UNIVERSITY OF ZIMBABWE
FACULTY OF LAW

AN INVESTIGATION INTO FACTORS THAT AFFECT THE SUCCESS OF CORPORATE RESCUE IN ZIMBABWE.

BY

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"Business rescue proceedings are not for the terminally ill…nor are they for the chronically ill"

Welman v Marcelle Props 193 CC and Another [2012] ZAGP JHC 32.

DECLARATION

I, Mandaza Gibson, hereby declare that, this dissertation is my own work and has never been submitted for any degree at any university. Where information has been obtained from other sources, I verify this has been acknowledged through references that are complete.

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Student's signature

This dissertation has been submitted for examination with my approval as the University Supervisor.

Supervisor

I confirm that l worked
with……

As his supervisor and fully support submission of this dissertation.

……

Supervisor's signature

DEDICATION

This dissertation is dedicated to my late dear departed parents Sam Pepukai Dickson Mandaza and Tariro Mandaza (Nee Zvaita). You will never be forgotten, thank you for all the sacrifices.

> "I carry your hearts with me, I carry them in my heart, I am never without them" EE Cummings.

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Chapter 1

1.1 Introduction and background

The concept of business rescue or corporate rescue is a new phenomenon in Zimbabwe that was introduced through the Insolvency Act (Ch 6:07). [1] The key issue at play was to do away with judicial management which involves, "A lot of processes, which include looking for investors, downsizing human capital, selling major assets and negotiating with the debtors to defer payments. Judicial management is done by a judicial manager appointed by the court to replace the directors of the distressed company".[2] This concept is also called corporate reengineering in North American terminology.[3] The concept of corporate rescue is referred in the Insolvency Act as covering proceedings that facilitates the rehabilitation of financially distressed companies.[4] Writing in the Yale Law Journal in 1982, Thomas H Jackson stated that, "The bankruptcy reorganization regime should operate in the best interests of creditors and maximising creditor recovery should be the exclusive goal of the corporate reorganization regime".[5]

Our courts have had an occasion to deal with the concept of corporate rescue. In the Metallon Gold case, the brief facts were that two creditors brought applications to put the company and its related companies under corporate rescue. The Supreme Court held that, "Judicial management had failed to cater for the needs of the modern-day business environment as it had several unsatisfactory aspects that defeated the purposes of business rescue". [6]

Corporate rescue is founded on a broader social justice perspective as compared to the old law of judicial management which was predicated on private corporate interest.[7] The purpose of the new Insolvency Act is to provide for the administration

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[1] F Manyuchi, *'Corporate Rescue vs Judicial Management'* Newsday, 21 October 2021.
[2] P Gosha "An analysis of challenges of judicial management as a tool for resuscitating distressed companies: a case of Harare district" (Unpublished BComm dissertation, Midlands State University (2016) available at http://ir.msu.ac.zw
[3] RJ Gumbo "A Guide to the corporate rescue procedure in Zimbabwe by 2020" available at https://gumboassociates.com (accessed 27 May 2022).
[4] Gumbo (n 3 above) 1.
[5] T.H. Jackson, "Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargains" (1982) 91 *The Yale Law Journal 857*.
[6] *Metallon Gold Zimbabwe (Pvt) Ltd and 3 Others v. Shatirwa Investments (Pvt) Ltd and 3 Others* SC 107/21.
[7] Manyuchi (n 1 above).

of insolvency and assigned estates and the consolidation of insolvency litigation. Critically, "The Insolvency Act replaced judicial management as a business rescue strategy with corporate rescue proceedings".[8]

In the case of *Feigenbaum and Another v Germanis NO and Others*[9] the court stated that, "Judicial management is an extraordinary procedure made available to a company by the court in special circumstances and for statutorily purposes as held in the case o*f Silverman v Doornhoek Mines Ltd 1935 TPD 349"*. The procedure was only adopted when, "The court was satisfied, with the facts contained in the application, that there is a reasonable probability that if placed under judicial management, the company is unable to pay its debts in full, meet its obligations and become a successful concern".

The court in the Metallon Gold Zimbabwe case went on to say, "With the passage of time, judicial management, which had been part of our law in terms of section 300 of the former Companies Act, became outdated and failed to cater for the needs of the modern-day business environment. It had several unsatisfactory aspects that defeated the purposes of business rescue".

The court went on to say corporate rescue, "Is seen as a measure that seeks to avoid the liquidation of a company and to preserve it in a solvent state for the benefit of the company's security holders and creditors including the company's workers, as well as the society in which it exists".[10] The advantage of this approach is that, "it seeks to cover the interests of all stakeholders who benefit from the existence of the entity concerned". Thus, the procedure aims to rescue the whole company or corporate entity. In other words, logic would require one to attempt to rescue a company before liquidating it.[11] Liquidation denotes a situation where decision makers decide to dissolve the company and strip its assets since the business of the company is no longer considered to be viable.[12]

[8] Jackson (n 5 above) 8.
[9] 1998 (1) ZLR 286 (HC) at p294.
[10] Jackson (n 5 above) 9.
[11] K Mpofu *"Exploring the novel concept of Business Rescue under the South African Companies Act 71 of 2008"* (Unpublished LLM dissertation, University of Venda), (2017) at 41.
[12] O Oluwadamilola "Corporate Debt Restructuring and the Global Harmonisation Process: Emerging Trends in Africa" (Unpublished PhD dissertation, University of Kent), (2018) at 56.

1.2 Problem statement

The preservation of jobs is historically acknowledged as one of the several economic and social benefits that could come out from a successful rescue of a business or a company.[13] It follows that this is a very important concept as companies are rescued as compared to being allowed to fold. The purpose is to avert the eventual failure of a company.

The problem statement is therefore to investigate the factors that affect the success of corporate rescue in Zimbabwe.

1.3 Research questions

The dissertation will raise and address the following questions:

- Are the current legislative provisions in place for the corporate rescue adequate?
- Is there any need for any statutory amendments to the law relating to corporate rescue?
- Have the courts been consistent in interpreting the law relating to corporate rescue as defined in s121(1)(b) of the Insolvency Act [Ch 6:07]?

1.4 Research objectives

The objective of this research is to explore the fundamentals of corporate rescue which is also known as business rescue as defined in the Insolvency Act [Ch 6:07]. The Insolvency Act 'hereinafter the Act' defines corporate rescue as , "Proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company, and of the management of its affairs, business and property and a temporary moratorium on the rights of claimants against the company or in respect of property in its possession and the

[13] A Loubser '*Some Comparative Aspects of Corporate Rescue in South African Company Law*' (Unpublished LLD dissertation, University of South Africa), (2010) at 51.

development and implementation, if approved, of a plan to rescue the company by restructuring its affairs".[14]

It is hoped that at the end of the research it will be established whether the safeguards in place are enough to see the procedure going through without any hindrance or there is a need to amend the Act. This is so given the significant role that companies play in the social and economic life of Zimbabwe. A lot of livelihoods are dependent on companies, as such they must keep on running. The folding of a single company can have devastating consequences for many people.

It is also hoped that this research will contribute to the current literature on corporate rescue in Zimbabwe. Very little research has been done specifically on this subject. It will also be established whether the Act has adequately provided enough safeguards for the success of the procedure and if not, what are the factors that are affecting the success of corporate rescue in Zimbabwe? Consequently, the research will also highlight current legislative shortcomings and recommend some reforms.

1.5 Research Methodology

The research is literature-based, involving an analysis of the relevant authoritative and persuasive sources of law on the topic that is legislation, case law, textbooks and journal articles. Works of notable academics and commentators on the topic will also be referred to. Further, the research will also involve a comparative analysis of the United Kingdom, South Africa and the United States of America. The purpose of a comparative analysis is to establish how the procedure has unfolded in those countries and what we can learn from others as a country. The comparative analysis will also assist in identifying areas, if any, where the current law may be improved.

1.6 Framework of the dissertation

[14] The Insolvency Act [Ch 6:07] Section 121(1)(b).

The dissertation will consist of five chapters.

Chapter 1 is the introduction. This chapter sets out the background to the concept of corporate rescue in Zimbabwe, the research problem, the research objectives as well as the research methodology.

Chapter 2 will provide an extensive historical development of corporate rescue. This chapter seeks to provide a full understanding of the original rationale behind the adoption of the concept. Judicial management as a concept will also be discussed and the reason that led to its abandonment in Zimbabwe.

Chapter 3 will explore the concept of business rescue in South Africa, United Kingdom and the United State of America. The application of the concept of judicial management in those countries will be fully explained in the chapter. The writer will also look at the various legislation in those countries coupled with a rundown of the major concepts of the concept.

Chapter 4 will sample a few companies that underwent or are undergoing business rescue in various jurisdictions. The reason for undergoing business rescue will be explored.

Chapter 5 will present the dissertation's main findings and recommendations for legislative reform. The findings will be informed by the research and the findings it is hoped, will assist in the body of literature on the subject matter.

CHAPTER 2
Historical overview of the development of corporate rescue proceedings in Zimbabwe

2.1 Introduction

To understand how corporate rescue came about it is important to first look at the concept of judicial management. This chapter will look at the way judicial management was introduced into our jurisdiction and why it was later discarded.

2.2 Definition by the courts

The Zimbabwean courts have defined the concept of judicial management in a number of judgements. Malaba J (As he then was) in the case of *Feigenbaum and Another v Germanis NO and Others*[15] defined judicial management as "…an extraordinary procedure made available to a company by the court in special circumstances and for statutorily prescribed purposes. It is only adopted when the court is satisfied that there is a reasonable possibility that, if placed under judicial management, a company which is unable to pay its debts will be able to do so in full, meet its obligations and become a successful concern". Sandura JA in the case of *Cosmos Cellular (Pvt) Ltd v PTC*[16] held that, "The objective of judicial management is to obviate a company being placed in liquidation if there is some reasonable probability that, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on". Thus, the primary purpose of judicial management was to rescue the company as a whole. Judicial management was provided for in the old Companies Act in section 300.

The procedure of judicial management was provided as an substitute to winding up in terms of Sections 299-314 of the Companies Act [Chapter 24:03]. The term was not defined in the old Companies Act. However, the concept means, "The management of a company by a person appointed by the Master of the High Court in terms of the provisions of the Companies Act, subject to the supervision of the High

[15] 1998 (1) ZLR 286 (H)
[16] 77/04 (ZHSC)

Court".[17] In the case of *Cosmos Cellular (Pvt) Ltd* v *Posts & Telecommunications Corporation* 2004 (2) ZLR 176 (S) at p 182, the Supreme Court stated that: "The object of judicial management is to obviate a company being placed in liquidation if there is some reasonable probability that, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on." With the passing of time, the concept of judicial management, which was in terms of s 300 of the old Companies Act, became obsolete and failed to meet the needs of the present-day business environment. It had several inadequate aspects that went against the purposes of business rescue.

In defining "judicial management", the court in *Fegenbaum and Another v Germanis NO and Others 1998(1) ZLR 286*, the court held that, "Judicial management is an extraordinary procedure made available to a company by the court in special circumstances and for statutory purposes. The procedure is only adopted when the court is satisfied, on the facts contained in the application, that there is a reasonable probability that if placed under judicial management, the company which is unable to pay its debts will be able to pay its debts in full, meet its obligations and become a successful concern".

2.3 Object of Judicial Management

In terms of section 300 of the old Companies Act, the object of judicial management was, "To avoid the drastic remedy of winding up when a company is in financial difficulties due to mismanagement or some other cause, but there is a reasonable probability that under more carefully controlled management it will surmount its difficulties".

2.4 Grounds for granting Judicial Management

In terms of section 300 of the old Companies Act, "The court could grant a provisional judicial management order in respect of a company on an application

[17] A Mugandiwa '*Judicial Management, Liquidation and Curatorship Processes Seminar'* The Institute of Chartered Accountants of Zimbabwe at 2.

referred to in paragraph (a) of subsection (1) of section two hundred and ninety-nine if it appeared to the court-

(i) That by reason of mismanagement or for any other cause the company is unable to pay its debts and has not become or is prevented from becoming a successful concern; and

(ii) That there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and

(iii) That it would be just and equitable to do so; or

(b) on an application referred to in paragraph (b) of section two hundred and ninety-nine, if it appears to the court that-

(i) if the company is placed under judicial management the grounds for its winding up may be removed and that it will become a successful concern; and

(ii) that it will be just and equitable to do so".

2.5 An outline of the steps that had to be followed

The Judicial Management Process as adopted from the old Companies Act [Chapter 24:03] was outlined as follows,

"Step 1- An application for judicial management is submitted to a High Court.

Step 2-The High Court grants a provisional order for judicial management.

Step 3-The Master of the High Court appoints a provisional judicial manager and holds separate meetings with the creditors, members and debenture holders if there are any.

Step 4-The provisional judicial manager takes over the management of the company and takes possession of the company's assets.

Step 5-At the meeting of the members, creditors and debenture holders, the provisional judicial manager reports fully on the financial situation and future prospects of the company. Thereafter, the meeting considers the report, decides on the desirability of placing the company in final judicial management and nominates a person as a judicial manager, and creditors prove their claims.

Step 6-On the return day of the provisional judicial management order, the court decides whether a final judicial management order should be granted, inter alia, taking into account the opinions of the creditors, or whether the company should rather be wound up.

Step 7-If a final judicial management order is granted, the court makes an order vesting the management of the company in the hands of the final judicial manager, subject to the supervision of the court.

Step 8-The final judicial manager takes over the management of the company inter alia, and investigates its affairs in the same manner as a liquidator would have done.

Step 9-When surplus funds become available, he distributes these among the creditors.

Step 10-In due course, the judicial manager could apply either for the cancellation of the judicial management order or for the winding up of (liquidation) of the company".

2.6 Who could approach the High Court?

According to the old Companies Act, a company, or creditors or its directors could make an application for a provisional judicial management order to the High Court. The court needed to be content that if the order is granted it would lead to the company's survival or part of its undertaking as a going concern. A going concern refers to, "An accounting concept connoting a business that is operational and sustainable in that it is expected to continue to operate for the foreseeable future".[18]

2.7 The Judicial Manager

A judicial manager was to a sick company what a doctor is to a patient and by accepting to be appointed into the office, the judicial manager held himself out to members and creditors of the company that he possessed not only the qualification

[18] D Davis "Business rescue proceedings and compromise" in W Geach, T Mongalo, D Butler, A Loubser, L Coetzee and D Burdette (ed) Companies and Other Business Structures in South Africa (2013) at 235.

onto his feet.[19] In *Millan N.O. v Smartland Huis Memerleersders Bpk Ltd 1972 (1) SA 741 (C) 744B* the court spelt out the objects of judicial management in a clear and lucid manner. It reads: "The objectives of a judicial management order are to postpone a liquidation of a company which is in difficulties and to provide a moratorium for the company for a period long enough to enable it to meet its obligations and to become a successful concern".

2.2.1. Duties of a Provisional Manager

The duties of the provisional were spelt out in section 303 of the old Companies Act in the following terms:

"A provisional judicial manager shall-

(a) Assume the management of the company and recover and take possession of all the assets of the company; and
(b) Within seven days after his appointment lodge with his Registrar, under cover of the prescribed form, a copy of his letter of appointment as a provisional judicial manager; and
(c) Prepare and lay before the meeting a report containing-
(i) An account of the general state of affairs of the company; and
(ii) A statement of the reasons why the company is unable to pay its debts or is probably unable to meet its obligations or has not become or, is prevented from becoming a successful concern; and
(iii) A statement of the assets and liabilities of the company; and
(iv) A complete list of creditors of the company, including contingent and prospective creditors, and of the amount and the nature of the claim of each creditor; and
(v) Particulars as to any source from which money has or is to be raised for the purposes of carrying on the business of the company; and
(vi) The considered opinion of the provisional judicial manager as to the prospects of the company becoming a successful concern and of the

[19] *Michelle Osvaldo Filanino vs Theresa Grimmel N.O. and Others HC* 7830/19.

removal of the facts or circumstances which prevent the company from becoming a successful concern".

Where the judicial manager entertained the view that he could not resuscitate the company after he had done his homework on the probabilities or otherwise of the company's life, he should hold meetings with its members as well as creditors and share his findings with, and recommendations, to them and define the correct path for them to follow.[20]

2.2.2 Concerns about Judicial Management

The purpose of judicial management as has been highlighted above was to transport a company out of the debt. It was, however, noted that several companies that were placed under judicial management in Zimbabwe failed to come out of the woods.[21] In terms of sections 199 to 300 of the old Companies Act, "It was the duty of the judicial manager to rehabilitate the company or to preserve part or all of its business as a going concern". Therefore, the Judicial Manager upon appointment would take control of the property of the company. During the whole period the company would be under judicial management, the judicial manager took control of the company and exercised all the powers of directors. For example, in the year 2015, Delma Lupepe, who was a major shareholder in the loss-making Bulawayo-based firm Merlin, made an allegation that the judicial manager Cecil Madondo of Tudor House was not telling the truth that the company was struggling to attract investors. And in the same year, Tetrad bank, which was under judicial management made an application to fire Winsley Militala who was its judicial manager for failing to comply with certain provisions of the Act.[22] He was being accused of allegedly availing a defective judicial management report to mislead creditors and shareholders.[23]

And in 2019, James Makamba made an appeal to the High Court requesting for the withdrawal of his investment vehicle Kestrel Corporation from judicial management after the manager reportedly failed to comply with a share purchase agreement.

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[20] *Michelle Osvaldo Filanino vs Theresa Grimmel N.O. and Others* HC 7830/19.
[21] M Chikono , '*Judicial Managers under fire'* The Zimbabwe Independent, September 17 2021.
[22] Chikono ibid (n 21 above).
[23] Judicial Managers under Fire available at https://www.pressreader.com (accessed on 26 June 2022).

Tichafa Mujuru, who is a major shareholder in National Blankets which was placed under judicial management stated that judicial manager fees were the last nail in the coffin. He also stated that, "The law gave the judicial managers too much power which removed transparency and accountability while demand for accountability by shareholders was viewed as interference".[24]

In the case of *Oakdene Square Properties (Pvt) Ltd and Others v Farm Bothasfontein Kyalami (Pty) Ltd and Others 2012 (3) SA 273* the court stated that judicial management has been termed a "spectacular failure" or "an abject failure". The major reason that led to its being dropped was the high standard of proof required for an order and the requirement that creditors' claims were to be paid "in full". It was also noted that, "Judicial Managers were appointed largely from practicing liquidators, many of whom lacked the mind-set of saving the company, invariably resulting in its liquidation. Judicial management also had a negative effect on the creditworthiness of the company, thereby undermining the financial assistance from financial institutions to recapitalize the company".

2.2.3 Further criticism

Other commentators have said that commented about it as follows, "Judicial management had several unsatisfactory aspects that defeated the purposes of business rescue. The procedure was regarded as an extraordinary remedy, which infringed on the rights of creditors and was only available under special and limited circumstances; it was a procedure only available to companies incorporated in terms of the Companies Act but was not available to other forms of business entities such as trusts, partnerships and private business corporations; the judicial management scheme was too formal and over regulated by the courts which made the procedure slow, costly and cumbersome; the requirements that had to be satisfied in an application for a judicial management order were onerous; there were defects in that, the old Act allowed an applicant to nominate a person to be appointed as a judicial manger".[25] Further, there was a complete lack of regulatory control over the qualifications of the judicial managers.[26] Hence, judicial management failed to

[24] Ibid
[25] T G Kasuso "Overview of the New Corporate Rescue Proceedings" available at https://www.businessweekly.co.zw (Accessed on 27 June 2022).
[26]Ibid Kasuso (n 25 above).

provide a mechanism for the management and reorganisation of companies with the purpose of returning them to profitability.

2.2.4 Some Case Law on Judicial Management

Liquidation or winding up may be defined as a legal process by which a company winds up or terminates its business.[27] The net effect of the procedure is that the assets are sold or disposed of in order to satisfy the creditor's claims.[28] The main reasons for liquidating a company may be that, "There might be a loss of the market for the company's products, the company may have failed to pay its taxes, the management of the company may have failed to execute their duties by under capitalising the business, excessive overheads and poor planning of the company's affairs and to end the overwhelming stress of continued trade and the harassment of creditors seeking payment".[29] The case law on judicial management dates back as far back as the fifties as evidenced by the case of *Ex Parte Lion Transport Co (Pvt) Ltd* [30] , in that case the court outlined which parties were entitled to apply for judicial management.

2.2.5 The Shagelok Chemicals case[31]

Initially the company applied for judicial management and the courts dismissed its application. It appealed to the Supreme Court but again its application was again dismissed. The company was the sole manufacturer of sodium silicate in Zimbabwe. The court held that there were no reasonable prospects of recovery and as such the creditors should not wait any longer. It was not in dispute that the company was in financial doldrums and the debts were building up every day. The fact that it had a monopoly on the market did not save it. The mismanagement had caused it to sink but I submit that business rescue could have saved it from folding because the market was there.

2.2.6 The Air Zimbabwe case

[27] R S Dzvimbo "Should the Zimbabwean Companies Act Move Away from Judicial Management and Adopt Businesss Rescue" (Unpublished LLM dissertation, University of Cape Town) (2013) at 54.
[28] Dzvimbo ibid (n 27 above) 54.
[29] Dzvimbo ibid (n 27 above) 54.
[30] 1954 SR 135.
[31] SC 1224/02.

The company experienced viability problems for some time despite it enjoying some monopoly over many years. Its workers applied to the courts for the airline to be placed under liquidation in the case of *National Airways Workers Union v The Minister of Transport, Communication and Infrastructure Development NO and Others*[32] the court granted the provisional judicial management after it was satisfied that the employees' claims were legitimate and *bona fide*. The government of Zimbabwe ended up assuming the debt of distressed company.

2.3.1 Some Criticism of Judicial Management

Criticism levelled against judicial management was that, it was too formal and overregulated, in that, "The procedure infringed upon the rights of creditors and was only available under special and limited circumstances. It was only available to companies incorporated in terms of the Companies Act and was not available to other forms of business entities such as partnerships and private business corporations".[33] Further, it was too formal and over-regulated, in that the procedure was rather costly.[34] The former Companies Act had some defects in the appointment and qualifications of judicial managers, for example, an applicant could nominate a person to be appointed as a judicial manager. Judicial management also failed to provide a mechanism for the management and reorganization of companies with a view to returning them to profitability. In some instances, it resulted in company failures and their winding up, thus at the end of the day affecting the economy of the country as a whole.[35] A genuine concern for the subsistence and well-being of those dependent upon an enterprise which may serve an entire town like Hwange Colliery is a key factor the law of insolvency needs to cater for. Liquidating a company may affect creditors, employees and whole communities. For example, when Mhangura Copper Company was liquidated the whole community of Mhangura was affected. These were some of the factors that led to the concept of corporate rescue being introduced. In the matter of *Powdrill v Watson 1995 (2) AC 394*, Lord

[32] HC 3783/12.
[33] *Oakdene Square Properties (Pvt) Ltd and Others v Farm Bothasfontein Kyalami (Pty) Ltd and Others 2012 (3) SA 273*
[34] The *Oakdene Square Properties case, supra* n 33.
[35] The *Oakdene Square Properties case, supra* n 33

Brown Wilkinson referred to a "rescue culture which seeks to preserve viable business".

The judicial managers were picked largely from practicing liquidators, many of whom did not have the mind-set of rescuing the Company, at most times resulting in its liquidation.[36]Judicial management had a negative effect on the credit worthiness of the company, thereby undermining financial assistance from financial institutions to recapitalise the company. It does not trigger a *concursus creditorum* as in the case of liquidation.[37]

2.4.1 The concept of Corporate Rescue

Section 121(1)(b) of the Insolvency Act defines corporate rescue in the following terms:

"(*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, 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 … ."

In terms of s 121(1)(b) of the Insolvency Act, "The test to be applied when assessing if a company should be placed under corporate rescue is whether or not the company is financially distressed. The exercise involves an objective

[36] Richard Bradstreet 2010 SA Merc LJ 195 at 207. The learned author regards the business practitioner as the "weakest link" for creditors in a business rescue proceeding, at 211.
[37] ***C.C.A. Little & Sons v Niven N.O.* 1965 (3) SA 517** (S.R., A.D.) at 520.

test, wherein the court is called upon to look at all the financial circumstances of the company including its ability to meet its obligations as they fall due".

Section 121(1)(f) of the Insolvency Act defines the term "financially distressed" as follows:

"(*f*) 'financially distressed', in reference to a particular company at any particular time, means that —

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months …".

As a result of the stated weaknesses, the concept of corporate rescue was introduced.

2.4.2 Brief History of the concept of corporate rescue

The notion of corporate rescue, also known as business rescue was brought to Zimbabwe in 2018, by the Insolvency Act [Chapter 6:07]. One of the major aims of the notion was to dump judicial management, which had dismally failed to achieve the wanted results in turning around troubled companies. The Insolvency Act replaced judicial management as a business rescue strategy with corporate rescue proceedings. The insolvency and restructuring of companies in Zimbabwe is governed by the Insolvency Act [Chapter 6:07] as read with the Companies and Other Business Entities Act [Chapter 24:04]. Traditionally, under the repealed Insolvency Act [Chapter 6:04] and the old Companies Act [Chapter 23:04], the Zimbabwean laws were characterized as being debtor-friendly.[38] However, the current Insolvency Act, which came into force on 25 June 2018, strikes a balance between the competing interests of creditors and debtors and the need to save commercial enterprises beset with some temporary setbacks which would if granted a moratorium, be able to

[38] P Mwandura and A Mugandiwa "Restructuring and Insolvency Laws and Regulations Zimbabwe 2022" available at www.//iclg.com (accessed on 26 June 2022).

overcome their difficulties.[39] The company's board or the shareholders can take a decision to commence corporate rescue proceedings.[40] Since the practitioner is in control of the rescue process, it is argued that the success of the business procedure will be heavily dependent on the personal attributes of the practitioner in any given case and that inadequate protection for creditors in this regard will undermine the effectiveness of the procedure in furthering the purposes of the Companies and Other Business Entities Act.[41]

The idea behind business rescue, therefore is, "An appreciation of the necessity to intervene at an early stage when a company is facing financial difficulties, but is not yet insolvent, with the sole objective of wanting to salvage, save or rescue it from certain downfall. A business rescue process can be initiated by various interested parties including trade unions, creditors the board and shareholders".[42] The term rescue is meant the reorganization of the company to avoid liquidation and restore it to a profitable entity.[43] The whole economy suffers when a company closes shop. The law on corporate rescue avails an opportunity for a company to be successfully rescued or turned around.[44] The end result is that creditors will get paid, jobs will not be lost and the company will be able to pay taxes to the revenue authorities.[45]

Levenstein (2015) makes a profound statement by saying, "Not all companies are suitable for business rescue. Much will depend on the cause of the company's financial distress. In some cases, a business rescue may be a prohibitively expensive process for a company to adopt. It might be that a straightforward sale of its business to an interested purchaser would be a quicker, more effective and less expensive option. It should be noted further that a business rescue does not always entail a complete recovery of the company in the sense that after the procedure, the company will have regained its solvency, its business will have been restored and its

[39] www.//iclg.com Restructuring and Insolvency Laws and Regulations Zimbabwe 2022 By Pauline Mwandura and Andrew Mugandiwa (Accessed on 26 June 2022).
[40] Section 122(1) of the Insolvency Act.
[41] Bradstreet, R. "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders Willingness and the Growth of the Economy South" (2010) Volume 22 *South African Mercantile Law Journal* at 195.
[42] E Levenstein "An appraisal of the new South African business rescue procedure" (Unpublished LLD dissertation, University of Pretoria), (2015) p263.
[43] Ibid Levenstein (n 42 above) 278.
[44] Levenstein "Sink or Swim? Business Rescue the Art of Treading Water" (7 March 2012) without prejudice 14-15.
[45] Levenstein (n 42 above) 278.

creditors repaid. While this may be an ideal outcome, it is seldom attainable".[46] Thus, it is submitted that not all corporate rescue proceedings produce a favourable outcome. In the United Kingdom, for example, just 10 percent of businesses going into Administration successfully come through the process.[47]

2.4.3 Some advantages of corporate rescue

One of the many advantages of a successful corporate rescue is that, "it prevents or limits job losses, having a successful and effective corporate rescue regime or procedure is thus of great importance to the economic growth and stability of a country".[48] Despite calling the procedure "business rescue proceedings", thereby insinuating that it concerns the rescue of a company's business (or part of its business), it is explicit from the definition that the major purpose of the proceedings is to save the company as a whole.[49] In the matter of *Antoinie Welman v Maecelle Props* [50] the court held that, "In my view, business rescue proceedings are not for the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which given time will be rescued and become solvent". It is submitted that there must be hope for the revival of the company. Where there is no prospect of the company becoming solvent again then corporate rescue may not be the best solution. The aim of corporate rescue, therefore, is: "To allow for the supervision of the company by the business rescue practitioner with the objective of either rescuing the company or allowing it to trade out of its financial predicament, or to offer a better dividend to creditors than would otherwise be achieved by way of liquidation".[51]

As indicated above, with time judicial management became obsolete and dismally failed to cater for the needs of the modern-day company.[52] There were so many aspects that were unsatisfactory about the whole procedure. Corporate rescue on the other hand seeks to avoid the liquidation of the company thereby preserving the

[46] Levenstein (n 42 above) 783.
[47] 'Administrations mostly ineffective, two thirds of UK businesses fail' available at https://www.consultancy.uk (accessed on 31 July 2022)
[48] Loubser (n 13 above) 2,
[49] Loubser (n 13 above) 45.
[50] 193 CC 2012 JDR 0408 (GSJ) 12 at para 28.
[51] J Rushworth "A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008" (2010) *Acta Juridica* at 375.
[52] *Oakdene Square Properties case* 273

company including its workers, as well as the society in which the company exists. The corporate rescue regime is broader than the judicial management regime.

Other commentators have claimed that, "The change from judicial management to business rescue was influenced by a number of issues, which included the stigma attached to entities under judicial management as unrehabilitated insolvents and the contention that such proceedings would be initiated to wind up such entities and liquidate".[53] The major benefit derived from commencing the corporate rescue proceedings is the deferral extended to financially distressed entities in respect of legal proceedings, including the enforcement against property owned by the company.[54] The Master of the High Court, Eldard Mutasa outlined the entire corporate rescue strategy as follows, "It is entirely an effective system in terms of the law whereby we are now having to focus on what can be done to rescue a company facing closure through focusing on several provisions of the law and in line with the second republic's vision of embracing productivity in all sectors of the economy"[55] There must be a "reasonable probability" that in the event that the company is placed under corporate rescue, it will be able to pay its debts and meet its obligations.[56]

It is apparent that in introducing the **Part XXIII** corporate rescue procedure in our law the legislature transplanted the South African Chapter 6 business rescue provisions in the South African Companies Act 71 of 2008.[57] The rehabilitative process is achieved through three processes, which are, namely: Management displacement by the assumption of control by the corporate rescue practitioner in place of the board of directors[58], a temporary moratorium on the rights of claimants[59] and the development and implementation of a corporate rescue plan.[60]

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[53] F Chimwamurombe and L Gona "Corporate rescue in Zimbabwe: The legal framework" available at https://www.businesstimes.co.zw (accessed on 26 June 2022)
[54] Chimwamurombe and Gona ibid (n 53 above).
[55] Zimbabwe rolls out a corporate rescue strategy for distressed firms on May 28, 2022 available on https://thezimbabwemail.com (accessed on 26 June 2022)
[56] Non-insolvency procedures in Zimbabwe available at https://www.dlapiperrealworld.com (accessed on 26 June 2022)
[57] T Manhombo A Basic Guide to Voluntary Rescue in Zimbabwe https://tanyaradzwamanhombo.wixsite.com (accessed on 27 June 2022).
[58] Section 121(1)(b((i) of the Insolvency Act.
[59] Section 121(1)(b)(ii) of the Insolvency Act
[60] Section 121(1)(b)(iii) of the Insolvency Act.

2.4.4 What does the term rehabilitation mean?

The term 'rehabilitation' is not defined in the Insolvency Act. Therefore, it can be argued that 'rehabilitation' within the context of corporate rescue means either a return of a financially distressed company to normalcy or, where that is possible, a better return to creditors or shareholders that they would hope to get under liquidation.[61] In the matter of "*Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another 2011 (5) SA 600 (WCC)"*, the court pointed out that, "…business rescue proceedings reflect a legitimate preference for proceedings aimed at the restoration of viable companies rather than their destruction. That is so because corporate rescue is in line with the modern trends of corporate regimes. The advantage of corporate rescue is that it tries to balances and secures the competing interests of creditors, shareholders and employees. It also makes a paradigm shift from having regard to creditors' interests only. And it is predicated on the belief that to preserve a business, the experience and skills of employees might in the end prove to be a better option for creditors. Lastly, it enables the creditors to secure a better recovery of their debts from debtors". This procedure is generally available to a category of persons known as 'affected persons' who can either be a shareholder, creditor, trade union or an unrepresented employee.[62]

2.4.5 Voluntary Corporate Rescue

The following quotation best summarises the rationale for voluntary corporate rescue, "The procedure (voluntary corporate rescue) is thus faster, simpler and much less expensive to commence than judicial management. It also allows the board of directors to act immediately once they realise that the company is heading for insolvency and needs the protection and the breathing space that business rescue proceedings will provide, during which rescue of the company or its business can be attempted"[63]

In the matter of "*Koen and Another v Wedgewood Village Golf and Country Estate (Pvt) Ltd and Others 2012 (2) SA 378 (WCC)"*, the court stated that " Business rescue

[61] Section121 (1)(b)(iii) of the Insolvency Act.
[62] Section 121(1)(a)(i)-(iii) of the Insolvency Act.
[63] Loubser (n 13 above) 51.

is intended to serve the public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation".

The corporate rescue proceedings are more flexible and company friendly than judicial management and their purpose is to facilitate the continued existence of a company in a state of solvency and to facilitate a better return on shareholders' income. However, the board must be properly constituted and the resolution must be passed in compliance with the legal thresholds.[64] Within five days after adopting and filing a resolution a company is required to publish a notice of the resolution to all affected persons.[65] The same notice must include a sworn statement detailing the grounds upon which the said resolution was based.[66]

2.4.6 Reasonable Prospect for Rescuing the Company

There should be a "reasonable prospect for rescuing the company". Eloff AJ in the unreported case of "***Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Limited and*** *Others"* in the Western Cape High Court under case number **15155/2011** held that the phrase "reasonable prospect" indicates that "something less is required than that the recovery should be a reasonable probability. If the facts indicate a reasonable **possibility** of a company being rescued, a court may exercise its discretion in favour of granting an order contemplated by the Act".[67] Anneli Loubser expressed the view that it would be "disastrous for the new procedure if the same high threshold test used for a judicial management order of 'reasonable probability' is to apply to this provision".[68] The philosophy underlining the grant of a business rescue order contemplates that the court cannot "second guess" the rescue plan which will ultimately be approved by the creditors' meetings.

The common philosophy running through the business rescue provisions is the realisation of the value of the *business* as a going concern rather than the juristic person itself. Hence the name "**business** rescue" and not "**company** rescue". This is in concert with the present day trends in rescue regimes. It attempts to secure

[64] Section 204 of the Companies and Other Business Entities Act [Chapter 24:31]
[65] Section 122(3)(a) of the Insolvency Act
[66] Section 122(3)(a) of the Insolvency Act.
[67] *Oakdene Square Properties* case 273.
[68] Loubser (n 13 above) 50.

and balance the opposing interests of creditors, shareholders and employees. It abridges a shift from creditors' interests to a broader range of interests. The thinking is that preserving the business coupled with the experience and skill of its employers may, in the end, prove to be a better option for creditors in securing full recovery from the debtor. Therefore, the purpose of corporate rescue is, "To avert the eventual failure of a company and to achieve the above objectives. The only acceptable outcome, at the end, is the survival of the financially distressed company".

2.4.7 Successful business rescue

Successful rescue provisions have taken various forms. Anthony Smit mentions some of the various forms such provisions can take: "On the one extreme end of the spectrum is the view that a corporate rescue is only successful if the corporation itself is saved, not merely the business and jobs of the corporation. In other words, the current shareholders continue their control of the business with some form of debt restructuring. An example would be the confirmation of a plan of reorganisation under Chapter 11 of the United States Bankruptcy Code where the debtor remains in control of the whole business after confirmation. Another example of a successful rescue may be the sale of the entire business to a third party thereby preserving the ongoing enterprise, but allowing the debtor corporation to slip into liquidation. Still, others will argue that a successful rescue is one which results in creditors receiving more than they would have done under a liquidation. A final example would be the successful continuation of the business enterprise and the preservation of jobs, with little or no emphasis on creditor recovery as is the case in France."[69]

In the case of "*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 at 13" the court said: "The primary aim of a corporate rescue procedure is not merely to rescue a company business or potentially successful parts of the business. The procedure aims to rescue the whole company or corporate entity. This will naturally include the preservation of jobs. Indeed, one of the main drivers for the introduction of the business rescue regime in place of the system of judicial management was the rescue of an ailing business and thus the retention of jobs".

[69] A Smits, "Corporate Administration: A Proposed Model" (1999) *De Jure* p 84.

This lustre on the purpose of the business rescue provisions is captured by Prof. Anneli Loubser and Mr Tronel Joubert as follows: "The preservation of jobs is widely regarded as one of the many economic and social benefits that could result from the successful rescue of a company or business … the saving of jobs is a high priority for South Africa and the introduction of an effective and successful business rescue procedure was seen by the government as an important measure to prevent further job losses. As was to be expected, the protection of the rights and interests of employees in the new business rescue proceedings were emphasised from the early stages of the corporate law reform process. It became evident that employees were to be regarded as stakeholders in a class of their own. In the Memorandum on the Objects of the Companies Bill 2008, it was stated that the new *Chapter 6* 'recognises the interests of shareholders, creditors and employees. The rest of this part of the document then continued by referring only to the protection of the interests of workers with no further mention of either the creditors or shareholders". It is submitted that the above quotation applies with equal measure to Zimbabwe. As a result of these developments, the Legislature enacted the new Insolvency Act with the new concept of corporate rescue procedures.

The court in "*Southern Palace Investments 265 (Pty) Ltd* v *Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 WCC" created a checklist to be used before a court grants a corporate rescue application. In that case, it was stated that, "The court needs to consider the following: 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. The second part of the financial distress investigation deals with insolvency. A company is regarded as technically insolvent (and thus financially distressed) if the liabilities of the company exceed the assets. A 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".

2.4.8 Indicators of Financial Depression

In the case of *Metallon Gold* SC107/21, it was held that "The court will have a basis to conclude that a company is financially distressed, especially in a situation where a company is unable to pay salaries to its employees, trade creditors, and regulatory authorities such as the National Social Security Authority 'NSSA' and the Zimbabwe Revenue Authority 'ZIMRA'. Failure to pay statutory obligations such as pensions and

the Mining Industry Pension Fund 'MIPF' in the case of mining companies is also an indicator that a company is in financial distress. Other indicators include failure to pay electricity bills, water bills, and professional membership fees for senior employees, and insurance policies. Thus, financial distress is associated with liquidity problems. A company will be regarded as being in financial distress where it is insolvent after all other circumstances have been considered, including considering alternative fair values of the assets and liabilities, factoring in reasonably foreseeable assets and liabilities, as well as considering any other proposed measures taken by management such as subordination agreements, recapitalisation or letters of support".

2.5.1 Corporate Rescue Practitioner

Corporate rescue is carried out under the guidance of an appointed corporate rescue practitioner who manages the company's affairs and business, in terms of an approved corporate rescue plan. The ultimate aim is to assist a company trade out of its financially distressed circumstances. Thus, as soon as corporate rescue proceedings kick-in, there is an automatic and general suspension on legal proceedings or executions against the company, its property, assets and on the exercise of the rights of creditors of the company.[70]

If a company is in financial die straights but there appear to be good prospects that, with time, the company will be able to wriggle out of the financially distressed circumstances, then corporate rescue should be attempted and it should be commenced at the first signs of financial distress. Directors' ought to be frank with the affairs of the company – failure to start corporate rescue when it is clear that the company is financially distressed may be construed as reckless trading and the directors may be held personally liable, for payment of any damages or criminally prosecuted under the Companies and Other Business Entities Act [Chapter 24:31], or under section 117 of the Insolvency Act should the company be put under liquidation.

2.5.2 What does corporate rescue aim to achieve?

Although the various aims of corporate rescue are not clearly defined in the Act, it can be gleaned that it aims to bring back to life distressed companies, saving them from vanishing which would have been otherwise be the fate should the company have gone through liquidation. Clearly speaking, corporate rescue intends to give distressed companies a second chance at continuing to trade. The South African

[70] B Moyo ***"Corporate Rescue Proceedings in Zimbabwe under the Insolvency Act [Chapter 6:07]" available at*** https://www.lexamicuszw.wordpress.com **(accessed 26 July 2022).**

Courts articulated the purpose of corporate rescue in the case of "***Absa Bank Limited vs Caine No and Another"***[71] where it was held that; "*Business rescue proceedings are much more flexible and financially distressed company friendly than judicial management". The potential business rescue plan provided for in ss 128(1)(b)(iii) has two objects in mind, "The primary object being to facilitate the continued existence of the company in a state of solvency and secondly and in the alternative, in the event that the primary objective cannot be achieved or appears not to be viable, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation".*

It is important to highlight that the reference and definition of 'financial distress' in the Act appear to be more focused on the future. The provisions in the Act on corporate rescue, therefore, address questions of probable insolvency as opposed to immediate insolvency. The implication is that corporate rescue proceedings cannot be applied to save companies that are already insolvent.

2.5.3 Qualifications to be appointed as a Corporate Rescue Practitioner

A person may be appointed as a Corporate Rescue Practitioner only if,"

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 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".

It is clear from the above key elements of the statute that the, "Corporate rescue practitioner must not have a relationship with the company such as would lead a

[71] 2014 ZAF SCH 48.

reasonable person to conclude that the integrity, impartiality and objectivity of the corporate rescue practitioner is compromised by that relationship".

According to the Estate Administrators Act [Ch 27:20], as amended in 2018, the below listed people qualify as Insolvency Practitioners: Registered legal practitioners, Registered public accountants or public auditors, a member of the Institute of Chartered Secretaries and Administrators of Zimbabwe, or any related field the (Estate Administrators) council may consider. When a company is under reconstruction some key stakeholders such as banks, customers or suppliers, as part of their risk mitigation measures may not be willing to do business with it and that may affect the success of the turnaround.[72] It appears corporate rescue in Zimbabwe is dominated by accountants with legal practitioners developing interest in the last few years.[73]

2.5.4. Powers of a corporate rescue practitioner

During a company's corporate rescue proceedings, the corporate rescue practitioner shall have the following powers,"

a) has full management control of the company in substitution for its board and pre-existing management which is dissolved in terms of the provisions of section 130(2);
b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;
c) may appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (3);
d) Is responsible for-

    (i) Developing a corporate rescue plan to be considered by affected persons;
    (ii) Implementing any corporate rescue plan that has been adopted"[74].

2.5.6 Duties of the Corporate Rescue Practitioner.

The corporate rescue practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under corporate

[72] G Hofisi, "*Factors influencing corporate rescue",* The Herald Newspaper (Harare), 20 August 2020.
[73] Hofisi ibid (n 72 above).
[74]

rescue and of his or her appointment.[75] The corporate rescue practitioner may not except with the approval of the Court appoint a person as part of the management of the company, or an advisor to the company if that person-

a) Has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or
b) Is an associate of a person who has a relationship contemplated in the above paragraph.

It is pertinent to note that during a company's corporate rescue proceedings, the corporate rescue practitioner is an officer of the court, and must report to the Court in accordance with any applicable rules of, or orders made by the Court, has the responsibilities, duties and liabilities of a director of the company and other.[76]

2.5.7 Corporate Rescue Practitioner's remuneration.

A corporate rescue practitioner is entitled to remuneration for his/her services. He can charge his fees in terms of the scale provided for on the Act.[77] A corporate rescue practitioner may agree on an agreement with the company providing for further remuneration as a contingency fee.[78] Once the remuneration agreement is approved by the creditors and shareholders it becomes binding on the company.

2.5.8. Removal of a Corporate Rescue Practitioner

A corporate rescue practitioner must be accountable and may only be removed by the Master of the High Court, a court order or upon a request by an affected party. In terms of section 132(1) of the Insolvency Act, grounds upon which a corporate rescue practitioner may be removed are listed and these are: By a court order in terms of section 123[79] or by the Master.[80]

"The court upon request of an affected person or on its own motion may remove a corporate rescue practitioner from office on any of the following grounds:

(a) Incompetence or failure to perform the duties of a corporate rescue practitioner of the particular company;

[75] Section 133(2) of the Insolvency Act.
[76] Section 133(4)(a) and (b) of the Insolvency Act.
[77] Second Schedule, item 1.
[78] Ibid Section 2.
[79] Section 131(1) of the Insolvency Act.
[80] Section 132(c) of the Insolvency Act.

(b) Failure to exercise the proper degree of care in the performance of the corporate rescue practitioners' functions;
(c) Engaging in illegal acts or conduct;
(d) Conflict of interest or lack of independence;
(e) The corporate rescue practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.[81] The company, or the creditor who nominated the corporate rescue practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 123(1)(b) to set aside that new appointment".[82]

The courts do not take lightly the removal of a corporate rescue practitioner due to the subtlety of the nature of corporate rescue proceedings. In the case of "*Kurt Robert Knoop and Another v Chetaali Gupta and Another"*[83] the court held that, "The discretion is exercisable if one or more of the grounds set out in the Act have been established on a balance of probabilities. Two general principles will be that removal is not something to be ordered lightly and that the primary reason justifying removal will be actual or potential prejudice or harm to the interests of the company, and those in whose interests the administration was established, creditors in circumstances of insolvency".

2.5.9 The Downside of corporate rescue in Zimbabwe

Most of the work performed by corporate rescue practitioners is specialist in nature in that it involves strategic business management, legal trouble-shooting and financial trouble-shooting as well. An individual corporate rescuer does not ordinarily possess such skills that a board may have. Zimbabwe institutions of higher learning have not started training these professionals.

Corporate rescue practitioners are usually under heavy pressure to turn around and leave the company. Such pressures usually emanate from the creditors, employees or shareholders. There are some allegations that some practitioners may try to prolong their stay as a way of earning more fees whereas there are also allegations that the short timelines may be untenable.[84]

[81] Section 132(2)(a to f).
[82] Section 132(3) of the Insolvency Act.
[83] 116/2020 ZASCA 163.
[84] Hofisi (n 72 above).

2.6.1 Is there a specific point at which a company must commence restructuring or insolvency proceedings?

Our law does not prescribe a specific point at which a company must commence restructuring or insolvency proceedings.[85] However, the directors and managers that are in financial distress have the following duties in terms of sections 54, 55, 57 and 195 of the Companies and Other Business Entities Act: a duty of care and business judgement rule; a duty of loyalty; a duty to disclose conflict of interest and a duty to act in good faith. In the event that a company is placed under corporate rescue proceedings, the directors/managers are enjoined to serve the corporate rescue practitioner with all the information about the company's affairs as may reasonably be required.

2.6.2 Effects of placing a company under the corporate rescue regime

Where corporate rescue proceedings or the liquidation procedures have commenced section 20 as read with section 126 of the Insolvency Act, imposes a general moratorium on all legal proceedings including enforcement action against the company, except, "With the written consent of the practitioner, with the leave of the court and in accordance with any terms the court considers suitable, as a set-off against any claim made by the company in any legal proceedings, criminal proceedings against the company or any of its directors or officers; proceedings concerning any property or right over which the company exercises the powers of a trustee or proceedings by a regulatory authority in the execution of its duties after written notification to the corporate rescue practitioner". It is, however, pertinent to note that, at any time prior to the adoption of a corporate rescue plan an affected person has the right to make an application to the court to either set aside a resolution to commence corporate rescue proceedings or the appointment of a corporate rescue practitioner.[86]

2.6.3 Difference between Corporate Rescue and Liquidation

The purpose of liquidation proceedings is to shut the company down, settle creditors' claims and dispose of the company's assets. Whatever is realised from the sale of the assets is used to pay the company creditor. On the other hand, the purpose of business rescue is to rehabilitate distressed companies to avoid them closing down. The idea of rehabilitation makes business rescue a more attractive

[85] Mwandura and Mugandiwa (n 38 above).
[86] Section 123(1)(a) and (b) of the Insolvency Act.

option to most businesses. However, there is an interplay between the two options.[87] It is important to note that, in the event that liquidation proceedings have commenced, an application to the court for corporate rescue would suspend the liquidation proceedings.[88] In the event that business rescue fails to resuscitate the company, liquidation proceedings may be commenced to serve the interests of creditors. Where there is a chance of the company being rescued, the business rescue option is a better option.

2.7.1 Conclusion

Corporate rescue proceedings are initiated to enable or initiate the rehabilitation of a company that is financially distraught.[89] The rehabilitation is achieved through, "The temporary supervision of the company and of the management of its affairs, business and property; temporary moratorium on the rights of claimants against the company or in respect of property in its possession and the development and implementation, if approved, of a plan to rescue the company". That is done by reorganising its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the company continuing in existence on a solvent basis. If that is not possible for the company to continue in existence, resulting in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the said company. The procedures of commencing corporate rescue are two; the board of a company or its shareholders or its shareholders can take a resolution to institute corporate rescue proceedings or is through an application to the court for an order commencing corporate rescue proceedings. The moratorium in terms of section 126(1) of the Insolvency Act is automatic and comes into effect on the commencement of the proceedings. During the proceedings, a company can only dispose-of its assets as directed in section 127(1) of the Insolvency Act. During corporate rescue proceedings, the Board of Directors is deemed to be dissolved and the directors can no longer exercise their functions. The corporate rescue practitioner draws a corporate rescue plan in

[87] T Kachara "*The Fundamentals of corporate rescue proceedings in Zimbabwe In Insolvency and Business Restructuring*" Zimbabwe LEXAfrica available https://www.lexafrica.com (accessed on 26 June 2022)
[88] Section 124(6) of the Insolvency Act.
[89] Section 121 (1)(b) of the Insolvency Act.

consultation with creditors, affected persons and the company management showing how the company will be rescued. In terms of section 143(1) of the Act, the plan must be approved by creditors and shareholders at a meeting convened in terms of section 143(1) of the Insolvency Act. Corporate rescue proceedings are terminated through a court order, the filing of a notice of termination with the Master and by rejection or substandard implementation of a corporate rescue plan. It is submitted that the proceedings are a massive shift from judicial management and they can achieve their intended purpose.

CHAPTER 3

A general look at the concept of business rescue in South Africa, the United Kingdom and the United States of America.

3.1. Introduction

This chapter will look at the concept of business rescue in South Africa, the United Kingdom and the United States of America. By rescue is meant simply a reorganisation of the company to take it back to a profitable entity and thus avoid liquidation.[90] In the United States of America the concept is based on the Chapter 11 of the US Bankruptcy Reform Act 1978.[91] That Act focuses on reorganizing companies that are in financial difficulties and combines it with an automatic moratorium. The main purpose of a business rescue or reoganisation is to avert a debtor from sliding into liquidation with the resultant loss of jobs and a possible misuse of economic resources.[92] The courts have recognized that the closure of companies affects the economy and society as a whole. In the case of "*Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others"*[93] the court held that, "It is clear that the legislature has recognized that the liquidation of companies more frequently than not occasions significant collateral damage both economically and socially, with attendant destruction of wealth and livelihoods". In the United Kingdom the development of the concept is largely based on the recommendations of the Cork Report.

3.2. South Africa

The South African Companies Act introduced a new business rescue regime whose purpose is to facilitate and rehabilitate or reorganize a company that is in financial distress. Rescue has been defined as a major intervention necessary to avert the eventual failure of a company.[94]

Section 128(1)(b) of the Act defines a 'business rescue' as follows:

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[90] F Cassim, et al, *Contemporary Company Law*, (2012) at 861.
[91] 11 USC 1978.
[92] *NLRB v Bildisco* 465 US 513 (1983) 528.
[93] 2012 (3) SA 378 (WCC) para 14.
[94] FHI Cassim '*Business Rescue and Compromises'* in Havenga et al South African Corporate Business Administration (Original Service 1995, Revision Service 18)

"Proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

i. The temporary supervision of the company, and of the management of its affairs, business and property;
ii. A temporary moratorium on the rights of claimants against the company or in respect of property in its possession, and
iii. The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes 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".

The company must be saved as a going concern and if that is not possible, the company must be restructured so as to produce a return for the company's creditors or shareholders.[95]

3.3 Swart v Beagles[96]

This was the first business rescue case in South Africa.[97] In that case, the applicant approached the court seeking to place the company under business rescue as a result of failure to pay its debts and fulfilling its financial obligations. The company also alleged that it was labouring under financial distress. The creditors opposed that application on the basis that, there were no reasonable prospects of success and the company had taken the route of business rescue as a way of escaping its financial obligations. The court held that, despite being in financial trouble, the applicant had not done anything to improve its situation by for example selling its assets to raise the required capital. The court went on to say that the interests of the creditors must be upheld when they are weighed up against the interests of the company. The court went on to decline the application for business rescue. This case

[95] Cassim (n 90) 864.
[96] 2011 (5) SA 422.
[97] Dzvimbo (n 27 above) p61.

is an example that, a *mala fide* application is not likely be entertained by the courts.[98]

3.4 Corporate Failure

It is an accepted fact of life that corporations can fail in the course of a business's life. A business is therefore expected to compete with its competitors if it entertains any chances of survival and if it cannot, then it must be prepared to leave the market.[99] However, failure also provides a good opportunity for business resources to be allocated. The reality is that corporate failures do happen, although painful, they are a common feature of a market economy and must not give rise to legislative interventions all the time.[100] However, corporate failure must be avoided as it has several consequences which may include, "Increasing unemployment by throwing workers into the labour market, increasing the level of poverty, depriving people, especially creditors, of their legitimate dues as well as potentially intensifying the crime rate and contributing to a reduction in the volume of tax earnings".[101] Such devastating effects makes it imperative to have an efficient and effective corporate insolvency law a necessity.[102] Mismanagement and unmarketable products precipitates corporate failure most of the time and this may lead to a drop in sales over several years and eventually insolvency.[103]

Corporate failure can be gleaned from, "The inability of a corporate organisation to achieve its strategic aim of growth and development, to attain its economic and financial objectives as well as legal obligations. It can also be gleaned from a managerial point of view such that there are irreconcilable disputes between leading stakeholders resulting in a managerial deadlock and where there has been failure of substratum in terms of underlying business objective".[104]

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[98] Dzvairo p61.
[99] F C Too "*A Comparative Analysis Of Corporate Insolvency Laws: Which Is The Best Option For Kenya?*" (Unpublished PhD dissertation, Nottingham Trent University), (2015) at 15.
[100] Resolution through the lens of corporate restructuring available at https://www.bankofengland.co.uc (accessed on 29 July 2022).
[101] D O Mbat and E I Eyo "Corporate Failure: Causes and Remedies" (2013) 2 Business and Management Research 4.
[102] Too (n 99 above) at 16.
[103] Mbat and Eyo (Note 85 above) at 16.
[104] Too (Note 86) above at 17.

3.5 Financial distress

A company that is financially distressed is, "A company that appears to be reasonably unlikely to be able to pay all its debts as they become due and payable within the immediately ensuing six months or a company that appears to be reasonably likely to become insolvent within the immediately ensuing six months".[105] The root of the financial distress is a liquidity problem or the inability to pay debts. Thus, the company will be failing to meet its obligations in the near future. The word "appears" means that the company is not at this stage in a state of insolvency but it is on the verge of getting into insolvency or it is experiencing some liquidity challenges. There must be a reasonable prospect of resuscitating the company. Business rescue proceedings replaced judicial management. Other authors have said that, distress describes a moment of despair which is an indicator that the company is having some challenges.[106]

Even though the definition makes reference to the rehabilitation of a company that is financially distressed, this is not the sole (or always) a necessity for the beginning of business rescue proceedings.[107] The main purpose of the proceedings is to rescue the company as a whole. The second possible outcome of a rescue plan, which is better return for creditors or shareholders is on all fours with second stated object of the administration procedure in English law.[108] What is interesting to note is that the shareholders play no role in business rescue proceedings and any benefits that accrue to them as a result of a successful rescue of the company will be purely incidental.[109] Insolvency is by and large a term which is used to describe an end result and is a pure reflection of what would have happened to the company.[110]

3.6. Initiation of business rescue proceedings

[105] Section 128(1)(f).
[106] J M Wood "*Corporate Rescue: A Critical Analysis of its Fundamentals and Existence*" (Unpublished PhD dissertation, The University of Leeds), (2013) at 28.
[107] Loubser (n 13 above) 45.
[108] Loubser (n 13 above) 45.
[109] A Loubser, "The role of shareholders during corporate rescue proceedings: always on the outside looking in?" (2008) Volume 20 *South African Mercantile Law Journa*l at 387-388.
[110] Hofisi (n 84 above) at 28.

The Companies Act of 2008 lays out two ways of starting off business rescue proceedings, which can be by the board of directors or an order of the court.[111] The idea behind business rescue proceedings is to return a company to a profitable entity and to avoid liquidation.[112] There are three stages during the business rescue process and these are, "The temporary supervision of the company's affairs, the temporary moratorium on claims and proceedings against the company and the development and the implementation of a business rescue plan".[113]

3.7. Resolution by the board

It is the board of a company that can take a resolution to initiate business rescue proceedings voluntarily.[114]The court is not involved at this stage. Loubser (2008) says that this procedure is very simple, fast and less expensive to initiate than judicial management. It also allows the company board the opportunity to act immediately and swiftly once it is realised that the company is heading towards insolvency and requires protection and the breathing space that the process of business rescue proceedings will provide.[115]

3.8 Application to court

The court application can be initiated by any affected person, who can be, "A shareholder, a creditor, any registered trade union representing employees of the company (or his representative) who is not represented by a registered trade union".[116] It is clear therefore that the company directors or the company can apply to court. The affected person can apply at any time to the court and this may even be possible even if the company is under liquidation proceedings.[117] The applicant is required to serve a copy of the application on the company and the Companies

[111] Sections 129 and 131 respectively.
[112] Business Rescue Proceedings available at https://www.accaglobal/com (accessed on 28 June 2022).
[113] Business Rescue Proceedings available at https://www.accaglobal/com (accessed on 28 June 2022).
[114] Section 73(5).
[115] Loubser (n 13 above) 51.
[116] Section 128(1)(a) of the Companies Act.
[117] (n 112 above) .

Commission and notify every affected individual in the manner outlined in section 131(2)(a) of the Companies Act.

3.9 The requirements to commence business rescue proceedings

The company's board of directors may take a resolution to voluntarily commence business rescue proceedings if they are of the opinion that the company is financially distressed and there seems to be a reasonable possibility of rescuing the company.[118] The directors may be motivated to act this way if a business entity is failing to pay its debts as the fall due and payable and its liabilities exceed its assets. Or the motivation may the realization that the company will become insolvent. It is however important to note that a company may experience a temporary cash-flow problem that may be caused by say an earthquake, a factory fire or labour unrest. Such a company would not be entitled to use business rescue proceedings while its problems are being solved because its liabilities would not exceed its assets.[119] Rescue proceedings must be entered sooner when signs of a failure are clear and apparent. Loubser (2010) states that, "It is an obvious and widely accepted fact that the sooner a rescue procedure is invoked, the greater the chances of a successful rescue are".[120] The term "rescuing the company" is defined in the Companies Act of 2008 to mean achieving the goals contained in the definition of "business rescue".[121]

3.10.1 Appointment of a business rescue practitioner

He has the most significant task of overseeing the business rescue process and turning the company around by coming up with an appropriate business rescue plan.[122] In terms of the Companies Act, he supervises and advises management and has total managerial control of the company in replacement for the board of directors and the pre-existing management.[123] The success or otherwise of the business rescue process falls squarely or his shoulders. A tremendous level of skill

[118] Section 129(1) of the Companies Act.
[119] Loubser (n 13 above) 68.
[120] Loubser (n 13 above) 68.
[121] Section 128(1)(h) of the Companies Act.
[122] Cassim (n 90) 888.
[123] Section 140(1)?(a) of the Companies Act.

and expertise is required of him. He is also an officer of the court and must report to the court in accordance with any applicable rules of, or any orders made by the court.[124] The court has the power to review his conduct.[125] Whilst his powers include managing the affairs of the company in substitution for the board of directors,[126] his most important function is developing and implementing a business rescue plan as enunciated by section 140(1)(d) of the Companies Act.

3.10.2 The qualifications of the practitioner

The job of a business rescue practitioner requires a specialized professional who has the necessary practical and professional experience.[127] "To be appointed as a practitioner a person:

- Must be a member in good standing of a legal, accounting or business management profession accredited by the Companies Commission;
- Must be licensed by the Companies Commission;
- Must not be subject to an order of probation;
- Must not disqualified from holding office as a director in terms of s69(8) of the Companies Act;
- Must 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;
- Must not be related to a person who has a relationship contemplated in the preceding paragraph".

Additionally, the practitioner, who may be an accountant or attorney and not necessarily a turnaround expert, must be suited to the particular circumstances of the case.

3.11.1 The business plan

[124] Section 140(3)(a) of the Companies Act.
[125] *In Re British American Racing (Holdings) Ltd [2005] 2 BCLC 234 (Ch D) 248f*.
[126] Section 140(1)(a) of the Companies Act.
[127] Cassim (n 90) 889.

The ultimate responsibility of the business practitioner is to come up with a business plan.[128] The plan has to be divided into three parts; Part A deals with the background, Part B deals with the proposals and Part C deals with the assumptions and conditions.[129] Part A must at least include among others a list of all the material assets of the company, an indication of the probable dividend that would be received by the creditors, a list of the holders of the company's issued securities. Part B deals with the relevant proposal steps to be taken to resolve the company's difficulties and Part C must set out the assumptions and conditions that must be fulfilled for the plan to be implemented. The practitioner must then provide a certificate that the information in the plan is accurate and correct and this plan must be published within 25 business days after the appointment of the practitioner.[130]

3.11.2. Removal and replacement of a business practitioner

Poorly skilled business rescue practitioners are often the cause of failed rescues, and this is mainly caused by a lack of skills and knowledge of the business rescue practitioner.[131] Any affected person may apply to court for an order setting aside the appointment of the business rescue practitioner on the basis that he or she does not meet the requirements of the Companies Act, he or she is not independent of the company or its management or that he or she lacks the necessary skills that are required by the company's specific circumstances.[132] Loubser (2008) argues that the last-mentioned ground is not stipulated as a requirement for appointment as a business rescue practitioner, and that this provision effectively introduces an additional requirement through the back door. A director who would have voted in favour of the business rescue resolution is also disqualified from bringing this application unless he can be able to satisfy the court that he acted in good faith but on the basis of false or misleading information.[133] In the event that the court sets

[128] (n 112 above).
[129] Section 150(2) of the Companies Act.
[130] Section 150(5) of the Companies Act.
[131] R Rajaram et al "Business rescue: Adapt or die" *South African Journal of Economic and Management Sciences* (SAJEMS) October 2018 p12.
[132] Section 130(1)(b)(i)-(iii) of the Companies Act.
[133] Section 130(2)(b) of the Companies Act.

aside the appointment of a practitioner, it must appoint an alternative one who meets the requirements of section 138 of the Companies Act or is recommended by or acceptable to the majority in value of the independent creditors who were represented in the hearing before the court.[134]The removal is governed by section 139(3) of the Companies Act which states that, "If a practitioner dies, resigns or is removed from office, the directors or the creditor who nominated that practitioner must appoint a new one". A practitioner may also resign from office, at any given time and for any reason.[135]

3.11.3 The legal consequences of a business rescue order

It has been stated elsewhere that business rescue is meant to facilitate the rescue of a company that is close to insolvency. This is achieved by an automatic moratorium and secondly through the skill and the guidance of the rescue practitioner.[136] During the business rescue proceedings, each director of the company must continue to perform the functions of a director albeit subject to the authority of the business rescue practitioner. This adopts the "management-displacement" approach which is synonymous with the United Kingdom. The directors are also expected to exercise any management functions in the company subject to the direction of the practitioner to such an extent that it is reasonable to do so.[137] They are however, required to disclose any financial interest they or their related person may have in the company.[138]

3.12.1 Automatic stay of proceedings against the company

The consequence of commencement of business rescue proceedings is that there is an automatic and general moratorium /freeze on all legal proceedings or executions against the company, its assets, its property and its assets and on the exercise of the rights of creditors of the company. In short, "There is a general moratorium on the enforcement of remedies against a company that is undergoing business

[134] Section 130(6)(a) of the Companies Act.
[135] Section 139(3) of the Companies Act.
[136] Cassim (n 90) 878.
[137] Section 137(2)(b) of the Companies Act.
[138] Section 137(2)(c) of the Companies Act

rescue".[139] The moratorium stays in place until the business rescue process has ended.[140] It is a general rule that the rights of creditors are not altered substantially during this time but simply frozen. This means that they cannot enforce their rights whilst the company is still undergoing business rescue, to do so they would require the authority of the business rescue practitioner. It has been argued that the moratorium gives the ailing company some breathing space thereby enabling the company the opportunity to reschedule its debts and liabilities whilst at the same time using the period to reorganize its affairs.[141]

3.13. The moratorium on legal proceedings

A company under business rescue is given wide protection by the law. For example, section 133(1)(a) and (b) of the Companies Act states as follows:

> "During business 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, except-
>
> (a) With the written consent of the practitioner;
>
> (b) With the leave of the court and in accordance with any terms the court considers suitable".

However, proceedings by a regulatory authority in the carrying out of its constitutional mandate are excluded from the moratorium under the provisions of section 133(1) of the Companies Act.[142] Criminal proceedings against the company or any of its directors or officers do not fall within the scope of section 133(1) and as such are not covered by the moratorium.[143]

3.14.1 The effect of business rescue on employment contracts and the employees

[139] Cassim (n 90) 878.
[140] Section 137(1)(d) of the Companies Act.
[141] Cassim (n 90) 879.
[142] Section 84 of the Companies Amendment Act 3 of 2011 and section 133(1(f) of the Companies Act.
[143] Section 133(1)(d) of the Companies Act.

The fair and equitable treatment of the employees of a financially distressed company is one of the primary goals of a good business rescue process.[144] The employees may be affected by a change in their employment contracts or by changes as a result of the normal course of attrition or a change in a part of a business that is being sold as a going concern.[145] Section 136(1)(/a) and (b) is aimed at the protection of employees. It is important to note that any retrenchments of employees of the company contemplated in the business rescue plan are subject to section 189 and section 189A of the Labour Relations Act 66 of 1995 and other applicable employment-related legislation.[146]

3.14.2 The effects on general contracts

The business rescue practitioner is empowered to suspend any contract during the business rescue proceedings.[147] The suspension of the contract or an obligation of the contract will only subsist for the duration of the business rescue proceedings.[148] However, the employment contracts are exempted from that provision. The standing position of the law is that the business rescue practitioner can only cancel a contract with the consent of the court and not unilaterally. This followed the fierce debate that ensued with the original version of the Companies Act. This provision has been hailed as providing the necessary safeguard against abuse of power by the practitioner by the business rescue practitioner.[149]

3.15.1 The United Kingdom

The Cork report states that, "One of the basic tenets of insolvency within the United Kingdom is to offer companies facing insolvency which have good future prospects, the opportunity to be rescued".[150] This is mainly done through restructuring and

[144] Cassim (n 90) 884.
[145] Cassim (n 90) 885.
[146] Section 136(1)(b) of the Companies Act.
[147] Section 136(2) as read with section 136(2A) of the Companies Act.
[148] Cassim (n 90) 886.
[149] Farouk HI Cassim *'Business Rescue and Compromises'* in Havenga et al South African Corporate Business Administration, 1995.
[150] The report submitted by the Insolvency review committee headed by Sir K Cork, Cmnd.8558,1982.

reorganization where the business is mainly healthy and has a good forecast of the financial tides turning in its favour.[151] The insolvency Act, of 1986, as amended by the Insolvency Act, 2000 started operating on 29 December 1986. This Act was the culmination of an in-depth investigation into insolvency law that commenced in 1977 following the appointment of a committee to carry out a total review of insolvency law under the chairmanship of Sir Kenneth Cork. Before the UK Insolvency Act, the major corporate recovery procedures available consisted of liquidation and receivership.[152] The concept of receivership came into existence on the back of a floating charge, this has been defined as "a kind of security used frequently in contract terms of which companies borrowed money from banks and by which such borrowings were secured on all of the company's assets".[153] The Cork Report expressed the opinion that, "In many cases insolvent companies that could have been rescued had been forced into liquidation because no proper rescue procedure was available to them, particularly where such companies had no floating charges and the appointment of a receiver and manager was thus not an option".[154]

The UK Insolvency Act was born out of the findings of the Cork Report which commenced in 1977 whose brief was to investigate the status of insolvency law in the United Kingdom at that time. The Cork report concluded that many insolvent companies, could been rescued rather than placing them into liquidation which was a norm during those days. Then, there were no corporate procedures available to companies. The Cork further intimated that it was a better option to sale a business as a going concern as that entailed preserving the workforce and the business.

3.15.2 The Cork Committee stated the following:

> "The business or commercial insolvent presents an entirely different picture from the private or consumer insolvent. The failure of such an insolvent has wide repercussions, not only upon those intimately connected with the conduct of the business, such as directors, shareholders and employees, but on other interests,

[151] R Goode, '*Principles of Corporate Insolvency Law 3rd ed'*, (2010) at para 1-21.
[152] Levenstein p103.
[153] H Rajak, (2013) '*Company Rescue and Liquidation' at* 1. Quoted from Levenstein p103.
[154] Report of the Review Committee on Insolvency Law and Practice Cmnd 8558 (1982) also known as the Cork Report.

such as suppliers amongst others. The effect of the failure upon the realizable value of stock, plant and goodwill can be disastrous, and not infrequently there is a general feeling of desperation, which needs to be resolved. We believe that a concern for the livelihood and well-being of those dependent upon an enterprise, which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community, that it must not be overlooked".[155]

The recommendation of the Cork Report led to the introduction of a new formal rescue procedure in the United Kingdom which was aptly named the administration procedure and which is regulated by Part 11 of the UK Insolvency Act. As a result of the introduction of the UK Insolvency Act, the UK brought into operation business rescue development. The UK Insolvency Act and the Enterprise Act of 2002 are the principal legislation which are applicable to the insolvency of companies incorporated in England and Wales. The administration procedure, as introduced by the Cork report, creates a rehabilitative procedure.

It has been stated that, the majority of reorganizations in the United Kingdom result from informal negotiations with creditors who are outside any formal insolvency or restructuring procedure.[156] Company Voluntary Arrangements ("CVAs") is a way of commencing formal restructuring. "A CVA is an agreement between a company, its shareholders and its creditors and is employed as a restructuring tool for all companies in financial distress. It is a procedure under Part 1 of the UK Insolvency Act where the directors or a liquidator or administrator propose a reorganisation plan which typically includes reduced or delayed debt payments or a capital restructuring".[157]

3.15.3 The Development of the pre-pack

[155] Cork Report (n 154 above) at para 193.
[156] G Graham, '*Review into Pre-pack Administration'* (2014) 3 available at www.gov.uk
[157] Part 1 of the UK Insolvency Act 1986 (sections 1-7 inclusive).

The pre-pack is the biggest development in the UK insolvency law. This process refers to "the operation by which the sale of a business of the company debtor is sized up, the business valued, its buyer identified and other appropriate factors connected with the sale are undertaken before the onset of the administration". This process allows the transfer of the business to take place as soon as the administration process has started.[158] The UK Insolvency Practitioners Association describes the pre-pack as "an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the sale immediately on, or shortly thereafter".[159] Put simply, 'In a pre-pack, an insolvent debtor company negotiates the sale of substantially all its assets on a going concern basis before initiating the administration proceedings".[160]

3.15.4 Advantages of a Pre-pack

The advantages to a pre-pack include, "It allows for the sale of a business as a "going concern" without impacting on the continuity of business operations upon the appointment of an administrator, it preserves the value of assets(particularly 'work in progress' and debtors which often become more difficult to realise following the appointment of an administrator, completing a sale immediately upon appointment can prevent losses which would reduce funds available for creditors, the appointed insolvency practitioner is in a position to choose the most appropriate buyer for the business assets, whether that is a third party wishing to use the assets in an existing business, or director (s) of the insolvent company and the image and the business brand is unlikely to be compromised by adverse publicity, leading to the increased likelihood of jobs being saved and suppliers being unpaid under the new ownership".[161] Its advantages include job preservation and for companies to continue contributing to the UK economy as a whole.

[158] Rajak H *Company Rescue and Liquidation (2013*) 32-36 …quoted in Levenstein p108.
[159] What is pre pack insolvency? Available at https://www.companyrescue.co.uk (accessed on 23 July 2022).
[160] A S Nocilla *"Corporate Rescue at the Crossroads: An Empirical and Comparative Examination of Pre-packaged Administration in the UK"* (Unpublished PhD dissertation, University College of London), (2019) at 4.
[161] Understand Pre-pack Administration and the company sale process available at https://www.begbies-traynorgroup.com (accessed on 23 July 2022).

Companies are not closed and livelihoods are not disturbed. The provisions incorporated in Schedule B1 to the UK Insolvency Act as inserted by the Enterprise Act, 2002 contain provisions that deal with administration.

3.15.5 Administration

An administrator is a person appointed under Schedule B1 of the Insolvency Act to manage the affairs, business and property of the company.[162] This procedure is only available to companies. The administration procedure commences with the appointment of an administrator for the particular company.[163] The administrator may be appointed by an order of the court under paragraph 10, by the holder of a floating charge under paragraph 14 or by the company or its directors under paragraph 22.[164] The powers to appoint an administrator barring having to obtain an order of court is given both to a company and the directors of a company by paragraph 22 of Schedule B1 to the Insolvency Act 1986. In terms of paragraph 12 of Schedule B1 to the Insolvency Act 1986, the application to a court for an administration order may be made by the company in terms of a resolution taken at a general meeting by the directors of the company by one or more creditors of the company, by the designated officer exercising the power conferred on him/her by section 87A of the Magistrates' Court Act or through a combination of these persons.

Loubser (2010:186) argues that, "By making it clear that both the company itself and the directors may apply, any uncertainty regarding the power of directors to apply without authorization by a general meeting, as experienced in South African law with regard to applications for judicial management or liquidation has been avoided".

The Cork Committee felt very strongly that the directors of a company should have an unfettered right to apply for an administration order.[165] Another measure which resulted from the Cork Report is the Company Directors Disqualification Act 1986

[162] Schedule B1 to the Insolvency Act 1986 inserted by the Enterprise Act 2002.
[163] Paragraph 1(2)(b) of Schedule B1.
[164] Loubser (n 12 above) 173.
[165] Paragraph 501 of the Cork Report.

(c46) in terms of which the director of a company that has become insolvent can be disqualified from acting as an insolvency practitioner or director.[166]

3.15.6 The Requirements for Administration

The first requirement is that the company is or is likely to become not able to pay its debts.[167] The applicant must state in his/her application that he believes that the company to be, or likely to become, unable to pay its debts in the case of an application for an administration order.[168] The affidavit supporting the application must contain, "A statement of the financial position of the company in which the applicant specifies to the best of his knowledge, the assets and liabilities of the company and details of any security known or believed to be held by creditors, as well as details of any insolvency proceedings in relation to the company of which the applicant is aware and any other information which the applicant believes will assist the court in making its decision".[169]

Where the appointment is to be made by the company or its directors without the intervention of the court, the statutory declaration accompanying the notice of intention to appoint an administrator that is filed with the court shall contain a specific declaration that the company is or is likely to become unable to pay its debts.[170] It is also pertinent to note that a company is also deemed unable to pay its debts if it is proved to the court that the value of the company's assets is less than the amount of its liabilities. Loubser p189 argues that, "This ground is important in a company rescue attempt because it allows an application for an administration order to be presented while the company is still able to pay its debts as they fall due but its contingent and prospective liabilities are such that at some stage the company's assets will clearly be exhausted before all creditors have been paid". In the case of "In Re COLT Telecom Group PLc (No 2)"[171] it was held that, "The court had to be satisfied that it was more probable than not that

[166] Loubser (n 13 above) 187.
[167] Paragraph 38(2)(a) of Schedule B1 to the Insolvency Act 1986.
[168] Rule 2.4 (1) of the Insolvency Rules.
[169] Rule 2.4(2) of the Insolvency Rules.
[170] Or, where no prior notice is required, the notice of appointment must contain this statement.
[171] [2002] EWHC 2815 (Ch); [2003] BPIR 324.

the company would become unable to pay its debts, and not merely that there was a real prospect of that happening".

3.15.7 The main responsibility of the Administrator

The main task of the administrator is to rescue the company as a going concern.[172] The use of the word as a going concern entails that it is the business that is of value and should be saved where possible, even if it means stripping the company to an empty shell. This is made clear by the power bestowed on the administrator to sell or dispose of the property of the company where possible. The administrator is also encouraged to realise property in order to make a distribution to one or more of the secured or preferential creditors.[173] The administrator plays a very important role and as has been highlighted above is appointed either by the court as part of the administration order or by the company or its directors.[174] It also pertinent to note that only a person who is properly qualified to act as an insolvency practitioner to the company may be appointed.[175]

3.15.8 Vacation of or removal from office

Paragraph 90 of the Insolvency Act of 1986 provides for instances where an administrator can be removed from office and these are, "If he dies, resigns, is removed by order of court or vacates his office because he is no longer qualified to act as an insolvency practitioner in relation to the company". The person who appointed him can also remove him. That ensures that an administrator who has failed to perform his duties properly can be removed without the expense and delay associated with removing him via a court process.[176]

3.15.9 The rescue plan

[172] Paragraph 3(1)(a)
[173] Loubser (n 13 above) 195.
[174] Paragraph 2 of Schedule B1 to the Insolvency Act 1986.
[175] Paragraph 6 of Schedule B1 to the Insolvency Act 1986.
[176] Loubser (n 13 above) 212.

Preparing a statement and setting out his proposals for achieving the purpose of administration is one of the most important duties on an administrator.[177] He is the only person who may submit a rescue plan. He is not obliged to consult the major creditors when planning on selling major assets of a company but it is advisable that he does so.[178] His statement of proposals must explain the circumstances that led to his appointment, the financial position of the company and how he intends the purpose of administration and how it should end.[179] The administrator however has the power to sell assets of a company without prior approval by the court or creditors. Once his proposals to rescue a company have been approved he has to act in terms of the proposals. His creditors have been given powers to challenge the conduct of the administrator in court.

3.16.1 Termination of administration

The appointment of an administrator is terminated one year after the appointment became effective.[180] This period was decided after consultations with a wide spectrum of interested parties although it may be amended in future if shown by experience to be necessary. The short period given has been justified in that administration is not seen as an end in itself but is only a facilitative procedure which is meant to afford the company some protection while it comes up with solutions to its challenges. In essence, "Administration is a temporary measure that grants the company a period of relief during which the foundations for its actual rescue are laid out, rather than being the rescue itself"[181]

The administrator of a company may apply to court for his appointment to terminate before it expires automatically if it seems to him that the goal of administration cannot be achieved, or he is of the opinion that the company should not have been placed under administration in the first place or if he is required to make such an application by a meeting of the company's creditors.[182] Where he

[177] Paragraph 49 of Schedule B1 to the Insolvency Act of 1986 and Rule 2.33 of the Insolvency Rules.
[178] Goode (n 151 above) at 382.
[179] Ruel 2.33(2)(m).
[180] Paragraph 76(1) of Schedule B1 to the Insolvency Act 1986.
[181] Keay A and Walton P *Insolvency Law: Corporate and Personal* LexisNexis 2017 at 95.
[182] Paragraph 79(1) and (2) of Schedule B1 to the Insolvency Act of 1986.

was appointed by the company or its directors, he may file a prescribed notice if he thinks that the purpose of administration has been sufficiently achieved with the registrar of companies or the court. He may turn the administration into a creditors' voluntary winding up if he believes that the total amount payable to all secured creditors has been paid or set aside and a distribution will be made to unsecured creditors.[183]

3.17.1 The United States of America

The jurisdiction of the United States of America is the leading exponent of a new business rescue culture. The sentiment of a rescue culture started from the United States' early history as "a country of immigrants eager for a fresh start, with a general optimism about the future and the potential of the United States' economy".[184] Their view of bankruptcy as a necessary part of a society that valued entrepreurial risk and over the years became known for a developing rescue culture aimed at debtor protection. Its approach of the "fresh start" in bankruptcy has proved extremely influential in the subsequent development of business rescue legislation in the whole world.[185]

As the country progressed Americans became tolerant to debt and bankruptcy became acceptable. The era of debt imprisonment paved the way to the concept of debt forgiveness and debt discharge. In 1978, the Bankruptcy Reform Act introduced several changes to the bankruptcy practice. That led to the US Bankruptcy Code of 1978 which had the following effect:

- It expanded the availability of bankruptcy as a remedy, by no longer requiring that debtors be insolvent;
- It expanded the exemptions available to individuals' seeking relief, thereby improving a debtors' chance for a fresh start;
- It consolidated the three different business reorganisation chapters under the Act into one chapter (Chapter 11) which allowed both the

[183] Paragraph 83 of Schedule B1 to the Insolvency Act of 1986.
[184] Rajak H *"The Culture of Bankruptcy" in Omar* (ed) International Insolvency Law: Themes and Perspectives (2013) 32.
[185] Flessner *"Philosophies of Business Bankruptcy Law:* An International Overview" in Goode (ed) Principles of Corporate Insolvency Law (2011) 19-28. Quoted from Levenstein p110.

restructuring of secured debt and continuance of the debtor in possession.

3.17.2 Chapter 11

A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a "reorganization" bankruptcy, the debtor usually remains in possession and has the powers and duties of a trustee, may continue to operate its business, and may, with court approval, borrow money. In this instance, a plan of reorganization is proposed, creditors whose rights are affected may vote on the plan, and the plan may be confirmed by the court if it gets the required votes and satisfies certain legal requirements.[186]

3.17.3 The Chapter 11 Debtor in Possession

This is usually used to organize a business which may be a partnership, sole proprietorship or even a corporation. A corporation has a separate legal personality and as such it does not put the personal assets of the shareholders at risk other than the value of their investment in the company's shares. In a sole proprietorship, does not have a separate legal personality and as such, a bankruptcy case involving a sole proprietorship includes both the business and personal assets of the owner in question. A partnership just like a corporation exists separately and apart from its owners' personal assets and may, in some cases, be used to pay creditors in the bankruptcy case or the partners, themselves, may be forced to file for bankruptcy.

3.17.4 The Small Business Case and Small Business Debtors

The Bankruptcy Code also allows the small business debtors to file for relief under two different special categories of Chapter 11 intended to streamline processes and reduce costs. The first option is referred to as "a small business case". It was created in 2005 by an Act called, the Bankruptcy Abuse Prevention and Consumer Protection

[186] Chapter 11- Bankruptcy Basics available at https://www.uscourts.gov (accessed on 23 July 2022).

Act. The second one, is referred to as subchapter V and was created in 2019 by the Small Business Reorganisation Act.[187] A debtor is free to elect any of those two options. Both small business and subchapter V cases are treated differently than the traditional chapter 11 case mainly due to the accelerated deadlines and the speed with which the plan is confirmed.[188] In both small business cases and subchapter v cases, the debtor must, among other things, attach its most recent balance sheet, statement of operations, cash-flow statement and Federal income tax return among other requirements.[189]

The concept of reorganisation took the form of equity receiverships in the United States. Equity receiverships came about as a way to rescue financially distressed railways, the need for a railway by the public as well as the difficulty of selling it as a going concern.[190] In equity receiverships, the creditors bought the business and paid for their purchase through claims against the old business. The newly formed corporation acquired the purchased assets and allocated its capital structure amongst the debtor's creditors and their owners.[191]

Eventually, the railroad organisations were to replace equity receiverships and the Chapters X and XI were added to the Bankruptcy Act to rehabilitate the large public owned companies and the small private owned companies.[192] In modern day America, a company is allowed to enter Chapter 7 to liquidate or Chapter 11 to restructure.

3.17.5 Stakeholder Protections

[187] ibid
[188] ibid
[189] ibid
[190] D G Baird, "The New Face of Chapter 11" (2004) 12 Am Bankr L Rev 69, 82. The value of the rail parts was worthless unless the parts remained together, and no one had enough capital to purchase the entire railroads. That is where the concept of 'going concern value' emerged.
[191] Robert C Clark "The Interdisciplinary Study of Legal Evolution" (1981) 90 Yale L J 1238,1252.
[192] Harvey R Miller and Shai Y Waisman 'Does Chapter 11 Reorganisation Remain a Viable Option for Distressed Business for the Twenty-First Century' (2014) Am Bankr LJ 153, 164.

The restructuring proceedings institute procedural and substantive safeguards to allow a debtor to develop a plan and present it to its creditors.[193] The procedural safeguards in place include the disclosure requirements to ensure that parties have access to proper information and the requisite to assess it, and notice requirements to ensure that the stakeholders have an opportunity to be heard.[194]

3.17.6 A new shift

Corporate rescue now looks different than it did many years ago when it first came on board. The legislation was enacted to avoid the devastating effects of business failure on stakeholders and the communities.[195] The idea was to rehabilitate and restructure corporations that were in financial distress by allowing them to fully emerge once more as fully functional companies. The saving of such companies protected the investments, maintain the customer base, preserve jobs and protect the wider communities from which these companies operated from.[196] It was later realised that these proceedings were expensive and long winding and thus there was a shift towards liquidation proceedings. Thus, much as traditional restructuring still takes place, the shift now is more towards liquidation proceedings.[197]

3.18.1 The post-commencement finance

Post-commencement finance or new financing is one of the most important aspects of the business rescue proceedings.[198] Like the moratorium, it is central to the business rescue.[199] Creditors and bankers would not be willing to give finance to companies that are under business rescue for obvious reasons. This is despite the fact that this finance is critical to the survival of a company undergoing business rescue. In the case of *National Labour Relations v Bildisco and Bildisco, Debtor-in-Possession et al*[200] the court held that, "The fundamental purpose of reorganization

[193] J Girgis, '*The evolution of corporate rescue in Canada and the United States'* Research Handbook on Corporate Restructuring Edward Elgar Publishing 2021 at 11.
[194] Ibid p18.
[195] Ibid p18.
[196] Ibid p18.
[197] Ibid p18.
[198] Cassim (n 90) 882.
[199] Cassim (n 90) 882.
[200] 465 US 513 (1983) 528.

is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources. In some cases reorganisation may only succeed if new creditors infuse the ailing firm with new capital". It has been noted that without such financing, the business rescue process will in all likelihood fail with result that the company will go into liquidation. Securing turnaround finance is key in order to meet the company's working capital requirements and the restructuring costs.[201] The United Nations Commission on International Trade Law (UNCITRAL) also affirmed that the continued operation of the debtor's business is crucial to reorganization and additional finance is vital to this objective.[202]

3.18.2 Sources of post-commencement finance

Sources of post-commencement finance can be the company's existing lenders that is the banks, private equity providers, the shareholders and third party acquirers of the company.[203] The Companies Act of South Africa creates, following the example of Chapter 11 of the US Bankruptcy Code, creates a statutory framework for super-priority post commencement financing.[204] Section 135(2) provides that during the business rescue proceedings, the company may obtain "financing" that is unrelated to employment which may be secured to the lender by utilizing any unencumbered asset of the company and will be paid in the order of preference set out in section 135(3)(b). Section 135(2) of the Companies Act of South Africa permits a company a company to use its encumbered assets as security for "financing" that is obtained by the company after the commencement of business rescue proceedings.

[201] The SAA Business Rescue Process: A steep learning curve-Lessons for SOEs available at https://www.werkmans.com (accessed on 26 July 2022).
[202] UNICITRAL Legislative Guide on Insolvency Law (2005) available at https://www,unitral.org (accessed 28th July 2022)
[203](n 201 above).
[204] Cassim (n 90) 883.

Chapter 4

Introduction

This chapter will take a look at companies that underwent business rescue in Zimbabwe and South Africa. There is not much literature in Zimbabwe so the writer will lean on some examples from South Africa. As has been highlighted above, the process of business rescue is meant to facilitate the rehabilitation or reorganization of a company that is in financial distress. The Zimbabwean companies to be discussed include the Cold Storage Commission, Redwing Mine, Shamva and Mazowe mines. The South African Companies to be discussed are Group 5 and the South African Airways.

4.1. Cold Storage Commission

Sometime in December 2020, the Government placed the company under business rescue to avert its liquidation.[205] For some time, the company had been struggling to pay its debts. Other allegations levelled against the company included poor management, mounting debts and alleged corruption. All these accusations made it difficult for the company to attract any investment. Other factors attributed to insolvency included corporate governance failures, imprudential financial management, inadequate funding or old equipment, loss of key suppliers, customers or personnel.[206] A well-known Chartered Accountant was appointed as the corporate rescue practitioner. He will oversee the temporary supervision of the company, the management of its affairs, property and business.

[205] P Ndlovu, 'Can CSC be revived?' available at https://www.chronicle.co.zw (accessed on 26 July 2022)
[206] *Zimbabwe: CSC Under Corporate Rescue* The Herald, (Harare) 11 December 2020.

However, the well-known Chartered Accountant was disqualified on the basis that he was conflicted and an interim corporate rescue manager was later appointed.[207] Cold Storage Commission was put under corporate rescue to enhance the joint agreement that Boustead Beef entered with the Government.[208] The company had enjoyed a monopoly since the year 1937 when it was formed. When the Government deregulated the industry in 1992, there was serious competition from the private players which were allowed entry into the industry.

4.2 Redwing Mine

The Redwing mine was put under corporate rescue in terms of the Insolvency Act at the behest of its workforce, represented by their trade union.[209] An application to remove it from corporate rescue was refused by the High Court which argued that it must remain under corporate rescue until it is able to operate normally. The application had been brought by King's daughter mine which is the parent company of Redwing Mine. The High Court granted the order to remove the corporate rescue practitioner because he was facing criminal charges. The reason for placing the mine under corporate rescue was that it was saddled with debts and was operating below capacity for some time.[210]

After the dismissal of the challenge, the creditors of the mine voted in favour of the rescue plan. The corporate rescue practitioner indicated that the mine would soon be able to settle the proven liabilities in full, reconstruct the balance sheet and resume underground mining and provide security of employment amongst others.[211] The corporate rescue practitioner indicated that he intended to bring in new shareholders who would buy shares from the existing shareholders and also inject funds into the business.[212] The business practitioner went to say that, "A plan to rescue Redwing will hinge on the restructuring of its business, property, debt, affairs, other liabilities, and equity in line with the expectations of affected persons

[207] *Brawl over CSC turns nasty* The Sunday Mail, (Harare) I May 2022.
[208] Ibid.
[209] https://www.miningzimbabwe.com Redwing remains under judicial plan (Accessed 26 July 2022)
[210] Ibid.
[211] *Creditors approve Redwing revival plan* The Herald, 16 September 2021.
[212] Ibid.

and other stakeholders such as the Government of Zimbabwe which envisages a US$4 billion target by the year 2023 on the back of a 100-tonne gold production".[213] However, Redwing is almost clocking two and a half years under administration, with no solution in sight having been placed under corporate rescue in July 2020.[214]

4.3. Mazowe and Shamva Mines

The two mines were placed into corporate rescue after an application by unions for a reconstruction order on them.[215] The Associated Mine Workers Union of Zimbabwe (AMWUZ) applied for a reconstruction order on the two mines in a bid to secure their unpaid wages as creditors besieged the two mines.[216] However, more than two years after the company was placed under corporate rescue, the fortunes have still not turned. At some point Metallon produced 100 000 ounces of good from its four mines at Shamva, Mazowe, Redwing and How.[217] The company however stopped operations at Shamva, Redwing and Mazowe mines in 2019, saddled by debts of US$200 million.

4.4. Group 5 Company

This a South African company. The Group Five Limited (G5 Limited) and its operating subsidiary Group Five Construction (G5 Construction), entered business rescue proceedings as a result of significant financial loses.[218] 96.1% of the creditors opted in favour of the plan for the G5 Construction and all the creditors elected in favour of the G5 Limited.[219] The business rescue plan was estimated to save at least 3500 jobs.[220]

4.5. South African Airways

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[213] Ibid.
[214] Ibid (n 209 above).
[215] Metallon;s debt-laden Shamva, Mazowe mines put into corporate rescue available at https://www.newzwire.live (accessed on 26 July 2022)
[216] Ibid.
[217] Ibid.
[218] Group Five creditors choose business rescue over liquidation available at https://www.news24.com (accessed on 27 July 2022)
[219] Ibid
[220] ibid

The South African Airways was placed under voluntary business rescue in December 2019 becoming the first South African state-owned company to do so.[221] The process gobbled billions of dollars and it placed the concept of business rescue under the spotlight.[222] In the case of "*South African Airways (SOC) Ltd (in Business Rescue) and others v NUMSA obo Members and Others"*[223] the court confirmed that, in the absence of a business rescue plan contemplating retrenchments, the issuing of retrenchments notices is prematurely unfair. The court also held that, "A business rescue plan is a necessary precondition for the commencement of any retrenchment processes under the Labour Relations Act 66 of 1995".

In the matter of *NUMSA obo Members and Another v South African Railways (SOC) Ltd and Others*[224], the court held that only the High Court is empowered to uplift the general moratorium on legal proceedings provided for in section 133 of the Companies Act. As such, employees who wish to commence legal proceedings in the Labour Court against their employer that has been placed in Business Rescue must do so in accordance with the provisions of section 133, by either obtaining written consent from the business rescue practitioners or leave of the court.

4.6. Key take-away

The key take takeaway from the South African Airways business rescue process is that, "Maintaining a constructive relationship with employees and organized labour is critical to the success of the business rescue process, especially where the company's aim is to trade its way out of its financially distressed situation. Standoffs with trade unions and employees, area a significant impediment to the rescue process, which result in delays and unnecessary costs. As such, a delicate balance must be struck in the restructuring process, based on the recognition that whilst employees are undoubtedly the lifeblood of the company, it is often necessary for distressed companies to reduce their operating expenses, through retrenchments. Striking this balance is difficult, more so in the case of SOEs, where government has

[221] The SAA Business Rescue Process: A steep learning curve-Lessons for SOEs available at available at https://www.werkmans.com (accessed on 26 July 2022).
[222] (n 219 above).
[223] (3) [2020] 8 BLLR 756 (LAC).
[224] [2021] JOL 49821 (LC).

as one of its objectives the creation and maintenance of employment"[225] It is clear therefore that an impasse on labour issues may invariably lead to the collapse of the restricting process and ultimately the company itself, which might lead to the company being placed into liquidation.[226]

4.7. Conclusion

Business rescue was initiated in the above companies following a realization that the companies were about to fold due to financial mismanagement. To avert loss of jobs the companies were placed under business rescue. In the case of South African Airways, the Government of South Africa as the major shareholder had to support the process using taxpayers' money. As has been noted above, the whole process of business rescue is to save jobs and the attendant job loses that would follow as a result of company closures.

[225] (n 219 above).
[226] (n 219 above).

Chapter 5

5.1 Introduction

This chapter is the conclusion to the dissertation. It therefore proposes recommendations to the business rescue proceedings in Zimbabwe. It will also look at the findings and recommendations of the research. Before delving into the recommendations, it is important to state that corporate rescue proceedings replaced the failed and discredited judicial management system. The concept of business rescue is now applied the world over. Examples have been cited of its application in South Africa, the United States of America, the United Kingdom and other countries. The concept has also been introduced in countries like China, which in 2006, in an effort to nurture its corporate culture enacted the Enterprise Bankruptcy Law of 2006.[227] It was a progressive move by the authorities in this country to progress to business rescue. Whilst the concept is still new, there is a need to publicize it so that more and more people are aware of it. Of great importance to the concept is the availing of post-commencement finance. This calls for the injection of money into the business undergoing business rescue. Most financial institutions are not keen on lending money to the ailing businesses as such, there may be need for legislation providing finance to businesses undergoing business rescue.

Before going into the recommendations, it is prudent to discuss some of the advantages of business rescue,

1. The board of the company can voluntarily commence a formal business rescue procedure without having to seek a court order as was the procedure under judicial management;
2. Business rescue discards the requirements for a "reasonable probability" that the company will become a successful concern, under business rescue, the Act only requires there to be a reasonable belief that the company will be rescued;
3. The provisions of business rescue include the plan of the procedure that should have the background, the proposal and the assumptions and conditions sections. This provision was lacking in judicial management and is one of its

[227] Z Zinian "*Corporate Reorganization under the Enterprise Bankruptcy law of the People's Republic of China-the Relevance of Anglo-American Models for China*", (Unpublished PhD dissertation, Durham University), (2014).

shortcomings as a formal plan is crucial to any proposed strategy that is proposed to rescue the business;

4. The board of a company that has been voluntarily placed under business rescue can appoint a business rescue practitioner of their choice rather than wait to agree to the one that would have been suggested on nominated by the creditors of the company as was prevalent under judicial management; thus, the board has a bit of independence to act of their own volition;
5. Under judicial management, the employee rights were minimal, however, under business rescue employees are given recognition throughout the duration of the procedure;
6. A huge difference or improvement under business rescue is that a company no longer has to initiate the rescue procedure only after providing proof that it is unable to pay its debts. It can commence the process at the earliest signs of financial distress;
7. The business rescue procedure provides for the qualifications that a business rescue practitioner must possess. This ensures that the company will be in the hands of someone who will be able to manage the company in distress. Business rescue is also less cumbersome in that it is not granted in two parts like judicial management where the court first grants the provisional order and thereafter, the final judicial management order after being satisfied that the company qualifies to go under judicial management. With business rescue proceedings, commencement takes place voluntarily or through a court order and the company will thereafter commence business rescue"[228]

5.2 Recommendations

After having looked at the concept of business rescue, I hereby propose the following recommendations.

1. In order for business rescue to be successful there is need for new money or post-commencement finance. In its absence, the only option left will be to

[228] Dzvimbo (n 27 above) at 52.

ensure that the creditors are placed in a better position than they would have been had liquidation been effected.

2. It is imperative that directors must not wait until it is too late to initiate business rescue proceedings. Whenever, directors see signs that the business is failing then the proceedings must be quickly initiated. Directors must act in good faith all the time and not wait until the process of business rescue become an academic exercise.
3. The business practitioner must work closely with all the stakeholders for the process of business rescue to succeed. A business practitioner must also be aware of the intended outcome of his engagement.
4. Business rescue proceedings do work. Some companies have gotten back to their feet after successful business rescue proceedings had been carried out. It is not correct to classify the process as a lost cause.
5. The skills deficit of a business rescue practitioner can lead to the process of business rescue failing. As such, the business rescue practitioner must be properly trained for the job at hand. To ensure that the business rescue practitioners are properly trained and registered it is proposed that A Business Rescuers Institute of Zimbabwe be set up to train and monitor the performance of business rescue practitioners.
6. Related to the above and recognising the important role the business rescue practitioners play, it is important to establish a proper framework for the accreditation of business rescue practitioners and also the establishment of a proper and continuous development programme of their training.
7. Currently, the business rescue practitioner is given a period of three months to turn around a company. It is recommended that the period be increased to one year as three months may not be adequate. The concerned Act, it is recommended must be amended accordingly.
8. Instead of matters involving business rescue going through the normal roll, it may be prudent to establish specialized courts to deal with such cases. This is important as the delays in hearing such matters may affect the livelihood of individuals or whole communities in the event of companies that employ a huge number of members of a community or where the whole community is dependent on a single company for its livelihood.

9. The financial sector must be proactive and make funds available to business rescue practitioners. As noted above, post-commencement finance is critical to the success of business rescue. It is suggested that banks be made to contribute to a reserve fund for such purposes. Every bank may be required to contribute a small percentage of its profits to such a fund.
10. There is also need to create an awareness of business rescue legislation so that directors can easily move to business rescue proceedings at the early sign of company failure. The Zimbabwe Institute of Directors must come up with a training programme on business rescue for all the directors. The training can be made mandatory as the one the Law Society of Zimbabwe has for legal practitioners.
11. A higher success rate can also be achieved by the putting in place of an independent regulator to manage the business rescue legislation. A retired director with a proven track record can be put in charge.

In conclusion, it is submitted that the notion of business rescue regime or corporate rescue is an effectual corporate rescue mechanism that has been utilized and has produced results across the world. Cases where it has been successful are abound. However, there is room for improvement as highlighted above. The growth of the business rescue mechanism can be improved by the involvement of all stakeholders. The business rescue practitioner deserves to be given all the necessary support by the directors, employees and financial institutions. There is also need to train them effectively to avoid placing the proceedings in the hands of incapable individuals. Although hope springs eternal, it must be emphasized that, "Business rescue proceedings are not for the terminally ill…nor are they for the chronically ill"[229]

[229] *Welman v Marcelle Props 193 CC and Another* [2012] ZAGPJHC 32 (24 February 2012) para 28.

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