

Business Rescue in South Africa: an exploration of the views of business rescue practitioners

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DECLARATION

I, Talira Naidoo, declare that this research report is my own work, except as indicated in the references and acknowledgements. It is submitted to the University of the Witwatersrand in partial fulfilment of the requirements for the degree of Master of Commerce in Accountancy. It has not been submitted before for any degree or examination at this or any other university.

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ABSTRACT

Given the seemingly low rate of success of the current business rescue regime (at just 13.6% as at June 2015), this study sought to identify whether the current business rescue regime in South Africa realises its intended objectives and why this meeting of objectives or failure to do so may be the case. It focuses on practical issues and the investigation is undertaken through interviews with business rescue practitioners who are the facilitators of business rescue. The findings show that there is a lack of clarity in the definition of success which may be cause for concern and that, despite its consistency with other jurisdictions, in the views of practitioners, the success rate is expected to improve. The study finds that there is a lack of prompt action when signs of financial distress are noted and a lack of funding for companies in business rescue. The experience of the practitioner has a significant impact on the success or failure of the rescue and may be one of the reasons for the current low rate of success of the regime, while the specific qualifications of the practitioner play a smaller role. The plan is imperative but there is often a lack of information and insufficient time allocated to its preparation. Consistency of Court judgements also has a bearing on success of business rescue, while consistency with provisions of other jurisdictions is not considered to be important.

1: INTRODUCTION AND BACKGROUND

1.1: PURPOSE

The purpose of this study is to identify whether the current business rescue regime, as legislated in the Companies Act No. 71 of 2008 (the Act), fulfils its intended objectives as identified by the Act and, if not, why this is the case. Given that the Minister of Trade and Industry has acknowledged that this regime may have shortcomings (Companies and Intellectual Property Commission (the Commission), 2014) and given the current low rate of substantial implementation of business rescue plans, these findings will assist in improving current business rescue practices and will contribute to the increased success of the business rescue regime in South Africa.

1.2: CONTEXT OF THE STUDY

Business rescue proceedings attempt to rehabilitate businesses that are in financial distress and provide them with an alternative to liquidation (Companies Act No. 71 of 2008). This is intended to enhance the viability of those businesses, as well as the economy as a whole. A successful rescue will encourage entrepreneurship and the growth of the private sector of the economy (Kaulungombe, 2012). The business rescue provisions of the Act aim to rescue businesses (Bradstreet, 2011).

Prior to business rescue provisions being enacted, judicial management was used for this purpose but this was traditionally seen as a precursor for liquidation (Levenstein, 2008). The business rescue regime for South Africa was long debated, while the United States of America (US), Australia and the United Kingdom (UK) had already instituted such procedures (Levenstein, 2008). The business rescue provisions introduced in 2008 brought South African company law in line with international provisions for corporate turnarounds (Levenstein, 2008) and aimed to address the shortcomings inherent in judicial management (Loubser, 2010).

Despite the provisions made in the Act to rehabilitate businesses, business rescue proceedings do not always succeed in rehabilitating the company — only 12% of the businesses that entered into business rescue between May 2011 and March 2014 concluded these proceedings successfully (the Commission, 2014) and, up to and including

June 2015, this success rate was 13.6% (calculated from figures provided by the Commission (the Commission, 2015b)). As discussed above, the Minister of Trade and Industry acknowledges that the regime has a number of shortcomings that have come to light in its implementation, such as “sanctions applied to business [rescue] practitioners and the regulation of their activities” (the Commission, 2014, p. 6). The purpose of this study is to elicit insights into the current practice of business rescue, its rate of success and the potential factors, if any, hindering the success of the regime.

1.3: RESEARCH QUESTION

From the perspective of business rescue practitioners, does the South African business rescue regime fulfil its intended objectives of rehabilitating the company or providing a better return than immediate liquidation and, if these objectives are not being met, why are they not being met?

1.4: SIGNIFICANCE OF THE STUDY

In the light of the significance of a well-functioning business rescue regime and the current low level of success (as identified by the Commission), it is necessary to establish whether the current business rescue regime addresses the intended objectives (per the Act) and to identify any issues that may be hindering the current rate of success. The current low rates of Gross Domestic Product growth, where South Africa narrowly missed a recession with a 1.3% contraction in GDP in the second quarter of 2015 and only 0.7% growth in the third quarter of 2015 (Statistics South Africa, 2015), highlights the importance of attempting to rescue companies. This is due to the fact that business rescue will indirectly promote competition and preserve employment (Kaulungombe, 2012), benefitting the economy as a whole.

In addition, companies have a direct impact on the social well-being of the community in which they conduct business (Loubser, 2010). Successful business rescue proceedings are in the interests of South African society as a whole. The successful rescue of financially distressed companies will limit job losses and this is extremely relevant in South Africa where unemployment figures are high (Loubser, 2010). The issue of high unemployment is exacerbated when businesses begin to collapse because companies are amongst the

biggest employers (Loubser, 2005). Loubser (2010) also explains that a greater number of South Africans now hold shares in listed companies indirectly and that individual shareholding has increased in South Africa. In particular, 95% of the shareholders in South Africa's publicly traded broad-based black economic empowerment share-purchase schemes are individuals (van Zyl, 2015). This emphasises the fact that companies are part of the community and that their failure will impact the community, placing greater importance on their rescue.

Although there are several studies that observe business rescue from various angles (legal, financier perspective, etc.), there are no studies which consider business rescue practices as a whole from the perspective of the business rescue practitioner. This study will offer detailed viewpoints of practitioners as the data is collected through interviews with practitioners. From these interviews, impediments to the current business rescue regime, in the views of practitioners, were established and practical recommendations are made where possible.

1.5: DELIMITATIONS

The study is limited to business rescue proceedings in South Africa and reviews corporate rescues in other jurisdictions only to the extent that this facilitates an understanding of why the current rescue regime in South Africa was developed. This is because most countries have their own corporate rescue regimes and there is extensive literature that compares these. The study will consider judicial management only to the extent that it facilitated and caused the development of the current business rescue regime.

1.6: ASSUMPTIONS

It is assumed that participants interviewed will be forthcoming with their views in responding to questions (as addressed by asking participants to explain any seemingly incomplete answers, as per Section 3.2) and that responses provided by these participants will reflect the views of business rescue practitioners in general.

2. LITERATURE REVIEW

2.1: BASICS OF THE BUSINESS RESCUE REGIME

Business rescue proceedings attempt to rehabilitate businesses that are in financial distress (Companies Act No. 71 of 2008) and provide them with an alternative to liquidation. The provisions for business rescue in the Act are vital to the functioning of a healthy economy (Kaulungombe, 2012).

There are two requirements for the use of business rescue provisions: the company must be financially distressed, and there must be a reasonable prospect of rescuing the company (Companies Act No. 71 of 2008). Financial distress refers to the appearance that the company will not be able to pay its debts as they fall due in the following six months or that the company will become insolvent in the following six months¹ (Companies Act No. 71 of 2008). Business rescue can be entered into voluntarily by the company, or applied for by creditors, shareholders and employees (Companies Act No. 71 of 2008).

Section 7(k) of this Act provides that the rescue and recovery should be efficient and balance the rights and interests of all stakeholders, while section 128 provides that a company that has instituted business rescue proceedings is temporarily supervised by a business rescue practitioner and granted a temporary moratorium on rights of claimants against the company in respect of property in its possession (Companies Act No. 71 of 2008). The Association of Chartered Certified Accountants states:

“The primary objective with business rescue provisions is to save the company as a going concern. If this is not possible, then the secondary object or goal is to restructure the company in such a way that shareholders and creditors will still get a return on their investments, which is better than the return that they would have received should the company be liquidated.” (ACCA, 2014)

Despite the provisions made in the Act, business rescue proceedings do not always succeed in rehabilitating the company, as reflected by the current low rate of success (the Commission, 2014; the Commission, 2015b).

2.2: IMPORTANCE OF BUSINESS RESCUE

¹ It is noted that insolvency, in the context of the definition of financial distress, refers to factual insolvency rather than commercial insolvency (Wainer, 2015).

“A robust rescue regime is essential if ailing companies are to be given every reasonable chance to regain health” (Finch, 2005, p. 374). Business rescue is intended to enhance the viability of those businesses, as well as the economy as a whole. While an effective business rescue regime is advantageous to any economy and country, it has even more relevance in developing economies where employment preservation is a key concern (Loubser, 2007). The acquisitions of TopTV², Meltz³ and Advanced Technologies and Engineering Company⁴ through business rescue “have resulted in the market and stakeholders (including creditors) becoming confident in the business rescue process” (Levenstein & Becker, 2013, p. 2). This emphasises the importance of a well-executed business rescue regime.

The survival and recovery of an ailing business can be extremely valuable to stakeholders (Loui & Smith, 2006). Business rescue provisions in the Act, through allowing for financially distressed businesses to be rehabilitated, reduces the number of liquidations and assists in maintaining a greater tax base from which government generates revenue (Kaulungombe, 2012). If a company is successfully rescued, it will have another opportunity to trade profitably and this will encourage entrepreneurship and the growth of the private sector in the economy (Kaulungombe, 2012). Claasens supports this view and states that business rescue, as an alternative to liquidation, is intended to “prevent the negative impact on economic and social affairs” (2012, p. 12). Loubser (2010) also refers to a statement made by Mr Robert Baxter, the Chief Economist of the Chamber of Mines of South Africa, when he said that an effective business rescue regime is taken into account by foreign investors in deciding whether to invest in a company. Business rescue may also be instrumental in fulfilling some of the other goals of South Africa – the short time frames available in terms of the Broad Based Black Economic Empowerment⁵ and the specified minimum targets of participation may mean that there are some people entering business for the first time without the necessary training and skills and it is imperative to assist these business when they show signs of distress (Loubser, 2007).

² TopTV faced difficulty due to the strong competition faced in the industry in which it operated (Speckman, 2012). The company changed its name to Starsat, had a change in shareholders and is now looking to end that process and continue to operate (Thangevelo, 2015).

³ The fashion store Meltz entered into business rescue after it became unable to pay its creditors (Planting, 2013). Meltz was subsequently acquired by African Procurement Agencies Proprietary Limited (Levenstein, et al, n.d.).

⁴ The Advanced Technologies and Engineering Company (ATE) was a well-established aerospace company that was placed under business rescue after difficult times (defenceWeb, n.d.). It subsequently was incorporated into the Paramount Group (defenceWeb, n.d.). This business rescue resulted in an important legal precedent being set. The Court held that ‘substantial compliance with s129(3) and s129(4) is insufficient (ENSafrica, 2012)

⁵ Broad Based Black Economic Empowerment Act 53 of 2003

As discussed in Section 1.4 above, companies have a direct impact on the social well-being of the communities in which they operate (Loubser, 2010), meaning that successful business rescue proceedings are in the interests of the South African society as a whole, especially given the current high rates of unemployment.

2.3: THE BIRTH OF BUSINESS RESCUE

2.3.1: The failure of judicial management

The business rescue regime legislated in the Act replaces judicial management which was perceived as a step toward liquidation (Levenstein, 2008). Under the Companies Act of 1973, a company which was financially distressed and could not meet its obligations had two alternatives to liquidation: judicial management or compromise (Claasens, 2012)⁶. Judicial management provided a formal corporate business rescue procedure but was not seen to be an effective means of rescuing companies in financial distress because of its low rate of success⁷ and instances of its abuse.

“Failure of judicial management to effect a rescue is the norm” (Rajak & Henning, 1999, p. 265). Loubser quotes J Josman’s judgement in the *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* case as stating that judicial management “barely worked” (Loubser, 2010, p. 3). It was also considered to be “cumbersome and was not accessible enough” (Alberts, 2004, p. 81). Judicial management was also only available to companies and not to close corporations (Lamprecht, 2008). The Department of Trade and Industry’s policy paper of May 2004 stated that judicial management provisions were rarely utilised and that, when utilised, the use of such provisions was rarely successful (Loubser, 2010). It was also considered to be a “special and extraordinary privilege that should be granted only in very special circumstances” (Loubser, 2008, p. 373). Bradstreet (2011) explains that of the companies that made use of the judicial management provisions, less than 20% avoided being wound up. Claasens (2012) states that judicial management was subject to failure due to the high level of probability of success required for rescue to be initiated and the requirement that the company settles all of its debt with its creditors. There was also a great level of Court involvement which was “self-defeating” (Rajak & Henning, 1999, p. 268) which

⁶ While schemes of arrangement and informal arrangements were also available, schemes of arrangement were regarded as too complex and too cumbersome, while informal arrangements could be jeopardized by a single creditor (Alberts, 2004).

⁷ In 1980, the success rate of judicial management was around 18% (Loubser, 2007).

may make it unsuitable for smaller businesses (Rajak & Henning, 1999; Lamprecht, 2008). There is an onerous burden of proof placed on the applicant (for judicial management) to show that it is probable that the company will be rescued (as opposed to possibility) (Lamprecht, 2008).

Claasens (2012) also criticises the mindset of judicial managers in saying that they did not have the mindset of saving the company, resulting in many cases of judicial management ending in liquidation. Some also may have had a conflict of interest where the judicial manager, who was also a professional liquidator, recommended that the company be liquidated and then applied for appointment as liquidator (Lamprecht, 2008).

The emphasis that judicial management placed on the interests of creditors stood in the way of rescuing a financially distressed company (Bradstreet, 2011). The shielding focus on creditors was not debtor-friendly (the regime focused on the interests of creditors) and, therefore, did not allow for successful rescues of companies (Bradstreet, 2011). The Centre for Advanced Corporate and Insolvency Law (2004) quotes Harmer (1997) as saying that a business rescue regime has a better chance of achieving the intended objective if the insolvency provisions are debtor-friendly. Shareholders were also only afforded limited influence and were generally “onlookers” (Loubser, 2008, p. 379). Judicial management also had a negative impact on the credit rating of the company and made it difficult for the company to obtain financial assistance (Claasens, 2012) with which to rehabilitate itself. Under judicial management, the management of the company was replaced with the judicial manager (The Centre for Advanced Corporate and Insolvency Law, 2004; Loubser, 2008). Courts saw judicial management as an extraordinary measure rather than a worthwhile alternative to liquidation (The Centre for Advanced Corporate and Insolvency Law, 2004). Judicial management could only be invoked if the company was already insolvent (The Centre for Advanced Corporate and Insolvency Law, 2004; Lamprecht, 2008).

The business rescue provisions legislated in the Act attempt to improve on and address the flaws of judicial management. Judicial management was aimed at rescuing businesses in distress but its flaws meant that this aim was not often realised (Bradstreet, 2011). Due to the low success rate under judicial management, creditors would resort to “cutting their losses” (Bradstreet, 2011, p. 356). The current business rescue regime recognises the value of the entity as a going concern (Bradstreet, 2011). This regime considers all affected parties and is not only focused on the interest of the creditors (Bradstreet, 2011). The business rescue practitioner is appointed to consider and balance the interests of all affected persons and the provisions of the Act afford protection to the financially distressed company (the

debtor) (Bradstreet, 2011). Despite this, business rescue may, in fact, also achieve a better outcome for creditors than liquidation, as the going concern value of a company is likely to exceed its liquidation value (due to the benefits to be derived from the creditor trading with the company in the future, if it survives) (Bradstreet, 2011). Furthermore, business rescue provisions in the Act can be applied when the company is financially distressed and need not be invoked only when the company is already insolvent (Companies Act No. 71 of 2008). The business rescue provisions in the Act bring about several improvements and address some of the flaws inherent in judicial management.

2.3.2: International corporate rescue provisions

Although South Africa was one of the first countries to introduce a form of corporate rescue through judicial management, prior to the Act, it lagged behind other countries in terms of its business rescue regime (The Centre for Advanced Corporate and Insolvency Law, 2004). This was due to a few progressions in other corporate rescue regimes that South Africa did not keep abreast of (as judicial management had not changed substantially since its enactment) (Kloppers, 1999). The trend in other modern corporate rescue regimes was to rescue the company and the business carried on by it (Bradstreet, 2011), while judicial management in South Africa was perceived simply to precede liquidation (Levenstein, 2008), which would not allow such a rescue to take place. It seemed that business rescue regimes worldwide were popular but that judicial management was unsuccessful (The Centre for Advanced Corporate and Insolvency Law, 2004). Judicial management was seen as an extraordinary measure, while other jurisdictions saw business rescue as a necessary and natural predecessor for insolvency (The Centre for Advanced Corporate and Insolvency Law, 2004).

In establishing its own business rescue regime, South Africa had the opportunity to learn from those of the US, Germany, Canada, the UK and Australia (Claasens, 2012; Cawood, 2014) because these countries had already instituted such practices. The main features of the corporate rescue regimes of these other jurisdictions and potential influences on the South African regime are discussed briefly below⁸:

The U.S.

⁸ It is noted that what constitutes success under the regimes of other jurisdictions may vary (as per the discussion of Conradie & Lamprecht (2015)). The key features are discussed as a means of showing how these regimes influenced the establishment of the South African business rescue regime, rather than for the purposes of comparison.

Chapter 11 of the U.S.'s Bankruptcy Code provides that rescue commences when a debtor files a petition with the Bankruptcy Court and that this petition need not show that the debtor is insolvent but need only show that the debtor is qualified to present such a petition (Pont & Griggs, 1995). This is similar to the consideration of financial distress in terms of the Act, rather than actual insolvency. The goal of filing a Chapter 11 petition (as opposed to filing for liquidation under Chapter 7) is to become profitable (U.S. Securities and Exchange Commission, 2009). This is similar to one of the objectives of the Act in terms of business rescue – to rehabilitate the company. Filing of this petition then allows the debtor (distressed company) 120 days to propose a plan for reorganisation (Pont & Griggs, 1995). After this period, other parties with an interest in the company may propose a plan but approval of all classes of creditors is not a prerequisite for the confirmation of the plan, as long as the plan is fair and equitable with respect to all interests affected by the plan (Pont & Griggs, 1995).

Germany

Unlike the corporate rescue regime in the U.S., the German business rescue regime does not provide for a debtor in possession (where the company itself has an opportunity to rescue itself) and does not place priority on reorganisations (Loubser, 2010). German law provides that rescue should only be an option if the value of the business as a going concern exceeds the liquidation value (Loubser, 2010). There is no difference in the procedure, under German law, regardless of whether it is expected that the company be liquidated or rescued (Loubser, 2010). The debtor or its creditors can apply to an insolvency court for the commencement of insolvency provisions, when the debtor is illiquid (unable to pay debts as they fall due), is in a situation where there is imminent illiquidity (but this option is only available if the debtor is the applicant) or is over-indebted (insolvent) (Loubser, 2010). The provisional order by the court (in terms of insolvency proceedings) may offer some protection of the debtor's assets but there is still a meeting of creditors in which claims are put forward and addressed by the insolvency practitioner (Loubser, 2010). There is little similarity between this regime and the South African business rescue regime.

Canada

Up until 1991, Canada did not reform its corporate rescue law, resulting in all secured creditors having to be in agreement if the company were to reorganise its affairs (Davis, 1991). Canada currently distinguishes between different sizes of companies in restructuring and larger and smaller companies' restructuring is governed by two different Acts (Conradie & Lamprecht, 2015). The majority of the creditors in each class and the Canadian court must

accept the restructuring plan (Conradie & Lamprecht, 2015). The Canadian business rescue regime has three main goals (similarly to those of the U.S., Australia and the U.K.) – (1) the impact on all stakeholders should be beneficial and (2) an economically viable company should emerge from the rescue or (3) there should be a better return for creditors than that achieved under liquidation (Conradie & Lamprecht, 2015). The latter two objectives are similar to those of the South African business rescue regime.

The U.K.

The U.K.'s corporate rescue provisions aim to preserve the continuation of the business as a going concern and to preserve some jobs as a result (Loubser, 2010). The U.K.'s Insolvency Act provides that financially distressed companies will have an administrator appointed to assist and that this administrator will have a wide range of management powers (Loubser, 2010). The process to establish these laws involved a report on previous laws (the Cork Report) which pointed out that court applications and hearings were costly and, therefore, recommended a voluntary arrangement procedure (Loubser, 2010). Administration begins with the appointment of an administrator, which may be achieved in one of three ways: by an order of the court; by the holder of a floating charge; or by the company or its directors (Loubser, 2010). The opportunity afforded to the directors to appoint an administrator arises from the fact that the directors are "in the best position to sense impending crisis" (Armour, 2004, p. 4). Administration is only available if a company satisfies two conditions: (1) the company is or is likely to be unable to pay its debts and (2) administration is reasonably likely to satisfy the intended objective of administration proceedings (Loubser, 2010). The intended objective of administration proceedings is to rescue the company as a going concern and, if this is not possible, to achieve a better return for creditors than that which would have been achieved had the company been wound up (Loubser, 2010). Administration grants the company a moratorium on the enforcement of claims and repossession of security (Armour, 2004). It was found that the main cause of financial difficulty (for the companies that entered into the U.K.'s corporate rescue procedure) was poor management and poor economic conditions and that the breathing space afforded by the moratorium has a significant effect (Pandit, Cook, Milman & Chittenden, 2000). This regime is also very similar to the current South African business rescue regime.

Australia

The Australian approach was guided by the approach of the U.K. and the U.S. (Routledge & Gadenne, 2004). The objective of the Australian corporate rescue regime is to maximise the

possibility of the company continuing, or, if this is not possible, to provide a better return than immediate winding up (Anderson, 2001). Australia's business rescue provisions call for the appointment of an independent, external 'company administrator' who is appointed by the board of directors (Pont & Griggs, 1995). This is similar to the appointment of the business rescue practitioner under the current South African regime. However, in contrast to the South African business rescue regime, the company administrator must be qualified as a liquidator (Anderson, 2001). When the company administrator is appointed and the company effectively enters into voluntary administration, there is a short moratorium on the enforcement of debts against the company but there are certain exceptions⁹ (there are no exceptions of this nature to the moratorium in the South African business rescue regime) (Museta, 2011). During this time the company administrator decides on the appropriate course of action by first investigating the financial position of the company (Pont & Griggs, 1995). The company administrator may then execute a deed of company arrangement (this is the primary objective), which is a plan for rescue or rehabilitation of the company, or decide that the company is to be liquidated (Pont & Griggs, 1995). The company administrator may exercise any power of the company or its officers (Pont & Griggs, 1995; Museta, 2011). The company administrator may breach industrial legislation if he deems this necessary in the execution of his duties (Museta, 2011). This regime, however, accepts that rescue need not necessarily rule out liquidation but should provide a better return to creditors than winding up (liquidation) (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68, 27 May 2013). This regime has many similarities to the current South African business rescue regime. In 2004, it was estimated that, of the companies that made use of voluntary administration, 20 percent attempted to continue trading (Routledge & Gadenne, 2004).

The provisions for business rescue inserted into the Act bring South African company law in line with international provisions for corporate turnarounds (Levenstein, 2008). It is important that a business rescue regime is specifically tailored for the economic and social conditions of a country (Claasens, 2012). The South African business rescue regime can, therefore, not be primarily based on that of another country.

2.4: COMPANIES ACT (2008)

⁹ These exceptions apply when the holder of a charge over the whole or substantial amount of company assets acts before or during the decision period and enforces that charge; when a secured creditor holding a charge has assumed possession or control over that property or has made arrangements for its sale; when a secured creditor holds a charge over perishable property; and when, prior to the appointment of the administrator, owners or lessors of property used by or in possession of the company enforce a right to take possession of that property (Museta, 2011).

One of the purposes of the Act, as per Section 7(k), is to balance the rights and interests of all relevant stakeholders and provide for the efficient rescue and recovery of financially distressed companies (Companies Act No. 71 of 2008). Business rescue provisions generally recognise the value of the business as a going concern, in this way catering for a wider variety of interests and moving away from primarily serving the interests of creditors (Claasens, 2012). However, rescuing the business may also provide a better return to creditors and will assist in preventing unnecessary liquidations (Claasens, 2012).

The business rescue provisions contained in the Act apply to companies and close corporations, until the latter form of entity ceases to exist (Loubser, 2010). This is despite the rescue provisions already in the Close Corporations Act (Loubser, 2010)¹⁰. For the purposes of this report, “company” is used in reference to both companies and close corporations. The Act, in section 128, defines ‘business rescue’ as:

proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;

(Companies Act No. 71 of 2008)

Business rescue proceedings may only be invoked by companies that are financially distressed. Both the inability to pay debts and insolvency need to be considered because a company that is temporarily unable to settle its debts as they fall due, as result of unforeseen circumstances, may have assets that exceed its liabilities but may need the protection of business rescue in order to rehabilitate itself (Loubser, 2010). Business rescue is likely to be more successful if it is initiated at the first sign of financial distress, rather than after the

¹⁰ Section 66 of the Close Corporations Act allows for the applicability of the provisions of Chapter 6 of the Act (which includes provisions related to business rescue and compromise with creditors) to Close Corporations. New Close Corporations can, however, not be formed (South African Institute of Professional Accountants, 2011).

company is actually insolvent (Loubser, 2010). As a result, the provisions for business rescue in the Act are a significant improvement on judicial management, which required the company to be insolvent before the institution of proceedings to rescue the company (Loubser, 2010). The Act also shows a fundamental shift towards a “debtor-friendly” approach (Alberts, 2004, p. ii).

A company may voluntarily enter into business rescue. This is discussed in Section 2.4.1. Alternately, an ‘affected person’ may apply for a company to be placed under business rescue – this is discussed in Section 2.4.2. Section 2.4.3 discusses the appointment of the business rescue practitioner to facilitate the business rescue proceedings and the business rescue proceedings themselves.

2.4.1: Voluntary entrance into business rescue

It is important in any corporate rescue legislation that there is a clear indication of which companies should attempt reorganisation in order to ensure the efficient operation of that legislation (Routledge & Gadenne, 2004). The Act provides that the board of a company may resolve to voluntarily place a company under business rescue if there are reasonable grounds to believe that the business is financially distressed and there is a reasonable prospect of rescuing the business. Business rescue is only available if there is a reasonable prospect of rescuing the company and is not available if liquidation proceedings have been initiated against the company, per section 129 (Companies Act No. 71 of 2008). In contrast to judicial management, there is no involvement of the court at this stage (Loubser, 2010). The resolution to place the company under business rescue will, however, only come into effect once it is filed with the Commission (Loubser, 2010). The voluntary resolution allows the board to take immediate action when it recognises the need for “breathing space” (Loubser, 2010, p. 51).

Once the board has resolved to enter voluntarily into business rescue, the company must, within five business days, publish a notice of such resolution and the effective date to every affected person and appoint a business rescue practitioner (Companies Act No. 71 of 2008). A notice of appointment of a practitioner must be filed with the Commission and published to each affected person (Companies Act No. 71 of 2008). An affected person may subsequently apply to the court for the setting aside of the resolution to enter voluntarily into business rescue (Companies Act No. 71 of 2008).

Should the board recognise that the company is financially distressed and that there is a reasonable prospect of rescue but decide not to place the company under business rescue the board must supply written notice to each affected person indicating the reasons for not adopting a resolution (Companies Act No. 71 of 2008).

2.4.2: Application to the Court for commencement of business rescue

As an alternative to voluntarily entering into business rescue, a shareholder, creditor, trade union representing employees of the company or employees not represented by the trade union (an “affected person”) can apply to the court at any time for an order to place the company in business rescue (Companies Act No. 71 of 2008). This, however, means that a director who was outvoted cannot make such an application (Loubser, 2010). This provision also allows for a single shareholder to apply to the court to place the company under business rescue, giving shareholders more influence than was the case under judicial management (Loubser, 2008). However, it is uncertain how much information a shareholder has access to and whether the shareholder will have sufficient evidence to support the application (Loubser, 2010). This provision, in allowing shareholders and trade unions to make an application to the court, is dissimilar to comparable corporate rescue systems (Loubser, 2010). However, the inclusion of trade unions allows for greater protection of the interests of workers (Loubser, 2010).

Upon application, the court has discretion either to dismiss the application or to place the company under business rescue (Claasens, 2012). Claasens states that, if there is a “reasonable possibility” of being rescued (2012, p. 11), the court should place the company under business rescue. Wassman uses the cases of *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) and *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (GSJ) (unreported case no 12/45437, 16566/12, 28-3-2013) to show that the courts do not institute business rescue on the basis of applications that are frivolous or show insufficient evidence of a reasonable prospect of rescue (Wassman, 2014). Courts evaluate the reasonable prospect of rescuing the company on grounds that are “material, factual and objective” (Wassman, 2014, p. 5).

In the *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 case, the applicants applied to the court for the institution of business rescue. The company had been stripped of most of its income and assets but the applicants believed that business rescue would be more beneficial than liquidation as they

believed that a higher value could be obtained for the remaining assets under business rescue (Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd (609/2012) [2013] ZASCA 68, 27 May 2013). The court ruled that in the absence of any income that could be used by the company, there was no reasonable prospect of rescuing the company (Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd (609/2012) [2013] ZASCA 68, 27 May 2013). One factor that should be considered in evaluating whether there is a reasonable prospect is whether the financial distress results from internal or external factors and whether those factors are temporary in nature (Bradstreet, 2011). If there is no reasonable prospect of rescue, the courts may rule that liquidation is more appropriate, as was the case in Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd (609/2012) [2013] ZASCA 68.

The King Code of Corporate Governance for South Africa (King-III) is a widely-used source of corporate governance principles and recommends that decision-makers consider the needs, interests and expectations of all interconnected economic actors (stakeholders) (Institute of Directors of Southern Africa, 2009). The opportunity afforded to stakeholders of the company to bring forward an application for business rescue to a court is reflective of stakeholder inclusiveness (as reflected in Principle 8.2 and Principle 8.4. of King-III (Institute of Directors in Southern Africa, 2009) which recommend that the company should develop mechanisms for stakeholder engagement and interaction). Once the business rescue application is approved by the court (or there is a resolution by the company itself to place the company under business rescue), business rescue proceedings can commence with the appointment of the practitioner.

2.4.3: Business rescue procedures

Upon commencement of business rescue (whether voluntary or as a result of application by an affected person), a business rescue practitioner is appointed to conduct the business rescue proceedings. If business rescue is effected through a voluntary resolution, the board will appoint a practitioner but if effected by application to the court, the court will appoint an interim practitioner (Loubser, 2010). This practitioner must be of good legal, accounting or business standing; must be licensed by the Commission; must not be on probation or disqualified from acting as a director; and must not be related to the company (Companies Act No. 71 of 2008). The business rescue practitioner has full management control of the company, may delegate any power or function to a person who was part of the board of the company, may remove a member of the management of the company from office, and is

responsible for the development and implementation of a business rescue plan (Companies Act No. 71 of 2008). Once appointed, it is the practitioner that will facilitate the business rescue proceedings.

The commencement of business rescue proceedings, as facilitated by the business rescue practitioner, grants a temporary moratorium on most legal proceedings against the company, including enforcement action against the company and claims in relation to any property in the company's possession (Companies Act No. 71 of 2008). This moratorium is inherent and does not need to be separately applied for, which was the case under judicial management (Loubser, 2010). Legal proceedings may be instituted against the company if it is with the written consent of the practitioner or by order of the court, as well as in limited other specific circumstances (Companies Act No. 71 of 2008). Guarantee or surety obligations may not be enforced while business rescue proceedings are ongoing (Companies Act No. 71 of 2008). This gives the company an opportunity to rehabilitate itself.

During business rescue proceedings, a company may only dispose of property in the ordinary course of business and in a bona fide arm's length transaction which is for fair value and approved by the practitioner in writing (Companies Act No. 71 of 2008). A company may obtain financing while under business rescue and the providers of this finance will have the greatest preference of all claims against the company (Companies Act No. 71 of 2008). Employees continue to be employed while business rescue is ongoing (Companies Act No. 71 of 2008). The practitioner may suspend any obligation of the company, in whole or part, and may apply to the court to cancel any contract or part thereof, unless such contract constitutes a contract of employment (Companies Act No. 71 of 2008). Directors, during business rescue, must attend to the requests of the practitioner (Companies Act No. 71 of 2008).

On commencement of business rescue, the practitioner must investigate the affairs and financial position of the company and determine whether there is a reasonable prospect of rescuing the company (Companies Act No. 71 of 2008). (This is despite the company or affected person making its/his own assessment prior to entering into business rescue.) If no such prospect exists, the practitioner must inform the affected persons and the court and apply to the court for the cessation of business rescue proceedings and the commencement of liquidation proceedings (Companies Act No. 71 of 2008). The practitioner should also identify whether the company is financially distressed and whether reckless trading occurred prior to the commencement of business rescue proceedings (Companies Act No. 71 of 2008).

Within ten business days of the commencement of business rescue proceedings, the practitioner must meet with creditors, inform them as to whether there is a reasonable prospect of rescuing the company, and may receive proof of claims by creditors (Companies Act No. 71 of 2008). Creditors may then decide whether to appoint a committee of creditors to consult with the practitioner about any matter, without directing or instructing the practitioner (Companies Act No. 71 of 2008). A similar set of proceedings must occur for employees (Companies Act No. 71 of 2008).

The practitioner must then prepare the business rescue plan which must contain all the information reasonably required to enable affected persons to decide whether to accept or reject the plan (Companies Act No. 71 of 2008). The plan is “a means to an end” (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68, 27 May 2013, p. 18), rather than an objective in itself. The existence of a provision requiring a plan shows an improvement on judicial management (Loubser, 2010).

Within ten days of the publication of this plan, the practitioner must convene a meeting of creditors in which he introduces the plan, informs the attendees whether there is still a reasonable prospect of rescuing the company, gives representatives of employees an opportunity to address the meeting, invites discussion and conducts a vote on any amendments, adjournments and preliminary approval of the plan (Companies Act No. 71 of 2008). A plan must be approved by 75% of the creditors’ voting interests and 50% of the independent creditors’ voting interests (Companies Act No. 71 of 2008). The prompt acceptance of the plan is of utmost importance in the success of the rescue (Lamprecht, 2008). Once approved, the plan is binding on the company, the creditors and holders of securities (Companies Act No. 71 of 2008). The company, under the supervision of the practitioner, must take all necessary steps to attempt to satisfy any conditions on which business rescue is contingent and to implement the plan (Companies Act No. 71 of 2008).

2.5: SUCCESS RATES

While the regime may be an improvement on its predecessor, there are seemingly low success rates of business rescue. There has been a reduction in the number of liquidations and this is “probably as a result of more financially distressed companies considering the business rescue route” (Hubbard, 2013). However, of the 1338 notices filed with the Commission by March 2014, only 1121 started (the remaining were invalid findings) and of these, only 129 were successfully concluded (the Commission, 2014). This translates to a rate of only 12%. Success, in this instance, refers to ‘substantial implementation’ of the

business rescue proceedings (the Commission, 2014)¹¹. Substantial implementation refers to the business having substantially carried out the activities that were set out for it to achieve through the duration of business rescue in the business rescue plan (the Commission, n.d.). In June 2015, the collective success rate, measured on the same criteria, increased marginally to 13.6% (239 business rescue plans substantially implemented of 1756 business rescues started (the Commission, 2015b)). The potential reasons for this are highlighted below.

Despite the low success rate, improvements in the success of business rescue are expected in the future (Pickworth, 2014) and this is already reflected in the marginal improvement in the success rate at June 2015 (the Commission, 2015b). Pickworth (2014) suggests that the recent success in the business rescues of Meltz, the Moyo restaurant chain and Advanced Technologies & Engineering Company show that business rescue is becoming more successful. A recent judgement by the South Gauteng High Court that clarifies the ranking of creditors is also expected to enhance the success of business rescue as it will allow business rescue practitioners to more easily approach new investors, as these new investors now have preference over existing investors (Pickworth, 2014).

2.6: FACTORS CONTRIBUTING TO SUCCESS OR FAILURE

Several factors have been identified as contributing to the low rate of success. These are the nature of the relationship between practitioner and management (Section 2.6.1), the lack of availability of funding (Section 2.6.2), qualifications and experience of the practitioner (Section 2.6.3), consistency of court judgements (Section 2.6.4), lack of prompt action (Section 2.6.5), the impact of international provisions (Section 2.6.6) and the rights of affected parties (Section 2.6.7).

2.6.1. Relationship between practitioner and management

A good working relationship between the practitioner and management is key to success in turning around a financially distressed company. A relationship of trust and a cohesive vision shared by management and the practitioner are imperative (Levenstein, 2008). A similar phenomenon exists in the U.K.'s corporate rescue regime and, in terms of this, the importance of co-ordination between directors and the practitioner for information flow is highlighted (Finch, 2005). Finch then identifies commitment to the rescue enterprise and the

¹¹ It is noted that there does not seem to be a formal set of criteria against which to evaluate success (Conradie & Lamprecht, 2015). However, this method of calculation is that used by the Commission at this time and the statistics produced are further corroborated by the Minister's comments.

varying incentives each person involved has to pursue the rescue of the enterprise (Finch, 2005). An example of the way a lack of co-operation may impede the success of the rescue procedure is where directors have a personal motive to limit the flow of information and to prolong their employment by forcing the practitioner to delay decision-making (Finch, 2005). Directors may also be distrustful of administrators (business rescue practitioners) as they may see the practitioner's main incentive as satisfying the banks, rather than rescuing the company (Finch, 2005). It is, however, also noted that changes in the senior management team may have a role to play in a successful recovery as this may be a means of restoring stakeholder confidence (Smith & Graves, 2005).

2.6.2. Availability of funding

Olivier (2014) states that not every business is a candidate for business rescue and that business rescue will only succeed if shareholders are willing to provide some form of working capital. A lack of available funding could seriously impede the success of business rescue as, without it, the company is unable to sustain its operations (Thomas, 2014). The delivery of any notice stating that the company is in financial distress could severely impede the ability of the company to secure funding and could potentially result in the cancellation of credit facilities and in demands by suppliers to be paid immediately (Loubser, 2010). Vriesendorp & Gramatikov (2010) find that a large majority of insolvency practitioners find that it is more difficult to find funding for companies that are in financial distress, especially when the company needs the funding most (when it is in financial distress). The lack of available funding may be due, in part, to the ability of the company to appoint the business rescue practitioner without input from creditors, giving rise to "a new level of the undesirable practice of the so-called 'friendly liquidation'" (Wainer, 2009, p. 825).

Finch (2005) points out that, in times of financial distress, banks (and other creditors) are in a position to demand certain terms and these terms may give them the ability to influence the strategy of the company. New funding from shareholders also increases the equity these shareholders hold in the company and will allow these shareholders greater control over the company (Finch, 2005). Despite this, the fact that the Act provides post-commencement financiers with superior priority may make it easier for the company to obtain funding (Finch (2005) points out that a flaw in the UK Corporate rescue regime is that it does not place the superior priority status on post-commencement financiers). However, despite this and the recognition by the World Bank and UNCITRAL that post-commencement financing is of importance, South Africa seems to lack significant available post-commencement finance (du Preez, 2012). There is also a lack of understanding by creditors of the business rescue

process, which may greatly hinder their ability to participate meaningfully in business rescue (le Roux & Duncan, 2013).

2.6.3. Qualifications and experience of practitioners

It is crucial that skilled business rescue practitioners manage the business rescue process (Bezuidenhout, 2012). A factor identified as contributing to the failure of business rescue is the fact that there are no clear requirements for the qualification as a business rescue practitioner (Pretorius, n.d.). Business rescue practitioners claim to be “flying blind” (Pretorius, n.d., p. 4). Practitioners do not know the reason for business failure and do not understand the warning signs present (Pretorius & Holtzhauzen, 2013). At present, there is no clear framework against which to perform their duties and this may be a contributing factor to the low success rate of business rescue. Qualification for persons of good legal or accounting standing amounts to a course addressing knowledge and skills (Pretorius, n.d.). There have also been a large number of people inappropriately acting as business rescue practitioners, due to it being viewed as a lucrative practice and the “ad hoc licensing methodology adopted in South Africa” (in the form of the lack of clear requirements for qualification as a business rescue practitioner) contributes to the existence of practitioners that are ineffective (Pretorius & Holtzhauzen, 2013). Finch identifies, as a critical aspect of a good corporate rescue regime, expertise “in making commercial or financial judgments and in devising strategies that advert to all creditor interests” (Finch, 2005, p. 385). Conducting corporate rescue will involve many different areas of expertise (Finch, 2005) and complex competencies to perform this “emergency-ward business” (Pretorius, n.d., p. 2) but a wide range of expertise in many areas of business is not currently a requirement for qualification as a business rescue practitioner. The expertise and knowledge of the practitioner is especially important given that s/he is able to exercise the powers of management and is responsible for the development of a business rescue plan. It is also of particular concern when there is consideration of the fact that turnaround managers and rescue practitioners may face several liabilities in turnaround situations (Pretorius & Holtzhauzen, 2013).

2.6.4. Court judgements

The lack of a specialist court has also been blamed for the lack of success of business rescue which has resulted in contradictory judgements (Ensor, 2014). [This refers to the fact that not all judgements are made in support of other judgements previously made.] This impedes the success of business rescue as it leaves practitioners with uncertainty about what are acceptable actions in the context of business rescue. Certain provisions in the Act

seem to lack clarity, such as the meaning of “reasonable prospect”. Case law would ordinarily clarify this meaning but the conflicting judgements in this area do not allow for the establishment of clear criteria.

2.6.5. Prompt action

For business rescue to succeed, it is imperative that prompt action and decisions are taken (Finch, 2005). Olivier (2014) states that delaying the process of requesting assistance is the worst thing a business owner can do. It is, therefore, imperative to recognise the warning signs (Olivier, 2014) and ask for help early on. Warning signs exist in several different categories, including management, finances, operations, strategy and banking (Pretorius & Holtzhauzen, 2013). These can be based on internal indicators (such as financial ratios) and external indicators and can be used by the practitioner as a pre-assessment prior to the practitioner undertaking the rescue (Prior, 2014). An earlier start of a rescue procedure will increase the chances of its success (Loubser, 2010). The board may delay in initiating business rescue because of its belief that there is not a reasonable prospect of rescuing the company, it believes it can continue and trade its way back to good financial health or it may wish to reward itself (the members of the board) (Loubser, 2010). This reward would come in the form of stripping some of the assets of the entity before it is closed down (Loubser, 2010). In both the case of attempting to trade the company out of financial distress and attempting to strip the company's assets for personal benefit, the directors may want to keep this information away from creditors to enhance their own ability to achieve their goal (Loubser, 2010). An entrance into business rescue would require informing creditors and this action will, therefore, be avoided. However, the Companies Act (2008) does provide that if the requirements for voluntary entrance into business rescue are met and the directors decide not to place the company into business rescue proceedings, a notice must still be issued to affected persons disclosing this fact (Companies Act No. 71 of 2008). This factor is adequately provided for. Finch (2005) and Loubser (2010) both note that the onerous requirements for notifications to be sent may act as a deterrent because this is a costly exercise.

Loubser (2010), however, also suggests that the converse may be true. If there were requirements to penalise directors through personal liability for not applying for voluntary business rescue in a timely manner, instead of applying for business rescue to avoid informing creditors, directors may prematurely resolve to liquidate the company as a means of avoiding liability for not having initiated business rescue proceedings (Loubser, 2010).

2.6.6. International provisions

While South Africa's rescue regime may have been developed in line with international provisions, the minor differences between the rescue provisions in the Companies Act (2008) and the provisions of other jurisdictions may be part of the reason why business rescue has not had much success. For example, the U.S.'s corporate rescue regime allows the company itself an opportunity to propose a rescue plan within 120 days of a petition being filed (Pont & Griggs, 1995). This allows the board to propose a rescue regime and does not call for the appointment of an external person (such as a business rescue practitioner). The board has the "requisite hands-on knowledge of a company's immediate state of affairs" (Finch, 2005, p. 391) and may be better able to develop a feasible rescue plan than an external person who is not familiar with the business. Further, the 120 days allowed by U.S. legislation (Pont & Griggs, 1995) to develop a rescue plan is significantly longer than the 25 days allowed by South African legislation (Companies Act No. 71 of 2008). The additional time may allow for a more comprehensive investigation and the preparation of a better plan. In turnaround situations, there is often dependence on financial reports, which are often inadequate and are found to be "after the fact" (Pretorius & Holtzhauzen, 2013, p. 468).

2.6.7. Rights

As mentioned above, the opportunity afforded to employees and a single shareholder to bring forward an application for business rescue is not comparable to any other rescue regime (Loubser, 2010). While shareholders have every right to be involved in corporate rescue procedures because they have a "real interest in the outcome" (Loubser, 2008, p. 372), shareholders do not necessarily have all the information required for an application and may not be able to participate meaningfully in the development of a rescue plan (Loubser, 2010). Furthermore, disgruntled employees have the right to apply to the court for the company to be placed under business rescue (Loubser, 2010), even if this is not the best course of action for the company. This opportunity given to individual shareholders and employees may result in there being a lack of commitment to the business rescue plan by the other stakeholders and this may ultimately cause the proceedings to be unsuccessful.

2.7: SUMMARY

It is clear that business rescue proceedings are not very successful, even when success is only measured by the substantial implementation of the business rescue plan. Certain critical factors for success are not necessarily considered prior to the institution of business rescue proceedings, such as whether a good working relationship can be established between the practitioner and management (as discussed by Levenstein (2008)). The commitment by shareholders and other potential providers of finance should also be considered, as explained by Thomas (2014).

Beyond these factors, the level of qualification and expertise of the business rescue practitioner has been singled out as a factor that may contribute to the failure of business rescue as at this time there are no clear requirements for qualification as a business rescue practitioner. A lack of a specialist court and the conflicting judgements that arise as a result is also considered to be a contributor to the lack of success of business rescue. While each jurisdiction must build its own regime to suit its specific circumstances, the unique provisions of the South African business rescue regime may cause its lack of success. Certain provisions impede the legislation from allowing for the objective of business rescue to be met, such as granting too much power to a single shareholder or employee and affording the practitioner full management control of the company.

As a result of the identification of these potential factors, it is necessary to investigate whether the business rescue regime meets its intended objectives and, if not, what factors, in the view of practitioners, are standing in the way of the regime meeting its objectives. This will address the research question which seeks to investigate whether the South African business rescue regime fulfills its intended objectives and consider, if the objectives are not met, why this may be the case. This investigation is conducted using the method described in Section 3, which makes use of interviews with business rescue practitioners. The results of these interviews are discussed in Section 4.

3: RESEARCH METHOD

This section sets out and explains the selected research method. Section 3.1 discusses a broad framework of the method and its nature. Section 3.2 explains why interviews have been chosen and how these were facilitated and used. Section 3.3 discusses the population and sample selection. Section 3.4 explains how the data was collected. Section 3.5 details ethical considerations made, while Section 3.6 explains how this data was analysed and interpreted. Limitations of the method are considered in Section 3.7 and, finally, the reliability and validity of the results are discussed in Section 3.8.

3.1: RESEARCH METHODOLOGY

This study focusses on the views of practitioners in South Africa with the aim of identifying obstacles to effective business rescue and providing normative recommendations for improving the level of success of the current business rescue regime.

The literature reviewed (see Section 2) pointed out some of the potential shortcomings of the regime from which themes were developed and these themes formed the basis for an interview agenda. The questions included in the interview agenda were designed to address the general practice of the participant in his capacity as a business rescue practitioner, rather than a specific business or case. The results of these interviews were then used to identify common themes and trends, from which results were drawn. The transcripts from interviews were coded with reference to common themes in order to establish whether the current business rescue regime meets its intended objectives and, if not, why this may be the case.

This study is qualitative and exploratory in nature as the results are formulated based on the insights and experiences of business rescue practitioners. Interviews were used to extract the views of business rescue practitioners with experience. The study makes use of grounded theory principles and focuses on the precise views of the participants.

3.2: RESEARCH DESIGN

The design of the study aimed to obtain an understanding of current practices of business rescue. It is exploratory in nature as it aims to understand practical issues that exist in the practice of business rescue (which is similar to the work of Ryan, Scapens & Theobald (2002)). The conclusions reached in this study may be used as a basis for future research (Ryan, et al, 2002; Section 5.3).

The research was performed using semi-structured interviews, which allowed interviewees to talk freely about the topic, which, in turn, allowed for a deeper understanding of the interviewees' practice and perceptions of business rescue (Holland, 1998). A pilot interview was conducted before the commencement of data collection to ensure that questions are sufficiently clear and address the research question (Rowley, 2012; Maroun & van Zijl, 2015). The pilot study responses and data were not used to develop the findings of this report but were used solely to improve the interview agenda and the validity of the research (Rowley, 2012).

Although questionnaires were considered, interviews were selected as the research instrument. Due to the nature of questionnaires, it would not be possible to obtain sufficiently detailed responses to provide adequate insights into the practice of business rescue (Rowley, 2012). Interviews were also considered to be preferable to questionnaires because they provide insights into the interviewees' accounts and knowledge (Alvesson, 2003). It was also necessary to gain insights from key individuals involved in the business rescue process (business rescue practitioners) and it was unlikely that these individuals would take the time to fill in a detailed questionnaire (Rowley, 2012). Due to the use of purposive sampling (Section 3.3.), interviews were deemed to be the most appropriate method.

A review of the literature was conducted with specific focus on how the current business rescue regime in South Africa was developed (Section 2). Through the use of this material, closed- and open-ended questions were developed for the interview agenda. Many of these questions asked for answers in terms of the specific experience of practitioners to encourage the participant to share his/her experiences and perceptions and give meaningful insight into the practice of business rescue. Where responses were unclear or did not fully answer the question posed, further questions were asked. The interview agenda used as the basis for interviews is included in Appendix 1.

Interviews were of varying lengths, with some as short as 30 minutes and some as long as 90 minutes. This length allowed sufficient data to be gleaned to construct useful findings in the context of this study (Rowley, 2012). The length and number of interviews (together with constant comparison) led to theoretical saturation being achieved (Willig, 2008; Creswell, 2007). This was determined as being when no new information was gleaned from further interviews (Willig, 2008; Creswell, 2007).

Interviews were conducted with experienced business rescue practitioners in order to address the research question. Where interviewees provided answers in terms of unique expressions or did not provide a clear answer, they were asked to explain these or add more detail. The data gathered from the interviews with these practitioners was analysed for common themes, using the methodologies detailed in Section 3.5 and this was used to develop a collective understanding of the current practice of business rescue (findings are presented in Section 4).

3.3: SELECTION OF INTERVIEWEES

Population

Business rescue practitioners were selected as constituents of the population as they are likely to have the most relevant knowledge for the study as they facilitate business rescue proceedings in South Africa (Companies Act No. 71 of 2008) and are able to advise a company on whether or not to enter into business rescue. This contributes to the quality and relevance of the data obtained (O'Dwyer, Owen & Unerman, 2011). In order to be a business rescue practitioner in South Africa, registration with the Commission is required. The Commission keeps a record of the 224 business rescue practitioners it has registered (this figure is at 27 March 2015¹²) (the Commission, 2015). Gauteng represents the economic hub of South Africa. Thus, practitioners from Gauteng are selected as constituents of the population. As the study is limited to business rescue proceedings in South Africa and practitioners in Gauteng, the population comprises the 121 practitioners registered with the Commission based in Gauteng province. This identification of the population is consistent with the work of O'Dwyer et al (2011).

Sample and sampling method

The Commission ranks the registered practitioners in terms of experience. 'Senior practitioners' are titled when having more than ten years' experience, 'experienced practitioners' when having more than five years' experience, and 'junior practitioners' when having less than five years' experience (the Commission, 2015a), where experience refers to experience in their particular related field. The sample is selected from only those practitioners who are senior or experienced because practitioners with greater experience will be able to provide better insights into the practice of business rescue. The sampling is, therefore, purposive (Rowley, 2012). While this method may introduce bias into the study, it provides the greatest amount of valuable insight as the practitioners with experience will be able to provide insights from business rescues they have performed (Rowley, 2012). As a result of using only practitioners with experience as interviewees, this study also makes use of elite interviewing (Marshall & Rossman, n.d.).

From the 85 experienced and senior registered business rescue practitioners based in Gauteng (as at 31 March 2014), a sample of twelve has been selected (Chen, Danbolt and Holland, 2014; O'Dwyer, et al, 2011; Rowley, 2012) as data saturation was expected to occur at this point. A small sample size is a core feature of qualitative research as it seeks to gain an understanding rather than generate generalisable findings (Ryan, et al, 2002; Willig, 2008). Interviews were conducted at the convenience of participants at a location and time of

¹² An earlier version of this list was used for planning purposes prior to the 2015 list being available.

their choice. Interviews were conducted in Gauteng between June 2015 and November 2015.

In total, thirteen business rescue practitioners were interviewed. Interviewees comprised business rescue practitioners of different backgrounds (based on information available from the Commission (the Commission, 2015)): interviewees comprised six practitioners from an accounting background, one member of the Institute of Directors, two business consultants, two attorneys, one financial advisor and one other professional.

3.4: DATA COLLECTION

Data collection and analysis made use of some of the principles of the grounded theory approach. There was a continual iterative process of interview responses being considered in terms of the literature and one another (Willig, 2008). Interviewees, being business rescue practitioners, were expected to have a thorough understanding of business rescue provisions and practices in South Africa.

The Commission provides the e-mail addresses of registered practitioners and this was used to contact intended interviewees to request their involvement in the study. The e-mail contained a participant information sheet which explained the nature and purpose of the study and informed the potential participants of their anonymity and the confidentiality of their responses should they wish to participate in the study (O'Dwyer, et al, 2011). This also detailed the likely duration of the interview to be approximately thirty minutes (Rowley, 2012).

Interviews were conducted in person — where possible and convenient to the participant — allowing interviewees to speak freely and share their experiences¹³. This advantage is considered to outweigh the time that was expended in collecting data through this method. As the population of practitioners was based in Gauteng, the costs involved in conducting interviews were not extensive. Where face-to-face interviews were not possible, telephonic interviews were conducted, in line with the recommendation of Rowley (2012). This option of interview type better facilitated elite interviewing (Harvey, 2011).

While there is a range of ways in which to collect data from interviews, such as scribing, recording and a combination of the two, scribing during the interview is distracting to the participant and scribing after the interview does not allow for all pertinent details to be

¹³ Thirteen interviews were conducted in total. Eleven of these were in person and two were conducted telephonically.

captured. As a result, audio recording is deemed to be the most effective method (Chen, et al, 2014). Before the commencement of the interview, each interviewee was asked if he had any objections to the interview being audio recorded (O'Dwyer, et al, 2011). This also assists in the data collection as the interview is semi-structured and many open-ended questions are asked. It would be impractical to scribe as the participant provides answers to open-ended questions. The use of an audio recorder also assists in preventing the interviewer from misinterpreting the interviewees' words, as it allows more time to be set aside for analysis of the true meaning of what the participant has said. This also gives the interviewer an opportunity to place the response of the interviewee in the greater context of the discussion (which addresses the recommendation of Alvesson (2003) that interview statements are viewed in their social contexts). The participant is, however, assured that the audio recording is kept secure and that absolute confidentiality is maintained (O'Dwyer, et al, 2011). This assurance is provided, both in the introductory letter and consent form. The consent form also provides written permission to use responses, as recommended by Leedy and Omrod (2013) and is provided in the introductory e-mail and prior to the start of the interview. Interviewees were also provided with a copy of the transcript and were given an opportunity to make any amendments they felt necessary (Rowley, 2012).

The interview began with establishing rapport with the participant by discussing the nature of the research and the participant's background (O'Dwyer, et al, 2011). A set of standard questions was asked from a semi-structured interview agenda (with follow-up questions where appropriate) to allow for comparisons to be made between the responses of different participants. This interview agenda was prepared in advance (Leedy & Omrod, 2013). Given that an interview is ultimately a conversation, care was taken in the wording of questions so as not to embarrass the participant or be invasive (Rowley, 2012). Different types of questions were asked at different stages to maintain the interest of the participant (Rowley, 2012; O'Dwyer, et al, 2011). In order to establish a means of comparing how significant a variety of factors are on the success of the current business rescue regime, one part of the interview consisted of a ranking question. This required the practitioner to rank the importance of ten factors on the success of the current business rescue regime, on a scale of one to five, where five meant that the factor was highly influential and one meant that the factor was barely influential. Where the practitioner ranked the factor as 2.5 or greater (out of five), this was considered to mean that the factor is of importance in the success of the regime.

Care was taken to explore the participant's views in detail, thereby eliminating any potential misunderstanding. Certain questions were asked more than once, in different ways, to establish the consistency of the participant's responses through multiple observations, as a vital quality control procedure (Harper & Cole, 2012). Questions were carefully worded so as to avoid the interviewer imposing the researcher's own views on interviewees. In conducting the interviews, the interviewer was careful about not being too direct and not asking any leading questions (Rowley, 2012). Instead, the interviewer maintained control of the interview, without influencing the responses of participants. Care was taken in this regard so as not to prejudice the results of the study. The interviewer focused on being a good listener, as recommended by Leedy and Omrod (2013).

3.5: ETHICAL CONSIDERATIONS

The interviewer's success is hinged on how well he anticipates and addresses ethical issues (Marshall & Rossman, n.d.). Interviewees were guaranteed complete anonymity in the interest of gaining complete and honest accounts (as was done by Maroun & van Zijl (2015)). As a result, quotes used in the findings section were thoroughly scrutinised for any information that could potentially be used to identify the interviewee and, if present, this was removed or the response was paraphrased (as was the case in the work performed by van Zijl (2013)). Interviewees were able to stop the interview at any time and were able to refuse to answer questions with which they were not comfortable. (This addresses the potential danger arising from the use of interviews (Marshall & Rossman, n.d.) and is in coherence with the study by Maroun & van Zijl (2015)). All respondents received a copy of their own transcript to verify that their responses were captured correctly. Ethics clearance was also obtained from the University of the Witwatersrand (Appendix 2).

3.6: DATA ANALYSIS AND INTERPRETATION

As stated above, data collection and analysis was based on the principles of grounded theory, as the researcher alternated between analysing interview data and reading literature based on the emerging themes (Willig, 2008). Once all the data was captured, it was analysed to establish common themes and ideas. The data was processed using grounded theory principles and a systematic set of procedures was used to derive the grounded theory phenomenon (O'Dwyer, et al, 2011). The use of the standardised interview agenda allowed for comparisons between responses of different participants to be made.

The transcripts of the interviews were analysed through a formal process of data reduction, data display and data verification (O'Dwyer, et al, 2011). Data reduction occurred, where key themes were established (O'Dwyer, et al, 2011) through a detailed reading of transcripts and rereading of the literature. These were then summarised (O'Dwyer, et al, 2011) for coding to begin. Themes were individually coded to assist with analysis (Rowley, 2012). Open coding was conducted first, in which the data was segregated into categories and common themes, followed by axial coding, in which relationships between categories were identified (including an identification of the central phenomenon and surrounding conditions), and, finally, selective coding, in which the categories and their interconnections were considered together, with connections being drawn between different categories (Leedy & Omrod, 2013; Creswell, 2007). Consideration of any apparent contradictions within a specific transcript or between interviewees was also made (for follow-up questions to be asked via e-mail for clarification) (O'Dwyer, et al, 2011). In addition, the responses were considered in conjunction with the literature to identify similarities and differences. Once theoretical saturation occurred, theory was then developed from the coded data.

3.7: LIMITATIONS OF THE STUDY

Due to the explorative nature of the study, the small sample size and the focus on the experiences of specific individuals, the findings of the study may not be readily generalisable (Ryan, et al., 2002). The views of individuals may also not represent those of the entire population. However, this study may be used as a basis for future research (Ryan, et al, 2002), as it provides insights into practitioners' experiences of the business rescue regime at present.

While there is an inherent risk (due to the nature of the study) that interviewees may provide rehearsed responses due to social pressures (Alvesson, 2003), this was addressed to some extent by guaranteeing interviewees complete anonymity.

3.8: RELIABILITY AND VALIDITY

To ensure that the findings of this study are credible, this study used robust data collection strategies to extract appropriately relevant responses and then used these to draw conclusions in a structured and unbiased manner. The responses garnered were considered in conjunction with the literature in order to determine plausibility.

Reliability

Reliability is achieved by sending each interviewee a transcript of the interview shortly after its occurrence, as well as a summary of findings to review and make any additions or corrections (Leedy & Omrod, 2013). There is also intensive, detailed analysis of interview transcripts (as discussed in Section 3.6) and consultation with supervisors with regard to the process of analysing these transcripts.

External validity

External validity is established through consultation with a researcher not involved in the study in order to review the classification and coding and so minimise bias (Rowley, 2012). It is noted that there is inherent subjectivity in the findings of this research and that, due to the reality being constructed through the interview process, the meanings of participants' responses are dependent on the context in which they were provided (Rowley, 2012). Peer review ensures that misinterpretation of responses has not occurred.

Internal validity

Internal validity is established by all interviews being carried out in a similar manner. The questions are carefully worded to avoid leading questions and the tone and manner of asking is carefully considered to eliminate any element of coercion (Rowley, 2012). Certain questions are asked more than once in different ways, in order to establish the consistency of the participant's answers and establish contextual validity. Furthermore, as detailed in Section 3.3 above, experienced practitioners were selected, as categorised by the Commission. This ensured that the most appropriate participants were selected for the study.

4. RESULTS AND ANALYSIS

This section contains an analysis of the interviews conducted and summarises the main findings. It highlights areas where the results corroborate the literature and areas where practitioners contradict the literature. Comparisons were also made between the responses of participants to different questions, as well as between participants to the same question. This section contains the results of the open-ended, closed-ended and ranking questions. The results are organised in themes arising from the literature and responses of participants, as follows:

Section 4.1.	Participants' views of the success rate and definition of success and contrasts this with the literature
Section 4.2.	Practitioners' views of judicial management
Section 4.3.	Views on determining whether a business is in financial distress and issues surrounding voluntary application for business rescue
Section 4.4.	The views on the balance of power and rights of stakeholders, in the context of business rescue
Section 4.5.	Perceptions of the impact of the relationships between stakeholders during the course of business rescue
Section 4.6.	Practitioners' perceptions of the impact of the qualifications and experience of the business rescue practitioner
Section 4.7.	Views on the preparation of the business rescue plan
Section 4.8.	Views of practitioner of the impact of court judgements on the business rescue regime and its success
Section 4.9	Differences in South African and international provisions as they relate to the practicalities of those international provisions in a South African context
Section 4.10	Perceptions of the role of creditors and availability of funding

4.1. SUCCESS OF THE BUSINESS RESCUE REGIME

When the participants were first asked about whether business rescue proceedings meet their intended objective of rehabilitating companies that are in financial distress, less than

half of them felt that this was true. Four participants did not provide a clear answer to the question posed and three participants felt that the intended objective was not met. Three practitioners commented that while the proceedings can meet their intended objective, the provisions may be abused (Participant 5, Participant 9, Participant 6) and, as one participant stated, are used to avoid liquidation or prevent creditors from acting against the company (Participant 5). One interviewee stated that when provisions are abused, it is often an unsuccessful business rescue (Participant 6). One practitioner stated that the regime should not have been called 'business rescue' as it creates the perception that "you are going to rescue something and it is going to come out on the other side fine and strong" which does not cater for part (b) of the definition [(i.e. a return better than liquidation)] (Participant 10). Some practitioners also explained that the rescues they have performed were successful (Participant 10, Participant 12) and it was due to being selective in which cases were taken on by them (Participant 10). (It is notable that the majority of practitioners interviewed seemed to have well-established business rescue practices and may be in a position to be selective, while a less established practitioner may not be in a position to do so.) This supports the literature that states that not every business is a candidate for business rescue (Olivier, 2014). This shows that there should be careful consideration of whether a distressed company is rescuable before it is placed under business rescue.

However, in a question asking specifically about success (as opposed to simply meeting intended objectives), the majority of participants did not provide a clear answer on whether they believed that business rescues are generally successful. Of those that did answer clearly, only half felt that business rescues are generally successful. This reflects the fact that there is some uncertainty about the success of the regime. Participant 13 explained that many statistics (on the success rate of business rescue) have a "flawed premise" (in terms of the way in which success is defined to produce these statistics) but if business rescue's success rate was compared to success rates of similar regimes around the world, it is successful. Another practitioner also felt that the current statistics on business rescue success are incorrect and commented that the statistics reflect that "15-17%" of business rescues are successful but fail to show that about "50% of plans get approved". This is in contrast to the literature which shows a 12% success rate (the Commission, 2014) up until 31 March 2014 and 13.6% up until June 2015. One practitioner remarked that some people think it is a "natural progression to use business rescue and, if that doesn't work, then go into liquidation - but some should go straight into liquidation" (Participant 7). Participant 7 also recommended that practitioners should undertake pre-assessments before they start an appointment, to make sure that there is a reasonable prospect of rescue.

A large majority of interview participants felt that, without business rescue, there would be unnecessary liquidations, with only two participants of the view that this would not be the case. This reflects on the impact that business rescue may have and supports the literature which states that business rescue reduces the number of liquidations and assists in maintaining a greater tax base from which government generates revenue (Kaulungombe, 2012). Of the two participants that did not believe that business rescue prevented unnecessary liquidations, one noted the following:

“Sometimes there should be liquidation because when the economy is booming, some companies make money because the tide is high and some of these may need to be eliminated” (Participant 7).

The other dissenting participant commented that “liquidations are carefully considered events” (Participant 4), suggesting that they would not be unnecessary. One practitioner, however, despite answering that without business rescue there would be unnecessary liquidations, stated that liquidations will always be necessary and that previously some people would put a company into liquidation, “fix it up and take it out of liquidation”¹⁴, which is similar to business rescue (Participant 5), in which a financially distressed company is ‘fixed’. Another practitioner, however, explained that “there was no other alternative” and that “business rescue has filled a big hole where there wasn’t actually a methodology to restructuring” (Participant 10). This shows that business rescue has a role to play in assisting ailing businesses.

When asked to define success as it relates to business rescue, the responses of practitioners varied widely. An interviewee remarked that this is a “grey area” (Participant 7). One practitioner felt that a successful business rescue resulted in a sustainable business on the other end, with debts addressed and stakeholder expectations met (Participant 5). Another felt that success constituted “saving jobs, creating a sustainable business and getting a better return for creditors” (Participant 8) and this was supported by another practitioner who stated that success constitutes “a business that comes out the other end that's a sustainable business that's still operating, still employing people, although it might look very different” (Participant 6). Other practitioners explained that it is the successful implementation of the business rescue plan (Participant 13, Participant 10, and Participant 1) that constitutes success. One of the participants stated, however, that what happens after the rescue must also be considered (Participant 1). Some practitioners referred to the

¹⁴ Per section 7 of the Insolvency Act No. 24 of 1936, the notice of surrender can be withdrawn with consent of the Master of the Supreme Court

definition (and its implied objectives) per the Act (Participant 9, Participant 2, and Participant 7), while one practitioner felt that the approval of the plan by all related parties constituted success (Participant 12). Two others felt that affected parties receiving more than they would have received under liquidation constituted success (Participant 3, Participant 4), while another explained that this is the “first hurdle” and the ultimate success is being able to return the company to solvent trading conditions (Participant 11), which reiterated the comments above about creating a sustainable business and saving jobs. These differing definitions are in contrast with the definition of success implied by the Commission in measuring the success rate based on the ‘*notices of substantial implementation*’ filed. This lack of clarity, however, shows that business rescue may be more successful than it is currently perceived to be.

Most practitioners felt that the success rate of business rescue would improve over time due to better understanding of the regime. One practitioner did not, however, think the success rate would improve as it is currently in line with that of similar regimes in other jurisdictions in the world (Participant 13). It was explained that the success rate would improve as a result of a greater understanding (Participant 5) by the market (Participant 9), directors (Participant 3) and judges (Participant 12). An interviewee observed that “many Boards have heard of business rescue but don’t know what it means” and that, as publicity and the number of judgements increase, awareness will grow and the success rate will improve (Participant 7). This is due to the fact that increased awareness may lead Boards to apply for business rescue earlier, leading to a better chance of success for the rescue (see Section 4.3). Increased awareness may also play a role in removing the stigma associated with business rescue and remove its close association with liquidation, which may increase the availability of funding for the business under rescue. The development of more consistent judgements was also raised by practitioners as a potential factor that will increase the success rate (Participant 6, Participant 7). This supports the literature which states that the success rate is expected to increase due to a recent judgement clarifying the ranking of practitioners, which would give practitioners better opportunity to obtain funding during the rescue because of the preferential ranking of these creditors (Pickworth, 2014). Participant 5 believed that the regime will gain credibility, as well. It was also noted that business rescue is often a “last chance saloon” and that, if companies make use of business rescue earlier in their distress (Participant 9), especially if the requirements of s129 (7) (which requires the Board to notify affected parties if it decides not to go into business rescue) were enforced, this will increase the success rate because “the more broken something is, the harder it is to put together”

(Participant 9). This reflects the notion in Section 4.3 below that an earlier start to the rescue will improve its chances of success.

A few practitioners also expressed the thought that the success rate will improve as the quality of practitioners improves (Participant 10, Participant 9, Participant 1, Participant 2, and Participant 7). Two practitioners observed this specifically in terms of experience (Participant 1, Participant 2) and one practitioner pointed out that practitioners are being sued for mismanagement (Participant 10). As a result of more experience and more experienced practitioners performing business rescues, these practitioners will have a better understanding of how to facilitate these proceedings and be better able to resolve problems, leading to better rates of success for the regime. The fact that practitioners are being sued for mismanagement shows that there is an additional duty of care imposed on the practitioner which will disincentivise inappropriate actions on his part, also improving the chances of success. Another practitioner stated that it is “becoming better known who are the respectable, reputable and ethical practitioners” in the market (Participant 11) and practitioners are becoming more “selective”, which will lead to greater rates of success (Participant 11). Participant 11 also observed that financiers are starting to recognise and support these ‘better’ practitioners and that the Commission is starting to be a little stricter about who may be appointed as a practitioner (Participant 11). This will lead to a better quality practitioner to perform rescues and will result in an increased rate of success.

It was also observed that banks are starting to view business rescue in a more positive light (Participant 1) as opposed to the negativity previously attached to it (Participant 8). The development of more consistent judgements was put forward by practitioners as a reason for this (Participant 6, Participant 7). Despite these varying opinions of success, most practitioners believed that the current business rescue regime is an improvement on judicial management. This is discussed in the next section.

4.2. JUDICIAL MANAGEMENT

When asked about judicial management, twelve of the thirteen participants believed that judicial management was not an appropriate and effective corporate rescue procedure, while one did not provide a clear answer. Many participants remarked that there were very few cases of judicial management achieving success. This supports the literature which states that judicial management is not seen to be an effective means of rescuing companies in financial distress (Loubser, 2010). This iterates that the current business rescue regime is an improvement on its predecessor. A participant stated that it was simply “a waste of

everyone's time" (Participant 3). Another commented that it was "tainted too early" and was "perceived to be a step prior to liquidation" (Participant 5). Judicial management required paying all debts in full (Participant 10) and, under this regime, the company would have to "find a way to live with all the shackles on going forward" (Participant 6). This shows that this regime was not debtor-focused. One participant used the analogy of a glass of water to explain:

"Judicial management looks at saving the glass (the vessel; the juristic person), [whilst] business rescue says saves the water" (Participant 4)

Another participant pointed out that judicial management was the "first of its kind" and was likely effective in its aims initially but "didn't keep pace with the changing business environment" (Participant 2). This reiterates that, although South Africa was initially at the forefront of corporate rescue, prior to the enactment of judicial management, it lagged behind other countries. One participant noted that judicial managers were liquidators and approached their duties with the intention to liquidate (Participant 1). This highlights the lack of debtor friendliness of this regime. It was also stated that judicial management was an "organised liquidation" and a process which "allowed an abusive approach" (Participant 11).

All participants agreed that business rescue was more beneficial than judicial management and a variety of reasons was provided. This supports the literature which explains that business rescue improves on judicial management. The 'flexibility' provided by business rescue (as an advantage over judicial management) was common to many of the responses. One participant explained this 'flexibility' as the business rescue regime being more tailored and being applicable to both small and large companies (Participant 2). This shows that business rescue is aimed to be more wide-reaching and accessible than judicial management.

The immediate protection offered to companies under business rescue was also considered to be a reason why business rescue is considered to be more necessary and advantageous than judicial management (Participant 1). Another reason was that business rescue proceedings seem to be more user-friendly (Participant 9) and easier (Participant 5) than judicial management (Participant 9), which was "legally top heavy" and not "focused on commercially rehabilitating a company" (Participant 9). However, the fact that the practitioner is an agent of the court and can bind people to a plan (Participant 3) is a reason that business rescue is preferable to judicial management. This allows for change to be effected efficiently. Lastly, it was noted that business rescue (and the protection it offers the

company) affords the company, management team and practitioner an opportunity to look inwards, while, judicial management compelled the company to have an external focus (Participant 13). This reflects the business rescue regime's focus on rehabilitation and rescue of the company as the main objective.

4.3. FINANCIAL DISTRESS AND VOLUNTARY BUSINESS RESCUE

The majority of participants felt that the assessment of six months for the consideration of whether the company is in financial distress is adequate. Only one participant disagreed with this and felt that all the timelines in business rescue were inadequate and that, in the specific circumstances in South Africa, the time allocated was inadequate (Participant 12). One of the participants who felt that six months was adequate, stated that this period was often too long and that this period should not be longer because it required looking forward (Participant 13). Some practitioners observed that, practically, Boards do not make such an assessment (Participant 13, Participant 4, Participant 3) and, if they did, there would be greater rates of success for business rescue (Participant 7, Participant 2) as the process would start sooner and the practitioner "would have more options available" (Participant 2). It was also observed that sometimes management takes too long (Participant 5). It was also noted that Boards do not act on indications of financial distress and "live in denial" and that the requirement that the company notify its creditors as to why it has not entered into business rescue when it is in financial distress has never been adhered to (Participant 6). This is also in contrast to the literature which suggests that the potential for management to evade applying business rescue to avoid informing creditors of financial distress was provided for by this requirement in the Act. This shows that there is a lack of adherence to and enforcement of the Act. This also shows that, despite the intentions of the Act and the provisions put in place to meet the objectives, it is, in part, practical issues that are standing in the way of the success of the regime.

When asked why directors might delay applying for a voluntary business rescue, practitioners cited many reasons. Some practitioners remarked that the management, who had driven the company into financial distress, felt they had the ability to rescue it from this distress (Participant 9, Participant 2, and Participant 4). This supports the literature which states that the Board of the company believed they can trade their way back to good financial health (Loubser, 2010). However, several other potential reasons were also noted, such as the fact that management may be uninformed (Participant 12), uneducated (Participant 3) or "don't know unless the lawyer mentions it" (Participant 5). This shows that

management lack appropriate knowledge and this may be an obstacle to the success of the regime. This may be as a result of lack of awareness, which if increased, will enhance the success rate (see Section 4.1). Practitioners also explained that management may delay the initiation of business rescue because it is not in their interests to lose control (Participant 7) and be governed by a practitioner (Participant 12). Other practitioners noted that management may be in denial (Participant 10, Participant 7, Participant 6, Participant 8), may be fearful of the unknown (Participant 10, Participant 7) or may be “stupidly optimistic” (Participant 10). The potential negative effect on management’s reputation and potential negative publicity (Participant 3) was also cited by some practitioners as a potential reason (Participant 4, Participant 8, Participant 6) which reiterates the issue of the company being tainted forever (Participant 5). A practitioner, however, commented that stigmatisation was a result of lack of knowledge (Participant 4), while another explained that there is still a culture of business rescue being akin to liquidation and that it was still seen in a negative light (Participant 13). In this regard, another practitioner suggested that education would be helpful in rectifying the problem (Participant 3). This is coherent with Section 4.1 above which showed that greater awareness will improve the success of the regime. Management may delay due to pride and ego issues (Participant 6), or if there is an imminent deal that keeps getting delayed (Participant 6). Management may also be seeking to protect its own interests (Participant 9).

One practitioner explained that management may delay in order to give them a chance to move their assets (Participant 12). This supports the literature which states that management may delay in order to reward themselves (Loubser, 2010). Another practitioner pointed out that filing for business rescue may trigger personal liabilities for members of management, particularly those who had signed surety (Participant 13). Participant 11 also observed that there are different issues in privately owned and public companies in this regard: this practitioner explained that in public and state-owned companies, there was an independent director and, due to their larger size, shareholder activism plays a role (Participant 11). However, in privately-owned companies, the largest shareholder may be the most influential director and may not be able to distinguish between his/her personal wealth and that of the business, which drives their decisions and makes them risk seeking (Participant 11). As a result, a further practical issue is that management protect their own interests at the expense of those of the company.

A few practitioners explained that, if companies came into business rescue earlier, it would be easier (Participant 8) and would lead to a greater chance of saving these companies

(Participant 3, Participant 7). This is congruent with the literature which states that it is imperative that prompt actions and decisions are taken for business rescue to succeed (Finch, 2005; Loubser, 2010). One practitioner, however, commented that business rescue “may have the unintended consequence of getting companies to work on problems earlier” (Participant 4), which, in light of an earlier start to a rescue increasing its chances of success, will improve the rate of success of the regime.

4.4. RIGHTS

When asked whether they felt that business rescue had balanced the rights and interests of all stakeholders, the majority of participants were of the opinion that it had. Two practitioners disagreed with this outright but a few practitioners, despite their agreement that the rights and interests of all stakeholders were balanced, explained that it depended on various factors. One practitioner said that generally rights and interests were balanced but remarked that sometimes Boards appointed a “friendly” practitioner who was biased towards the interests of management and that this led to the objectives being skewed (Participant 9). This does not consider the interests of the creditor (Wainer, 2009) and may lead to a lack of available funding from creditors (see section 4.10). Another practitioner commented that there was a balance for workers but not for banks (Participant 12), while one commented that SARS is in a difficult position because SARS has no incentive to vote for the plan as SARS would recover all its money under liquidation (Participant 1). It was also stated that “some may have more power in some rescues than others but we have to have everybody’s support” (Participant 2). Furthermore, even if the practitioner did obtain unanimous agreement to the plan, those with security will get more than those without security (Participant 4). Another practitioner reiterated the imbalance resulting from secured creditors (Participant 8).

One practitioner remarked that “business rescue is very employee-friendly and is meant to be” (Participant 10), while another noted that “it is too heavily balanced on the side of labour” but that this was a reality of our society (Participant 13). While this reflects that the business rescue regime is specifically tailored to the specific circumstances of South Africa, this practitioner also felt that this was “sometimes at the expense of creditors and excludes shareholders” but that this may not be “a bad thing” (Participant 13). Another view was that the Act may have given “certain administrative processes too much credence” (Participant 5) but expressed that there is a “good balance of creditors’ rights, employee rights and a desire to keep the company going” (Participant 5). The difficulty in achieving this balance was

explained by one practitioner who also stated that “business rescue would result in the stakeholders being equally unhappy” (Participant 7), while another commented that “there is a total imbalance and that’s why we have divided unions” (Participant 12).

While one practitioner disagreed, the majority of participants felt that the power awarded to a single shareholder or employee was not too great, suggesting that the regime fairly balances the rights and interests of all stakeholders, as intended. In explaining this, one practitioner noted that:

“Employees are entitled to be properly retrenched and the single shareholder is parked on the side really and doesn’t play much of a role” (Participant 10).

This was corroborated by three other practitioners, with one stating that:

“A shareholder does not have any power over a business rescue unless the rights attached to their securities are affected” (Participant 7).

In the ranking question, practitioners placed some importance on the support of trade unions and employees but this was varied on the ranking scale between a rank of five (three practitioners), a rank of four (four practitioners) and a rank of three (three practitioners). (A factor is considered to be of importance if it is ranked at 2.5 or higher.) One practitioner explained the practitioner’s ranking of four by stating that “employees know what’s going on” (Participant 8). This spread of rankings iterates the importance of the balance toward labour, as highlighted by some practitioners. This again reflects that the current business rescue regime is tailored specifically to South African circumstances.

Support of trade unions and employees in developing a business rescue plan (Practitioner view of importance of factor)

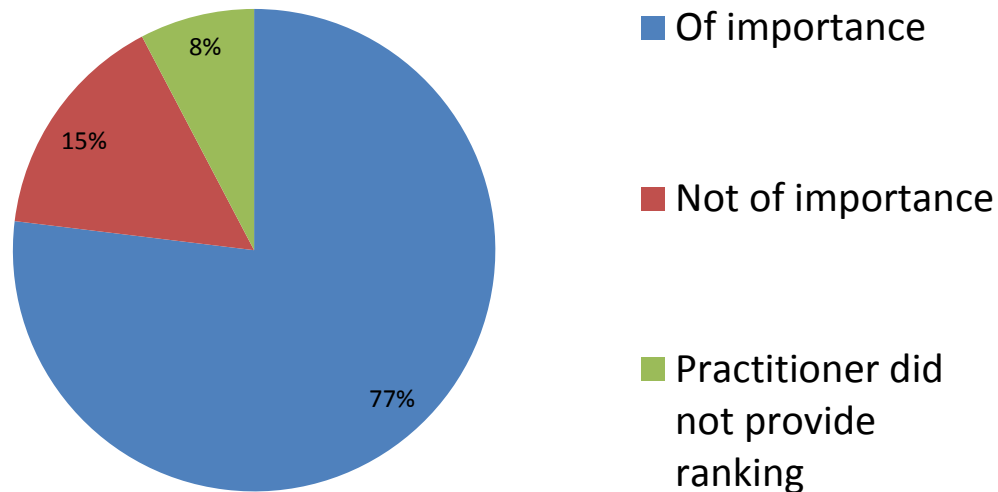


Diagram 1: Diagram showing the ranking of support of trade unions and employees in developing a business rescue plan (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean 'of importance')

4.5. RELATIONSHIP

On average, practitioners ranked the relationship of trust between the business rescue practitioner and management of the business being rescued to be fairly influential on the success of the business rescue. Four practitioners ranked this factor as five, while four ranked it as four and two as three. Two practitioners ranked this factor as two and a half (out of five) while one practitioner ranked this as one. The majority ranked this factor as having some influence on the success of business rescue, showing its importance and supporting the literature. However, one practitioner who ranked this factor to be less influential on success explained that “trust has no place in business rescue” (Participant 4).

Ranking of Relationship of trust between practitioner and management (Practitioner view of importance of factor)

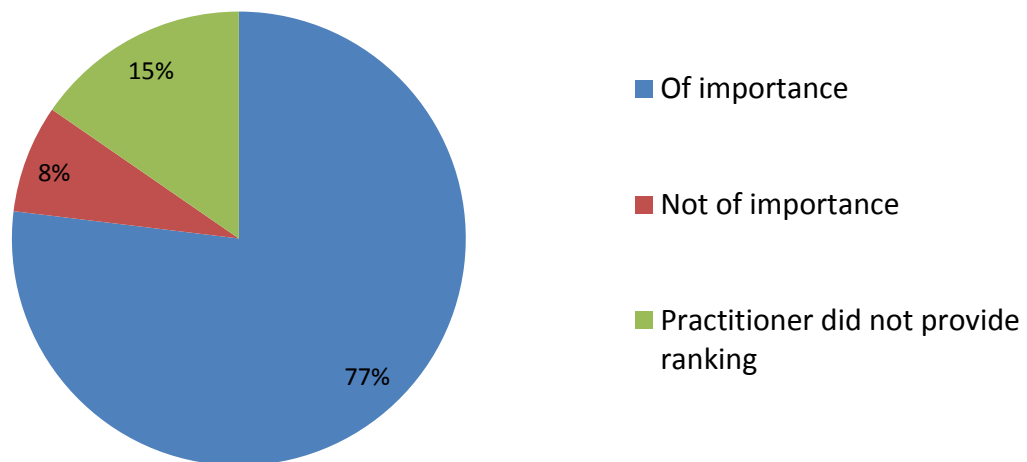


Diagram 2: Ranking of relationship of trust between practitioner and management as a means of facilitating actions aimed at rescuing the company (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean 'of importance')

Despite this, there was general consensus amongst interviewees that the relationship between the practitioner and management will have a significant impact on the prospects of the company's rescue. This supports the literature which states that a good working relationship between the practitioner and management is the key to a successful turnaround (Levenstein, 2008). Some participants explained that there is some level of reliance on management, due to the practitioner not being an expert in every field (Participant 8, Participant 6, Participant 5, Participant 10) but they also cautioned that healthy skepticism on the part of the practitioner is important (Participant 5) and that, while management and the practitioner must work as a team (Participant 8), the practitioner could not be "beholden" to management (Participant 9). This is clearly a difficult balance to achieve.

It was also explained that, while the practitioner does have to work with management, if the practitioner finds management to be "incompetent and lying" (Participant 4) or frustrating implementation of the plan, the practitioner must remove management. This participant

pointed out that the Act allows for the removal of a person as director but does not remove the person as an employee of the company (Participant 4). This suggests that, while the person will still retain his employment, he will no longer be able to make managerial decisions. It was stated, by another practitioner, that the speed of the rescue is enhanced if there is a good relationship between the practitioner and management (Participant 7). Another participant corroborated this view in stating that “a good cooperative relationship with management is a good ingredient for a successful outcome” (Participant 11). This participant, however, remarked that, if this relationship does not exist, the practitioner must have the courage to remove management. This practitioner also stated that, in the practitioner’s practice, it was believed that management “changes or are changed” (Participant 11): management either must change their behaviour or must be removed. This action and the comments of practitioners show that this relationship and its management will have a significant impact on the success of the rescue.

The relationship between management and the practitioner must be ethical and must have clear goals (Participant 12). One practitioner explained that shareholders cannot be excluded because, unless the company is a big corporate, shareholders may be directors and may have vested interests in the business and cannot differentiate between the two different roles they hold (Participant 13). This reiterates the need to include all affected parties (see Section 4.4.). This practitioner explained that they (the shareholders who are also directors) may have a skewed view of the business and that, if they could not be brought around to the practitioner’s way of thinking, the rescue will fail (Participant 13). This reiterates the issue of management delaying the rescue because they are in denial and can be considered to be obstructing the success of the regime (see Section 4.3.).

4.6. QUALIFICATIONS AND EXPERIENCE

On average, practitioners ranked the experience of the practitioners (in general) in conducting business rescues as a five. The qualification of the practitioner was, however, ranked lower, at four on average. Seven practitioners, which constitute just more than half, ranked qualifications of the practitioner as a five, while eleven ranked experience of practitioners as five, suggesting that experience is more influential on the success of business rescue than the qualification of the practitioner. One practitioner commented that “the real qualification is qualification by experience” (Participant 12). All practitioners believed the experience of the practitioner to be of importance, while all but one believed that the qualification of the practitioner was of importance.

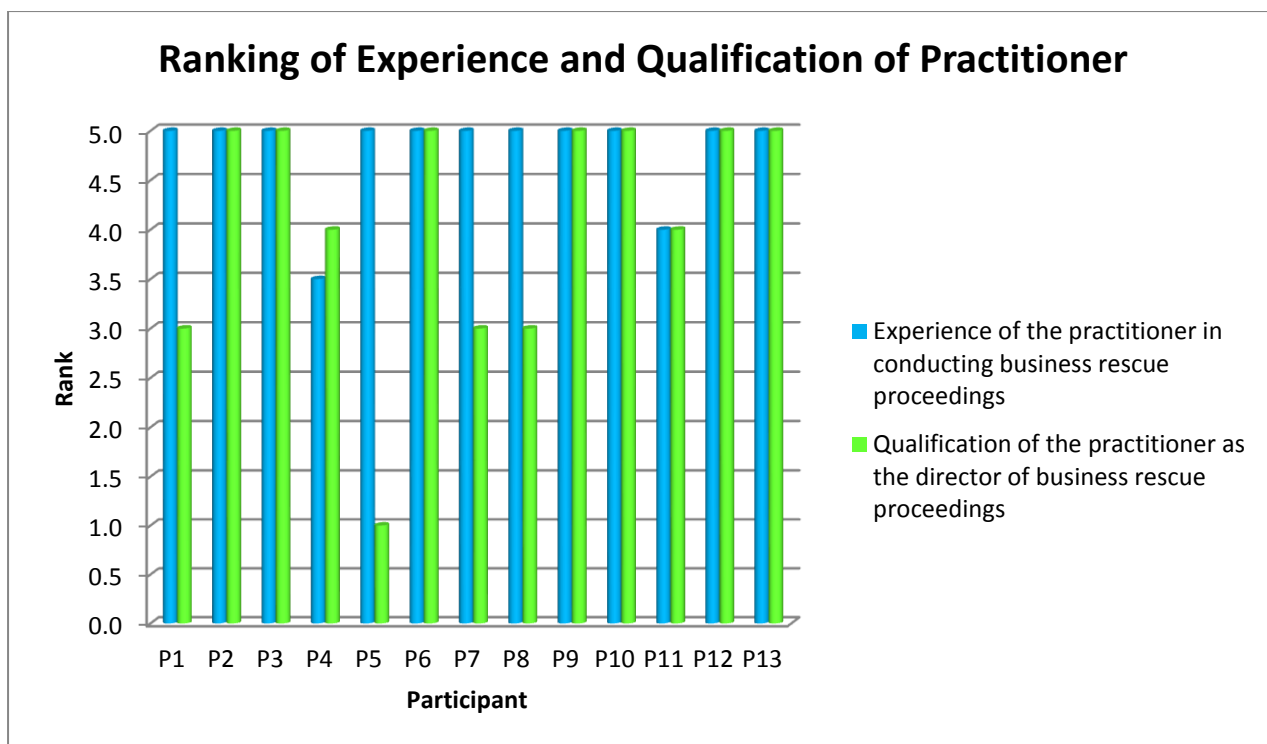


Diagram 3: Ranking of Experience and Qualification of Practitioner

Many practitioners felt that business rescue practitioners (in general) were not adequately qualified to conduct business rescue proceedings. It was, however, pointed out that “there are some very well-qualified and competent practitioners and a large number who are hopelessly underqualified” (Participant 9). One practitioner pointed out that the business rescue regime is only three years old (Participant 4) and that the practitioner was being asked to “handle a complex legal process in a difficult environment” without a regulatory framework (Participant 4). One practitioner stated that there is “just a complete lack of competencies” (Participant 6). This shows that practitioners may lack the necessary competencies in terms of knowledge and experience to conduct business rescue proceedings.

When asked if there were any requirements that they would like to be introduced into the criteria to qualify as a business rescue practitioner, practitioners made two main suggestions. Firstly, was the issue of experience. One practitioner explained the importance of experience by stating that “without practical experience, it is like learning to drive a motor car while sitting at your desk” (Participant 10). It was pointed out that “very few business rescue practitioners have run companies themselves” (Participant 6) and that there is “no

replacement for experience” (Participant 13). A practitioner explained that there are many issues in business rescue that require different skills and, while not everybody can have all of them, “experience is a good remedy for fixing up on a lot of the shortfalls” (Participant 10), while another commented that “business management and commercial experience is important, as well as an open mind and attitude” (Participant 8). There seems to be a general lack of practical experience.

It was suggested that the problem of a lack of experience be addressed by the implementation of a requirement for junior practitioners to serve an apprenticeship with senior practitioners (Participant 9, Participant 13): this could take the form of a joint appointment (Participant 1). One practitioner also suggested that reference checks on practitioners include the validity of relevant experience (Participant 5).

The second suggestion related to additional qualifications. While one practitioner explained that more qualifications similar to the CA or LLB designations would be beneficial (as is the requirement in Australia, where being an administrator is “almost a second professional qualification” (Participant 2)), it was also suggested that a specialist course form part of the criteria to qualify as a business rescue practitioner (Participant 10, Participant 1, Participant 2). One practitioner suggested that an accounting degree, coupled with specialist courses, would “provide the best launching pad” (Participant 10), while another stated that a financial or legal qualification combined with a course should form part of the requirements (Participant 1). This practitioner stated that while practitioners may be qualified as attorneys, auditors or liquidators, they lack experience (Participant 1). These views support the literature which showed that there are no clear requirements for qualification as a business rescue practitioner (Pretorius, n.d.). An interviewee pointed out that there is a flaw in performing business rescue from a purely accounting and legal perspective (Participant 8). One participant went as far as to state that there should be “fewer liquidators and more experienced businessmen” (Participant 5), while another stated that “you need a lawyer and an accountant” and suggested this be addressed by joint appointments (Participant 1). This re-emphasises the need for greater experience and the need for that experience to be widespread.

Another participant, however, stated that there needed to be competence on the part of business rescue practitioners in four main areas because of the multidisciplinary nature of business rescues: finance, accounting and tax; management; law; and ethics (Participant 11). The identification of the multidisciplinary nature of business rescue supports the literature which states that conducting corporate rescue will involve many different areas of

expertise (Finch, 2005). A practitioner explained the multidisciplinary nature of the business rescue practitioner's duties by stating:

"The company stands on a few pillars. It's got its financial pillars, and human resources, and a marketing strategy and operational requirements. It's got all sorts of elements that the business stands on and you need to take cognisance of all." (Participant 6)

A participant also pointed out that a short course developed by the University of Pretoria based on courses in the U.S., Europe and Australia may help to fulfil this purpose (Participant 11). Another practitioner also referred to this course and mentioned that this should be included as a requirement to qualify as a business rescue practitioner (Participant 3). This shows the need for stricter requirements to be allowed to qualify as a business rescue practitioner.

4.7. BUSINESS RESCUE PLAN

In ranking the influence of the factor on the success of business rescue, participants ranked a comprehensive business rescue plan fairly highly. Seven participants ranked it as a five and one at 4.5, while three ranked it as a four and two ranked it as three, suggesting that the comprehensiveness of the plan has a significant bearing on the success of the business rescue. All practitioners found a comprehensive business rescue plan to be of importance (as shown by a ranking of 2.5 or higher). This shows its importance in facilitating the rescue.

The business rescue plan is the "single-most important aspect of your business rescue" and is the "foundation of the business going forward" (Participant 13). "A good plan has a long-term view but has short term milestones" (Participant 5). Participant 5 elaborated that the problem is that the plan is put into action and created as a "one year thing, which may not create a sustainable business", while another practitioner pointed out that, once adopted, the plan is a binding document (Participant 6). It was also stated that there are some plans that use a boilerplate template which does not address the strategy or economics of the company being rescued and that a competent business rescue plan should "properly combine business strategy, restructuring measures and the legal protections of Chapter 6 [of the Act] to rehabilitate the company" (Participant 9). This shows that plans are an integral part of the rescue and must consider the specific circumstances of the company and should take a long-term view. The plan should be "equitable to all parties" must be "sustainable and must not be discriminatory" (Participant 12). Participants' remarks on the plan included "the simplest plans work best" (Participant 1) and that the plan must "stay away from grey areas" (Participant 3). Participant 4 noted that the plan has to withstand some degree of scrutiny

because creditors have to approve it. One of the key issues, as identified by Participant 6, is to allow the creditor to be able to compare the return from a rescue as a dividend versus the return from liquidation. This practitioner also explained that an independent expert should be appointed to perform valuations and that the plan should give some visibility into the future (Participant 6). This indicates that reliance will be placed on the plan and emphasises the importance of its appropriate preparation.

On the ranking scale, creative strategies with which to rescue the business were ranked highly by the majority of participants as a factor that is very influential on the success of business rescue proceedings. The average ranking for this factor was four, suggesting that creative strategies may have a significant influence on the success of the business rescue. This iterates the comment of Participant 9 and shows that boilerplate strategies will not lead to a successful rescue.

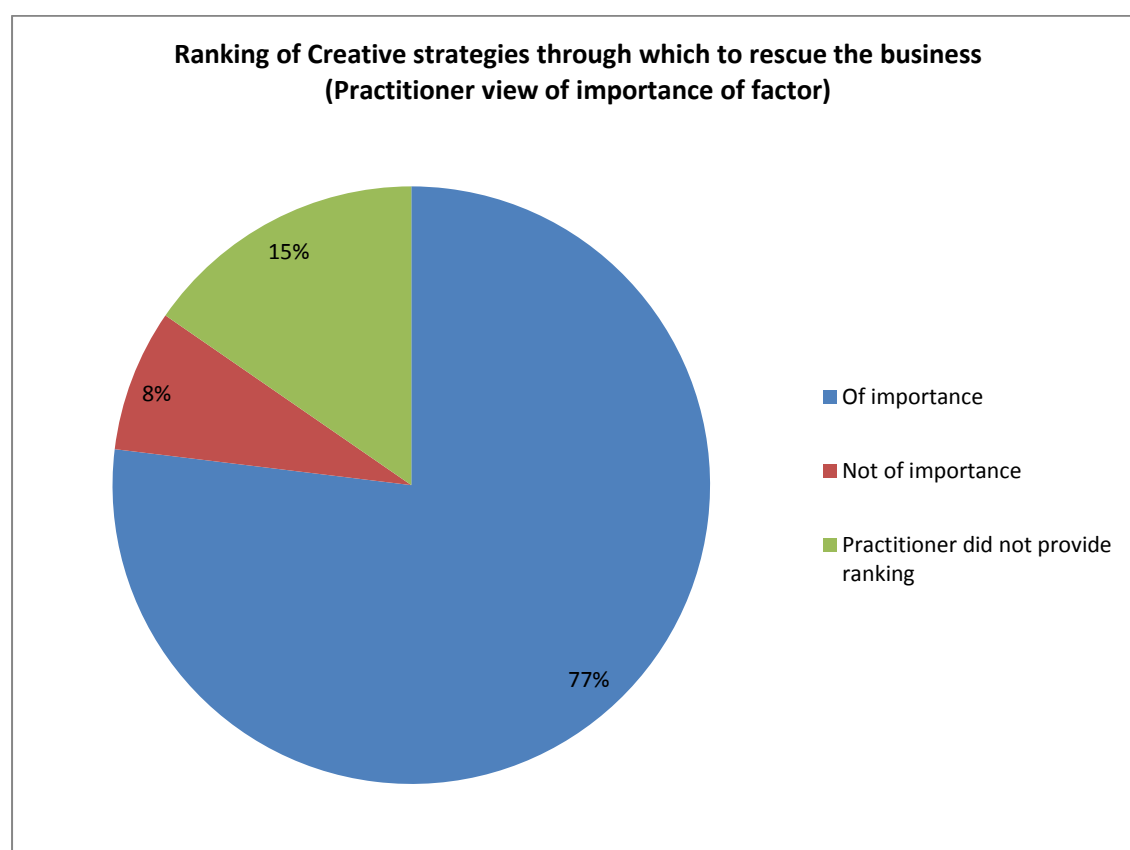


Diagram 4: Ranking of creative strategies through which to rescue the business (Practitioner view of importance of factor, in which a ranking of 2.5 or more is considered to mean 'of importance')

Many difficulties in developing the plan were explained by practitioners, such as having a long-term vision but needing to use short-term steps and the fact that various assumptions exist (Participant 5). The difficulty resulting from assumptions was reiterated by a practitioner pointing out the fact that forecasting had to be used (Participant 10) and another who pointed out the fact that since it is based on the future this creates a difficulty (Participant 8). If the practitioner has a liquidator's mindset, it will not work (Participant 5). Another difficulty noted was putting a document together which is compliant with the Act but comprehensible by the ordinary businessman (Participant 13). This shows that there are several intricate considerations that need to be made in developing the business rescue plan and that adequate time should be dedicated to it.

It was also observed that companies enter into business rescue "too far down the road" (Participant 9). Lack of information and lack of transparency were also pointed out as difficulties (Participant 12, Participant 8), as was prejudice to business rescue from major creditors (Participant 12) or a lack of understanding by creditors (Participant 11). The fact that management has to run the business and give the practitioner information to populate the plan was also noted as a difficulty (Participant 2), as was the difficulty in getting information from management (Participant 8, Participant 11, Participant 4), while one practitioner considered as a difficulty the fact that management may not like the plan (Participant 3). It was explained that a lack of quality in the information provided also presents a difficulty and that the use of an audit firm to verify whether information is valid may be necessary (Participant 6). The fact that both legal and accounting competencies are required to develop the plan was also mentioned as a difficulty (Participant 1), reiterating the need for the practitioner to have a multitude of competencies. The lack of quality information and the lack of assistance from management is a significant difficulty in conducting a successful business rescue.

One participant recommended that a provision be included that allowed for a revised business rescue plan (Participant 5), while another stated that "a plan is a plan" and is "based on today" but is not "cast in stone" (Participant 8). The difficulty in deciding what is to happen to creditors' claims was also noted, as well as distractions in the form of litigation without the grounds to succeed, which is initiated to upset the business rescue (Participant 7, Participant 6). It was also noted that there are other laws in the country that do not speak to business rescue and, while the practitioner has certain powers under the Act, he "still lives under the umbrella of many other Acts of relevance to that business" (Participant 6) and this presents a difficulty.

The majority of practitioners ranked an extended time for the preparation of the business rescue plan as important, with an average ranking of four, suggesting that the current restrictions may be preventing the current regime from achieving success. Three practitioners, however, did not place importance on this factor and ranked it as one on the scale.

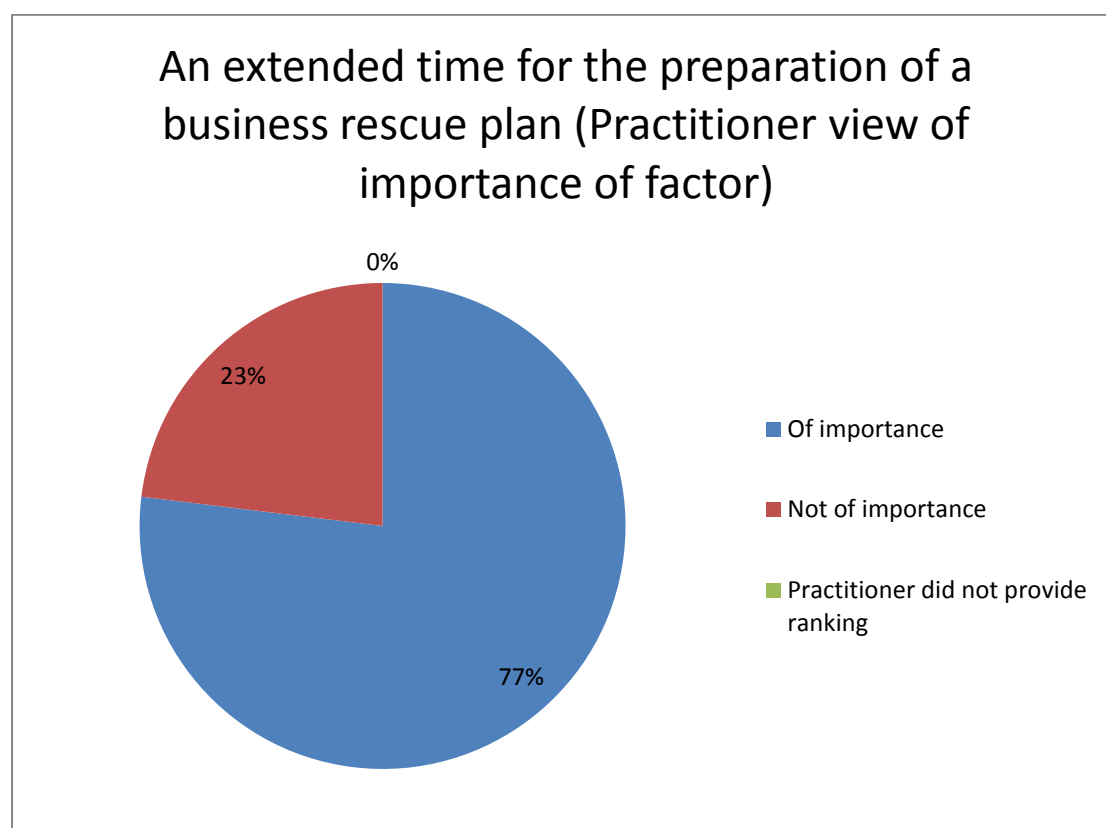


Diagram 5: Ranking of an extended time for the preparation of a business rescue plan (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean ‘of importance’)

Most participants felt that a longer time should be available for the preparation of the business rescue plan and a few explained that they have been able to complete very few plans within the allocated 25 days (Participant 1, Participant 13). Two did not feel that a longer time was necessary, while many also explained that it is currently possible to apply for an extension, with creditor approval (Participant 9) and one stated that, because the Act provided this mechanism, an extended time was not necessary (Participant 2). One practitioner explained that while 25 days is not sufficient, the Act should also not provide for a longer period because “there is a mechanism whereby you can get an extension, but the extension is becoming the norm” (Participant 11). It was explained that it is a good thing “to

put time limits and procedures on these things” (Participant 9) and that “25 days may be impossibly short, but there are provisions to extend this” (Participant 9). One practitioner explained, however, that 25 days is not sufficient because “if you publish a plan, it must work” (Participant 12) and that 25 days was insufficient because “80% of normal creditors don’t even understand the difference between debt counselling, business rescue and liquidation” and needed this to be explained before they granted permission for the plan to be extended (Participant 12). This also reflects the current lack of awareness referred to in Section 4.1. Another practitioner commented that the practitioner needed to think “five years down the line” but had only 25 days in which to do so (Participant 5).

A few practitioners stated that the time allocated to developing a rescue plan should be dependent on the size and complexity of the business (Participant 8, Participant 4, Participant 7, and Participant 1) with one suggesting that the time allocation be linked to the Public Interest Score of the company (Participant 7). This is because a greater amount of time would be required where there is greater complexity and size, due to additional considerations existing (for example, larger labour force). An interviewee, however, explained that the Board itself must consider whether there is a reasonable prospect of rescue and that this evidence provided by the Board in this regard could be used to develop the business rescue plan (Participant 4). This practitioner, however, explained that in trading conditions in South Africa at present, this is unrealistic, because there are not good practices regarding corporate governance and because it is not possible to get information (needed for the plan) in 25 days (Participant 4). Thus, additional time is needed for suitable a business rescue plan to be drawn up.

4.8. COURT JUDGEMENTS

Consistent court judgements as a factor influencing the success of business rescue were ranked, on average, at four. Most practitioners ranked this factor at five or four, with one ranking it at three and one at one. One practitioner who ranked this factor at four, stated, as a reason, that “you have to know all the rules” (Participant 4). Another practitioner commented that there are “too few” court judgements and that there would be a significant influence “but there isn’t enough precedent” (Participant 10).

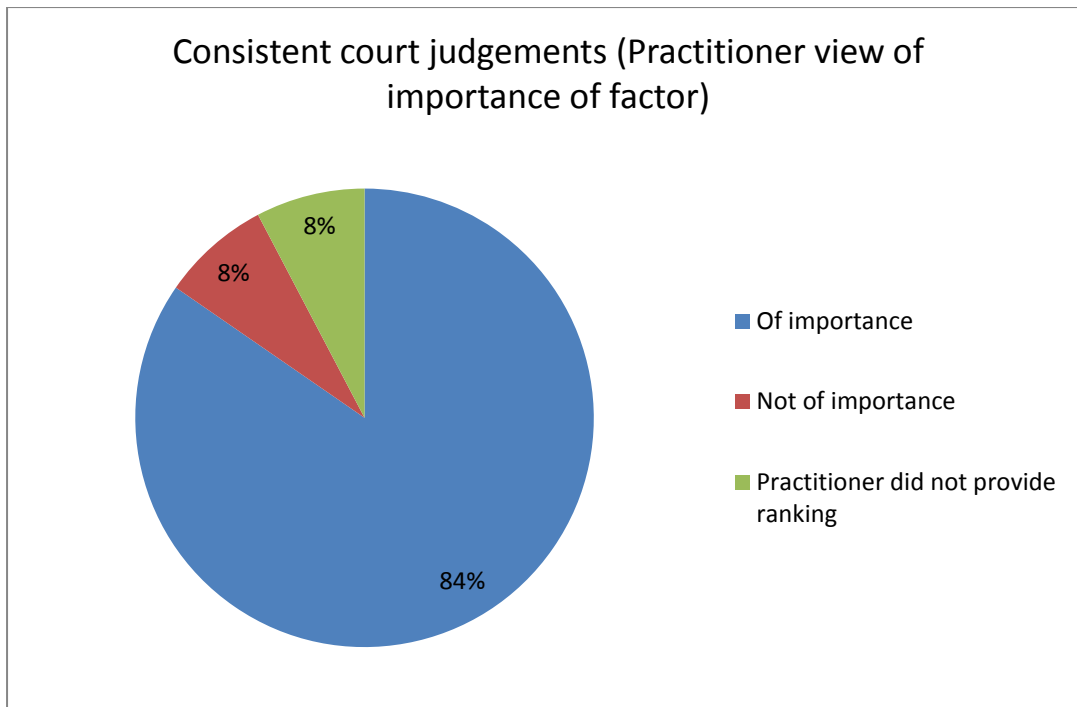


Diagram 6: Ranking of consistent court judgements on matters relating to business rescue (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean 'of importance')

Generally, practitioners felt that there have been some good judgements and some bad ones, where some provide clarity and some have negative influences (Participant 12). Courts clear up the grey areas (Participant 3) which arise as a result of the legislation being difficult to interpret (Participant 9). The view of one practitioner was that the court itself had not correctly interpreted the consideration of the requirement that the business rescue should not leave creditors worse off than liquidation (Participant 1), while another practitioner observed that different courts have reached different conclusions and that this has created uncertainty (Participant 7). This supports the literature which states that a lack of a dedicated court has resulted in contradictory judgements (Ensor, 2014). However, one practitioner explained that, despite some judgements currently having a detrimental effect, as time goes by, there will be more consistent judgements (Participant 2). This will help to “shape and form otherwise ambiguous or conflicting aspects” (Participant 13). It is believed that court judgements are already becoming “more robust” (Participant 8) and that some of these judgements have been “a big help” (Participant 4). However, another practitioner noted that the judgements had not had a huge influence to date but that there would be increasing influence of legal precedent going forward (Participant 11). One practitioner explained that the Act “envisages dedicated business rescue courts and that hasn’t happened” (Participant

6): this supports the literature that states that the lack of a specialist court may be blamed for the lack of success of business rescue (Ensor, 2014). However, another practitioner expressed the view that the courts are currently supportive of business rescue and they do a “good job of preventing unfounded attempts” (Participant 9). This shows the importance and effect of court judgements and the expectation that they will play an increasing role in the business rescue regime.

4.9. INTERNATIONAL PROVISIONS

Practitioners did not rank the cohesion between South African business rescue provisions and provisions of other jurisdictions highly. The highest rank was a three, while the average rank was two. This suggests that cohesion between South African business rescue provisions and international provisions has a minimal bearing on the success of the regime.

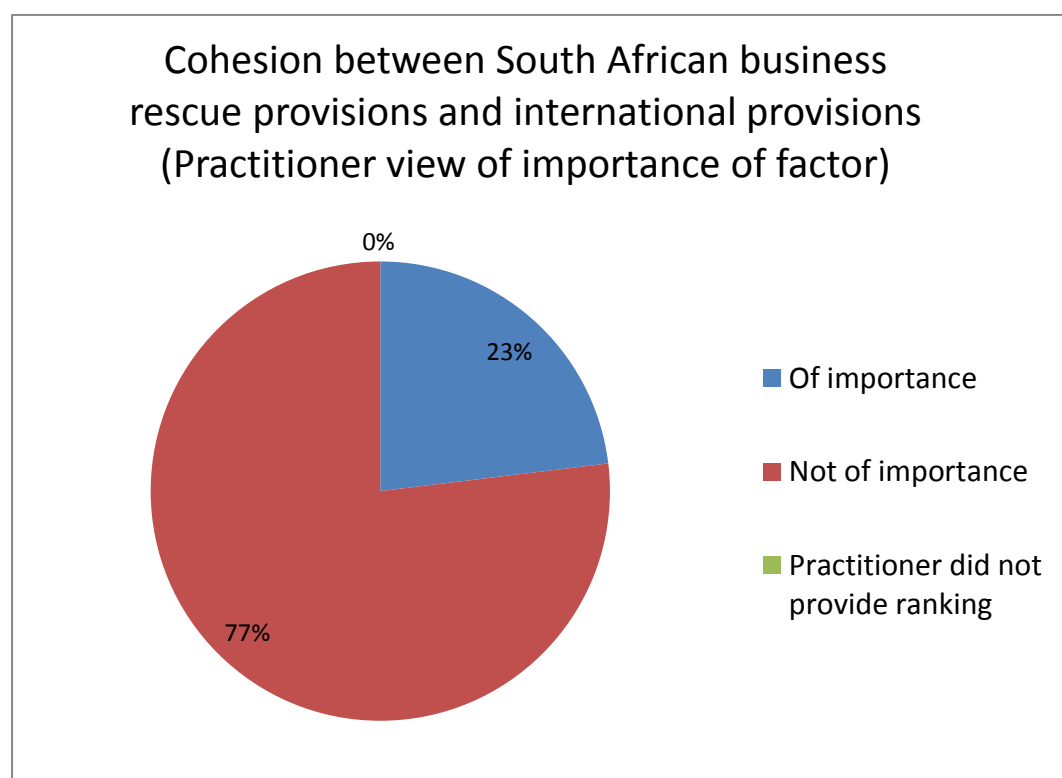


Diagram 7: Ranking of cohesion between South African business rescue provisions and international provisions (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean ‘of importance’)

When asked whether a rescue regime that allows management to develop the plan without the appointment of a practitioner (such as the regime in the U.S.) will function effectively in South Africa, some practitioners pointed out that this depended on the company and its

management (Participant 10, Participant 6), while a practitioner said that this will not function effectively in South Africa (Participant 1). One practitioner who believed the effective functioning of such a regime is dependent on the quality of management stated that “if you make that a blanket availability in South Africa, it will fail” (Participant 6). A few practitioners felt that it will not function effectively because management are sometimes the problem (Participant 1, Participant 3, Participant 5, Participant 12), while one stated that “there has to be an external perspective because management is so sucked into the business” (Participant 8). It was also stated that “generally, the same people that got the business into trouble are seldom the people to get it out of trouble” (Participant 7). One practitioner also commented that the interpretations of some sections of the Act are still debatable (Participant 1) and will, therefore, not allow for such a regime to function effectively. This was corroborated by another practitioner who stated that “it may work if you have specialised commercial courts” (Participant 7).

Some practitioners explained that a scheme of arrangement allows management to set out a compromise without appointing a practitioner (Participant 2, Participant 4). It was, however, pointed out that this can only work effectively if “trust relations with customers, lenders and suppliers” are still intact (Participant 2). One practitioner pointed out that, since the company has opportunities to resolve issues itself every day, companies may be entering into business rescue for other reasons, such as protection of mining rights (Participant 4). This may also be to use the legal protection offered by business rescue, which a practitioner stated needed “the independence of a neutral third party expert” (Participant 9). Some practitioners made some comments on the current corporate rescue regime in the U.S. One stated that the U.S. courts “only allow the company [itself] to resolve its issues until the creditors complain” (Participant 4), while another explained that it is “difficult for management to develop a plan without an external, independent perspective” and that, in the US, the external perspective comes from the court (Participant 11). This shows that there was generally little support for a regime that allows management to develop the business rescue plan.

One practitioner pointed out that it may be a misconception to think that management develop the plan themselves and said that they actually outsource this at great expense (Participant 13). The responses of the practitioners in this area are in contrast to the literature which suggests that management has the “requisite hands-on knowledge of a company’s immediate state of affairs” (Finch, 2005, p. 391). Furthermore, while the power afforded to a single shareholder or employee is unlike any other regime (Loubser, 2010), as

shown above, practitioners did not think that the power afforded to a single shareholder and employees was too great but felt that the imbalance in favour of labour was appropriate. Cohesion between South African business rescue provisions and the provisions of other jurisdictions was not considered to be important.

4.10. CREDITORS AND FUNDING

The majority of participants stated that, in their experience, creditors were generally willing to accept a business rescue plan and cooperate with its implementation. Only one participant felt that this was not the case. This participant stated that the practitioner has to prove to the creditors that the business rescue can work and that the practitioner must work with them to win them over (Participant 8). Another participant specified that creditors with no security and creditors who were not reinsured were willing, while banks that have credit guarantees may be less willing (Participant 12). A different participant who had experienced willingness by creditors to cooperate, also explained that there was “a lot of negotiation” (Participant 6) and believed that the only way to encourage creditor cooperation is “through education and making them a part of the process” (Participant 6). Creditors are more willing to cooperate with the implementation of the business rescue plan once they overcome their initial anger and fear (Participant 5). Creditors generally seem to be supportive of business rescue.

One other participant pointed out the difference in behaviour of different creditors. This participant stated that creditors with security are “inclined to liquidate and cut their losses” but that trade creditors and employees were “more willing to speculate because they have nothing to lose” (Participant 4). Creditors are believed to be more cooperative when there is communication and transparency (Participant 7). When asked about the relationship of trust between management and the practitioner and its influence on the prospects of the company’s rescue, one practitioner also emphasised the importance of the relationship of trust between the practitioner and creditors (Participant 1).

The majority of the participants ranked the ability to source funding from shareholders on the lower end of the five point scale. Some practitioners noted that while funding is important, it is rarely available from shareholders. This is incongruent with the literature which states that business rescue will only succeed if shareholders are willing to provide some form of working capital (Olivier, 2014). The ability to source external funding, other than from shareholders, was ranked much higher by participants. Participants did, however, point out the lack of the post-commencement funding market in South Africa. One interviewee stated that:

“Distressed companies can’t find money for good reason. Our capital markets are too thin. We are not creative enough in our working capital structure.” (Participant 4)

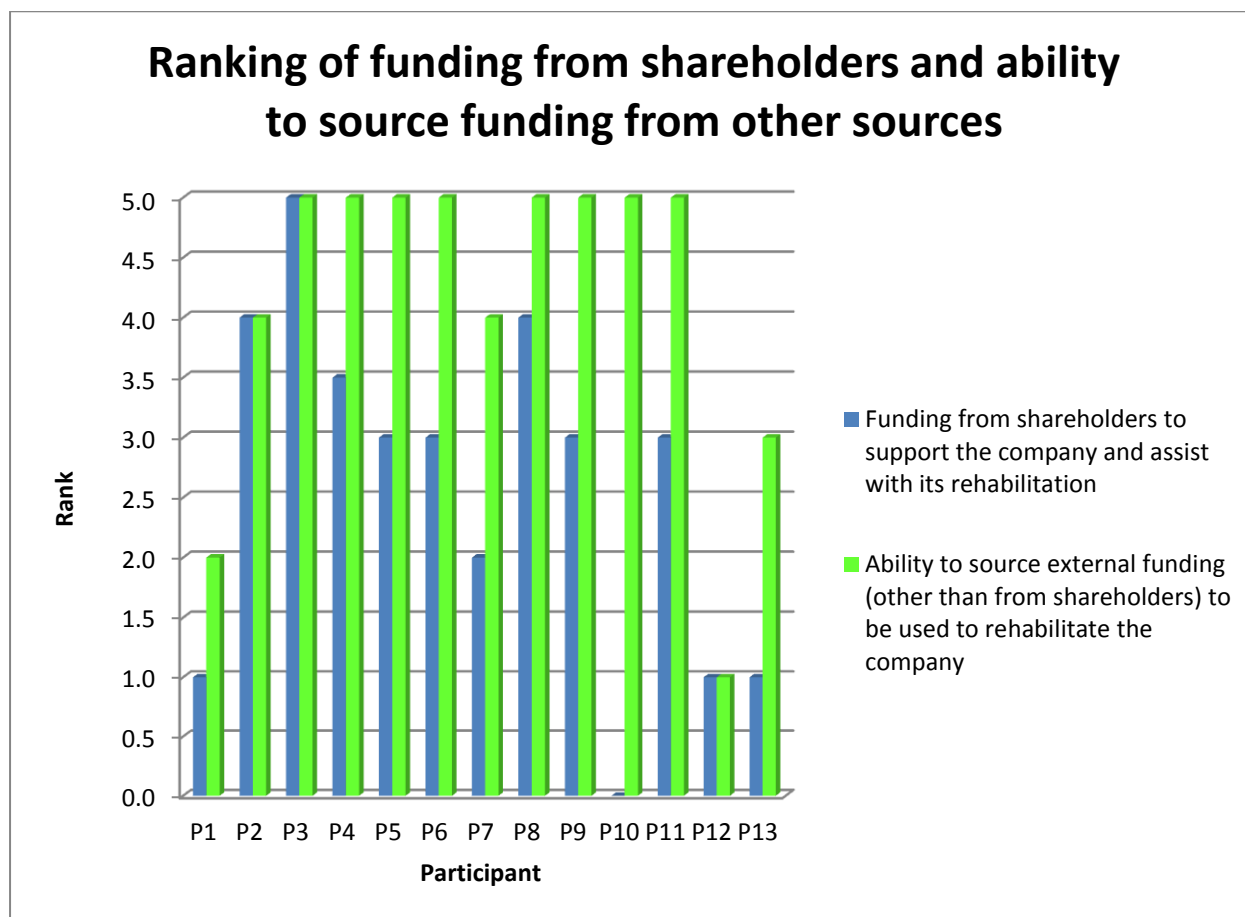


Diagram 8: Ranking of funding from shareholders and ability to source funding from other sources

In the experience of the participants of this study, it was established that there is a difficulty in obtaining funding during and after the business rescue because the business being rescued is “perceived as a huge risk for funders” because of its financial distress and potential inability for the lender to recover all funds (Participant 8) and because there is a lack of a post-commencement finance market in South Africa (Participant 3). A participant stated that “finding post-commencement funding is a key determinant of success” (Participant 9), iterating its importance in a business rescue and supporting the literature. One interviewee commented that “the U.S. has a very deep market and South Africans should study this market”. The problem created by the difficulty and delay in obtaining funding was summarised by a participant who stated “by the time you get the funding, you

might sit with a dead patient” (Participant 6). It was also stated that obtaining funding is easier where there are assets which can be used as security (Participant 7). If a company were to go into business rescue without consultation, all funding would dry up and security-ships would be triggered (Participant 4). This would be because of the perception of additional risk, due to the lack of involvement and understanding by creditors. This supports the literature which states that the delivery of a notice stating that the company is in financial distress would impede its ability to secure funding (Loubser, 2010). Other financing solutions could be explored (Participant 4) but, while it may be easier to obtain funding after business rescue, the company may still be “tainted forever” (Participant 5). Funding has a key role to play in the success of the rescue but is difficult to obtain.

5. CONCLUSION

The section summarises the key findings of the study, together with concluding remarks in Section 5.1. It then discusses the contribution of the study in Section 5.2. and outlines opportunities for future research in Section 5.3..

5.1. SUMMARY OF FINDINGS AND CONCLUDING REMARKS

Business rescue was legislated to improve on its precursor, judicial management. While business rescue may have a role to play in reducing the number of liquidations, it does not seem to be very successful when success is measured by the substantial implementation of the business rescue plan. This study set out to identify and understand whether the current business rescue regime meets its objectives and to identify the obstructions, if any, to the success of the business rescue regime in the South African market place. The findings of the study are based on the views of the business rescue practitioners interviewed. The summarised findings of the ranking questions are included as a graph in Appendix 3.

The majority of participants did not feel that business rescue meets its intended objectives and some felt that the regime was sometimes abused. The findings revealed that there is a lack of a clear definition of success from participants and the flaws in current measures of success were highlighted. This study showed that the seemingly low current rate of success may be a result of mismeasurement of the rate of success. It was, however, noted by many participants that without business rescue, there would be unnecessary liquidations, showing the usefulness of business rescue, despite its low rate of success. Practitioners generally believed, in line with the literature, that the success rate of business rescue will improve. Practitioners also agreed that business rescue was more beneficial than judicial management and most practitioners felt that judicial management was not an appropriate and effective corporate rescue procedure. This study showed that, despite the seemingly low rate of success, the business rescue regime is valuable in South Africa.

The findings of the study reflect that the regime balances the rights and interests of all stakeholders and that the bias towards labour is appropriate for our democratic country. Practitioners also ranked the support of trade unions and employees as influential in the success of the regime. In addition, this study found that the cohesion between South African business rescue provisions and similar regimes internationally had limited influence on the success of business rescue and that a regime which allows management to develop the business rescue plan (similar to corporate rescue regimes in the U.S.) would not function

effectively in South Africa. The study shows that the current business rescue regime is tailored to the specific needs of South Africa and that this is appropriate.

The experience and qualifications of the practitioner in conducting business rescue proceedings were considered by this study and it was found that business rescue practitioners in South Africa generally rank experience as more important than the specific qualifications of the practitioner. The study showed, however, that a lack of experience and qualification in practitioners is a flaw in the current practice of business rescue and that experience in this practice is very necessary. Specifically, experience was considered to be very valuable and apprenticeships and joint appointments were suggested as means to address the lack of experience of junior practitioners. Short courses to enhance understanding and ability to run businesses were also recommended by practitioners.

The findings reflect that consistent court judgements were influential in the success of the regime and show that inconsistent court judgements are an obstruction to success and should be rectified in order to improve the regime's success.

Regarding the issue of time constraints, this study showed that most South African practitioners feel the assessment of six months for the consideration of financial distress is adequate but some noted that this does not actually happen, which may be an obstruction to the success of the regime because an earlier start to the rescue will improve its chances of success. Various possibilities were cited as potential reasons why management may delay applying for voluntary business rescue. This included denial, fear, protection of own interests and lack of awareness. However, it is shown by this investigation that prompt action in initiating business rescue is key to a successful turnaround.

The relationship between management and the practitioner was considered, by practitioners, to be influential in the success of the rescue. It was noted by practitioners that, while a good relationship may be beneficial, the practitioner can remove management if necessary. Practitioners considered the plan to be vital to the rescue but noted many difficulties in the development of a successful business rescue plan. Quality of information and the lack thereof, as well as difficulties in forecasting were also mentioned. A few practitioners recommended that the time allocated to the development of the plan be based on the size and complexity of the business because it is not always sufficient. It was also shown that a lack of quality information and a lack of sufficient time in which to process that information are impediments to the success of the regime.

This study also found that a key feature of corporate rescue may be lacking – there is a lack of available funding for a company going through business rescue. In this regard, the study found that creditors are generally willing to accept a business rescue plan and cooperate in its implementation. Practitioners generally expressed that, while funding was important, it was rarely available from shareholders and had to be sourced elsewhere. The lack of a post-commencement funding market in South Africa and the difficulty this presented was also highlighted as a key area of concern which needs to be addressed in the market place.

In conclusion, while the success rate of business rescue seems to be poor (13.6% as at 30 June 2015 (the Commission, 2015b)), the lack of a clear definition of success may cause the effectiveness of the regime to be underestimated. This study has shown, based on insights of business rescue practitioners, that certain issues need to be urgently addressed to give business rescues a fighting chance of success. There needs to be careful consideration of the prospects of rescue prior to a business rescue being initiated. Management need to be forced to protect the interests of the company and should be held accountable for a failure to do so. There should be a good working relationship between management and the practitioner but this should be balanced so that they work as a team without the practitioner being restricted by management. More stringent requirements should be introduced for qualification as a practitioner, particularly in terms of experience, and could be addressed by apprenticeships for junior practitioners.

Reliance is placed on the business rescue plan and this document should be carefully prepared, but its careful preparation is hindered by the lack of available information and lack of cooperation by management. While there is a mechanism by which to extend the 25 days allocated to the preparation of the plan, the time allocated should be based on the size and complexity of the business. However, companies sometimes come into business rescue too late and an earlier start would increase the chances of success. Better enforcement of current legislation would assist in this regard.

Also, the lack of consistent court judgements may have hindered the success rate of the regime and the development of more consistent judgements will assist in improving its success. Practitioners believed that the lack of available funding may contribute to the low rate of success of the regime due to the lack of a suitable post-commencement funding market in South Africa. In order to secure funding, the relationship between the practitioner and creditors may also be of importance. While some provisions of the regime are not comparable to those of other regimes internationally, the provisions of the South African legislation are suitable in the South African context.

Practitioners generally believed, despite the issues raised, that the success rate of business rescue will improve in time. They also agreed that business rescue was a more beneficial, appropriate and effective corporate rescue procedure than judicial management and liquidation, and that there was a strong hope for corporate rescues' success in South Africa in the years ahead.

5.2. CONTRIBUTION OF THE STUDY

In the light of the significance of a well-functioning business rescue regime and the current low level of success (as identified by the Commission), this study has demonstrated that it is necessary now more than ever before to determine whether the current business rescue regime addresses the intended objectives (per the Act) and the needs of distressed companies. Further, it is vital that we understand and create a much-needed dialogue on the issues that may be hindering the current rate of success to allow corporates in need of rescue a fighting chance. This study addresses this key area of concern by exploring whether the current rescue regime meets its intended objectives and identifying obstacles to the success of the regime. In doing so, this study has provided insight into the practice of business rescue from the point of view of practitioners and has provided a list of shortcomings in the current practice which can be used as areas for potential improvement. This study has also contributed to the existing research on business rescue in South Africa from the unique angle of business rescue practitioners and focuses specifically on the views of South African practitioners whilst much of the literature and data available only focuses on specific legal provisions and implications and case studies. Therefore, this study has made a worthwhile contribution to the existing research available.

5.3. LIMITATIONS AND OPPORTUNITIES FOR FUTURE RESEARCH

This research report is limited to the success of the South African business regime as legislated by the Act and the practitioners involved in facilitating this process. While many studies have been undertaken comparing the South African business rescue regime to corporate rescue regimes of other jurisdictions, this study (and those studies) could be expanded to include the views of practitioners from these other jurisdictions. Comparisons could also be made of practical difficulties faced in different jurisdictions and an analysis can be undertaken to evaluate whether certain difficulties are more prevalent in developing countries.

The study is further limited to business rescue proceedings that commenced before 30 June 2015. A future study could be conducted to evaluate whether the difficulties and issues identified above persist as the regime matures.

This study also did not extensively examine the difference between business rescue and liquidation. The ability of the company to choose business rescue or liquidation when it is in financial distress could be examined further, with specific focus on the reasons why the company may select business rescue over liquidation and vice-versa. The role the size of the company may play in this regard has also not been examined.

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APPENDIX 1: INTERVIEW AGENDA

The following is a list of the questions that were asked of practitioners participating in the study. Participants were informed of the purpose of the study at the start of each interview and were informed that they did not need to answer questions they did not wish to answer.

Short questions

Please answer with Yes/No and elaborate wherever possible.

1. The objective of business rescue is to rehabilitate businesses that are in financial distress. Do you believe that these proceedings in fact meet this intended objective?
2. Do you think that the assessment of six months for the consideration of whether the company is in 'financial distress' is adequate?
3. In your experience, has business rescue truly adequately balanced the rights and interests of all stakeholders?
4. In your opinion, is the power granted to employees and a single shareholder too great?
5. Do you think that business rescues are generally successful?
6. Do you think that judicial management was an appropriate and effective corporate rescue procedure?
7. Without business rescue, do you believe there would be unnecessary liquidations?
8. In your experience, have creditors generally been willing to accept a business rescue plan and cooperate with its implementation?
9. The Companies Act (2008) only allows 25 days for the development of a business rescue plan. Do you think that there should be a longer period available in which to develop a business rescue plan?

Ranking question

10. Please rank each of the following factors influencing the success of business rescue proceedings on a scale of 1 to 5 (where 1 is barely influential and 5 is highly influential):

Potentially influencing factor	Rank from 1 – 5
Experience of the practitioner in conducting business rescue proceedings	
Qualification of the practitioner as the director of business rescue proceedings	
Relationship of trust between practitioner and management as a means	

of facilitating actions aimed at rescuing the company	
A comprehensive business rescue plan which will be used to rescue the company	
Creative strategies through which to rescue the business	
Funding from shareholders to support the company and assist with its rehabilitation	
Consistent court judgements on matters relating to business rescue	
Ability to source external funding (other than from shareholders) to be used to rehabilitate the company	
Cohesion between South African business rescue provisions and international provisions	
An extended time for the preparation of a business rescue plan	
Support of trade unions and employees in developing a business rescue plan	

Longer answer questions

11. What, in your opinion, constitutes success as far as business rescue proceedings are concerned?
12. Comparing the current business rescue regime to judicial management, which one do you think is more beneficial and why?
13. What are your views on the preparation of a business rescue plan?
14. In your experience, what are some of the difficulties you have come across in developing business rescue plans?
15. How does the relationship between the practitioner and management affect the prospects of the company's rescue?
16. Do you think that business rescue practitioners are generally adequately qualified to conduct business rescue proceedings? If not, are there any requirements you would like to have introduced into the criteria for qualifying as a business rescue practitioner?
17. What influence have court judgements on matters relating to business rescue had on the success of the regime?
18. Do you expect the success rate of business rescue proceedings to improve? What motivates this opinion?

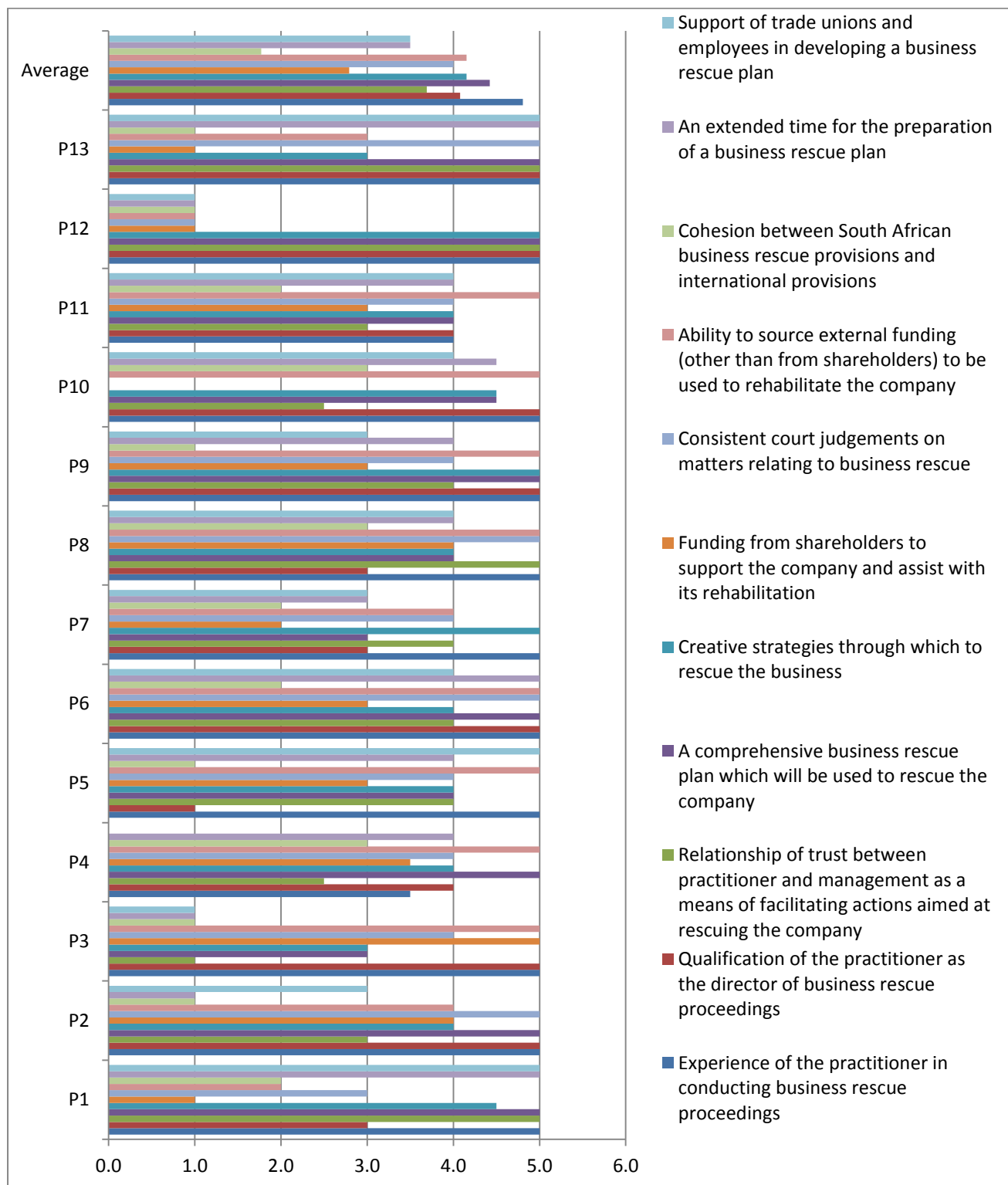
19. In your experience, how easily have companies placed under business rescue been able to obtain funding, during or after the business rescue proceedings?
20. In your opinion, why might directors of a company delay applying for voluntary business rescue?
21. Certain other jurisdictions allow management to develop a rescue plan without appointing a practitioner. In your opinion, would this practice function effectively in South Africa? Please elaborate.

APPENDIX 2: ETHICS CLEARANCE

Ethics Clearance for this study was granted by the University of the Witwatersrand. Ethics Clearance reference: **CACCN/1091**

APPENDIX 3: SUMMARY OF RESPONSES TO RANKING QUESTIONS

The chart below shows a summary of the responses of the practitioners to the ranking questions posed (where “P” refers to participant number).



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