THE CRITICAL ROLE OF AFFECTED PERSONS IN SUCCESSFULLY RESCUING THE COMPANY

by

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1. Summary of the minor dissertation

1.1 Introduction

The purpose of this minor dissertation is to explore the effectiveness of the rights that are provided to affected persons of a company that is under business rescue, and how these rights can be used by the affected persons to ensure that the company is rescued in terms of section 128 (1)(b)(iii) of the Companies Act No.71 of 2008 ("the Companies Act").[1] Affected persons derive their rights to be involved in the business rescue proceedings from the Companies Act. However, some of the rights provided to the affected persons afford them with protection, arguably, to such an extent that it can be detrimental to the financial status of a company in business rescue. As a result, some affected persons end up suffering irreparable financial loss because of the language of the provisions in the Act.

In other instances, the Act gives too much protection to affected persons, such as the employees of the company to the detriment of the company.[2] The minor dissertation explores the manner in which an equilibrium can be reached between the protection afforded by the rights given to the affected persons for their benefit in the company while at the same time using those rights to ensure that the objectives of business rescue are upheld at all times.

1.1. Research problem

The minor dissertation examines the importance of the rights that are provided to affected persons in business rescue and how these rights can be used by the affected persons to ensure that both the debtor-company and the relevant stakeholders are able to survive the proceedings. It appears from the provisions of Chapter 6 of the Companies Act that although there are three categories of people that are mentioned under the definition of affected persons, there are in fact more people who are negatively affected by the

[1] Companies Act 2008 s128 (i)(b)(iii).
[2] Companies Act 2008 s144.

conduct of the company under business rescue.[3] The additional person that is negatively affected in this regard is the surety who has stood to make repayment of the debts of the company should it fail to do so when called up by the creditors. The question of the minor research then turns on whether the current definition of 'affected persons' as mentioned in section 128 of the Companies Act should be expanded to include sureties, and whether the rights of the current affected persons should be amended.[4] Must the term 'affected persons' be amended so as to ensure that the persons who are financially linked to the company are included in the business rescue proceedings? This question will be answered by examining the role that the current affected persons play in a company that is under business rescue proceedings. The minor dissertation will further examine the extent to which the rights of the affected persons assist or hinder the progress of a company under business rescue proceedings.

The need to examine the effectiveness of the rights of the affected person arises as a result of the judicial interpretation of section 154, wherein courts held different views regarding the position of persons who have stood as sureties for the companies that have subsequently been placed under business rescue.[5] The idea to criticise the statutory definition of affected persons came as a result of the conflicting judgments regarding the interpretation of section 154 of the Act which is the provision that has been interpreted by the Supreme Court of Appeal to exclude the sureties from receiving a benefit of the discharge of claims of creditors as concluded between the debtor-company and its creditors.[6] The rights that are extended to the affected persons are critical in ensuring that the business rescue process is managed successfully and that the interests of the relevant stakeholders are

[3] Chapter 6 of the Companies 2008.
[4] Op cite 1.
[5] Companies Act 2008 s154.
[6] New Port Finance Company (Pty) Ltd v Nedbank Ltd [2014] ZASCA 210.

considered fully.[7] And the provisions relating to these affected persons should be interpreted in accordance with the rules of interpretation so as to avoid giving legislation meaningless interpretation.

Research aim

The aim of the research project is to attempt to criticise and analyse the approaches that have been adopted by the courts in interpreting the rights of the affected persons and their relationship with the company under business rescue proceedings. The research will also provide some suitable alternatives that can be adopted into chapter 6 of the Act so as to curb the harshness currently set by the precedent of our courts when it comes to the company and its relationship with the affected persons. It is argued that the current interpretation of section 154 fails to acknowledge that where the debtor and the creditor agree to discharge a part of the claim of the creditor, the effect of that discharge is that it changes the initial agreement between the creditor and debtor, and the suretyship which is ancillary to that debt should also be reduced accordingly.[8] The interpretation of section 154 has relied upon the wording of the section wherein it provides for the discharge to be conducted in accordance with a business rescue plan that has been approved by the relevant stakeholders.

However, this interpretation of the section fails to take cognisance of the fact that sureties are excluded from participating in the business rescue process by virtue of not being included in the definition of 'affected persons' under section 128.[9] The research project further provides a critical analysis of the problems that come with the insufficient description of section 128 as far as section 154 is concerned. Section 154 illustrates the issues that come with the current definition of affected persons: in that a person, such as a surety, who is an integral part of the company, is not considered in the Act and the result thereof is that the lack of consideration can render a company unsuccessful with its business rescue proceedings.

[7] Part C of Chapter 6 of the Companies Act 2008.
[8] Companies Act 2008 s154.
[9] Op cite 1.

Delineations and limitations

The minor dissertation focuses on the role that affected persons play when the company is under business rescue. The paper looks at the challenges that each of the affected persons faces and proposes solutions on how these issues can be resolved. However, the concepts of business rescue in South African jurisprudence is fairly new, although there has been some development in this area of law; there are still not enough textbooks that have been written about this procedure. As a result, case law and journal articles form greater part of the primary resource for this minor dissertation. Save for the commentary in Henochsberg, the textbooks that are currently available mainly discuss the procedural aspects of business rescue but fail to adequately engage with the texts; hence the research consists of mostly cases that have been brought before the courts for clarity, the minor dissertation will discuss the interpretation thereof in accordance with the rules of interpretation.[10]

Chapters of the essay

Chapter 1 of the minor dissertation is an introduction of the concept of business rescue as found in Chapter 6 of the Companies Act as well as the description of other terms that are relevant to business rescue proceedings as well as the research. The chapter also includes the research topic, research question and key references that are used throughout the research project.

Chapter 2 of the minor dissertation describes the rules of interpretation of statute that are followed in South African jurisprudence and how these rules have been applied in the interpretation of Chapter 6 of the Companies Act. Chapter 2 of the minor dissertation further examines the position of

[10] PM Meskin et al, Henochsberg on Companies Act 71 of 2008, Vol 1.

shareholders and creditors as affected persons of a company under business rescue and how courts have attempted to interpreted the rights of these affected persons in relation to the company.

Chapter 3 of the minor dissertation examines the roles that unionised and non-unionised employees play in rescuing a company. It further considers the rights that employees have and how these rights can be utilised in a manner that will assist the company in achieving the aims of business rescue.

Chapter 4 of the minor dissertation focuses on the sureties as persons who are financially linked to the company in terms of section 154.[11] The chapter examines the nature of suretyship agreement and the role that these agreements play for affording a company the necessary credit that it needs in its survival. This section further examines the role that sureties play once a company has been placed under business rescue proceedings. The role of the sureties is analysed in relation to section 154 and the interpretation thereof as provided for by the courts.[12] This chapter further compares the position of sureties in relation to business rescue and liquidations proceedings.

Chapter 5 of the minor dissertation has a conclusion and recommendations as to what the writer proposes as the way forward for the dilemma created by the research question.

Key References

Below are the terminology and concepts that I will be using throughout this minor dissertation. The majority of these terms are derived from Chapter 6 of the Companies Act.

***Affected persons**:* means shareholders, creditors, and employees of the company represented by a registered trade union and those that are unrepresented;[13]

[11] Companies Act 2008 s 154.
[12] Ibid.
[13] Companies Act 200 s 128(1).

Business rescue: means the proceedings to facilitate the rehabilitation of a company that is financially distressed by providing: a temporary supervisor, who will restructure the affairs of the company; a temporary moratorium on the rights of claimants against the company; a plan that will be developed and implemented with an aim to maximise the likelihood of the company continuing on a solvent basis or providing a better return for creditors and/or shareholders than they would have received in liquidation;[14]

Independent creditor: means a person, including an employee, who has a claim against the company, and is not related to the company, a director or the practitioner, as stipulated in section 2 of the Act;[15]

Liquidator: in relation to a company, means the person appointed under Chapter 6 as liquidator of the company, and includes any co-liquidator and any provisional liquidator so appointed, once a court order placing the company in provisional or final liquidation has been granted;[16]

Business rescue practitioner: means a person appointed, or people jointly appointed in accordance with section 138 of the Companies Act, to oversee a company during business rescue proceedings;[17]

General moratorium: means the suspension of all legal proceedings and the enforcement thereof in relation to any property belonging to the company or lawfully in its possession.[18] Once a company is in business rescue, people are suspended from instituting legal proceedings or enforcing their claims against the company. However, the company is not prohibited from instituting legal proceedings or enforcing its claims against third parties.[19] The moratorium is a defense in *personam* that applies in favour of a company that has been placed under business rescue proceedings;[20]

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[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid
[18] In the matter of Chetty v Hart [2015] ZASCA 112 para 12 the SCA held that the meaning of legal proceedings also include arbitration proceedings.
[19] Companies Act 2008 s 133(1).
[20] Investec Bank Ltd v Bruyns 2012 (5) SA 430 (WCC) para 18.

Binding offer: is an offer that is made by either a creditor or a shareholder to another creditor who is against the adoption of a business rescue plan.[21] The value of the binding offer is calculated as the equivalent of what that creditor would have received had the company went in to liquidation proceedings.[22] If the company in business rescue makes receives more money, the creditor who accepted the offer is not allowed to come back and request more money as a result thereof;

PCF: Post commencement funding, is the financial assistance in terms of a loan that a company in business rescue borrows from a creditor. The creditor who lends PCF is then ranked first in terms of repayment and receives the unencumbered assets as security for the advanced PCF;

Union: means a registered trade union as defined in terms of section 96 of the Labour Relations Act No. 65 of 1995;

Board: means a board of directors of a company; and

CIPC: means the Companies and Intellectual Property Commission.

1.2 Business rescue proceedings

The research projects focuses on the situation that most companies find them in once they have been placed under business rescue proceedings. It is not important for the purpose of the research project to know how these companies were placed in business rescue. However, in order to understand exactly what happens when companies are in business rescue proceedings, one needs to know and fully comprehend the process through which companies can be placed under business rescue. Business rescue is the proceedings to facilitate the rehabilitation of a company that is financially distressed.[23]

[21] Companies Act 2008 s153(1)(b)(iii).
[22] Ibid.
[23] Swart v Beagles Run Investments 25 (Pty) Ltd and Others [2011] ZAGPPHC 103 at para 14.

A company is financially distressed when it appears to be reasonably unlikely that it will be able to pay all of its debts as they become due and payable within the immediately ensuing six months or when it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months[24]. In order for a company to qualify for a business rescue, it must show that it is not only financially distressed but that there is also a reasonable prospect of it being rescued in one of the two ways mentioned above.[25]

A company can be placed under business rescue either by a resolution of the board or by an application to court made by any of the affected persons.[26] When business rescue proceedings are commenced by way of a resolution, the directors ought to ensure that the current and accurate financial status of the company is reflected on the papers so as to give the creditors a true sense of whether or not the company can be successfully rescued.[27] The commencement of the proceedings by way of a resolution is onerous on the board in that it requires strict compliance with the time limits provided in the Act.[28] Apart from the fact that the resolution must be properly constituted,[29] the Act further has other administrative requirements that must strictly be adhered to, more specifically in respect of the meetings that must take place with the affected persons, respectively.[30]

Should the board not comply with all of the relevant requirements as provided in the Act, then the affected persons may approach the court for an order setting aside the resolution, which will only happen if it is just and equitable to do in the eyes of the court.[31] Lastly, there is also a limit on the time in which an application for the setting aside of the plan may be brought before a court; it appeared from the *Panamo Properties (Pty) Ltd v Nel* case that an

[24] Companies Act 2008 s182(1)(f).
[25] Companies Act 2008 s131 (4)(a).
[26] Piet Delport *The Companies Act Manual* page 142.
[27] *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others* [2015] ZASCA 69 para 34.
[28] Companies Act 2008 s129.
[29] *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) para 16.
[30] However, in the matter of *Panamo Properties (Pty) Ltd v Nel and Another NNO* 2015 ZASCA it was held that non-compliance with the provisions of the Chapter 6 of the Act does not automatically render the proceedings a nullity. It merely provides the affected persons with an opportunity to approach the court.
[31] Ibid at para 29.

application for the setting-aside of the resolution may not be brought after a plan has been adopted.[32]

The commencement of business rescue by way of a resolution is however limited, in that it cannot be initiated once there is an already existing application for the liquidation of the company.[33] The business rescue proceedings of a company that is in liquidation can only be instituted by way of an application made by any of the affected persons to the same court that is hearing the application for the liquidation of the company.[34] Section 131(1) provides for any affected person to apply to court at any time to place the company under business rescue proceedings.[35] It has been held in the SCA case of *Richter v Absa Bank* that business rescue proceedings of a company can be brought even after the final liquidation order in respect of that company has been granted.[36] Apparently this is echoed by section 131(6) of the Act which states that a business rescue application in respect of the company stays the liquidation proceedings of that company until decided upon by the court.[37] The court can either grant an order placing the company under business rescue proceedings if it is just and equitable to do so or it can dismiss the business rescue application and place the company in liquidation proceedings.[38]

However, as of current the law is not clear as to how far into the liquidation proceedings of the company the affected persons may apply to court to have the company placed under business rescue proceedings. It appeared from the judgment of Gamble in the *Van der Merwe and Others v Zonnekus Mansions* matter that there exists a limitation, but the limitation on this is also not clear as he did not elaborate further on this point.[39] At the moment it appears that our courts are also waiting on the legislature to amend the Act before making definitive judgments. This is to some degree contradictory to the aim of section

[32] Ibid at para 29.
[33] Companies Act 2008 131(7).
[34] *Sibakhulu Construction (Pty) Limited v Wedgewood Village Golf Country Estate (Pty) Limited*.
[35] Companies Act 2008 s 131(1).
[36] *Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 100 para 15.
[37] Companies Act 2008 s 131(6).
[38] Companies Act 2008 s131(4)(a).
[39] *Van der Merwe and Others v Zonnekus Mansions (Pty) Limited (In liquidation) and others* para 57

7 of the Act, which is to rescue companies that are financially distressed as opposed to hopelessly insolvent companies.[40]

In a business rescue application that is brought post the liquidation order being granted, the affected person bringing such an application is under an obligation to place the correct factual basis before the court that indicate that there exists a reasonable prospect that the desired outcome of either rescuing the company or achieving a higher return for creditors and shareholders exist.[41] The application must be served on all affected persons in order to afford them an opportunity to also participate in the hearing of the application.[42] Once the court has heard the matter, it can rule that*, inter alia*, on the face of the papers, it is satisfied that a case for the commencement of business rescue has been met; or that it is just and equitable under the circumstances to order that the company commences with business rescue as per section 131(4) of the Act.[43] In Addition thereto, the court must further be satisfied that there is a reasonable prospect for rescuing the company.[44] Failing which, the court may dismiss the application.

A reasonable prospect of it being rescued

In the matter of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, the court considered the meaning of 'reasonable prospect' and stated that in considering whether the company has a reasonable prospect of being rescued, judges should look at the following factors:[45]

a) The likely cost of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

[40] The writer argues that a company which has been declared insolvent is not capable of being rescued through business rescue as this is not the correct procedure for it. Business rescue is designed to assist companies that are on the verge of being insolvent and not hopelessly insolvent. When a liquidation order has been granted against a company it is because that company is factually insolvent and does not pass the solvency and liquidity test as per section 4 of the Act. A clear distinction needs to be drawn between companies that fit the threshold of being financially distressed and those that are insolvent. The provisions of business rescue were not designed to revive dead companies.
[41] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013(1) SA 542 (FB) para12.
[42] Companies Act 2008 s 131(3).
[43] Op cite 29.
[44] Ibid.
[45] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) 24.

b) the likely availability of the necessary cash resource in order to enable the ailing company to meet its day to day expenditure, once its trading operations commence or resumed. If a company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

c) The availability of any other necessary resource, such as raw materials and human capital; and

d) The reasons why it is suggested that the proposed business plan will have reasonable prospect of success.[46]

The aforementioned factors are not exhaustive, but are indicators of some of what a business rescue application should contain if it is brought while the company is undergoing a liquidation or if it is brought by some of the affected persons.[47] Some affected persons, such as the creditors and employees who do not normally have the inside financial information that the management team and shareholders of a company have might not be able to include this in their application for a business rescue.

To prepare a thorough schedule detailing the information regarding the; likely cost of rendering the company able to commence with the rescue; availability of PCF to sustain the company while under business rescue; and suggestion as to why the company is most likely to be rescued under the proposed schedule will prove that the application is made in good faith.[48] Also, providing the aforementioned information in an application will put the court in a better position to objectively ascertain whether or not the company has reasonable prospects of being rescued.[49] After realizing that the aforesaid steps can be onerous on certain applicants, the court held that each case should be considered on its own merits and without applying any of the abovementioned factors in a rigid manner.[50]

Once an order placing the company in business rescue has been granted, an interim business rescue practitioner will be appointed. The functions of a

[46] *Ibid 17*.
[47] Ibid.
[48] Ibid.
[49] Ibid at para 24.
[50] Ibid at para 30.

practitioner includes, *inter alia*, the assessment of whether the company has a reasonable prospect of success and preparing the business rescue plan.[51] Whereafter, the status of the interim practitioner will be confirmed at the first meeting of creditors after they have voted.[52] In terms of the Companies Act, business rescue is supposed to be a very quick process that is supposed to last for approximately 3 months.[53] However, the writer is aware of a company that has been under business rescue proceedings for over 4 years.[54]

The purpose of a business rescue plan

The business rescue plan provides all stakeholders with the necessary information to make the decision regarding the affairs of the company and how they should be managed going forward.[55] The business rescue plan must contain the factual information regarding the basis on which the business rescue application was sought and that it must state that business rescue is sought on genuine grounds and that it is not being used as a subversive exercise to enable the company to avoid its creditors.[56] The information provided to the stakeholders must at least include a list of the assets of the company and the securities held in respect of each of those assets.[57]

Section 150(2)(c)(i) of the Companies Act requires the plan to include a statement of the conditions that must be fulfilled for the plan to come into operation and be fully implemented.[58] In terms of section 150(5) the plan must be published within 25 days of the appointment of the practitioner.[59] However, the practitioner's failure to publish the plan within the stipulated time does not terminate the business rescue proceedings, as extension dates can be sought from creditors.[60]

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[51] Companies Act 2008 s140.
[52] Tshepo Mongalo "Modern Company Law for a competitive South African Economy" page 381.
[53] Companies Act 2008 s 132(3).
[54] LGI Properties Rose (Pty) Limited (in business rescue) this company has been in business rescue since 26 February 2013 and continues to be in business rescue.
[55] Companies Act 2008 s131(4).
[56] *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Limited and Others* [2015] ZAKZPHC 31.
[57] Companies Act 2008 s 150(2)(a).
[58] Ibid.
[59] Companies Act 2008 s 150(5).
[60] *Shoprite Checkers (Pty) Limited v Berryplum Retailers CC and others* [2015] JOL 34498 (GP) page 1.

As part of the conditions of a business rescue plan, most business rescue practitioners now include a condition that states that the repayment of certain debts to creditors and of compromises that need to be made with certain creditors must be done in the presence of sureties.[61] However, it is my understanding that few of the plans published ever consider the sureties who soon turn into prospective creditors of the company as a result of having to pay the company's creditors on behalf of the company by virtue of the suretyship agreements. This is because the inclusion of the sureties in a plan is not a legal requirement in terms of any provision of the Act.[62] Instead what ends up happening in most instances, is that the plans only provide information relating to the creditors that are currently known to the company and not contingent creditors such as the sureties.[63]

The role of a business rescue practitioner

When a company commences business rescue through filing a resolution it must nominate its chosen practitioner. However, if business rescue commences by way of a court application, then either the application or the court will appoint a practitioner who will assist the company in its rehabilitation process. In terms of section 138 of the Act, a practitioner is someone that is a member in good standing of a legal, accounting or business management profession accredited by the commission.[64]

In the matter of *Griessel v Lizemore*, Spilg, J held that a practitioner must be independent and not be related to any of the company's directors.[65] The practitioner must show that he is capable of coming to decisions in his own mind without the influence of any of the directors of the company.[66] The practitioner is called to assist the company and look out for the interests of the affected persons and not to align himself with the interest of one director over those of the entire group of affected persons.[67]

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[61] Companies Act 2008 s 154.
[62] Companies Act 2008 s 133(2).
[63] *Absa Bank Limited v Golden Dividend 339 (Pty) Limited and Others* 2015 (5) SA 272 (GP) page 305.
[64] Companies Act 2008 s138.
[65] *Griessel and Another v Lizemore and Others* [2015] ZAGPJHC 189 para 80.
[66] Ibid.
[67] Ibid.

A practitioner has a duty to prepare the business rescue plan and steer the company into a direction that will either render it a solvent company or provide a better return for creditors and or shareholders than it would in liquidation.[68] In preparing the plan, the practitioner must conduct his own investigations into the affairs of the company.[69] As a person who is in charge of the company, the practitioner is also expected to mediate or investigate any concerns that the employees might have regarding the status of their employment and contracts.[70] In ensuring that the company runs efficiently under the control of the practitioner, the practitioner may delegate some of his powers to the board of directors.[71] However, such a delegation should not be absolute to such an extent that the practitioner is unaware of what is happening in the company.[72]

Once the practitioner has investigated the affairs of the company and prepared the plan, he must convene a meeting where the affected persons will vote either in favour of the plan or propose that the plan be amended.[73] If the plan is approved, then the practitioner will work in accordance with it.[74] However, if there are affected persons such as creditors who are opposing the plan, the practitioner can apply to court to force these disgruntled creditors or employees to accept the offer.[75] Also, the practitioner can request that one of the affected persons proposes a binding offer to the disgruntled affected person.[76] Although, the binding offer may be rejected, this can form the basis for a practitioner to approach the court with his independent legal advisers and challenge the rejection of the binding offer by the disgruntled affected person.[77]

Where the practitioner is found to have acted in contravention of his powers as provided by the Act and in a manner that puts the company in a far worse off position, he can be removed by any of the affected persons.[78] The removal of the practitioner can only be done through an application to the court stating

[68] Companies Act 2008 s 140(1)(d)(i).
[69] Companies Act 2008 s 141(1).
[70] *Griessel v Lizemore* at para 64.
[71] M*urgatroyd v Van den Heever NO and Others* [2014] 4 All SA 89 (GJ) at para 16.
[72] Companies Act 2008 s 142.
[73] Companies Act 2008 s 140.
[74] Ibid.
[75] Companies Act 2008 s 153(7).
[76] Companies Act 2008 s 153(1)(b)(ii).
[77] Companies Act 2008 s 153(7).
[78] Companies Act 2008 s 139(1).

full reasons as to why the practitioner should be removed from his position.[79] However, in many instances where the practitioner has acted negligently in exercising his duties as a guardian of the company, the courts have awarded courts against the practitioner in his personal capacity and not *ex officio*.[80]

As will be shown more fully in the following chapters, the success of a company that is under business rescue depends on the use of the rights provided to the affected persons. It also depends on the detail of the plan provided to the affected persons by the practitioner. To the extent that the rights of the affected persons are not drafted clearly in the Act, this becomes problematic since the affected persons end up not being able to fully assist the company undergoing business rescue through effective use their rights.

[79] Companies Act 2008 section 139; See also *Lazenby v Lazenby Vervoer VV and Others* [2014] ZANWHC 41 at para 25.
[80] Ibid.

Chapter 2

2. Rules of interpretation of legislation

This chapter, explores how our courts have interpreted the provisions of chapter 6 of the Companies Act more particularly the provision relating to the rights of shareholders and creditors as affected persons.

The chapter starts by discussing the rules of interpretation as found in South African jurisprudence and then apply these rules in the interpretation of the rights of the affected persons as provide for in terms of chapter 6 of the Act. The analysis of the provisions of chapter 6 of the Act is aimed at showing the difficulties that exists with the current interpretation of the provisions and how this has hindered the progress of companies that are under business rescue.

In terms of South African jurisprudential principles of interpretation, there are rules of construction which form part of the common law. These rules are there to assist the courts when interpreting legislation by looking at the purpose of the legislation and the intention of the legislature which drafted the legislation. It appears from case law that some provisions of the chapter 6 of the Act are shoddily drafted and that some of them are not even capable of being interpreted clearly without creating new legal problems thereof.[81]

2.1 The literal approach of interpreting legislation

In terms of the legislation, the interpreter should focus on the literal and grammatical meaning of the legislative provision to be interpreted.[82] Essentially, the interpreter picks up a dictionary and looks up the word needing to be interpreted.[83] In this regard, the interpretation process entails that the interpreter must look at the plain meaning of the words; whatever meaning the words carry, it is this meaning which is assigned to them. However, should the

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[81] *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others* [2015] ZASCA 69 para 43.
[82] Zoneska Investments (Pty) Ltd t/a Bonatla Properties (Pty0 ltd v Midnight Storm Investments 386 Ltd [2012] ZAWCHC 163 at para 31.
[83] Ibid.

plain meaning of the words be ambiguous, vague or misleading and the application of this would lead to absurdity then, under these circumstances, the court may deviate from using the ordinary meaning of the words.[84]

Where the meaning of the provision is unclear and/or ambiguous, the court can then use the legislation in its entirety and other provisions to draw from there what the meaning of the provision in issue could be.[85] However, when inferring the meaning of the provisions from the surrounding sections, the court must apply a strict meaning to that provision in question.[86] If this too leads to absurdity, then the court needs to refer to common law which formed the basis of that act and how it developed prior to the enactment of the legislation.[87]

In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* the court held that

> *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.*
> *Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.*
> *Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the*

[84]Blignaut v Stalcor (Pty) Ltd and Others 2014 (6) SA 398 at para 19.
[85] Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others [2013] ZAGPPHC 12 para 15.4.
[86] Ibid.
[87] Ibid.

> *one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document*.'[88]

In the aforesaid matter of *Endumeni Municipality*, the judge cautions courts from attributing meaning to provisions of legislation where the meaning of such does not clearly follow from the legislation as a whole. The act of interpreting legislation is a critical one as it requires a judge to interpret a provision without usurping the powers of the legislature by creating something totally different from the one intended by the legislature.[89]

As will be seen from the cases discussed below, there are instances when judges have interpreted the provisions of the Companies Act in a manner that strays away from the traditionally known principles of common law. The effect of this interpretation is that it creates a confusion as to the application of the law and it puts an onerous burden on the persons that are affiliated with the company. An example of this is illustrated by the interpretation of section 154 of the Companies Act as given by the different courts that have considered this provision wherein the courts have given different judgments regarding the status of sureties and their liability to the creditors of the company. Section 154 is discussed in chapter 4 hereof.

The rule of interpretation or legislation using the aforementioned approach was first discussed in the matter of *Sussex Peerage*,[90] where the court held that:

> "*The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case; best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to*

[88] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2013] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2All SA 262 9SCA para [18].
[89] Ibid.
[90] *Sussex Peerage* Case [1844] 11 Clark and Finnelly 85, 8 ER 1034 at 1.

> *the preamble, which, according to Chief Justice Dyer is "a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress.*''

It is argued that the literal approach has inflexibility which places a particular strain on the legislation in that it requires the legislature to make law which provides for all eventualities. Further, the interpreter is not allowed to interfere with the legislation and is restricted to the body of the text. It is argued that the literal interpretation section 154 leads to ambiguity and that it needs to be redrafted so as to provide meaningful rights to the creditors, sureties and companies as mentioned thereat. As will be seen in chapter 4 hereof, our courts have tried to attribute meaning to the wording of section 154; however, this exercise has proven to be even more confusing than what might have been intended. It appears from the different cases that in trying to interpret the provision, our courts have actually interfered with the legislation and extended it beyond the meaning intended by the legislature.

Arguably, the use of the literal approach in the interpretation of legislation can sometimes have unintended consequences which the legislature did not foresee.[91] As a result, the use of the literal approach often leads to the legislation becoming ineffective. Similarly, the inability of the courts to use other external aids in interpreting the legislation while using the literal approach can also lead to a misinterpretation of the legislature's intention regarding the provision. It is submitted that by solely interpreting section 154 based on the ordinary meaning of the words without looking at other provisions of chapter 6 of the Act or the Act in its entirety. There is a high probability that the interpretation, in isolation, will lead to a completely different and possibly unintended meaning of the provision.

The interpretation might even lead to the provision being incongruent with other provisions of the Act. More often than not, provisions are capable of having more than one interpretation and meaning. This then leaves the legislature's intention of the legislature at the mercy of our courts in that the interpretation of the provision is left to the courts to give it meaning as they

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[91] Ibid.

deem fit. However, our courts can come to different conclusions about a provision and depending on the number of justices believing a certain way that provision will then be given the meaning chosen by the majority of the justices. In South Africa even this interpretation cannot, with certainty, be said to be the only correct one unless it has been tried and tested before the Constitutional Court, which is the highest court of the land.[92]

In South African jurisdiction legislation is interpreted through the use of the literal meaning unless such interpretation leads to absurdity. However, with the Constitution being the supreme law of the land, the rules of interpretation have to some degree changed in that the interpretation of any legislation must now follow the spirit and purport of the Bill of Rights.[93]

2.2 The purposive approach of interpreting legislation

In interpreting the provisions that define the roles and rights of affected persons, it is necessary for courts to consider the Bill of Rights during that exercise.[94] In South African jurisprudence interpretation of legislation now starts from the Constitution and flows to the other approaches.[95] In the Constitutional Court matter of *Bato Star*, Ngcobo J held that the interpretation of legislation must promote the spirit, purport and objects of the Bill of Rights, and that the interpretation of any legislation must always be aimed at advancing the values enshrined in the Bill of Rights, such as equality.[96]

Company restructuring procedures have previously been dominated by creditor-friendly legislation such as the Insolvency Act[97] which provide for the liquidation procedure for insolvent businesses and the 1973 Companies Act[98] which provided for the judicial management of companies that were unhealthily

[92] The Consitution of the Republic of South Africa, 1996 s7.
[93] Ibid.
[94] Companies Act 2008 s 7(1).
[95] Op cite 93 at s2.
[96] *Bato Star Fishing (Pty) Lt v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) 72.*
[97] Insolvency Act No. 24 of 1936.
[98] Companies Act No.61 of 1973.

trading. Prior to the enactment of the Companies Act in 2008, there was no legislation in the South African jurisprudence that was aimed at advancing the interests of other company stakeholders other than the creditors.[99] Chapter 6 of the Companies Act tries to redress the inequality that resulted from the previous business restructuring procedures.

However, the provisions of chapter 6 of the Companies Act are not always clear in the manner in which they have been drafted. As a result, the courts have had to interpret them in order to give them a coherent legal meaning. In order to be able to interpret legislation in a manner that follows the spirit and purpose of the Bill of Rights, it is crucial that when the courts interpret the Companies Act they do so by following the purposes of the Act as listed in section 7 thereof.[100] The purposes of the Companies Act that are relevant to the business rescue provisions are the following:

> **7 Purposes of Act**
> *"The purposes of this Act are to-*
> *(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;*
> *(b) promote the development of the South African economy by-*
> *(i) encouraging entrepreneurship and enterprise efficiency;*
> *(ii) creating flexibility and simplicity in the formation and maintenance of companies; and*
> *(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;*
> *(d) reaffirm the concept of the company as a means of achieving economic and social benefits; and*
> *(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders."*

[99] Richard S Bradstreet 'The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May adversely Affect the Lenders' Willingness and the Growth of the Economy' (2010) 22 SA Merc LJ 195.
[100] Companies Act 2008 s7.

When the provisions of the chapter 6 are interpreted, the courts have a constitutional obligation to ensure that the interpretation thereof is aimed at the promotion of the purposes of the Act as aforementioned.[101] The interpretation of legislation using the purpose thereof ensures that the meaning attributed to the provisions is not too far off from the intention of the legislature and that it follows the Constitution as the supreme law of the land.[102]

In the circumstances, the provisions of section 128 which define the term 'affected persons' will be considered fully below in light of the purposes stipulated above. Further, the rights afforded to these affected persons in terms of the provisions under chapter 6 of the Companies Act will also be examined as to whether or not they advance the purposes of business rescue as supported by section 7(k).[103]

2.3 The interpretation of the rights and role of shareholders in business rescue proceedings

As indicated above, the definition of affected persons in the Act includes shareholders and as such, shareholders are given rights to participate during the business rescue proceedings. Below is an analysis with regard to the effectiveness of the rights given shareholders in achieving the primary goal of business rescue, being the rescuing of a company into a solvent position where it is able to trade without the need of a practitioner.

In terms of s128(1)(a)(i) of the Act, a person who is a shareholder in a company has a right to participate in the business rescue proceedings of that company irrespective of whether that person's shareholding is disputed or not. In terms of the section 1 of the Act, a shareholder is the holder of a share issued by a company and who is entered as such in the certificate register. The ordinary meaning of the word 'shareholder' is what entitles that individual, as an affected person to participate in the business rescue proceedings of the company. In the matter of *Oakdene Square Properties (Pty) Ltd v Farm*

[101] Op cite 82 at para 32.
[102] Op cite 93 at s2.
[103] Companies Act 2008 s7(k).

Bothasfontein, where a shareholding of one of the shareholders of the company was contested, Brand JA of the SCA held that although the entitlement of one of the shareholders was disputed, the shareholder qualified to be an affected person in terms of section 128 of the Act.[104] The literal approach taken by Brand JA is consistent with the definition of shareholder which is found in section 1 of the Companies Act, in that a shareholder qualifies in terms of section 128 by simply being registered as such. There is no need for the exact shareholding to be known.[105]

The Act does not seek to give participation rights to the shareholders according to the classes of shares they hold. All shareholders are given equal rights in participating in the business rescue proceedings of the company. Similarly, business rescue proceedings do not alter the classification of shares in the company and the position of the shareholders.[106] It merely works with the same share structure that was there prior to the commencement of the business rescue proceedings. The share structure can only be altered on two grounds: if the court directs that the shares be altered; and in an approved business rescue plan approved by shareholders, creditors and the other relevant stakeholders.[107] The share structure can only be altered if the alteration will be to the benefit of the company in that it will be able to achieve one of the two aims of business rescue.

Affected persons have a right to participate in the business rescue proceedings of the company irrespective of whether the business rescue proceedings were instituted through the filing of a resolution by the board of the company, as mentioned in section 129[108] of the Act or through an application made by one

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[104] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 at 72 - *With reference to s 131(1), the definition of 'affected person' in s 128(1) - which is the definition section for purposes of chapter 6 – includes a shareholder or creditor of the company. On the face of it, Educated Risk is the registered holder of 40 per cent of the shares in the company. Although its entitlement to those shares is disputed, it therefore appears to qualify as an 'affected person'.*

[105] Shareholder, subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be;

[106] Op cite 104.

[107] Companies Act 2008 section 137(1) provides that during business rescue proceedings and alteration in the classification or status of any issued securities in the ordinary course of business, in invalid except to the extent that - (a) that the court otherwise directs; or (b) contemplated in an approved business rescue plan.

[108] Companies Act 2008 s129 stipulates that subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision…(4) states that each affected person has a right to participate in the hearing of an application in terms of this section.

of the affected persons in terms of section 131(1) of the Act.[109] The participation of affected persons in the business rescue proceedings is regulated by part C of chapter 6 of the Act. Accordingly, affected persons not only have a right to institute the proceedings but they also have the rights to: apply to court to have the business rescue proceedings[110] and the appointment of a business rescue practitioner set aside, as well as the right to approach the court to set aside the plan.[111]

Further, section 146, a provision under part C of Chapter 6 of the Act, provides for the participation in business rescue proceedings by the holders of securities in the company. Section 146 provides for each holder of the issued security of the company to be notified of the court proceedings regarding business rescue and to formally participate in the business rescue proceedings as well as to vote to approve or reject a proposed business rescue plan.

The enactment of these provisions in the Act serves an essential role in the business rescue proceedings of the company as they provide the shareholders who may not know the exact situation of the company, with an undisputed right to know about the financial status which the company finds itself. The right of shareholders to participate in the process of regulating the company's future financial planning. Most large businesses have shareholders residing in different parts of the world and for the Act to prescribe that the shareholders be notified about the business rescue proceedings of the company serve a good cause as shareholders are mainly the persons who invest capital and funds into the running of the company.

However, it appears from section 146(d) of the Act that the shareholders are only allowed to vote to approve or reject the plan if it contemplates altering the classes of shares associated with those shareholders. It is argued that this limits the application of section 128 in that the participation by shareholders is restricted to those who are going to be affected by the plan.

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[109] Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under and commencing business rescue proceedings.

[110] Companies Act 2008 s 130(1)(a).

[111] *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & others* [2015] ZASCA 69 para 54.

Instead of allowing shareholders to participate in voting for the business rescue plan, it requires only the shareholders whose shareholding is going to be altered only, and not all shareholders as initially envisaged by section 128.[112] Loubser argues that since only those shareholders whose rights will be directly affected by the plan may attend the meeting, it is misleading to phrase this provision as if each shareholder would be entitled to make such a proposal as not all of them are provided with the right to participate in the approval of the plan.[113]

Secondly, the right to propose an alternative plan is limited to exactly that; to propose an alternative plan. It remains the sole right of creditors to vote on the proposal. If the creditors have voted in favour of the original plan, they will simply reject the proposal for an alternative plan put forward by a shareholder. In this regard, the reality is that this provision does not provide the shareholders with the rights necessary to have a meaningful impact in the implementation of the plan.[114] It is not clear why the legislature would choose to only grant shareholders with the rights to propose amendments and not vote for a plan. In this regard, it is argue that a company with a fewer creditors would be subjected to the will of those creditors even if their claims will not be significantly affected by the business rescue. This appears to put more power in the hands of creditors than is necessary.

Similarly, the shareholders should also be given a right to vote on the plan and not to merely propose amendments. I submit that it could not have been the intention of the legislature to exclude innocent shareholders from voting on a plan regarding the future conduct of their company.

In the matter of *Sibakhulu Construction (Pty) Limited v Wedgewood Village Golf Country Estate (Pty) Limited*, wherein during an application for the liquidation of the respondent at the Western Cape High Court, the applicant discovered that certain creditors had instituted business rescue proceedings in the High Court of Port Elizabeth. The creditors in the application instituted therein were permitted to intervene in the litigation instituted at the Western

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[113] Loubser (2010) TSAR 687 at 700.
[114] Ibid.

Cape High Court. In terms of the litigation that took place at the Western Cape High Court, the judge had to determine, *inter alia,* which 'court' between the two courts mentioned above had jurisdiction to hear the application to institute business rescue proceedings in respect of the respondent. In coming to the decision, Binns-Ward J held that the

> "*questions of interpretation of the 2008 Companies Act must be undertaken with the provisions of ss5 and 7 in mind. In particular, s 5(1) provides that the Act must be interpreted to give effect to the purposes set forth in s7. In determining the effect of s23 of the Act on the question of a court's jurisdiction it seems to me that the provisions of s 7(k) and (l) have a bearing… I consider that it would give effect to the purposes set out in s7(k) and (l) to interpret s23 of the Act to the effect that a company can reside only at the place of its registered office (which, as mentioned, must also be the place of its only or principal office).*" [115]

The result would be that there would in respect of every company be only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters.

2.4 The interpretation of the rights and role of creditors as affected person

Role of a creditor in business rescue proceedings

Section 128(1) of the Companies Act lists creditors as affected persons of a company for the purposes of business rescue. In terms of section 131(1) of the Act each creditor, as an affected person, has the right to apply to court, at any time, for an order placing the company under supervision and commencing the business rescue proceedings. In addition to being given the right to commence the proceedings, creditors are also afforded a number of other rights which they can use during the proceedings. However, some rights of creditors are limited by the *moratorium* that is triggered by the commencement of the business rescue proceedings.

The effect of *the moratorium* applies to all creditors including the creditor who has brought the application. This was confirmed in *Nkhoma DT & 4 Others v Zonnekus Mansion (Pty) Ltd (In Liquidation), CSARS & Standard Bank of SA*

[115] 2013 (1) SA 191 (WCC) 23.

Ltd, wherein the applicants lodged a new business rescue application while another business rescue application was still before the court.[116] Weinkove A.J stated that the latter business rescue application was a nullity as the first had not been disposed of and that '*while a business rescue application is in extant, another application cannot be brought*'.[117] Further, the *moratorium* suspends all legal proceedings that the creditors might have already initiated, and any judgment or ruling that is made during this period is unenforceable.

On the other hand, however, once the business rescue proceedings have commenced, creditors are given a huge role in which to influence the direction that the company takes by making proposals on how the business rescue plan can be amended and by voting in favour or against the proposed plan. A business rescue plan cannot succeed without the approval of at least 75% of independent creditors present at the time the plan is being voted for. It is crucial for the creditors of the company to be involved in the business rescue proceedings and participate in the voting process and in the process of amending the plan. A company that has the backing of its creditors is most likely to succeed in its rescue or to achieve a greater return for the creditors.

Most companies that get rescued through the business rescue process do so with the assistance and corporation of creditors. Without creditors taking compromises or reductions on their claims, most companies would not survive business rescue but would remain insolvent. Creditors that cooperate with the companies end up taking a lesser amount from the company than what they are owed. The change in the amounts repaid to creditors can, to some extent, be seen as a catalyst that changes the nature of the contract between the creditors and the company. Dr Levenstein warns that the acceptance of such debt compromise can result in a perceived erosion of contractual relationship between the lenders and the debtor companies as shown in chapter 4.[118]

The contractual relationship between the creditor and the company does not change; however, the obligations of the company in terms of the contract are

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[116] Nkhoma DT & 4 Others v Zonnekus Mansion (Pty) Ltd (In Liquidation), CSARS & Standard Bank of SA Ltd.
[117] Ibid.
[118] Eric Levenstein "*An appraisal of the new South African business rescue procedure* (LLD thesis University of Pretoria (November 2015)) page 132.

altered and to some extent even abandoned so as to provide the company with some breathing space. Unless otherwise stated in the business rescue plan, the contractual obligations of the company to the creditors are suspended only for the duration of the business rescue proceedings and not entirely extinguished.[119] If the business rescue proceedings terminate due to the non-fulfilment or the company is liquidated, then the company's contractual obligations are resurrected and it becomes liable to its creditors in full. That way the company cannot use business rescue as a tool to evade creditors and avoid performing contractual obligations when they become too onerous to perform.[120]

Balancing the rights of creditors and those of the debtor-company

There are instances where a company reaches a compromise with the creditors in a manner that freezes the claims of creditors as at the date of the commencement of business rescue proceedings. In this way, the creditors' claims against the company do not accrue interest whilst the company in under business rescue.[121] The company only becomes liable to the creditors for the amount that was outstanding as of the date of commencing with the business rescue proceedings and nothing more. The creditors take a compromise in their claim as this is sometimes perceived to be better than what they could possibly receive should the company be liquidated. The looming threat of receiving less in liquidation proceedings than in business rescue proceedings is always a useful tool in the company's hands when negotiating during business rescue proceedings.[122]

Although the company might argue that creditors will receive a better return in business rescue than they would in a liquidation, the result of that argument has "negative repercussions on the traditional binding force of contracts"[123] and the economy. However, as business rescue aims to save jobs and ensure

[119] Ibid.
[120] Ibid at page 133.
[121] In a business rescue lecture conducted by Dr Eric Levenstein for the Advanced Company Law Course, he informed the class that Stuttafords International Fashion Company (Pty) Ltd (In business rescue since 26 October 2016) is one of the companies that proposed a business rescue plan that intends on 'freezing the creditors' claims against the company until as such time as the company is able to pay the creditors' claims.
[122] Ibid.
[123] Eric Levestein Thesis paper 132

that there is prolonged employment, which is better than in liquidation, more creditors are more likely to take that instead of liquidation. Also, when creditors know that they are going to receive more funds from the business rescue than from the immediate liquidation of the company, creditors are likely to support that business rescue.

Moreover, in liquidation creditors are ranked in an order from secured creditors, unsecured creditors, preferred creditors and lastly concurrent creditors.[124] In most liquidation proceedings only the secured creditors receive full payment of their claims.[125] The remaining creditors stand to receive a few cents in a rand, if any. When comparing this situation to that in a business rescue proceedings where all creditors, secured and concurrent creditors included, all stand to receive some form of payment in respect of their claims, it is not difficult to see why the option of business rescue might be preferred and accepted by most creditors as it guarantees them payment of some of their claims irrespective of their ranking as opposed to liquidation where concurrent creditors are at risk of not receiving any payment whatsoever.[126] All the more, it would be prudent we ensured that the process is a success given the possible knock-on consequences. Once a business rescue plan has been approved and is being implemented, creditors lose their rights to enforce their claims against the company for the remaining of the debts.

The aforesaid protection provided to the company provides it with the much needed breathing space from the claims and judgments that creditors could potentially take against the company. The protection of the company against creditors is further reinforced by section 152(4) which states that a plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person was: present at the meeting, voted in favour of the adoption of the plan, or had approved their claims against the company.[127] Also, a creditor who unreasonably opposes the adoption of a plan can, upon a court

[124] Diener N.O. v Minister of Justice and others [2016] JOL 35748 (GP) para 52.
[125] Insolvency Act s89.
[126] Cassim, F et al Contemporary Company Law (2011) chapter 18 page 902.
[127] Companies Act 2008 s 152(4)(a)-(c).

application by a practitioner, be declared a hostile creditor and be removed from the voting process and the proceedings of the company.[128]

Maintaining equilibrium between the interests of creditors and debtor-companies is difficult especially in an economic system like South Africa. Our legislation always has to take into account the political climate in which South Africans live and try to adjust the injustices of the past. This means that in some instances creditors, who in the normal course of business would liquidate companies, find themselves in situations where they have to cooperate with the company and the practitioner in business rescue. Although equilibrium is not always reached, the Act does to an extent succeed in providing financially distressed companies with a way out of trouble while simultaneously providing reasonably efficient means to providing creditors with a better return for their claims.

However, the provisions of the Act that provide the creditors with the rights to vote in favour of the plan or reject same if it is not what they want, can be seen as the provisions that attempt to achieve the equilibrium. When a moratorium is placed on all legal proceedings against a company under business rescue, creditors are deprived of taking action to recover their claims against the company. However, when the Act provides for creditors to participate in the voting of the plan, it gives them the right to regulate how the company should deal with their claims and this restores the power that is lost by the application of the moratorium.

Although the preparation of the plan is always conducted by the practitioner, the plan will not succeed in its approval or implementation if the creditors do not agree with it. In my view Rushworth is correct when he states that business rescue is intended to provide a reasonable balance between the interests of the debtor company, which is given the opportunity to prepare a rescue plan with some protection from action by creditors, and the creditors themselves who have a right to vote on the plan.[129]

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[128] Companies Act 2008 s 153(1)(a).
[129] Jonathan Rushworth, 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' (2010) Acta Juridica 375 at 407.

The creditors' rights to vote against the plan are not absolute. As any creditor's vote can be overridden by a court if it appears that the creditor merely voted against the plan because it did not cater for the repayment of the creditor's claim to the satisfaction of that creditor. A practitioner is given a right to apply to court to set-aside the vote of that creditor. Also, another shareholder can choose to buy that creditor's claim at a price equivalent to what the creditor would have received had the company been liquidated. Further, creditors are also prohibited from enforcing their claims or instituting legal proceedings against the company while it is in business rescue. A creditor that wishes to proceed with legal actions against the company must first seek the approval of the practitioner or of the court.

Another way in which creditors assist companies is through the provision of post commencement funding ("PCF") once the company has commenced with the proceedings. The provision of PCF ensures that the company is able to pay its immediate needs and is able to pay salaries of its employees and the salary of the practitioner. However, the provision of PCF is not mandatory and if the company is relying solely on creditors providing it with PCF in order for it to be rescued, then the courts can render the business rescue proceedings a sham and place the company in liquidation.

From the above paragraphs it is has been noted that the Act currently provides some shareholders with the rights to participate in the discussions regarding the plan while other shareholders are not involved at all. It is not clear why the legislature would want shareholders to be involved only in proposing the amendments of the plan if they are not going to be voting on it. In this regard, I recommend that the legislation be amended to provide shareholders with a right to participate in the voting process of the plan.

In respect of creditors, I am of the view that the interpretation of the rights of creditors currently shows the intention of the legislature in that the power that is granted to creditors in the liquidation proceedings is removed in the business rescue proceedings. In business rescue the power is shifted to the debtor-company by the application of the moratorium and is only counter-balanced by the right of creditors to vote on the business rescue plan.

Chapter 3

3. The critical role of employees in business rescue

3.1 The rights and role of the employees as affected persons

This chapter examines and analyses the role that employees play in assisting a company that has been placed under business rescue. As will be seen below, one of the main reasons for the inclusion of the business rescue chapter in the Companies Act was to provide for a company restructuring mechanism that does not result in the loss of employment and which is aligned with our employment laws.

Liquidation, which is one of the restructuring mechanisms that creditors prefer, however, results in the loss of employment for most people and has a negative effect on the economy of the country.[130] Liquidations had a negative impact on the employees of the company in that where companies were not being bought as a going concern, the employees had to be retrenched and were left with nothing but a preferent claim in the liquidation.[131] Fewer companies were sold as a going-concern and the negative results thereof rose in exponential figures.[132]

The claim of employees would always be paid out of the residue of the estate, after the secured creditors and South African Revenue Service ("SARS") had been paid. Companies that had been liquidated seldom had any residue and this meant that the employees of that company would not only lose their jobs, but would also not receive any payment due to them as part of their severance pay.[133] As a result, the legislature included provisions within the business rescue chapter with an aim of providing employees with better protection than

[130] *Sondamase and Another v Ellerine Holdings Ltd and Another* [2016] ZALCCT 53
[131] *Ibid.*
[132] Loubser "Judicial Management as a Business Rescue Procedure in South African Corporate Law" 2004 SA Merc LJ 16.
[133] Insolvency Act 1936 s89.

they previously enjoyed taking into account where the company went into liquidation.[134]

In terms of business rescue proceedings, employees are given rights aimed at protecting their employment with the company and are given the opportunity of participating in the process. Firstly, as affected persons, both unionised and non-unionised employees have a right to bring an application to court for the commencement of business rescue proceedings in respect of the company.[135] Consequent to a business rescue application brought by or on behalf of the employees, the court in the matter of the *Employees of Solar Spectrum Trading v Afgri Operations*[136] held that a plan should not be a prerequisite when business rescue applications are instituted by employees, as this would not only be unduly onerous but '*would have the effect of importing a requirement that the legislature did not envisage regard being had to the architecture of the Act as a whole'*.[137] The court did not want to impose the plan as an additional requirement to an application brought by the employees as this would be more onerous than the actual meaning of the Act.

This appears to be in line with the intention of the legislature that prompted the enactment of the business rescue chapter in the Companies Act. Previous company restructuring procedures did not cater for employees and debtor-companies as much as they catered for creditors employees were preferent creditors who only received payment when there was residue in the insolvent estate after the secured creditors and SARS had been paid. Therefore, for a court to recognise this effect and align the business rescue procedures in a manner that aims to advance the intentions of the legislature shows a shift in the aims of the new company restructuring procedure.

When making the application for business rescue, the employees have to notify the company as well as the shareholders and creditors.[138] Once an application has been heard and the order for commencing business rescue proceedings has been issued, the employees are given a right to be consulted

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[134] Op cite 132.
[135] Companies Act 2008 s 131(1).
[136] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd para 12.*
[137] Ibid at para 18.
[138] Companies Act 2008 s131(2).

and to participate in the proceedings.[139] In terms of section 148 the practitioner must convene a meeting with the employees within 10 business days of the commencement of business rescue.[140] The purpose of the meeting is for the practitioner to inform the employees about the results of the preliminary investigations and whether the practitioner believes that there is a reasonable prospect of rescuing the company. To the extent that the practitioner does not believe that the company can be rescued, then he ought to inform the employees regarding the possibility and timing of the company being placed under liquidation. However, if the practitioner believes that the company can be rescued but that there are some changes that will have to happen and those changes might affect the contracts of the employees, then the practitioner has an obligation to inform the employees as well as the unions they belong to of the said changes.[141]

In terms of section 136, when a company is under business rescue proceeding the terms and conditions of the contract of employment are not altered, they remain the same as they were prior to the company being placed under business rescue proceedings.[142] However, if the company is of the view that it needs to retrench some employees in order to be viable and be rescued, then it must retrench the employees in accordance with section 189 and 189A of the Labour Relations Act No.66 of 1995.[143]

The practitioner is obliged to engage with the unions and the non-unionised employees in a meaningful manner that aims to provide solutions to the possible changes that affect the contract of employment for the employees. The agenda of the issues to be discussed during the consultations must further be expressed fully so as to avoid confusion between the parties involved.[144]

In the matter of *Solidarity obo Fourie and Others v Vanchem Vanadium (Pty) Ltd and Others*, where the practitioner of Vanchem Vanadium retrenched employees after the trade unions failed to attend the consultations, the Labour

[139] Companies Act 2008 s144(3).
[140] Companies Act 2008 148(1).
[141] Ibid.
[142] Companies Act 2008 s 136(1)(a).
[143] Section 131(1)(b); See also Solidarity Obo BD Fourie & Others v Vanchem Vanadium Products (Pty) Ltd and Others at para 23.
[144] Companies Act 2008 s148(1)(a).

Court held that the unions should have engaged fully with the practitioner and that the representatives from the unions failed to report to the unions and their members about the issues tabled at the meetings. In this matter, Solidarity argued that there were no formal and substantive consultations that took place immediately prior to the practitioner deciding to issue a notice of retrenchment to the employees.[145] Solidarity further argued that the process of engagement had been suspended since the parties had referred the matter to CCMA for the 'Training Lay-off Scheme' to be explored as an alternative to retrenchment. As a result, it argued that the retrenchment notices that had been issued by the practitioner were not binding on the employees.

Similarly, NUMSA argued that the practitioner failed to consult with the unions and the non-unionised employees regarding payment of the severance pay.[146] According to NUMSA, the proposal by the practitioner that the company retracts its commitment to pay the severance pay in terms of its policies was never fully discussed by the practitioner and the unions. Further, the issue of reemploying some of the employees as part of the restructuring of the company was never fully ventilated as the parties were still exploring the options provided by section 189A of the LRA, argued NUMSA.[147] The union also demanded that the practitioner tables the plan as the employees had been deprived of their section 189 LRA rights to conduct a meaningful consultation with the practitioner.[148]

In defending the company, the practitioner stated that the notice of retrenchment provided to the employees mentioned that the employees were going to be negatively affected by the restructuring of the company as the financial state of the company had deteriorated further than initially thought.[149] However, the practitioner conceded that when the consultations with the unions and the non-unionised employees took place, nobody had expected the company to continue losing business as it did, and that when the decision

[145] Ibid.
[146] National Union of Metalworkers of South Africa.
[147] Solidarity Obo BD Fourie & Others v Vanchem Vanadium Products (Pty) Ltd and Others at para 21.
[148] Ibid at para 22.
[149] Ibid at para 24.

to retrench the employees was taken, the practitioner did not consult further with the unions to inform them about the latest events.[150]

In coming to its decision, the labour court held that it was apparent to everyone, when the consultations ended, that the practitioner was considering placing the company in liquidation proceedings and that the implications of a liquidation were obvious to everyone.[151] The labour court further mentioned that it appeared from the actions of the unions that they had focused too much on looking for alternatives that could prevent the complete cessation of the production, and on utilising training lay-off scheme that is provided by the CCMA even though the CCMA had already refused to entertain this matter.[152] Lastly, the labour court held that '*if the unions believed that the LRA section 189A process under the auspices of the CCMA was incomplete, nothing prevented them from either trying to extend that formal process or from insisting on the conclusion of the consultations under the LRA's section 189 on issues which they felt had not been properly canvassed'*.[153]

In relation to section 136 of the Companies Act which provides the employees with a right to be consulted under the provisions of the LRA, NUMSA argued that a termination of services of the employees of a company that is in business rescue can only be done in terms of an approved plan, and that if there is no plan then the termination is unlawful as it contravenes the section 136(1)(a).[154] In applying section 136(1), the labour court used a two-staged approach; the first leg of section 136 affirms the continuation of the contract of employment for the employees. As such the employees do not cease to continue working just by the mere commencement of business rescue proceedings by the company.[155]

The second leg of section 136(1) of the Act obliges the practitioner to conduct retrenchments in the plan in compliance with the relevant provisions of the labour laws pertaining to retrenchments. In an obiter the labour court stated that the '*reference to changes occurring in the "ordinary course of attrition" that*

[150] Ibid.
[151] Ibid at para 25.
[152] Ibid.
[153] Ibid at para 26.
[154] Ibid at para 27.
[155] Ibid at para 33.

might be seen as a basis for interpreting the section to provide a guarantee of continuity of employment and not merely the preservation of conditions of employment'.[156] The labour court held that the provisions of section 136 do not outlaw retrenchments made by a practitioner of a company that is in business rescue outside of a business rescue plan. In this regard, it can be said that although employees have been afforded protection by the legislature in terms of their agreement they are not completely immune to retrenchments. The right of employees not to be retrenched by a practitioner must be weighed against the harm that the salaries of employees will cause to the company. It follow that companies are not compelled to continue with the employment of its entire workforce if it will not be able to sustain itself during business rescue.

3.2 The ranking of the claim of employees

Further to the rights provided to employees under sections 128 and 136 of the Act, section 144 provides employees with a comprehensive list of how their rights should be treated. When a company is under business rescue proceedings, any remuneration, monies or reimbursement that it owed to the employees becomes due and payable at the commencement of business rescue thereof.[157] The outstanding payments to the employees entitle them to become preferred unsecured creditors of the company.[158] The ranking of the claim by the employees does not change even if the company is placed in liquidation proceedings post business rescue.[159]

In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd*, the court held that the ranking of claims in a business rescue is as follows: first, the remuneration and expenses incurred by the practitioner, for costs of business rescue proceedings; second, is the remuneration of the employees which became due and payable after the business rescue proceedings commenced; third, the repayment to creditors that provided PCF to the company; then follows the secured creditors or other creditors for any loan or supply made before business rescue proceedings began; thereafter comes the claim of employees for any remuneration which

[156] Ibid at para 35.
[157] Companies Act 2008 s144(2).
[158] Ibid.
[159] *Diener NO v Minister of Justice and others* [2016] JOL 3548 (GP).

became due and payable before business rescue proceedings began; lastly, the claims of the unsecured creditors for any loan or supply made to the company before business rescue proceedings began.[160]

In the event that business rescue proceedings are superseded by liquidation, section 135(4) states that the abovementioned ranking stays the same save for the costs arising out of the administration of the liquidation proceedings. In the matter of *Diener NO v Minister of Justice* and others, the court held that that

> "*section 135(4) of the Companies Act 71 of 2008 provides that if business rescue proceedings are superseded by liquidation, the preference conferred in terms of section 135 will remain in place, except to the extent of any claims arising out of the costs of the liquidation. The preferences conferred by the section are clear, and include the business rescue practitioner's remuneration. As stated, the claim of the practitioner is subject to any claim arising out of the costs of liquidation, and only after payment of those claims, will the business rescue practitioner's costs be paid, provided the business rescue practitioner has proven such claim. Thus, the remuneration of the business rescue practitioner and the expenses incurred during business rescue proceedings, to the extent that they were not paid during the business rescue proceedings and liquidation, can only be paid after the costs set out in section 97 of the Insolvency Act have been paid".* [161]

As a result, the ranking of the claim by the employees remains protected and unchanged. Unlike in a normal liquidation where the claims by the employees' rank as preferent claims in a business rescue the claims of the employees enjoy a preferential status above creditors.

In addition to the preferential status that is given to the claims of the employees, employees have a right to vote with creditors on a motion to approve the plan and to make submissions to the meetings of holders of voting interests.[162] To the extent that the employees wish to nominate and appoint a committee that will promote their interest during the business rescue

[160] [2013] ZAGPJHC 109 at para 21.
[161] Ibid.
[162] Companies Act 2008 s 144 (3)(f) and (e).

proceedings, section 148(1)(b) allows for the employees to have such a committee.[163] The committee of the employees may consult with the practitioner in relation to matters concerning the proceedings, but they may not direct or instruct the practitioner.[164] Further, the committee can receive reports from the practitioner on behalf of the employees and make recommendations for the amendment of the plan.[165]

3.3 The impact of the rights of employees on a company that is under business rescue

It appears from the above paragraphs that employees have more rights that aim to protect their interests in business rescue proceedings than in any other company restructuring procedures that are available under company laws. In a restructuring procedure that is meant to assist a company in regaining its solvency status back, the existence of employees' rights should also be aimed at assisting the company in achieving one of the two aims of business rescue. The following sections examine the impact of the employees' rights in a company that is under business rescue proceedings.

In the matter of *the Employees of Solar Spectrum Trading v Afgri Operations*, the court relaxed the need for affected persons to have a business rescue plan when making an application for placing a company in business rescue. As seen above, this relaxation is necessary when employees do not have access to the financial documents of the company. This relaxation is also beneficial to shareholders and creditors who are not closely linked with the company. As a result of this relaxation more affected persons are able to make applications to the courts for business rescue proceedings without fearing that the burdensome requirement will act as a barrier to achieving a much needed aid to the company.

Although the relaxation is to be applied on a case by case basis, the result of this is that more affected persons are going to be able to approach courts and attempt to save a company before it becomes hopelessly insolvent. The

[163] Companies Act 2008 s148(1)(b).
[164] Ibid.
[165] Companies Act 2008 s 149 (1)(a) and (b).

relaxation offered by the courts serves as an encouragement to affected persons to act fast and not wait until the company is insolvent before bringing a business rescue application. Affected persons will be able to be more proactive when dealing with the company financial issues.

Moreover, unions representing employees are now able to request financial statements from the company for the purposes of bringing a business rescue application.[166] This right further affords employees access to information that they would not normally be entitled to have. Therefore, employees, through the use of section 31 (4) of the Act, can be able to attach the financial statements in support of their business rescue applications. Attaching the financial statements in a business rescue application will ensure that the courts properly consider the position of the company and that justice for the employees and the company is achieved.

Although the requirement to have a business rescue plan in an application has been relaxed as per the case of *Solar Spectrum Trading v Afgri Operations*, the employees could nonetheless use the financial statements provided to the unions in the applications as a way to show that the company is financially distressed.

However, it appears from case law that although the right of access to the financial statements has been provided to the unions, there has not been any union that has used this information for the purposes of launching a business rescue application. The unions seem to have taken a reactionary role in business rescue proceedings than a proactive role. It is not quite clear why the unions tend to adopt this and taking a passive role in the business rescue proceedings. This passive role that unions are adopting in proceedings was criticised by La Grange J, in the matter of Solidarity obo *BD Fourie v Vanchem Vanadium (Pty) Ltd*, where he expressed his concerns regarding the inactive role that NUMSA played in the matter.[167]

In relation to the ranking of the claims, it appears from the matter of *Diener NO v Minister of Justice* that the employees are given a preference over some

[166] Companies Act 2008 s 31(4).
[167] *Solidarity Obo BD Fourie & Others v Vanchem Vanadium Products (Pty) Ltd* at para 27 to 30.

creditors both under business rescue proceedings and in liquidations proceedings that have superseded a business rescue.[168] The ranking aims to align the intention of the legislation for protecting employees in a financial restructure of a company with the reality that affects employees when a company is restructured. However, this can also be dangerous for a company that has a large claim from the employees. If the claims of the employees are not possible to be comprised or reduced in terms of sections154 and 155, then the company might find itself in a situation where it becomes insolvent when assessing the claims of the employees.

As a result, my view is that the historical claims of the employees against companies should be suspended for the duration of business rescue proceedings. In this regard, employees will still be paid their salaries as per the terms and conditions of their employment contracts; however, if the company owes employees for any leave or any other historical payment, then payment of that historical claim should be suspended and not be calculated for purposes of evaluating the financial status of a company in business rescue. Payment of historical claims should be deferred until the company has either achieved the primary goal of business rescue or if not achieved, then the historical claim will rank in the manner established in the *Diener NO v Minister of Justice* case.

I further submit that in the event that employees are retrenched as seen in the case of *Solidarity v Vanchem*, then payment of the severance pay should also be deferred until the company is able to afford payment of such claims. The suspension of both historical claims and severance payments will ensure that the company has a healthy balance sheet while it is undergoing business rescue and simultaneously not forgetting that it owes such amounts to the employees. This approach will further be in line with the LRA requirements under sections 189 and 189A thereof in that the employees are not precluded from claiming for their severance pay but the company's obligation to make that payment while it is in business rescue is suspended pending the

[168] [2016] JOL 35748 (GP) at para 48.

achievement of either the primary goal or will the claim will be accounted for under liquidation proceedings.

Further, both unionised and non-unionised employees have been given rights to participate in the process of voting and the approval of the plan.[169] This right is seen as a very important one for employees and it assists the company by ensuring that the employees are aware of the changes within the company and the changes that might affect their employment. Also, when employees are consulted in the proceedings, they are able to work with the company in changing its status from a financially distressed to a financially solvent one. The process of involving employees ensures that there is cooperation between the company, the employees and the practitioner. The channel of communication between the practitioner and the employees is opened.

Once a plan has been approved everyone within the company works together to achieve the common goal of rescuing the company. It further strengthens the trust between the practitioner, who is a new person in the company, and the employees who have been in the company for a long time, they can all work with each other knowing the plans of the company and how the ultimate goal can be achieved. It is my view that once employees know exactly what the plan is; they are less likely to resist the change in the company's structure.

The role that employees play in the rescuing of a financially distressed company is an important one. However, more action is needed on both the part of the employees and on the unions if companies are going to be rescued. The unions must ensure that they are communicating with the practitioner and the employees at all times during business rescue. A passive role will only lead to the disruption of the communication between the employees, unions and practitioner as seen in the matter of *Solidarity obo BD Fourie v Vanchem Vanadium (Pty) Ltd*.

[169] Companies Act 2008 s144 (3) (f).

Chapter 4

4. The involvement of sureties in business rescue proceedings

The aim of this chapter is to evaluate and analyse the role that sureties play in rescuing a company under business rescue proceedings, more specifically whether sureties should be liable for payment or performance of the debtor's obligation, when the debtor and creditor have entered into an agreement to discharge the claims of the creditors. The analysis will be achieved by looking at the nature of suretyships, the importance of a surety in a company, the treatment of sureties in chapter 6 of the Companies Act and in business rescue proceedings and how the courts have treated the issue of sureties for companies under business rescue.

4.1 The relationship between a company and the surety

A suretyship contract is an ancillary contract that exists as a result of the main agreement being in place. In a contract of a suretyship, the surety assures the creditor that if the debtor (for the purposes of the research the debtor is the company) defaults on any of the payments or on any of its obligations to the creditor, the surety will make the payment or perform the obligation and to the extent necessary indemnify the debtor. Until the surety is called upon to perform the obligations of the debtor, there exists no real relationship between a surety and the debtor. For all intents and purposes the relationship between the debtor and the surety only comes into existence when the surety performs obligations on behalf of the debtor. At common law prior to the surety performing the obligations, it is merely a contingent creditor of the debtor. When the surety is called upon to make payment or to perform the obligation of the debtor, it has to inform the debtor about the demand and that it intends honouring it.[170]

Further, in terms of the common law when the main contract between the company and the creditor lapses, automatically the suretyship agreement lapses as well.[171] Further, where the debt has been compromised or reduced between the creditor and the company, the liability of the surety is also reduced

[170] Investec v De Bruyn 2012 (5) SA 430 (WCC) para 22.
[171] Ibid.

in the same manner as it is accessory to the main debt.[172] A suretyship agreement is invalid if the main agreement between the company and the creditor falls away. Although, suretyships agreements are ordinarily concluded after the main agreement has been concluded, it has been held in the matter of *GA Odendal v Structured Mezzanine Investments (Pty) Ltd* that suretyship agreements can be concluded before the main contract is concluded.[173]

The function of suretyships is very important to companies as creditors are able to lend companies money and offer to provide services knowing that there is a separate security in place which will pay should the company not be able to pay. In most instances as will be seen in this chapter, sureties are mainly people who are related to the company. Although it is not a requirement that sureties be related to the company, creditors tend to have faith in a company that has related persons willing to stand as sureties for its debts and/or obligations. The issue with sureties, however, emanates when the company commences with company restructuring procedures such as business rescue and liquidation. As mentioned, the issue as it seems relates to whether sureties are liable for payment of the company's obligations when the company and the creditor have decided to either suspend, compromise or reduce the company's obligations in terms of the main agreement.

As stated above, at common law when the main debt is compromised or reduced, the suretyship is also reduced or compromised accordingly. However, there are common law principles that creditors employ in order to be able to recover money or obligations directly from the surety without having to exhaust its options against the company. The aforesaid principle is known as the renouncement of the *beneficium ordinis seu exussions*.[174] The renouncement of the benefit of excussion means that the surety waives its rights to have the creditor attempt to recover the money from the debtor first before calling up the suretyship.[175] It is my understanding that once the creditor calls the suretyship, the surety has to perform the obligation demanded by the

[172] Ibid.
[173] *Odendal and another v Structured Mezzanine Investments (Pty) Ltd* [2015] JOL 33675 (SCA) page 1.
[174] Forsyth et al 'Caney's The law of Suretyship' (2010) page 44.
[175] Ibid.

creditor. Thereafter, the surety will have a claim against the debtor for the performance of the obligation.

Most suretyship agreements that sureties conclude with financial institutions stipulate that the surety renounces the benefit of the excussion and that the creditor has the right to call upon the suretyship should the debtor be placed in a form of a restructure such as business rescue, liquidation or judicial management.[176] When faced with a matter regarding a company undergoing a restructure, our courts have not always been consistent in their interpretation of the principle of suretyship and how the interpretation affects the financial position of the company and that of the surety. By way of an example in the *Tuning Fork v Greeff*, the court stated that there is no provision in the new Act which states that the moratorium does or does not operate in favour of a surety for the distressed company. However, the court in the matter of *New Port* states that the creditor's ability to sue the surety remains unaffected unless the plan itself makes provision for the situation of sureties.[177]

To illustrate this, in the matter of T*uning Fork v Greeff*, the court held that there is no provision in the Companies Act which states that the moratorium does or does not operate in favour of a surety for the distressed company.[178] This statement was overturned in the matter of *New Port v Nedbank Ltd* wherein the court held that the creditor's ability to sue the surety remains unaffected unless the plan itself makes provision for the situation of sureties.[179] In this instance you have one court denying that there is a provision that deals with the liability of sureties while in the other court it is stated that the liability of sureties remains unless it is changed in the plan.[180]

4.2 The dilemma of the interpretation of section 154

The problematic area comes when the creditor and the debtor agree to reduce or discharge the claim of the creditor without the knowledge of the surety, and further require that the surety pays the difference between the reduced amount

[176] Tuning Fork Ltd v Greeff and another 2014 (4) SA 521 (WCC) para 41.
[177] New Port Finance Company (Pty) Ltd v Nedbank Ltd [2014] ZASCA 210 at para 14.
[178] Ibid at para 28.
[179] Op cite 97.
[180] Op cite 96 at para 28.

and the actual initial debt.[181] This issue has come before our courts under the provision of s154 of the Companies Act which allows for creditors and debtors to agree to discharge the claim of the creditor by way of a business rescue plan.[182] The problem that the agreement between the creditor and the debtor creates is that the surety becomes liable to the creditor without actually knowing whether or not the debtor is unable to fulfil its obligations under the main agreement.

In an attempt to come to a conclusion regarding the status of sureties and the discharged debts, our courts have had competing views on the matter and none of them seem to sufficiently address the issue. There appears to be two schools of thought when it comes to the interpretation of section 154 of the Companies Act and the two competing views are found in the cases of *Tuning Fork (Pty) Limited v Greeff* and in the case of *New Port*.

Section 154 reads as follows:

> ***"Discharge of debts and claims*** *(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.*
> *(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan."*

According to the commentary in Henochsberg the purpose of section 154 is to clarify the position on the discharge of debts and claims against the company once a business rescue plan has been adopted and implemented.[183] If a plan that seeks to compromise or release the company from performing certain obligations is approved and implemented, the relevant creditor loses the right to later enforce that debt. It does not matter whether that particular creditor voted in favour of the plan or against it.[184]

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[181] Eravin Construction CC v Bekker NO [2016] ZASCA 30 at para 11.
[182] Ibid at para 12.
[183] Op cite 10 at page 531.
[184] *DH Brother Industries (Pty) Ltd v Gribnitz NO and Others* 2014(1) SA 103 (KZP) para 38.

In *Tuning Fork (Pty) Ltd v Greeff,* the court had to decide whether a creditor loses its claim against a surety if a duly adopted and implemented business rescue plan provides for the creditor's claim against the principal debtor to be compromised in full and final settlement of such claim.[185] The defendants in this matter were directors of the company, and they had executed suretyship agreements in favour of the applicant for the due and punctual payment of the debts by the company. The suretyship agreements did not stipulate that the claim against the sureties will survive a compromise with the debtor. Subsequent to the execution of the suretyship agreements, the company was placed under business rescue proceedings, a plan was developed and approved by the relevant parties. In terms of the plan, the company had to continue trading and service the reduced debts as per approved terms thereof. The plaintiff, who was also a creditor of the company, instituted legal proceedings against the defendants for the debts of the company. In return, the defendants defended the action on the basis, *inter alia*, that the compromise with the principal debtor (the company) released them from liability.[186]

In his attempt to come to the conclusion Rogers AJ, following an earlier obiter dictum that he had mentioned in *Investec Bank Limited v De Bruyns,*[187] stated the following:

> "(a) when interpreting section 154, one cannot imply a term that says '*creditors' rights against sureties are or are not unaffected by the adoption of a business rescue plan'*. The rules of interpretation as seen in chapter 1 above, do not allow for the interpretation of a statute by reading in provisions that are neither intended nor implied in the text. The interpreter has to read in the language that is consistent with the text, unless that interpretation will lead to absurdity. However, the court did not view it as necessary to read in the aforesaid text onto section 154;
> (b) in respect of the suretyships, it had to apply the general principles of the law of suretyship;
> (c) the general principles of the law of suretyship under our common law had to be applied in order *'to determine what effect, if any, the provisions contained in any particular business rescue plan have on*

[185] Op cite 90 at page 1.
[186] Ibid at para 13.
[187] Investec Bank Ltd v De Bruyns op cite 12 at para 20. Rogers AJ states that *if the plan is approved and implemented with its terms and conditions, an affected creditor may in terms of s154(1) lose the right to enforce its claim. I am prepared to assume in the defendant's favour if all of these events were to occur a surety for the company would not be liable to the creditor for more than so much of the claim as survives the implementation of the plan.*

> *sureties*'. It appears from the chapter 6 of the Companies Act that sureties are not catered for by the Act. The only time chapter 6 makes provision for sureties, is when the company itself stood as surety for someone else, and this is found under section 133(2) of the Act;
>
> (d) as seen above, one of the principles of suretyships is that when the debt is discharged by a compromise between the debtor and the creditor, the surety is also discharged unless the surety has renounced the benefit of excussion. In this matter the suretyship did not provide for the renouncement of the benefit of excussion by the surety. The general principle of the benefit of excussion '*also applies to a compromise or release pursuant to a statute, regardless of whether or not the creditor supported the compromise or release'*. The suretyship concluded by the defendants did not exclude the application of the law in this regard;
>
> (e) '*if a business rescue plan provides for the discharge of the principal debt by way of a release of the principal debtor, and the claim against the surety is not preserved by such stipulations in the plan as may be legally permissible, the surety is discharged'.* This reasoning by the court is in line with the nature of the suretyship in that it is accessory to the debt; its existence is directly related to the existence of the debt; and
>
> (f) lastly, the '*business rescue plan in this matter was construed as one by which the company had been discharged from its liability and since the liability of the sureties was not addressed in the plan, the liability of the defendants was also discharged'* through the use of common principle of the accessory nature of the suretyship."[188]

It appears from the reasoning of Rogers AJ that, absent a regulatory clause in the suretyship agreement, the common law principles of suretyship will apply, and when the performance of obligations by a debtor have been discharged in terms of a plan the liability of the surety will also be discharged. The application of the common law principles is a result of the lack of provision for sureties in the Companies Act by the legislature. Upon analysing the judgment of Rogers AJ, one can see that creditors to companies under business rescue have to regulate the issue of compromise in the suretyship agreements and not wait for the plan. This however, only solves half of the problem, as the sureties are deprived of their rights to check whether or not the debtor is in fact unable to perform the obligation and not just that it has chosen not to perform the obligation.

Further, if this reasoning is followed, and the creditors regulate the liability of the sureties through the clauses of the suretyship agreement, and the liability

[188] Ibid at para 14.

of the debtor is discharged in the plan; the company is at risk of having to perform the obligation despite having discharged the obligation with the creditor. This happens when the surety has performed the obligation of the debtor in favour of the creditor and returns to the debtor to claim for the performance as entitled by common law. If the debtor and creditor decide to compromise the creditor's claim without the knowledge of the surety, the surety has recourse against the debtor for the performance once it has performed in terms of the suretyship.

However, when a company has been placed under business rescue and has compromised the claim of a creditor in terms of an approved plan, then the surety is at risk of not being able to exercise the right of recourse against a company that is still under business rescue. Once a plan has been adopted and implemented, it cannot be adjusted. There is no provision in the Companies Act that enables any of the affected persons to attack an approved plan.

In order to illustrate the shortcomings of section 154 as indicated above, the following example is made: Company A owes five million rand to Creditor C and due to not satisfying the insolvency test, Company A is placed under business rescue; Company A and Creditor C agree by way of an approved plan that the claim of Creditor C will be reduced to three million rand; Company A pays three million rand to Creditor C; Creditor C then goes to Company B, which stood as surety for the debts of Company A in favour of Creditor C, and demands that Company B makes payment of the shortfall in the amount of two million rand; and Company B pays the shortfall amount to Creditor C . In terms of the law of suretyships, Company B now has a right of recourse against Company A, however, since Company A is under business rescue, the right of recourse can only be exercised with the consent of the practitioner or upon an application to court. Once Company B is permitted to lodge its right of recourse against Company A, Company A will effectively be in the same position it was in prior to concluding a compromise with Creditor C. This position is one where Company A continues to owe an amount of five million rand despite having made a compromise with Creditor C. The compromise that is made under section154 does not benefit the company in any way. It merely just provides

the creditor with more than one way of recovering its claim, for instance a part of the debt is recovered from the company while the rest is recovered from the surety.

Effectively, section 154, which is a provision that was meant to assist the company in reducing claims of creditors is, in practice, a dormant provision that does not meaningfully solve the financial problems of the company that it might have been enacted to solve.

Although this issue was raised in the *Investec Bank Ltd v De Bruyns, Rogers AJ* dismissed it without actually considering the effects and the uncertainty that comes with leaving this section without a meaningful interpretation.[189] This fails to consider the fact that the financial status of the company is directly affected by the amount it owes to its debtors. When a debt that was compromised to R0 with the creditor suddenly becomes R100 at the hands of the surety, the financial status of the company changes from solvent to insolvent and this could mean the difference between companies surviving business rescue and companies being placed in liquidation after the assessment by the practitioner. With all due respect, the reasoning of Rogers AJ, creates a substituted creditor in the form of the surety without providing the company that is in actual financial distress with any meaningful relief. The lack of provision for the position of sureties in business rescue proceedings is dangerous for the company in as far as the financial status of the company is concerned.

There are matters where the liability of the sureties is regulated in the suretyship agreements as well as in the plan. However, the regulation thereof does not always mean that the creditor will lose its right to enforce its claim against the surety. In adopting the reasoning of Rogers AJ the court in the matter of *Absa Bank Limited v Du Toit and Others*, held that where the plan stipulates that the payment to the creditor in terms thereof is the 'full and final settlement of all of the creditor's debts', the creditor does not have a right to enforce the remaining part of the claim against the sureties.[190] In the aforesaid

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[189] *Investec Bank Ltd v De Bruyns* op cite 12 at para 22 and 23 Rogers AJ, states '*if the creditor were to recover from the surety in full, the right to consider a compromise against the principal debtor would pass to the surety because the creditor would fall out of the picture and the surety would take the creditor's place by virtue of his right of recourse against the principal debtor…Even if this were so, I do not see how this could affect the position*.'

[190] *Absa Bank Limited v Du Toit and Others* [2013] ZAWCHC 194 at para 19.

matter, the suretyship agreement had stipulated that the liability of the sureties will not be extinguished by any compromise between the creditor and the principal debtor.[191] However, when the approved plan states that the amount to be paid by the company under business rescue is the 'full and final settlement of the creditor's claim', the clauses of the plan overrode the clauses of the suretyship agreement. The matter of *Absa Bank Limited v Du Toit and Others* is proof that the reasoning of Rogers AJ in the matter of *Tuning Fork (Pty) Ltd v Greeff* does not sufficiently address the issue of sureties and their liability to creditors and that any regulation thereof must be provided for by the legislature.

If the reasoning in the *Tuning Fork (Pty) Ltd v Greeff* matter is followed together with that of the *Absa* matter, then creditors will be hesitant to accept persons standing as surety for the debts of companies as these tend to be useless when companies are placed in business rescue. Creditors play an important role to companies and sureties help secure credit where companies would not have been granted same. To say that the business rescue plan once approved and implemented in the terms set out in the matter of *Absa Bank Limited v Du Toit and Others*, prevents creditors from enforcing their claims against sureties is to undermine the very nature of suretyships.[192] In the aforesaid matter the surety was able to raise a defence that the claim of the creditor against him was extinguished by the fact that the business rescue plan stipulated that the pay out to the creditor was in full and final settlement of its claims, and stated that this provision also applied in respect of the claim of the creditor against the surety.

It is important to recognise the importance of sureties as well as the critical role that creditors play in the life of companies. Financial institutions and other financial services providers lend credit to companies with a hope that they will get it back, and if the company is unable to pay all of it, then the surety will be liable for the shortfall.

In my view the result of the ruling in the *Absa Bank Limited v Du Toit and Others* matter creates a negative domino effect on the creditors of the

[191] Ibid at para 13.
[192] Op cite 145.

company; if the claim against the company and the claim against the sureties are both limited to a specific low figure, then the creditor risks being insolvent.[193] There exists a real possibility that the creditors could also be placed under business rescue or in liquidation as a result of the compromised claims in terms of the plan for the company.

In my view it is unfair on the creditor concerned to be expected to take a compromise on its claim against the company so the company can pay other creditors at the expense of a single creditor.[194] The other school of thought can be found in the judgment of the *New Port Finance Company (Pty) Ltd v Nedbank Ltd* matter. In this case, the SCA held that section 154(1) should be interpreted to mean '*that in certain circumstances a creditor will not be able to enforce a debt against a company in business rescue' and, section 154(2) should be interpreted to mean 'that the company may enforce a debt in accordance with and to the extent permitted by the terms of the business rescue plan'*.[195]

The SCA further held that section 154 is capable of the construction that it deals only with the ability to sue the principal debtor and not with the existence of the debt itself and that if that is the case then the liability of the surety would be unaffected by the business rescue, unless the plan itself made specific provision for the situation of sureties.[196] It appears from the aforesaid quote from the SCA that again the regulation of the liability of the sureties is placed on the plan that must be approved by creditors, the same creditors who are only interested in recovering their claims. This reasoning fails to consider the fact that sureties are not party to the business rescue process as they are not affected persons in terms of the Act.[197] Sureties do not have any person representing their interests during the discussions surrounding the plan. Therefore, any judgment that places the fate of sureties in the plan is a flawed judgment.[198]

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[193] Ibid.
[194] Kritzinger and another v Standard Bank of South Africa [2014] JOL 32603 (FB) para 55.
[195] New Port Finance Company (Pty) Ltd v Nedbank Ltd [2014] ZASCA 210 para 14.
[196] Ibid.
[197] Stan Rio Pipe and Steel (Pty) Ltd v Esterhuizen [2016] ZAGPPHC 35 at para 11.
[198] Ibid.

In the *New Port v Nedbank Ltd* matter, New Port and another had stood as sureties for companies that had been placed under business rescue. While the companies were defaulting on their payments to Nedbank Ltd, Nedbank Ltd instituted action proceedings and obtained default judgments against the companies, *New Port* and the other surety. The liability of the sureties to *Nedbank Ltd* had been fixed by the judgment.[199]

As a result of the judgment that had been obtained against the sureties, the settlement in terms of the business rescue plan in respect of the indebtedness of the company did not alter the liability of the sureties to *Nedbank Ltd*.[200] The nature and extent of the liability in terms of the suretyships had been established. In terms of section 154(1) of the Act, the plan must have been approved and implemented, the issue with the argument of *New Port* is, *inter alia*, that the plan in respect of the companies in business rescue had failed.[201] Further, it was stated that any compromise made between the companies and *Nedbank Ltd* would never have an effect on the liability of the sureties as the suretyship agreements and the judgment bound the sureties and companies to be jointly and severally liable for the debt to Nedbank.[202]

The judgment could be interpreted to mean that once judgment has been given in respect of the liability of sureties, the sureties will have to honour it and only hope to recover from the company in terms of their right of recourse. However, when there is a plan that does not cater for the contingent liability of the sureties in terms of the judgments, the sureties are again left without any proper recourse. If this position remains as the *ratio* to be followed, then companies are at risk of losing persons who will stand as sureties in favour of creditors. This is because sureties will be weary of the repercussions such as liquidations and sequestrations applications that could follow as a result of the main debtor entering into compromise with the creditor to the disadvantage of sureties.

Interestingly, in the matter of *De Beer NO v First Rand Bank Limited* the sureties were allowed to bring an interdict against the company in order to

[199] Ibid at para 9.
[200] Ibid at para 11.
[201] Companies Act 2008 s154(1).
[202] Op cite 103 at para 9.

safeguard the property that forms part of the security to which the liability of the sureties attached.[203] The learned judge held that this must be so because where the assets of one entity are defrayed, that has the effect of devaluing the estate of that particular entity, consequently increasing the exposure of the sureties.[204]

The aforesaid matter directly addresses the issue of section 154. It provides a meaningful safeguard to sureties for companies under business rescue in that they can apply to court if the company intends on selling the property that will increase the exposure to creditors. This approach looks at the interests of both the company and sureties in that both must be protected and be held accountable where it is necessary. However, due to technical errors with the procedural requirements the matter was struck-off the roll, nonetheless it is argued that the principle from this matter can be adopted to assist in the interpretation of section 154 to enable it to have the impact that the legislature had intended.[205]

Arguably, the different interests of the parties involved must be considered fully and there should not be a party that is forced or coerced to assist a financially distressed company. It might well be important that companies are afforded some breathing space, compromises and post commencement funding where it is necessary to do so; however, none of the other parties should be exposed to financial dangers as a result thereof. Creditors, sureties and other people who have provided some form of security to creditors for the debts of the company should be afforded an opportunity to present their proposals in the business rescue plan. And the only way that this can be done is if the definition of ‘affected persons’ in section 128 is amended to include sureties and other security providers for the company. The Act needs to empower these people with a meaningful role to play in the company’s restructuring process. As seen in *De Beer v First Rand Bank*, sureties need to assume an active role in the company so that they can protect the assets of the company for which their security is based.[206]

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[203] *De Beer NO v First Rand Bank Limited* 2015 JDR 2266 (GP) para 16.
[204] Ibid.
[205] Ibid at para 18.
[206] Op cite 109.

This will effectively ensure that companies are always trading solvent as the sureties will have a direct and material interest in the company. Also, in similar way as unions can request the financial statements of a company for the purposes of instituting business rescue proceedings, sureties should also be afforded this right. If sureties are provided with meaningful rights in respect of the company, the company has a better chance of being rescued as sureties can institute business rescue proceedings well before the company becomes insolvent.

Although some people might view this as interfering with the control of the company; however, as seen in chapter 2 above under the trade unions, the right to access to financial statements for the commencement of business rescue has been frequently invoked and there is no evidence to say that the sureties will abuse this right if it were to be provided to them. Therefore, as a way of ensuring that the company is successfully rescued, there is a need for all stakeholders including sureties, to all be involved in the approval and implementation of the plan, this will ensure that all parties work together with a common goal of assisting the company knowing that if the plan fails then there are going to be serious repercussions on everyone. As mentioned this can be achieved by amending the definition of 'affected persons' in section 128 and by affording sureties similar rights such as the right to participate in the voting and approval of the plan and the right to institute business rescue proceedings.

Business rescue proceedings have two objectives: one which is aimed at rescuing the company, as discussed above; and the second objective is aimed at providing a better return for the creditors or shareholders than would result from the immediate liquidation of a company. The role and rights of sureties of a company that is in business rescue has been discussed above; however, in the event that the status of the company worsens and the company is liquidated, one wonders what will happen to the rights of the sureties in this regard. Sureties to a company that is in liquidation are at risk of having to honour their agreements in favour of creditors. In the event that the company does not have sufficient assets to discharge its full indebtedness to the creditor, then the sureties will be liable for the shortfall thereof.

However, to the extent that there is another security in the form of property that a creditor can use to reduce the indebtedness of the company, this will be done first as secured creditors are paid out in accordance with the liquidation and distribution account in terms of section 89 of the Administration of Insolvent Estates Act.[207] This is important for sureties as in this event they can only be liable to that specific creditor for only the remaining part of the debt. Unlike in business rescue proceedings, where a creditor in agreement with the debtor can choose to immediately discharge the claim of the creditor against the debtor in hope to recover the full amount from the surety; it is better for the creditor to first obtain its share in terms of the liquidation and distribution account prior to instituting proceedings against the surety.

However, should the creditor first recover its debt from the sureties, the sureties are not barred from proving their claim against the company.[208] Unlike in business rescue proceedings where the sureties are unable to prove their claim once the plan has been approved and implemented, in liquidation proceedings claimants can lodge their claims at either the first or second meeting of creditors.[209] To the extent that the claims were not lodged in the aforesaid meetings, they can request that the liquidator convenes a special meeting for the purposes of lodging of the claim by the surety.

Further, in the event that the surety is not happy with the manner in which the liquidator has drawn the liquidation and distribution account, the surety can lodge a complaint with the Master of the High Court and request that the account be amended.[210] Lastly, unlike in business rescue proceedings where there is a *moratorium* that applies on legal proceedings instituted against the company, liquidation proceedings do not have a similar protection. It is my understanding that claimants can institute legal proceedings against a company that is in liquidation if their claims have not been accepted by the liquidators and request that the courts access the claim and direct the liquidator to approve the claim.

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[207] Act No. 66 of 1965.
[208] Insolvency Act 1936 s44.
[209] Insolvency Act 1936 s104.
[210] Ibid.

This appears to be a gross oversight on the part of the legislature to provide sureties to companies in business rescue with no rights whereas in liquidation proceedings that actually compete with business rescue proceedings, where sureties have avenues in which to recover some of their money from the debtor company. This is a problem as it provides sureties with reasons to oppose business rescue applications that appear not to cater for their interests. From the point of view of a surety it is better to have a company liquidated than placed under business rescue proceedings as there are more chances of recovering some of the money paid to creditors in liquidation than in business rescue.

Chapter 5

5. Conclusion and recommendations

The aim of the minor dissertation was to analyse the rights that affected persons are provided with in terms of the Act as well as the manner in which those rights are exercised. The minor dissertation further scrutinised the definition of 'affected persons' by looking at the provisions of the Act and seeing whether or not the current definition is sufficient to cover all persons who are affected when a company is placed under business rescue.

The rights of affected persons were looked at in light of the interpretation that has been attributed to them by our courts. In respect of the shareholders, it became apparent in the analysis that the rights provided to shareholders are not enough to render them useful for the purposes of rescuing a company. In this regard, I took issue with the fact that only the shareholders whose shareholding is being altered are given the rights to participate in the discussions regarding the business rescue plan. In my view, which is stipulated above, shareholders irrespective of the status of their shareholding should be in a position to discuss the plan with all the other stakeholders.

Further, I also realised that although some shareholders are allowed to participate in the discussions regarding the plan, they are only allowed to propose amendments to the plan. Unlike the other affected persons who are able to vote in favour or against the plan, shareholders are not provided with this right. In this regard, I propose that the rights of the shareholders be amended to include all shareholders in the business rescue proceedings, and that the shareholders whose shareholding is going to be altered be allowed to vote on the plan. These amendments can be effected by the legislature. In this regard, I would propose that the Act is referred back to the legislature for amending.

In regard to the rights provided to creditors, I found that creditors to the company in business rescue are afforded sufficient rights to enable them to have a meaningful participation in the business rescue proceedings. Further, it is my view that the provisions of the business rescue chapter have to a larger degree achieved the purpose of which they were intended. In this regard, I

compared the rights that creditors have under the liquidation proceedings against the rights they have in business rescue proceedings: in my analysis I realised that the business rescue provisions are not as creditor-friendly as the liquidation proceedings. The provisions create an equilibrium between the rights of the company and those of creditors. The moratorium that applies in respect of the claims of creditors shifts the power from creditors to the debtor-company and then the creditors' rights to vote in favour or against the plan restricts the application of the moratorium in the hands of the company. As such, the parties are compelled to negotiate in good faith and come to a solution that is amicable to both parties, even in situations where the debtor-company is liquidated in terms of the secondary aim of business rescue.

In relation to the employees of the company under business rescue, I found their rights to be overreaching. In this regard, the rights afforded to the employees are wide and they tend to protect the employees to the detriment of the company in business rescue. I looked at the rights of the employees to claim their severance payments when a company is placed in business rescue. I found this to be financially strenuous on a company that is already financially destressed. It is understandable that employees have a right to their salaries and outstanding payments. However, when a company is placed under business rescue it is highly unlikely that it will be able to afford paying salaries that are in arrears. As a result thereof, I suggest that the outstanding salaries be noted in the plan, however, payment thereof should be suspended until the company is able to pay for it or have super-preferential treatment if the company is liquidated after being placed under business rescue.

In relation to the definition of affected persons, it is my view that the current definition is insufficient as it does not cater for every person that is linked to the company under business rescue. In this regard, I suggested that the definition of affected persons be amended to include sureties as these are some of the people who suffer the most when companies are placed under forms of restructuring. My reasons for suggesting the amendment were formed by looking at the interpretation of section 154 that has been given by different courts. In this regard, I looked at different case law and stated how each case fails to adequately provide sureties with protection from abuse by the company

and creditors. Currently, companies under business rescue are able to use the sureties as scapegoats for performing obligations in favour of the creditors while knowing very well that sureties will not be able to use their rights of recourse against the company while it is under business rescue.

Further, sureties are also receiving abuse from creditors who do not wish to partake in the business rescue proceedings of the debtor company. As such, I recommend that the definition of affected persons be amended to include sureties and that sureties be given rights to participate in the discussions regarding the plan since they stand to be materially affected by the outcome of the plan. As it stands, chapter 6 of the Companies Act should be amended in the manner described above.

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