AN ANALYSIS OF CORPORATE RESCUE PROCEEDINGS UNDER THE INSOLVENCY ACT [CHAPTER 6:07]

Chigumba Patience
Email: *patiencechigumba@gmail.com* and *pchigumba@gzu.ac.zwt*

Abstract

The Insolvency Act [Chapter 6:07], overhauls an archaic and oppressive legal regime on judicial management in Zimbabwe. It seeks to achieve this aim through a moratorium procedure which is conventionally known as corporate rescue. Corporate rescue is a mechanism devised to resuscitate financially distressed companies and other business entities, under the supervision of a corporate rescue practitioner. Practically, corporate rescue entails the restructuring of the firm, its assets and liabilities, in a manner that guarantees the company's continued solvent existence. Insolvency does not only affect the shareholders of a company but it also affects other stakeholders i.e. creditors, directors, employees, the community and overall revenue generation in Zimbabwe. As such, it makes sense to give a kiss of life and breathing space to financially distressed companies and other business entities, so that they become solvent again, for the well-being of all stakeholders, rather than subject the company to euthanasia under judicial management or liquidation. Other jurisdictions have adopted expansive corporate rescue or business rescue procedures to save commerce under their insolvency or bankruptcy law with the exception of South Africa which has adopted business rescue under its Companies Act. Our Companies and Other Business Entities Act [Chapter 24:03], does not provide for corporate rescue procedures. In the main, corporate rescue enjoins the judiciary, creditors, directors, shareholders and employees to come together in an inquiry to determine if a financially distressed company can be revived before liquidation proceedings can be initiated or after liquidation proceedings have commenced, before the company can be wound up. However, just like any new life support mechanism, it's compatibility to the Zimbabwean business culture is still to be tested. The corporate rescue practitioner and other stakeholders must produce a cogent resuscitation strategy that will survive the current turbulent and sluggish economic environment. As such, corporate rescue is not a mechanism for the business to evade liability but an opportunity for companies and other business entities that can be saved to be placed under a support system that can make the business solvent again. The article will examine the law on corporate rescue in Zimbabwe through a comparative legal research with South African business rescue procedures due to the shared similarities in our rescue provisions. South Africa and Zimbabwe also share structural commonalities of Roman Dutch law. The concept of business rescue is now well embedded in South Africa, which may inform the application of corporate rescue in Zimbabwe where the concept is still new in order to help enhance insight and understanding. This paper will assist in the interpretation of selected corporate rescue provisions in the Insolvency Act and shed light on the purpose and value of corporate rescue. This paper will also highlight conceptual, legal, practical problems and questions that arise in this area of the law. This is done in order to incite legal reform, to rectify and promote a lucid practicable corporate rescue system in Zimbabwe.

1. Introduction

After decades of the death penalty being passed on financially distressed companies in Zimbabwe, financially distressed corporate entities now have a second bite of the cherry through corporate rescue. This is a mechanism put in place to resuscitate financially distressed corporate entities in Zimbabwe before they are finally declared dead (wound up).[1] A company's failure affects not only its members and creditors, but also, its employees, suppliers, distributors and the community at large.[2] It makes sense to attempt to rescue businesses suffering a momentary setback but have the potential to survive if given some backing and time to overcome their financial difficulties. Many countries have realized the need to resuscitate struggling businesses through the implementation of a wide spread culture of business rescue[3] or corporate rescue[4] which, in turn, resulted in special statutory provisions for corporate rescue being introduced in many legal systems, including the United States of America[5], United Kingdom[6], Australia[7], India[8], South Africa[9], Germany[10] and France[11]. Corporate rescue[12] is one of the most important, legal

[1]V Finch *Corporate Insolvency Law: Perspectives and Principles* (2009) 188: "Corporate rescue, or 'corporate reorganisation'; may be regarded as an alternative to immediate liquidation of the company, with the aim to prevent the death of the company." See also, A Belcher, *Corporate Rescue* (London 1997) 12 who also states that "corporate rescue 'is a major intervention necessary to avert eventual failure of the company."

[2] FHI Cassim, *Contemporary Company Law* (2012) 870.

[3] Business rescue is commonly achieved through the sale of the company's assets and business as a going concern, which, as commonly believed, could generate more value than assets being sold in a piecemeal fashion.

[4] Company rescue often involves changes in the management of the company and is usually achieved through reorganising methods such as refinancing, debt composition or rescheduling, downsizing activities, and making redundant part of the workforce to offer temporary relief: J Armour, A Hsu & A Walters, *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings* (2006) Report 2.

[5] United States of America Bankruptcy Code, Bankruptcy Reform Act 1978.

[6] United Kingdom Insolvency Act of 1986.

[7] Australian Corporations Act 2001.

[8] The Insolvency and Bankruptcy Code, 2016 (No. 31 of 2016) of India.

[9] The South African Companies Act, 71 of 2008.

[10] Section 270b of the German Insolvency Code of 1994.

[11] French Commercial Code.

[12] Insolvency Act [Chapter 6:07], section 121 (1)(b) "corporate rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for- (i) the temporary supervision of the company, and of the management of its affairs, business and property; and (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs,

reforms brought about in Zimbabwe's Insolvency Act [Chapter 6: 07],[13] which is a mirror of the South African Business Rescue Procedures under the Companies Act.[14] The rationale of providing for corporate rescue under the Insolvency Act, as is the case in the United Kingdom, is that, insolvency is the ambit of law which deals with trade or business debtors as a group, therefore it is prudent to introduce an encompassing corporate rescue system in such a statute.[15] Our Companies and Other Business Entities Act [Chapter 24:31] does not have corporate rescue provisions or cater for judicial management and liquidation. The purpose of corporate rescue in Zimbabwe is to facilitate for the rehabilitation of financially distressed companies by providing for temporary supervision of the company, the management of the entity's business affairs and property, the temporary moratorium on the rights of claimants or creditors against the company and the development and implementation of a rescue plan.[16] It is a long standing debate as to whether or not corporate rescue should seek only to maximise the returns to pay creditors of an insolvent company, or other goals do matter; such as preserving jobs, rehabilitating troubled companies and protecting the interests of local communities. The Zimbabwean corporate rescue mechanism is centered on company rescue while business rescue is a secondary objective.[17] This paper examines the law on corporate rescue, interpretation of selected provisions and conceptual issues on, commencement of rescue, evidential foundation of proving financial distress, existence of "reasonable prospects" to rescue company or business entity, directors and corporate rescue

business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

[13] Insolvency Act [Chapter 6:07] of 2018.

[14] Companies Act 71 of 2008.

[15] P Kloopers, 'Judicial Management Reform -Steps to initiate Business Rescue' (2001) *13 SA Merc LJ* 358.

[16] HS Cillers & ML Benade *Corporate Law* (2000) 478; Insolvency Act Chapter [Chapter 6:07],section 121 (1)(b). The objectives of corporate rescue are clearly defined under the UK Insolvency Act of 1986 at section 3 (1) as follows: "The administrator of a company must perform his functions with the objective of – (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors."

[17] A Nwafor *The Goals of Corporate Rescue in Company Law: A Comparative Analysis,* Corporate Board: Role Duties of Composition (2017)11 http://doi.org/10.22495/cbv13i2art2.

practitioner's role, power and personal liability, the business judgment rule, the standard of 'just and equitable' and the assumption that liquidation is a point of no return.

2. A brief overview of the scope and purpose of corporate rescue

2.1 Financial Distress

According to the Insolvency Act[18] (the Act), a company is financially distressed when it appears that the company is reasonably unlikely to be able to pay 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,[19] within the immediately ensuing six months.[20] This is an objective test where the court is called upon to examine all financial circumstances of the company, including the company's ability to meet obligations as they come through.[21] The first leg of the test looks at a reasonable likelihood that the company may reach a position within the next six months where it will no longer be able to pay its debts as they become due and payable.[22] The court needs to consider, the cause of the financial failure, the remedy for the failure, whether there is a reasonable prospect that the remedy will be sustainable; and whether there are concrete and objective ascertainable details beyond mere speculation that the remedy is sustainable before granting corporate rescue.[23]

The next part of the financial distress investigation looks at insolvency. Under this part of the test, the court must consider the complete financial position of the company when determining whether there is a reasonable likelihood that the company will be insolvent within six months.[24] Financial distress is satisfied after all other circumstances have been considered, including other fair values of the assets and liabilities, factoring in judiciously foreseeable assets and liabilities, as well as putting into consideration any other proposed

[18] [Chapter 6:07] of 2018.
[19] A Nwafor (n18 above); *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239: there is need for a holistic approach to determine whether a company can be cash flow insolvent whilst it is wealthy on the balance sheet, meaning it has assets that exceed its liabilities.
[20] [Chapter 6:07] s 121(1)(f).
[21] *Metallon Gold Zimbabwe Pvt (Ltd) & 3 others* v *Shatirwa Investments Pvt (Ltd) & 3 others* SC 107/21.
[22] Ibid.
[23] *Southern Palace Investments 265 (Pty) Ltd* v *Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 WCC.
[24] Ibid.

measures taken by management such as subordination agreements, recapitalisation or letters of support.[25]

The Zimbabwean concept of financial distress is focused on the future status of a company and does not concern itself with the present financial status of the company. The insolvency mentioned in the Act is prospective, it can be either factual insolvency[26] or commercial insolvency[27] but rescue cannot be employed where the company is already insolvent.[28] The aim is to resurrect ailing companies and not dead companies. There is also need to determine what type of insolvency is intended by this provision, whether it is a cash flow insolvency or balance sheet insolvency[29] whereby the liabilities of a company exceeds the assets of the Company. A company can be cash flow insolvent meaning unable to pay its debts as they fall due and still be wealthy through its assets which exceed its liabilities.[30] The balance sheet test and cash flow insolvency test are not accurate tests that depict the financial situation if a distressed company but are employed as a statutory rule to determine insolvency for legal purposes.[31] Financial distress is associated with liquidity problems so if a company is unable to pay regulatory authorities like the Zimbabwe Revenue Authority (ZIMRA), employee remuneration, trade creditors, utility bills and statutory obligations like pensions are a basis for the court to conclude that a company is financially distressed.[32]

[25] Ibid.
[26] This is when the company's liabilities exceed the company's assets and the company is unable to meet its debts when they become due.
[27] *Rag (Pvt)Ltd* v *Huizenga N.O.* 1986 (2) ZLR203 (S) states that: "The test for commercial insolvency is whether or not a company has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a situation to carry on normal trading – in other words can the company meet current demands and remain buoyant?".
[28] A Nwafor (n 17 above) 6.
[29] In the *BNY Corporate Trustee Services Ltd* v *Eurosail* [2013] UKSC 28 at 42 the court pronounced that the "balance sheet" test for insolvency must take account of the wider commercial context. In this the case courts were advised to look beyond the assets and liabilities that were used to prepare a company's statutory accounts when deciding whether or not a company is "balance sheet" insolvent. See also *Boschpoort Ondernemings (Pty) Ltd* v *Absa Bank Ltd* [2014] 2 SA 518.
[30] *Bank of Australasia v Hall* [1907] 4 CLR 1514 held that the question is whether the debtor can pay his debts, not the surplus of the assets.
[31] *Metallon Gold Zimbabwe Pvt (Ltd) & 3 others* v *Shatirwa Investments Pvt (Ltd) & 3 others* SC 107/21.
[32] Ibid.

2.2 Purpose of Corporate Rescue

The purpose of rescue[33] differs from jurisdiction to jurisdiction because some jurisdictions like the United Kingdom and Australia have both company rescue[34] and business rescue imbedded in their laws.[35] Unlike in our jurisdiction, it is at the disposal of affected persons to explore both options. In some instances the ailing company cannot be saved therefore business rescue has to take effect in the form of selling the business to another entity for its continuity, whilst the company goes into perpetual demise (winding up).[36] There are also other rescue laws which are concerned with rescuing the business and not the company.[37] Corporate rescue proceedings are implemented in order to restore a company to a profitable stage and to avoid liquidation.[38]

The objective of corporate rescue is to facilitate the rehabilitation of financially distressed companies; in order to exploit the company's probability of existing as a solvent company to achieve a better return for creditors or shareholders than it would receive upon immediate liquidation of the company.[39] Corporate rescue does not necessarily entail a complete recovery of a company in the sense that the company will have regained its solvency, restoration of business and payment of creditors. Sometimes a business rescue process can result in a management buy-out or a takeover of the distressed company.[40] Rehabilitation of the company is achieved based on three phases as follows:

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[33] A Belcher *Corporate Rescue: A conceptual Approach to Insolvency Law* (1997) 4: rescue is a major intervention necessary to avert the eventual failure of a company. Chapter 11 of the US Bankruptcy Code defines rescue as reorganization of the company to restore it to a profitable entity and avoid liquidation.

[34] Rescuing the company as a going concern.

[35] In the UK, the scope of rescue is wider, including both a turnaround of the company and alternatively preserving the core of a company's business. Underlining such differences is the distinction between 'company rescue' and 'business rescue. See note 3 and 4.

[36] Nwafor (n 17 above).

[37] D French, S Mayson & C Ryan, *Mayson, French & Ryan on Company Law* (2016) 671: the objective of rescuing the company as a going concern is hardly ever pursued, because the usual solution to an insolvent company's problems is to sell its business to another person.

[38] PM Meskin *Insolvency Law and its operation in winding up* (2015) 18; H Miller and S Waisman 'Does Chapter 11 Reorganisation Remain a Viable Option for Distressed Businesses for the Twenty-First Century?' (2004) 78 *American Bankruptcy Law Journal* 153, 192–193: It is commonly recognised that corporate rescue is concerned with how to capture and maximise the going-concern surplus of distressed companies and how to distribute it among corporate constituents.

[39] A Loubser 'The Role of Shareholders during Corporate Rescue Proceedings: Always on the outside looking in?' (2008) *SA Merc LJ* 372.

[40] Cassim (n 2 above) 863.

i) Temporary supervision of the company[41], which entails ,management of its affairs, business and property by the corporate rescue practitioner;[42]

ii) Temporary moratorium on legal proceedings by claimants or creditors against the company or property in its possession;[43] and

iii) The development and implementation of a corporate rescue plan by restructuring its affairs, business, property, debt, equity and other liabilities.[44]

The broad goals of corporate rescue are, value maximisation for creditors and the divergent goal of preservation of the enterprise in order to benefit many more interests than those of the owners[45] and creditors.[46]

3. Voluntary Commencement of Corporate Rescue Proceedings

3.1 Commencement of rescue through a Board resolution

The Board of a Company may pass a resolution that the company voluntarily begins corporate rescue proceedings.[47] The Board can place the company under supervision based on reasonable grounds that the Company is financially distressed[48]; and that there is the existence of reasonable prospects of rescuing the company.[49]

3.2 Existence of "reasonable prospects" to rescue company

The board cannot merely state that there exists "reasonable prospects" to rescue the company; there is need for a cogent evidential foundation to support the existence of reasonable prospects that the desired objective of rescue is achievable.[50] The courts

[41] Corpoorate rescue proceedings are not permanent, they must be conducted with the maximum possible expedition, see *Koen and Anor* v *Wedgewood Village Golf & Country Estate (Pty) Ltd and Ors* 2012 (2) SA 378 (WCC).
[42] s 121 (1) (b) (i) Insolvency Act [Chapter 6:07].
[43] s 121 (1) (b) (ii) Insolvency Act [Chapter 6:07].
[44] s 121 (1) (b) (iii) Insolvency Act [Chapter 6:07].
[45] Loubser (n 39 above) 389 states that if shareholders rights, including the right to vote on and thereby to advance the rescue attempt of the company, are taken away from shareholders, this is in effect a confiscation of their private property.
[46] A Flessner, 'Philosophies of Business Bankruptcy Law: An International Overview' in JS Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994) 13–24.
[47] s 122 (1) Insolvency Act (Chapter 6:07).
[48] s 122 (1) (a) Insolvency Act (Chapter 6:07).
[49] s 122 (1) (b) Insolvency Act [Chapter 6:07].
[50] *Re Harris Simons Construction Ltd* [1989] 1 WLR 368; Nwafor (n17 above).

have stated that one cannot be prescriptive about "reasonable prospect" but the directors must truly believe that prospects exist and that belief is to be based on concrete foundation.[51] Reasonable prospect to rescue connotes probability[52] and one has to make a prima facie case to persuade the court that reasonable prospect exist.[53]A reasonable decision is not supposed to be a perfect decision and the directors are entitled to exercise business judgment.[54] Once a director or shadow director knows or ought to have concluded that there is no 'reasonable prospect' that a company would avoid going into insolvent liquidation he/she must take every step with a view to avoiding potential loss to company. The director can also incur personal liability for reckless trading under the Companies or other business Entities Act [Chapter 24:31], [55] and the Act for reckless trading and insolvent trading.[56]

The board resolution has no effect or force if: it has not been filed with the Master of the High Court (first) and the Registrar of Companies, it's a company or the Registrar of Co-operative Societies or it's a Co-operative Society depending on which business entity is involved.[57] Corporate rescue applies to companies only or other business entities in tandem with the new Companies and other Business Entities Act [Chapter 24:31]. The resolution also may not be adopted if the company has initiated voluntary or compulsory liquidation proceedings.

3.4 Procedures for voluntary corporate rescue

If the board of directors fails to follow procedures laid out under section 122 (3) and (4) of the Act, their resolution for corporate rescue becomes null and void and the company cannot file another resolution before 3 months of the lapsing of first resolution. The procedures are laid out as follows:

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[51] Ibid.
[52]P Kloopers, "Judicial Management Reform -Steps to initiate Business Rescue" (2001) 13 *SA Merc LJ* 362 *"*This requirement of a reasonable probability that the company will recover to the extent that it will be able to repay its debts in full has been criticised as being outdated, unrealistic and often contrary to the wishes of creditors."
[53] Nwafor (n17 above) 7.
[54] *BCE Inc v 1976 Debenture Holders* [1974] AC 821.
[55] Section 68 Companies and Other Business Entities Act [Chapter 24:31].
[56] Section117 and section 118 Insolvency Act [Chapter 6:07].
[57] Section 122 (2) (b) Insolvency Act [Chapter 6:07].

(i) The Board has to deliver a written notice to all affected parties, together with a sworn statement stating the relevant reasons for adopting the resolution and the effective date of the resolution; [58] and appoint a corporate rescue practitioner who is qualified in terms of section 131 of the Act [59]and has consented, in writing, to take the post.

(ii) The notice of appointment of a corporate rescue practitioner must be filed within two days of appointment to the Master or the Registrar of Companies or Co-operatives, depending on the business entity involved, and published within 5 working days for all affected persons.[60]

This provision raises a question of whether "a nullity" was intended to mean the same as "void" or whether the resolution must be treated as if it never existed.[61] The provision is subject to various interpretations. It could mean that the resolution would remain valid until a court order declaring it void has been obtained. It could also mean that the resolution immediately and automatically becomes of no force and effect as soon as the stipulated number of business days has expired, without the necessary requirements having been met.[62] There is need for pronouncement from the court on the exact meaning of these provisions; it remains one of the mysteries of the Act.

A company may not adopt a resolution to begin liquidation proceedings whilst it has initiated corporate rescue proceedings and these proceedings have not lapsed or ended.[63]

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[58] Section122 (3) (a) Insolvency Act [Chapter 6:07].

[59] Sections 122 (4) Insolvency Act [Chapter 6:07] which states " A person may be appointed as the corporate rescue practitioner of a company only if the person- (a) is not disqualified to be appointed liquidator in terms of section 74; (b) has been registered and licensed as an insolvency practitioner in terms of the Estate Administrators Act [Chapter 27:20]; (c) is not disqualified from acting as a director of the company in terms of the Companies Act [Chapter 24:31]; (d) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; (e) is not an associate of a person who has a relationship contemplated in paragraph (d); (f) has provided security in an amount and on terms and conditions that the Master considers necessary to secure the interests of the company and any affected persons."

[60] Section122 (3) (a) Insolvency Act [Chapter 6:07].

[61] A Loubser 'The Business Rescue Proceedings in the Companies Act 2008' 3 (2010) TSAR 3.

[62] Ibid.

[63] Section 122(6) Insolvency Act [Chapter 6:07] provides that, a company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the

An affected person[64] may also apply to the court to set aside a resolution to commence with corporate rescue proceedings voluntarily, if there is no reasonable basis for believing that the company is financially distressed, no reasonable prospects of rescuing company or the company has failed to satisfy the procedural requirements in section 122 of the Act.[65]

Objections can be lodged against the actions of the board of directors to commence corporate rescue through a resolution on the grounds that (a) there exists no reasonable basis for believing that the company is financially distressed; (b) lack of reasonable prospect for rescuing the company; or (c) the company's failure to satisfy the procedural requirements set out in section 122.[66] Objecting creditors or affected persons are protected by the 'best interests' test, which enumerates that each objecting creditor must receive at least as much under the plan as it would in liquidation. In addition, the 'feasibility test' has to be satisfied, which dictates that, the company must be reasonably likely to be able to perform the promises it makes in the plan.[67]A director who has voted in favour of a resolution for corporate rescue cannot apply to court to have it set aside unless he/she can satisfy to the court that, in supporting corporate rescue, he/she acted in good faith on false or misleading information.[68] Another problem that might arise in the adoption of a resolution by the directors is when one director challenges the validity of that resolution to place the company under rescue.[69] Section 122 and 123 of the Act readily assumes that the resolution passed by the directors is valid.[70] Therefore, the answer to whether or not an order to place a company or business entity under corporate rescue should be set

resolution has lapsed in terms of subsection (5), or until the corporate rescue proceedings have ended as determined in accordance with section 125(2)

[64] Section 121 (a) of the Insolvency Act [Chapter 6:07] states that "*affected person*, in relation to a company, means (i) a shareholder or creditor of the company; and (ii) any registered trade union representing employees of the company; and (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives".

[65] Section 123 (1)(a)(i), (ii) and (iii) Insolvency Act [Chapter 6:07].

[66] Requirements to be met for placing a company on corporate rescue based on a board resolution.

[67] G McCormack 'Corporate Rescue Law: An Anglo-American Perspective' (2007*) International and Comparative Law Quarterly* 528.

[68] Section 123(2) Insolvency Act [Chapter 6:07].

[69] *Ofer Svan* v *Gilard Shabtai & 3 Others* HC 5436/21.

[70] Ibid.

aside based on the validity of a resolution is best answered by the Companies and Other Business Entities Act.[71]

4. Commencement of rescue through Court Order

An affected[72] person may apply to a court at any time for an order placing the company under corporate rescue proceedings.[73] The directors of the company and the company itself are not authorized to apply for a corporate rescue order. Loubser[74] propounds that the exclusion of both the Board and individual directors from applying for a corporate rescue order is regrettable since no board resolution to commence rescue proceedings may be taken after 'liquidation proceedings' have been initiated, even if the board is convinced that the company can be rescued.[75] A director will often be an affected person by virtue of being a shareholder but can also be an employee of the company if a contract of service has been concluded.[76] The inclusion of individual shareholders, registered trade unions representing employees of the company and even individual employees who do not have to be creditors of the company to qualify seems excessive.[77] The *Metallon Gold* case is authority on the point that not any registered trade union will have *locus standi* to apply for corporate rescue. The registered trade union must be representing employees of the company to be placed under corporate rescue and not merely a registered trade union of the same industry. The inclusion of individual employees and trade unions is justifiable on the basis of it being part of the protection of "the interests of workers", which is prominently featured as an object of the new corporate rescue proceedings.[78]

[71] [Chapter 24:31].
[72] Section 121(1) (a); "affected person", in relation to a company, means- (i) a shareholder or creditor of the company; and (ii) any registered trade union representing employees of the company; and (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.
[73] Section 124(1) Insolvency Act [Chapter 6:07].
[74] Loubser (n 61 above) 7.
[75] Ibid.
[76] Cilliers & Benade (n 16 above) 138.
[77] Loubser (n 61 above) 7.
[78] Ibid.

It is mandatory for every affected person to be given notice of the application to commence corporate rescue through a court order.[79] Failure to notify any of the affected persons of such an application will render it a nullity.[80] The applicant also has to comply with the peremptory provision that notice should be by way of "standard notice"[81]and any other form of notice which is not prescribed by the Act will also render the application a nullity.[82]

An application for an order for corporate rescue is also possible even if the company is under liquidation proceedings. An application for corporate rescue whilst the company is under liquidation proceedings will suspend liquidation until corporate rescue has ended or the court has adjudicated[83] upon application.[84] The term liquidation proceedings has been found to be ambiguous because it denotes three separate meanings. "Liquidation proceedings" can refer to court proceedings leading to the granting of an order for liquidation, winding up proceedings after a provisional order appointing liquidator or proceedings after a final liquidation order which precludes all preceding proceedings. The South African courts with similar corporate rescue provisions as those of Zimbabwe have interpreted 'liquidation proceedings' to mean winding up proceedings, since they are part and parcel of liquidation proceedings, even if winding up proceedings come at a later stage.[85]

The *ABSA* case[86] illustrates that no matter how far liquidation proceedings would be, an order to rescue the company can still be obtained. It has also been elaborated that the liquidation proceedings referred to in this section refer to the obtaining of a provisional or final order for liquidation not mere filing or lodging of an application that has not been

[79] *Metallon Gold Zimbabwe Pvt (Ltd) & 3 others* v *Shatirwa Investments Pvt (Ltd) & 3 others* SC 107/21.
[80] Ibid.
[81] Section 2 of the Insolvency Act [Chapter 6:07] defines standard notice as notice by registered mail, fax, e-mail or personal delivery.
[82] In the *Metallon Gold* it was held that notice to affected persons by way of publication, which was not prescribed by section 2 of the Act rendered the application for corporate rescue a nullity.
[83] Adjudication means hearing of the matter by the high court not mere lodging or filing of application to the court.
[84] Section 124 (6) Insolvency Act [Chapter 6:07].
[85] *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 GP
[86] Ibid.

adjudicated by the High Court.[87] An application for corporate rescue suspends liquidation proceedings even when a final order for liquidation has been granted and the company is under a liquidator.[88] This has raised many arguments due to the fact that final liquidation is a point of no return where rescue cannot be implemented because the company no longer has original status or *locus standi*.[89] This provision on liquidation proceedings that suspend corporate rescue is liable to abuse. One can file a vexatious and meritless application for rescue in order to undermine and frustrate a liquidation application.[90]

4.1 The grounds upon which court will grant order for corporate rescue

The relevant grounds in terms of which a court may grant an order to place a company under supervision and commence with corporate rescue proceedings are that:[91]

*i) the company is **financially distressed** –*

*ii) the company has **failed to pay over any amount in terms of an obligation under a public regulation or contract** in respect of employment matters, or*

*iii) It is otherwise **just and equitable** to do so **for financial reasons** and there must be **reasonable prospects** of rescuing the company."*[92] (emphasis added)

These grounds are therefore wider than the grounds relevant for a board resolution and introduce the standard of just and equitable.

4.1.1 The ground of failure to pay an amount which is due

The second alternative ground is of non-payment by the company of amounts due in respect of contractual or statutory obligations relating to employment matters. Loubser[93] believes that non-payment should occur over a stipulated minimum period or frequently before it constitutes a ground for rescue proceedings, and if at least two consecutive payments have been missed.

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[87] *First Rand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 256 KZD; H Stoop 'When does Application to commence business Rescue proceedings suspend liquidation?; (2014) *De Jure* 329-339.
[88] *Ritcher v Bloempro CC & Others* 2014 (6) SA38 GP.
[89] Stoop (n 87 above) 338.
[90] Ibid.
[91] Section 124(4)(a) Insolvency Act [Chapter 6:07].
[92] Ibid.
[93] Ibid.

4.1.2 The ground of whether it is 'just and equitable", for "financial reasons" to rescue the company

The ground of just and equitable *"for financial reasons"* to rescue the company is the third alternative. This ground is vague and unclear as to whether these financial reasons relate to financial difficulties that are not covered by the definition of financial distress[94], such as a company that may become insolvent or unable to pay its debts over a longer time than stipulated in the definition.[95]

The introduction in this ground of the concept of "*just and equitable"* allows the courts to intervene where there has been an inequality or injustice. It was also part of the now repealed provision on judicial management[96] and the winding up[97] of a Company under the under the Companies Act [Chapter 24:03]. When considering the issue of whether it is just and equitable to rescue the business entity, no general rule can be laid down as to the nature of the circumstances to be borne in mind.[98] The courts are required to make a fair consideration of all the circumstances connected with the formation and the carrying on of the company.[99]The test does not look at weighing the competing interests of the company against the creditors. Instead, the question is, *"whether, having regard to all the circumstances, there was at the date of the presentation of the petition a reasonable hope that in time the subsidiary company could be carried on at a profit."*[100]

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[94] Section 121(1) (f) Insolvency Act [Chapter 6:07].
[95] Loubser (n61 above) 11.
[96] Section 300(1)(a)(iii) Companies Act [Chapter 24:03]; *Zimbabwe International Trade Fair Company* v *Viking Plastics (Pvt) (Ltd) and Bongani Ndlovu N.O* HC 3387/11; *National Airways Workers Union v The Minister of Transport, Communication and Infrastructure Development NO and Others* HC 3783/12; *Shagelok Chemicals (Pvt) Ltd* v *International Financial Corporation SC 1224/02*. See also *Steelnet (Zimbabwe) Ltd HC 746/13* (unreported judgment) which held that: it was just and equitable for the company to be placed under judicial management to allow working capital to be put into the company and revive the fortunes of the company rather than letting individual creditors to sell in execution items or properties so far attached at the expense of other creditors.
[97] Section 208(2)(b) Companies Act [Chapter 24:03].
[98] *Loch v Blackwood (John) Ltd* [1924] AC 783.
[99] *Davis & Co Ltd v Brunswick (Australia) Ltd* [1936] AC.
[100] *Davis & Co Ltd v Brunswick (Australia) Ltd* [1936] AC.

4.1.3 The ground of "reasonable prospects" to rescue the company

The third alternative ground also introduces the test for, "*reasonable prospects"* of rescuing the company. Reasonable prospect has been interpreted to mean, a prospect based on reasonable grounds and not speculative suggestions or averments. This means that the applicant is supposed to place before the court, a factual foundation for the existence of a reasonable prospect that corporate rescue will achieve the primary objective (company rescue) or the secondary object of business rescue.[101] It is debatable whether the costly remedy of obtaining an order of court will prove to be a very effective weapon against abuse. Yet, making it too easy to reverse a board's decision will undoubtedly undermine the success of the corporate rescue proceedings.[102]

5. Moratorium on legal proceedings against company

The general moratorium is one of the most important features of corporate rescue. The moratorium contained under s126 (1) of the Act, is meant to provide the company with breathing space, to give the company appropriate time to implement its rescue procedures and to allow the administration to assess the company's viability.[103] The moratorium is automatic upon commencement of the rescue process until the end of rescue.[104]The rescue process commences upon the mere filing of the application for corporate rescue with the Registrar of the High Court.[105] Corporate rescue commences before the merits of the application are considered.[106] This entails a halt or stay on any

[101] *Oakdene Square Properties (Pvt) Ltd and others v Farm Bathasfontein (Kayalami) (Pvt) Ltd and others* 2013 4 SA 539 (SCA).
[102] M Steiner 'The Insolvency Bill 2000: Rescue culture in the new millennium' (2000) *Journal for International Banking Law* 61 : in discussing the corporate rescue procedures in England, stated that it was almost impossible to reconcile the desire for a relatively cheap and straightforward moratorium regime, with the need to prevent unscrupulous company directors from abusing the procedure. See also Loubser (n 61 above) 3.
[103] C Anderson 'Viewing the South African Business Rescue, Provisions from an Australian Perspective' (2008) 1 *PER* 17; PA Delport *et al Henochesburg on Companies Act 71 of 2008 (2012)* 478.
[104] E Levenstein *An Appraisal of the new South African Business Rescue Procedure* Unpublished LLD thesis University of Pretoria (2015) 564.
[105] *Metallon Gold Zimbabwe Pvt (Ltd) & 3 others* v *Shatirwa Investments Pvt (Ltd) & 3 others* SC 107/21.
[106] Ibid.

legal proceedings or executions against the company (subject to certain exceptions).[107] The moratorium protects the company against lawsuits by all disgruntled creditors since the focus of the corporate rescue practitioner is to rescue the business.[108] According to the *Cloete Murray* case, the moratorium does not stop a creditor from cancelling an agreement due to a breach of contract because such action cannot be considered to fall under the stay of 'legal proceedings' or 'enforcement' falling under the notion moratorium.[109] In line with international best practice, this provision prevents creditors from "stealing a march" to prejudice other creditors who are willing to await the results of the rescue process.[110] The moratorium preserves the assets of the company, value and the business of the company to give the corporate practitioner time and chance to formulate a fireproof rescue plan and deliver a maximum dividend to creditors that is grander than the liquidation dividend. [111] There is also a moratorium on the disposal of a company's property.[112] There are general exceptions to the general moratorium on legal proceedings, which are:

i) written consent of the corporate practitioner;[113]

ii) leave of the court;[114]

iii) a set-off against claim made by company in any legal proceedings before or after corporate rescue commenced;[115]

iv) criminal proceedings against the company or any of its directors or officers;[116]

[107] s126(I) Insolvency Act [Chapter 6:07] states that during corporate rescue proceedings, no legal proceeding, including enforcement action, against the company; or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum.
[108] H Mmbara, *Impact of the Business Rescue Moratorium on Creditors, Unpublished LLM thesis University of Johannesburg (2016) 9.*
[109] *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[110] *UNCITRAL legislative Guide on Insolvency Law Part 1* (2005) 12.
[111] Levenstein (n 104 above) 565.
[112] R Bradstreet 'The new Business Rescue: will creditors swim or sink' 2011 *SALJ* 372.
[113] Section 126(1)(a) Insolvency Act [Chapter 6:07]. *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) is authority on the issue that failure to obtain consent from the corporate rescue practitioner and leave of the court does not invalidate any proceedings instituted against a company under corporate rescue. This should not have been allowed due to the importance of the moratorium to corporate rescue, the moratorium should only be set aside by court order or at the end of corporate rescue.
[114] Section 126 (1) (b) Insolvency Act [Chapter 6:07].
[115] Ibid.
[116] Ibid.

v) proceedings concerning property held in trust (as trustee)by the Company;[117] and

vi) proceedings by a regulatory authority in execution of its duties (claims by the Zimbabwe Revenue Authority).[118]

A company may only dispose of property if it is in the ordinary course of business or it is a *bona fide* transaction at arms' length for fair value that is approved in advance and in writing by the corporate rescue practitioner.[119] The UK Insolvency Act 2000[120] states that a moratorium on the voluntary corporate rescue, will only come into effect after a professional validation by an accountable and qualified insolvency practitioner that the company can indeed be rescued and it is not a delaying tactic to the liquidation of the company. Also in the United States of America, a secured creditor can apply to the court for an order uplifting or granting relief against automatic stay.[121] Loubser submits that there is need for an interim moratorium which will inform creditors of the impending automatic stay on proceedings and the commencement of the corporate rescue proceedings.[122]

6. Post-commencement finance

Any remuneration, reimbursement or other amount of money relating to employment, which becomes due and payable by a company to an employee during corporate rescue proceedings, will be treated as post-commencement finance to be paid in order of preference.[123] Creditors are reluctant to finance a company that is placed under corporate rescue if such finance is critical to the survival of the company. Section 128(2) states that a company may obtain financing that is unrelated to employment.[124] This financing may be secured to the lender by utilising any unencumbered asset of the company and will be paid in the order of preference.[125] The relevant order for preference is as follows:

[117] Ibid.
[118] Ibid.
[119] S 127 (1) (a) (i), (ii) and (iii) Insolvency Act [Chapter 6:07].
[120] Section 1A Insolvency Act [Chapter 6:07].
[121] Section 105(a) US Bankruptcy Code.
[122] Loubser (n 61 above) 689.
[123] Sections 128 (1)(a), (b) and (3)(a) Insolvency Act [Chapter 6:07].
[124] S 128(2) Insolvency Act [Chapter 6:07].
[125] S 128(2) (a) and (b) Insolvency Act [Chapter 6:07].

i) the practitioner's remuneration and expenses and all claims arising from the costs of the corporate rescue proceedings;[126]

ii) all claims for post-commencement financing obligations relating to employment matters;

iii) post-commencement finance not employment-related; and

iv) unsecured pre-commencement finance.

7. Effect of corporate rescue on employees, directors and general contracts

One of the main objectives of corporate rescue is to protect the employees and other creditors. During corporate rescue, employees are employed on the same terms as they were employed prior to the commencement of the proceedings. Any changes must occur in the ordinary course of termination, in accordance with labour laws and by mutual agreement between the parties.[127] Employees to whom any other money, remuneration or reimbursement for expenses is owed before the commencement of corporate rescue, are treated as preferential creditors of the company. [128]

7.1 General contracts

The corporate practitioner has the right to suspend any obligation arising under an agreement to which the company is a party at the commencement of the proceedings and even if the agreement will become due during the proceedings.[129] This provision relates to general contracts to the exclusion of employment contracts.[130] However, the consent of the court is needed for a cancellation of such a contract; and a aggrieved party may lodge a claim for damages against the company.[131] Under common law, specific performance will not be ordered against an insolvent estate. As such, if the corporate

[126] S 128(3) Insolvency Act [Chapter 6:07].
[127] Section 129(1)(a)(i) and (ii) Insolvency Act [Chapter 6:07].
[128] Ibid.
[129] Section 129 (2) Insolvency Act [Chapter 6:07].
[130] Section 129 (3) Insolvency Act [Chapter 6:07].
[131] Section 129 (3) and (4) Insolvency Act [Chapter 6:07].

rescue practitioner of a company refuses to render performance under an uncompleted contract, the other party will have merely a concurrent claim for damages based on breach of contract as well as the right to cancellation for breach of contract.[132]

7.2 Directors

During the rescue process, the board of directors is deemed to be dissolved and each director may not continue to exercise their functions. Nevertheless, they may exercise a management function within the company in accordance with express instructions and directions of the corporate rescue practitioner. Therefore, any unapproved action taken by the directors is void. [133] This is called the management-displacement system of insolvency which is similar to that of the United Kingdom. The rationale of the system is that the failures of the previous management are not carried on by the corporate rescue practitioner. This system has the disadvantages of lack of continuity and slow rehabilitation.

7.3 Employees

The primary aim of the Zimbabwean corporate rescue legal framework, which is similar to the South African business rescue framework, is not merely to rescue a company business or the successful parts of the business. Rather, it recognizes the preservation of jobs as an economic and social benefit of rescue.[134] Employees and other creditors, whether represented or not, are entitled to participate in court proceedings arising during corporate rescue. They must be given notice of the court proceedings,[135] the decisions, meeting or other relevant events concerning the corporate rescue proceedings. They must also form an employees or creditors committee,[136] vote with other creditors on a motion, make submissions at meetings before vote is taken, be consulted by the corporate rescue practitioner during the development of the corporate rescue plan and

[132] A Loubser 'The business rescue proceedings in the Companies Act 2008: concerns and questions part 2' 4 (2010) *TSAR* 691; C Nagel (ed) *Mars The Law of Insolvency in South Africa* (2008) 222.
[133] Sections 130(2)(a),(b) and (4) Insolvency Act [Chapter 6:07].
[134] *South African Airways (SOC) Ltd (In Business Rescue) and Others* v *National Union of Metalworkers of South Africa obo Members and Others* 2020 ZALAC 34.
[135] Section 138 Insolvency Act [Chapter 6:07].
[136] Section 138(3) Insolvency Act [Chapter 6:07].

propose development alternative plans.[137] An aggrieved creditor can apply to the court for a review of the corporate rescue practitioner's determination pertaining to voting interests and creditor status.[138] No alteration in the classification or status of issued securities is permitted during corporate rescue proceedings, unless it is by the approval of the court or done in terms of an approved corporate rescue plan.[139]

8 The Corporate Rescue practitioner's powers and role

The corporate rescue practitioner has complete management control of the company in the place of the board of directors.[140] The practitioner may also delegate power or function to a person who was part of the board of directors or the management of the company.[141] The practitioner may be appointed by the Master of the High Court, if commencement happened by way of a board resolution. If proceedings commenced by way of a court order, then the court will appoint a practitioner. The practitioner needs to have the relevant qualifications[142] as stated in section 131(1)(a)–(f)[143] of the Act. However, these qualifications are vague and do not point to any business professional skills and practical experience that the practitioner must possess save for highlighting that the practitioner

[137] Section 137(3) Insolvency Act [Chapter 6:07].
[138] Ibid.
[139] Section 130(1)(a) and (b) Insolvency Act [Chapter 6:07].
[140] Section 133(1)(a) Insolvency Act [Chapter 6:07].
[141] Section 133(3) Insolvency Act [Chapter 6:07].
[142] Section 21 Estates Administrators Act [Chapter 27:20] provides for the qualifications for registration as follows: "(1) Subject to subsection (2), a person shall be qualified for registration as an administrator of estates if— (a) he is registered as a legal practitioner in terms of the Legal Practitioners Act [Chapter 27:07]; or (b) he is registered as a public accountant or public auditor in terms of the Public Accountants and Auditors Act [Chapter 27:12]; or (c) he is a member of the Institute of Chartered Secretaries and Administrators in Zimbabwe established in terms of the Chartered Secretaries(Private) Act [Chapter 27:03]; or (d) he has passed such examinations set by the Council as may be prescribed; or (e) he possesses such qualifications and additionally, or alternatively, has such experience as may be prescribed or as the Council considers qualifies him for registration."
[143] Section 131 Insolvency Act [Chapter 6:07] on the qualifications of practitioners provides that:
"(1) A person may be appointed as the corporate rescue practitioner of a company only if the person
(a) is not disqualified to be appointed liquidator in terms of section 74; (b) has been registered and licensed as an insolvency practitioner in terms of the Estate Administrators Act [Chapter 27:20]; (c) is not disqualified from acting as a director of the company in terms of the Companies Act [Chapter 24:31]; (d) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; (e) is not an associate of a person who has a relationship contemplated in paragraph (d); (f) has provided security in an amount and on terms and conditions that the Master considers necessary to secure the interests of the company) and any affected persons."

must be registered and licensed as an insolvency practitioner.[144] There is need for professional management in keeping the business of the debtor intact. This brings us to the question of whether the services of an insolvency practitioner/accountant[145] are appropriate to achieve the goals of corporate rescue.[146] The insolvency practitioner, as stipulated in the Act, is a specialized professional whose main role is the financial analysis of corporate performance (an accountant) or even legal counseling and litigation (legal practitioner), which hardly seem to be the most worthy candidate for business managerial tasks.[147]

Having a corporate rescue practitioner to run the company provides a greater guarantee of independence and increases the integration and harmonization of procedures if liquidation of the company is the eventual outcome.[148] The United States rescue system retains the management of the company under the debtor-in-possession system (DIP) whilst the United Kingdom system just like the Zimbabwean system adopts the management- displacement insolvency regime based on the reasoning that you cannot leave an alcoholic in control of a pub - if the company management failed once, it is bound to keep failing.[149]

Insolvency practitioners act either in the interests of secured financiers or at the direction of the court.[150] However, the corporate rescue practitioner can seek assistance from the management of the company. This is essential to preserve value and ensure the success of the rescue plan. The management- displacement insolvency regime is questionable and harsh because there is a possibility of delays in the commencement of reorganization or loss by the creditors of the going concern premium value, since only management can implement timely re-organisation.[151]

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[144] Ibid.

[145] G McCormack 'Corporate Rescue Law: An Anglo-American Perspective' (2007) *International And Comparative Law Quarterly* 531propounds that: " Having an accountant at the helm makes sense if the process is really about valuation and asset sales rather than running the business with a view to bringing about the return of profitable trading."

[146] Ibid.

[147] D Hahn 'Concentrated Ownership and Control of Corporate Reorganisations' (2004) 4 *JCLS* 146.

[148] McCormack (n 145 above) 527.

[149] G McCormack (n145 above) 518.

[150] Ibid.

[151] Hahn (n147 above) 141.

The practitioner can only be removed from office by way of a court order based on the grounds of: i) incompetence or failure to perform duties ii) to exercise a proper degree of care, iii) engaging in illegal acts, iv) incapacitation, v) conflict of interest and disqualification. If the rescue practitioner who is appointed by the company or the creditors is removed, dies or resigns; the company or creditors must appoint a new practitioner.[152] In the execution of his duties, the corporate rescue practitioner acts as an officer of the court with the same responsibilities, duties and liabilities of any other director of the company.[153] A practitioner is liable for the consequences of any act or omission amounting to gross negligence in the performance of their powers and functions.[154]

The corporate rescue practitioner is entitled to charge the company for his/her remuneration and expenses.[155] The practitioner may propose or negotiate further or additional remuneration in the form of a contingency fee.[156] This further remuneration may be based on:

i) the adoption of a corporate rescue plan at all, within a particular time, or the inclusion of any particular matter within such a plan; or

ii) the attainment of any particular result or combination of results relating to the corporate rescue proceedings.[157]

This provision of further remuneration might become problematic in the future, because it entitles the rescue practitioner to demand more payment for each job done. This might not be reasonable in the long run since these charges are not regulated and might hinder the resuscitation of the business due to greed.

9 The Corporate rescue plan

The vital function of the practitioner is to prepare a knowledgeable corporate rescue plan, which is informative to all affected parties in deciding whether or not to agree with the corporate rescue plan.[158] The plan has been provided in order to guide the rescue

[152] Section 132(2)(a-f) Insolvency Act [Chapter 6:07].
[153] *Booysen* v *Jonkheer Boerewynmakery (Pvt) Ltd and another* 2017 (4) 4 SA 51 (WCC)
[154] *Probadeck Investments (Pvt) Ltd v Redwing Mining Company (Pvt) Ltd* HC 104/21.
[155] Section 136 (1) Insolvency Act [Chapter 6:07].
[156] Section136 (2) Insolvency Act [Chapter 6:07].
[157] Section 136 (2) (a) and (b) Insolvency Act [Chapter 6:07].
[158] Section 142 (2) Insolvency Act [Chapter 6:07].

practitioner and that he/she does not become a law unto him/herself. It is divided into three parts. Part A deals with the background of a list of all company material assets, the list of creditors, the creditors with securities and their possible dividend, and the corporate rescue practitioner's remuneration.[159] Part B contains the proposals on the nature and duration of the moratorium, the preferential creditors order, the role of the company upon rescue and the extent of the company's release from debts.[160] Part C, contains assumptions and conditions on the operation, implementation and termination of the corporate rescue plan.[161]The practitioner must provide a certificate attesting to the authenticity of all information in the corporate rescue plan.[162] The publication of the corporate rescue plan must be within 45 business days after the appointment of the practitioner.[163] The corporate rescue practitioner is also enjoined to disclose to all the creditors, the dividend that is to be obtained if the company is to be liquidated.

10. Consideration of the Corporate Rescue Plan and failure to adopt rescue plan

The practitioner must convene and preside over a meeting of all creditors and any other holders with voting interests, to introduce the corporate rescue plan for the consideration of all creditors, ten days after its publication.[164] He or she must deliver a notice, at least five days prior to the meeting, to all affected persons and a decision has to be made at the meeting to adopt or reject the plan. [165] The practitioner must inform the parties at the meeting whether he or she thinks that there is a ***reasonable prospect*** (emphasis added) of the company being rescued.[166] It is uncertain whether secured creditors are allowed to vote since it is in conflict with the security they hold against the company. Nevertheless, the term "all creditors" is implied to mean they can cast a vote.

A majority vote of 75 percent by the holders of the creditors' voting interests as well as 50 percent of the independent creditors' voting interests must support the plan for it to be

[159] Section 142 (2) (a) Insolvency Act [Chapter 6:07].
[160] Section 142 (2) (b) Insolvency Act [Chapter 6:07].
[161] Section 142 (2) (c) Insolvency Act [Chapter 6:07].
[162] Section 142 (4) Insolvency Act [Chapter 6:07].
[163] Section 145 (5) Insolvency Act [Chapter 6:07].
[164] Section 144 Insolvency Act [Chapter 6:07].
[165] Section 144 (1) (a) Insolvency Act [Chapter 6:07].
[166] Section 144 (1) (b) Insolvency Act [Chapter 6:07].

accepted on a preliminary basis.[167] The plan will be regarded as finally approved only if the rights of any class of shareholders or the holders of the company's securities are not altered by the rescue plan.[168] If it does alter their rights, a meeting must be called by the practitioner to call for a vote by them to approve the plan, by way of a majority vote exercise.[169] If they do not accept it, the company may apply to the court to have the vote set aside on the grounds of inappropriateness.[170] If the corporate rescue practitioner fails to take any action to have the vote by the holders of voting interests set aside, any interested party may make such application to the High Court.[171] A corporate rescue plan that has been accepted is binding on each creditor and every holder of securities of the company. [172]

11. The termination of the Corporate rescue proceedings

Corporate rescue proceedings terminate in terms of section 125(2)(a)–(c) of the Act, through a court order to set aside the resolution for rescue or an order that commenced the proceedings.[173] If corporate rescue proceedings are converted to liquidation proceedings,[174] the practitioner must file a notice of termination to the Master of the High Court, [175]rejecting the corporate rescue plan proposal and the non -extension of proceedings by affected persons.[176] The Act is devoid of automatic or compulsory termination of corporate rescue proceedings.[177]

12. Conclusion

The corporate rescue proceedings are fairly new to the Zimbabwean company and other business entities rescue culture and will have to be tested for viability in Zimbabwe's business environment. These provisions have come at a point where the nation's

[167] Section 144 (2) (a) and (b) Insolvency Act [Chapter 6:07].
[168] Section 144 (3) Insolvency Act [Chapter 6:07].
[169] Ibid.
[170] Section 145 (1) (b) Insolvency Act [Chapter 6:07].
[171] Section 145 (2) Insolvency Act [Chapter 6:07].
[172] Section 144(4) Insolvency Act [Chapter 6:07].
[173] Section 125 (2) (a) Insolvency Act [Chapter 6:07].
[174] Ibid.
[175] Section 125 (2) (b) Insolvency Act [Chapter 6:07].
[176] Section 125 (2) (c) Insolvency Act [Chapter 6:07].
[177] *Metallon Gold Zimbabwe Pvt (Ltd) & 3 others v Shatirwa Investments Pvt (Ltd) & 3 others* SC 107/21.

economy has been rendered a severe blow by a long history of unsuccessful judicial management proceedings and the credit crunch. Corporate rescue proceedings have been promulgated at a difficult but well-needed time, where the business environment in Zimbabwe is hostile due to high levels of inflation and economic depression. As such, this calls for the government and all other stakeholders to revise their corporate financing procedures and laws. The viability of these proceedings is embedded in the potential resuscitation of business entities, which is being jeopardized by the adversities in the economy and is therefore paralyzing any resuscitation strategy that can be proposed by the rescue practitioner. Due to the wide cry against judicial management as a rescue procedure, no rescue culture has actually developed in Zimbabwe. In most cases where companies are in financial distress, they have engaged in informal rescue workouts or automatically applied for liquidation. In Zimbabwe, as highlighted, there are some unclear and ambiguous provisions which will need rectification and replacement by the legislature. Although our courts have not yet deliberated much on corporate rescue issues, it being a new law, clarity on unclear or ambiguous provisions can be obtained from the bench, in the future. In this regard, the courts may draw from persuasive Roman Dutch jurisdictions like South Africa which have had a chance of deciding on some of these conflicting provisions.

Zimbabwe's business culture and environment is unique but can still learn from other jurisdictions who have implemented corporate rescue for the past decade in Africa and abroad in order to make its provisions more accessible and acceptable for successful rescue. As much as liquidation has been clearly set out as essentially based on foreclosure and piecemeal sale of the business assets, corporate rescue is a rescue mechanism shrouded in uncertainty because the outcome is uncertain. There is need for negotiating and bargaining in good faith for all stakeholders, for it to be a success and for the company to be an on-going commercial structure. The major aim is to preserve the going concern surplus of the company and there is need for an accurate evaluation of the economic viability of a company in financial distress. This is difficult and based on a subjective judgment derived from the information in the possession of all stakeholders. At the crux of corporate rescue is the evaluation of and willingness to accept risk. The future

prospects for successful turnaround of rescue proceedings depend on complex and diverse issues such as: the harshness of the company's liquidity crisis; the result of negotiations for support from its senior financial creditors; the economic viability of the business; the integrity of the corporate rescue practitioner; and the market reaction to the company's financial trouble.