial management. This is time and resource wasting. The person in charge of rescuing

³³⁴ Pieter Kloppers *Judicial Management : A Corporate Rescue Mechanism in need of reform* (1999) Stellenbosch Law Review 425.

the company has limited room to exercise inhibited free will. My recommendation is that there should be court supervision to legitimise the procedure but it should be minimal and the courts should only serve as supervisors during the process. Under the South African business rescue provisions, court supervision is minimal and this is commendable.

6.8 Post commencement finance

Post commencement finance is an important aspect of the business rescue³³⁵ in South Africa. As discussed in chapter three, it is an integral aspect of the business rescue procedure just like the moratorium. I suggest that Zimbabwe also incorporate this provision in the proposed new business rescue procedure. No lending facility will want to take a risk of financing a financially distressed company that is under business rescue for fear of not getting paid. There is need for cash injection after commencement of the rescue process. Creditors who bail out the company after commencement of business rescue are given priority over those before the procedure began. This is an incentive to alleviate their fears about their debts failing to be repaid.

The disadvantages of post commencement finance are that ‘it gives existing creditors an opportunity to provide for additional new financing on condition that their pre-existing claims are secured.’³³⁶ In light of this revelation, I suggest that the business rescue model for Zimbabwe tie up this loophole by inserting a provision that prohibits the creditors from abusing the procedure. It should state that only post commencement finance will receive the special presence status not the claims before business rescue commenced.

6.9 The time span for rescuing the business

Under the business rescue provisions in South Africa, a company is granted three months upon which to successfully turn around its financial misfortunes and become viable once again with the option of an extension. This in my view is a short period of time, no real significant change can be effected in three months

³³⁵ Cassim (note 2) at 882.

³³⁶ Ibid at 884.

especially in the case of big companies. My recommendation is that the period be extended under the proposed Zimbabwean business rescue case to six months plus an option for an extension. In this way, the business rescue practitioner has enough time to implement the plans for financially rescuing the company, it also grants the company time to source out funding from creditors.

As in most cases change is always met with resistance, doubt and criticism. Even though business rescue is essential for Zimbabwe at the moment, there is probably going to be challenges regarding enacting a new legislation. The possible hindrances to the enactment of business rescue in Zimbabwe that I foresee are that:

Judicial management though thoroughly lacking in its effectiveness as a company rescue procedure has not been a total failure in Zimbabwe as there are few companies that have actually undergone successful judicial management. There might be critics who will argue that the procedure is not working because of the current economic status of the country whereby every sector has been hit by the effects of the hyperinflation era that led to the demise of virtually everything in the past decade and not necessarily because judicial management is not an effective mechanism of corporate rescue. To show that there is need for business rescue to be adopted in Zimbabwe, the statistics of South African companies that are currently under business rescue will be of persuasive value.

Another setback to the acceptance of business rescue is that it is significantly different from judicial management. Its introduction may get stakeholders nervous as to the capabilities of the business rescue practitioner to execute their duties. As for creditors, they may not be receptive to post commencement finance because of the risks associated with despite their claims being given priority. The repayment of debt is every creditor's main concern, whether or not the debtor is financially stable is irrelevant.

Because business rescue will be introduced in a judicial management environment where most companies get liquidated due to failure of the procedure, I foresee a reluctance to become business rescue practitioner amongst the professions for fear of stigma attached to the already failing present company rescue regime. I suggest that there be proper education on the subject so that all those who will be in charge of business rescue i.e. the judges and business rescue

practitioners are adequately equipped with the knowledge as to how they are supposed to conduct themselves. This may be done through business rescue workshops. In general, it is widely accepted that judicial management is not an effective procedure. There are probably going to be critics who will doubt the proposed new company rescue mechanism capabilities of doing a better job than the current judicial management system. They will argue that the two are similar therefore it will be grudgingly accepted with suspicions and doubts.

Another setback I see is that it will take a long time to incorporate the procedure into the Zimbabwean Companies Act because financial constraints and the complexities of the procedure. In the meantime, the viable companies that need the procedure will continue getting short-changed under judicial management. I suggest that the procedure be incorporated expediently by the legislature. It should be a priority and the earlier it is introduced the better.

In conclusion, judicial management in Zimbabwe needs to be repealed to pave way for business rescue. Judicial management has become an unsupervised winding up as it proceeds to liquidate assets of the company in order to satisfy creditor claims.³³⁷ At present in South Africa, statistics show that several companies are already utilising the procedure and this is commendable seeing that judicial management in South Africa was hardly used by companies. The fact that business rescue is being regarded as a way out of insolvency is a sign that the process is definitely a marked improvement from judicial management hence the need for Zimbabwe to emulate the South African position. The available South African business rescue case law precedents will be of importance to Zimbabwe. Not only will it implement a better business rescue mechanism by learning from South Africa's mistakes, it will benefit from the various case law judgements on the subject as judicial precedent as well as a guideline on the principles of business rescue.

The Zimbabwean company law regime should be modern and constantly evolve to remain up to date with the ever evolving business world. It should be characterised by good corporate governance. A good company law regime stabilises the economy and in turn successful companies will keep contributing

³³⁷ Harry Rajak, Johan Henning *Business Rescue for South Africa* SA LJ 2601999.

towards its growth by paying taxes. It is thus essential for a state to have a measure in place that will help the companies that are potentially viable but are in financial distress so that they keep generating income towards its coffers. At the moment there is now a widespread loss of confidence in the ability of judicial management to act in public interest in the way that was originally envisaged of a regime designed to prevent temporary illiquidity from destroying potentially sound businesses to the consequent loss of employment, work in progress and investment. The abovementioned statement summarises the judicial management system in Zimbabwe at present. Companies have been liquidated and have left a trail of destruction in the sense that people have lost their jobs, the economy has lost its source of tax income and the community at large has lost the input it used to enjoy from the company.

As stated in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein Kyalami (Pty) Ltd*³³⁸, ‘The need for a change in our corporate Insolvency law arose from the fact that South Africa had a traditional liquidation system with a liquidation culture’. This statement also applies to Zimbabwe. The country also has a liquidation system with a liquidation culture as stated in the above comment. It is thus necessary for every state to implement a business rescue mechanism that will be practical and effective enough to assist bankrupt but viable companies to be financially stable once again. In South Africa the reform from the unsuccessful judicial management system reflected a trend evident worldwide to implement rescue mechanisms for financially ailing companies rather than simply provide for their demise through liquidation.³³⁹ The latter sentiments depict the plight of Zimbabwe because it lacks an efficient company rescue mechanism as judicial management has proved to be incapable of meeting the standards and expectations of a modern company rescue mechanism.

Taking all these factors into consideration, I maintain that judicial management is ineffective and should be repealed by the Zimbabwean legislature and instead incorporate business rescue in the Companies Act.

³³⁸ 2012 (3) SA 276.

³³⁹ The Department of Trade and Industry policy paper ‘*South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*’ GN 1183 of 23 June 2004.

BIBLIOGRAPHY

Primary sources

Cases

Zimbabwe

Clarke v Protein Foods (Pvt) Ltd 1970 (2) RLR 278

Agree and Sons Ltd v Lever Bros (Pvt) Ltd 1981 ZLR 537

Ex Parte Lion Transport Co (Pvt) Ltd

Steelnet (Zimbabwe) Ltd

Shagelok Chemicals (Pvt) Ltd v International Financial Corporation SC 1224/02

National Airways Workers Union v The Minister of Transport, Communication and Infrastructure Development NO and Others HC 3783/12

Zimbabwe International Trade Fair Company v Viking Plastics (Pvt) (Ltd) and Bongani Ndlovu N.O HC 3387/11

South Africa

Le Roux Hotel Management (Pty) Ltd 2000 (1) SA 223 (C)

Pienaar v Thusano 1992 (2) SA 552 (BGD) 585

Millman v Swartland Huismeubeleerders (Edms) Bpk 1972 (1) SA 741 (C)

Ex Parte Onus (Edms) Bpk 1980 (4) SA 63

Irvin and Johnson Ltd v Oelofse Fisheries Ltd

Klopper v Die Meester 1977 (2) SA 477 (T) 484

Re Idstein (Pty) Ltd 1957 (1) SA640 (W)

Rennie v Holzman 1987 (4) SA 938 (C)

Theron v Natal Marksagente 1978 (4) SA 898 (N)

Joosab v Ensor NO 1966 (1) SA 319 (A)

Ben-Tovim v Ben-Tovim and others 2000 (3) SA 325 (C)

Western Bank v Laurie Fossatti Construction (Pty) Ltd 1974 (4) SA 607

New Union Goldfields v Cohen 1954 (2) SA 397 (A)

Swart v Beagles (Pty) Ltd 2011 (5) SA 422

Southern Palace Investments (Pty) Ltd v Midnight Storm 2012 (2) SA 423

Wedgewood Golf and Country Estate (Pty) Ltd (In Liquidation) v Nedbank Ltd
19599/2012

ABSA v New City Bank 45670/2011

AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd 2012 (5) SA
515

Oakdean Square Properties (Pty) Ltd v Farm Bothasfontein Kyalami (Pty) Ltd
2012 (3) SA 276

Silverman v Doornhoek Mines Ltd 1935 TPD 353

Venter v Williams 1982 (2) SA 706 (A)

The United States of America

NLRB v Bildisco 465 US 513 (1983) 528.

England

In Re Computer Systems plc. 1992 All ER 475 (CA) 488

Statutes

Zimbabwe

Companies Act Chapter 24:03

South Africa

Companies Act 71 of 2008

Insolvency ACT 24 of 1936

United States of America

Bankruptcy Code 1978

Secondary sources

Books

Cilliers, Benade *Corporate Law* 3ed (2000) LexisNexis South Africa

Blackman, Jooste, Everingham *Commentary on the Companies Act Volume 3* (2002)

F H Cassim *Contemporary Company Law* 2ed (2012) Juta and Co Ltd Cape Town

L Madhuku *An Introduction to Zimbabwean Law* (2010) Weaver Press Harare

R H Christie *Business Law in Zimbabwe* 2ed (1998) Juta and Co Ltd

Shrand Keeton *Company Law and Taxation in South Africa* (1974) Cape Town Legal and Financial Publishing Company

Tshepo H Mongalo *Modern Company Law for a Competitive South African Economy* (2010) Juta and Co Ltd

Vanessa Finch *Corporate Insolvency Law: Perspectives and Principles* 2ed (2004) Cambridge University Press

Journals

Andrew Hutchinson *Business Rescue- How secure is the secured creditor?* (2011) Unpublished Article, University of Cape Town¹

Collin Anderson, David Morrison *The Commencement of the Company Rescue: How and when does it start* in P J Omar (Ed) *International Insolvency Law: Themes and Perspectives* (2008)

Harry Rajak, Johan Henning *Business Rescue for South Africa* SA LJ 260199

Jonathan Rushworth *A critical analysis of the Business Rescue Regime in the Companies Act 71 of 2008* in Tshepo Mongalo (Ed) *Modern Company Law for a Competitive South African Economy* (2010) Juta and Co

Pieter Kloppers *Judicial Management Reform- steps to initiate a Business Rescue* (2001) SA Mercantile LJ 358

Pieter Kloppers *Judicial Management- a Corporate Rescue Mechanism in need of reform* (1999) 10 Stellenbosch Law Review 417

Richard Bradstreet *Business rescue proves to be creditor friendly: C J Classen J's analysis of the new business rescue procedure in Oakdene Square Properties 7*

Richard Bradstreet *The leak in the Chapter 6 Life Boat: Inadequate regulation of Business Rescue Practitioner may adversely affect Lenders willingness and the growth of the Economy* (2010) SA Mercantile LJ 201

Reports and other sources

Deloitte Doing Business in Zimbabwe, the Jewel of Africa

Department of Trade and Industry Notice 1183 of 2004

Department of Trade and Industry Policy Paper '*South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*' GN 1183 of June 2004

Savastano, Miguel Dollarization in Latin America: Recent Evidence and Some Policy Issues IMF Working Paper WP/96/4: iii

A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* LLD (UNISA)

The Herald Newspaper '*Judicial Management an effective tool*' 12 October 2012

The Zimbabwean Newspaper '*20 Companies liquidated*' 26 June 2013

The Sunday News '*Companies under judicial management urged to merge*' 7 July 2013

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