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Does the role of a business rescue practitioner necessitate the imposition of fiduciary duties and liabilities to the same degree as directors of a company?

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DOES THE ROLE OF A BUSINESS RESCUE PRACTITIONER NECESSITATE THE IMPOSITION OF FIDUCIARY DUTIES AND LIABILITIES TO THE SAME DEGREE AS DIRECTORS OF A COMPANY?

by

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I. INTRODUCTION

Business rescue practice is a legislative mechanism in terms of Chapter 6 of the Companies Act 71 of 2008 ("the Act"), aimed at rehabilitating failing companies. Business rescue proceedings ("proceedings") are defined as the '[facilitation of the] rehabilitation of a company that is financially distressed'.[1] This is achieved through the temporary supervision of the company by the business rescue practitioner ("practitioner"), as well as a temporary moratorium on the rights of claimants. The goals of business rescue proceedings are to *either* rehabilitate the company to operate on a solvent basis, or to secure a better return for creditors upon the company's liquidation.[2] The ultimate manner of rehabilitation of a company is set out in the business rescue plan drafted by the practitioner and voted on by affected parties[3] as envisaged in the Act.

Central to the success of the proceedings is the effective execution of the business rescue practitioner's duties.[4] Section 140(1) of the Act confers substantial powers on the practitioner, which includes the practitioner's duty to assume full management control over the company, to investigate and monitor the affairs of the company, and to develop and implement the business rescue plan.[5] In terms of this section the practitioner assumes the 'responsibilities, duties and liabilities of a director of a company'.[6] Coupled with the far-reaching powers of the practitioner, the practitioner may still be held liable in terms of s 140(3)(c)(ii) and s 77 of the Act.

This report primarily seeks to contrast the roles and responsibilities of practitioners to that of directors of a company, to advocate that practitioners should be separately regulated and not attributed the duties, responsibilities, and liabilities of directors. This

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[1] Section 128(1)(b) of the Companies Act.
[2] Section 128(1)(b)(iii) of the Companies Act. See also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others (609/2012)* [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) (27 May 2013) para 23.
[3] Section 128 (1)(a) of the Companies Act defines affected persons as shareholders, creditors, registered trade unions representing the employees of a company and employees not represented by a trade union.
[4] Farouk HI Cassim, Maleka Ferrida Cassim, Rehana Cassim, Joanne Shev, Jacqueline Yeats *Contemporary Company Law* 2 ed (2012) 894.
[5] Dennis Davis (ed), Walter Geach (ed), Anneli Loubser, Zolani Buba, David Burdette, David Butler, Lindi Coetzee and Tshepo Mongalo *Companies and Other Business Structures* 4 ed (2019) 287.
[6] Sections 75 to 77 of the Companies Act.

report will consider the role, duties, responsibilities, and liabilities of directors, practitioners as well as other functionaries such as trustees and executors. This report will conclude that practitioners and directors have fundamentally different roles, and based thereon, practitioners should be regulated separately.

II. ROLES, RESPONSIBILITIES AND LIABILITY OF THE PRACTITIONER

Given their significant and unique role, practitioners have wide powers and responsibilities. Essentially practitioners "substitute" the board and pre-existent management and are regarded as the ultimate decision maker during the proceedings.[7] A practitioner is defined as a person(s) appointed to 'oversee a company' during the rescue proceedings in terms of s 128(1)(d) of the Act. This is further expanded on in ss 140 and 141 of the Act, where the practitioner has two overarching powers, namely, investigative and managerial powers.[8]

(a) Managerial powers of the business rescue practitioner

Section 140(1)(a) of the Act states that the practitioner has 'full management control of the company in substitution for its board and pre-existent management'. The Act does not define the term "management control". However, in s 128(1)(i) the term supervision refers to the 'oversight imposed on a company' in the course of the proceedings. This corroborates the fact that practitioners fulfil a supervisory role during the proceedings,[9] whilst the management roles and responsibilities of the board and pre-existent management are suspended.[10] The board and pre-existent management only have authority as delegated by the practitioner[11] as prescribed by the Act.[12]

In the matter of *Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and Another,*[13] it was held that the Legislature intended for the practitioner to

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[7] Eric Levenstein *South African Business Rescue Procedure* LexisNexis 2017 9-37.
[8] Kudazi Mpofu, Anthony O. Nwafor & Koboro J. Selala 'Exploring the Role of the Business Rescue Practitioner in Rescuing a Financially Distressed Company' (2018) 14(2) *Corporate Board: Role, Duties and Composition* 22.
[9] Eric Levenstein op cit. note 7 at 9-36.
[10] Annelie Loubser *Some comparative aspects of corporate rescue in South African company law* (published LLD thesis, University of South Africa, 2010) 111.
[11] Ibid 111.
[12] Section 140(1)(b) of the Companies Act.
[13] *Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and another* (2017) 1 All SA 862 (WCC) para 68.

act as more than a mere "nominal figurehead" in their role.[14] Moreover, that even though the practitioner is authorised to delegate their powers, the practitioner should *actually* exercise control over the company and not be at the behest of the board or management.

Section 137(2)(a) of the Act states that directors of the company 'must continue to exercise their functions [as] directors[s] subject to the authority of the practitioner'. This reinforces the notion that directors do not cease to hold office but do so under the authority of the practitioner; hence a distinct limitation on the exercise of the directors' powers and functions.[15] Section 137(2)(b) further states that directors owe a duty to the company to fulfil their management functions 'in accordance with express instructions or direction of the practitioner'. Any actions taken by pre-existent board members or directors will be void in the absence of the practitioner's approval.[16] Thus the "buck stops" with the practitioner.

During the proceedings, the practitioner is expected to take full management control and sustain the company's operations, obtain post-commencement finance,[17] draft the business rescue plan[18] and engage with all stakeholders.[19] The practitioner is further tasked to take important decisions concerning, but not limited to; employment related issues and[20] the suspension of obligations of the company which would become due.[21]

(b) Investigative powers

Practitioners are compelled to investigate the affairs of the company to determine the company's financial position, and whether reasonable prospects of rescuing the company exist.[22] If the practitioner concludes that there are no reasonable prospects

[14] Ibid para 68. See also *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and Others* (10862/14) [2015] ZAKZPHC 21 (20 March 2015) at para 55 where the court states that 'the BRP may not be a dummy or puppet blindly following instructions of a shareholder or anyone else who appointed him.'
[15] *Ragavan and others v Optimum Coal Terminal (Pty) Ltd and Others* [2022] JOL 52124 (GJ) para 34 – 36.
[16] Ibid.
[17] Eric Levenstein op cit. note 7 at 9-36.
[18] Ibid. See also s 150(1) of the Companies Act.
[19] Eric Levenstein op cit. note 7 at 9 - 35-36
[20] Ibid. See also s 136(1) of the Companies Act.
[21] Ibid. See also s 136(2) of the Companies Act.
[22] Section 141(1) of the Companies Act. See also Eric Levenstein op cit. note 7 at 9-42.

of rescuing the company, the practitioner must notify the company, all affected persons and the court.[23] The proceedings must then be terminated or alternatively place the company under liquidation.[24]

The investigative powers of the practitioner further obliges the practitioner to investigate whether any voidable transactions exist, and to take the necessary steps to remedy the matter.[25] The practitioner uses their discretion to determine which transactions are voidable.[26] Additionally, practitioners are also required to investigate whether directors or the company have failed to perform any material obligation in respect of the company.[27] The practitioner is further obligated to investigate any instances of 'reckless trading, fraud or the contravention of laws relating to the company'.[28] Section 142 of the Act assists practitioners to satisfy their duty in terms of section 141 by compelling directors to co-operate with the practitioner by delivering all the books and records that relate to the company and its affairs.[29]

The practitioner must convene the first meeting of creditors to inform them of their view whether a reasonable prospect to rescue the company exists.[30] The fulfilment of the practitioner's obligations in terms of s 141 is essential to the success of the business rescue proceedings.

(c) Development and approval of the business rescue plan

A crucial element of the practitioner's duties concerns the drafting, facilitation of the adoption of the plan, and the implementation thereof.[31] The business rescue plan (the "plan"), if approved, constitutes the route toward the ultimate rehabilitation of the company.[32] The plan should be drafted in accordance with the information and conclusions drawn during the investigation of affairs of the company as above

[23] Eric Levenstein op cit. note 7 at 9-43. See also s 141(2)(a) of the Companies Act.
[24] Ibid.
[25] Section 141(2)(c) – (d) of the Companies Act.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Section 142 of the Companies Act.
[30] Section 147 of the Companies Act.
[31] Section 140(1)(d) of the Companies Act. See also Eric Levenstien op cit. note 7 at 9-34.
[32] Eric Levenstein *An Appraisal of the New South African Business Rescue Procedure* (LLD thesis, University of Pretoria, 2015) 497.

discussed. The first aspect relating to the 'development and approval of the business rescue plan' is the preparation of the plan as prescribed by section 150 of the Act, after consultation with the management of the company and affected persons.

The Act prescribes the minimum contents of the plan. The plan should contain information 'reasonably required' by affected persons to make an informed decision, to accept or reject the plan. The plan must be published in accordance with the statutory provisions,[33] and the practitioner is then required to convene a meeting with the affected persons to consider the plan.[34] The result of the meeting could result in the adoption of the plan,[35] a motion to amend the plan or adjourn the meeting to revise the plan,[36] or the rejection of the plan.[37]

(d) Fiduciary nature of the practitioner's role and duties

A fiduciary is described as a person who assumes certain duties and responsibilities or, by law, is obliged to act in the best interest of those whose interests are being protected.[38] There is no 'closed list of fiduciary relationships',[39] however, the court in *Phillips v Fieldstone Africa (Pty) Ltd*[40] held that the characteristics listed below are useful, but not decisive, tools to identify a fiduciary relationship:

> *"(1) Scope for the exercise of some discretion or power;*
> *(2) that power or discretion can be used unilaterally so as to effect the beneficiary's legal or practical interests; and*
> *(3) a peculiar vulnerability to the exercise of that discretion or power."*[41]

Directors are considered fiduciaries and hold a position of trust in relation to the company. Fiduciary relationships are rooted in elements of honesty, loyalty, and

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[33] Section 150(5) of the Companies Act.
[34] Dennis Davis (ed) & Walter Geach (ed) op cit. note 5 at 292. See also s 151 of the Companies Act read with Regulation 125(2) to the Companies Act.
[35] Section 152(2) and 152(4) of the Companies Act.
[36] Section 152(1)(d) of the Companies Act.
[37] Section 153 of the Companies Act.
[38] M Blackman, R Jooste, G Everingham *Commentary on the Companies Act* Juta Online Publication 31.
[39] *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 (6) SA 531 (SCA) para 16.
[40] 2004 (3) SA 465 (SCA) 23.
[41] *Phillips v Fieldstone Africa* (Pty) 2004 (3) SA 465 (SCA) para 34.

trust.[42] Such relationships arise as a matter of law, given their special nature, and as a matter of fact where a close trusting relationship exists.[43]

In the matter of *Robinson v Randfontein Estates Gold Mining Co Ltd*[44] it was held that a fiduciary relationship 'exists where one man stands to another in a position of confidence involving a duty to protect the interests of that other'. Directors hold fiduciary positions and owe their fiduciary duties to the company.[45] The term company refers to the 'collective body of shareholders' present and future or the incorporators as a general body.[46] As a consequence the company is permitted to enforce the duties against the directors.[47] A director is obligated to act in the best interests of the company and compelled to distinguish their own interests from those of the company.[48]

Like directors, practitioners also hold a position of trust and loyalty and are statutorily obliged to act in the best interest of the company in an unbiased manner.[49] Practitioners must be 'held to a high professional and ethical standard' and are also considered officers of the court, in *Knoop and Another NNO v Gupta (Tayob Intervening)*, it is however evident that reference to an officer of the court is 'vague without legal context'. Therefore, practitioners are referred to as officers of the court to at most 'convey that a fairly high standard of personal integrity is called for from the person so described', and not necessarily in the practical sense where such a person

[42] K A Dharmarante *Consideration of Whether Directors Should Stand in a Fiduciary Relationship with Company's Related and Inter-related Companies* (University of Witwatersrand, Johannesburg) 1.
[43] Vincent R Johnson 'The fiduciary obligations of public officials' (2019) 9 *St Mary's Journal on Legal Malpractice and Ethics* 310.
[44] 1921 AD 168 at 177. See also Sindiswa Cynthia Jonas *The Duty to Disclose Personal Financial Interest and Its Implications on Good Corporate Governance and Company Efficiency with Specific Reference to SOC's'* (LLM thesis, University of the Western Cape, 2021) 37.
[45] Cohen v Segal 1970 (3) SA 702 (W), *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 Appellate Division.
[46] Farouk HI Cassim op cit. note 4 at 515.
[47] Ibid at 516. See also s 218(2) of the Act which states any person in contravention of the Act is liable to any other person for damage or loss as a result of the contravention. The Act in s 1 defines person to include a juristic person as well.
[48] Sindiswa Cynthia Jonas *The Duty to Disclose Personal Financial Interest and Its Implications on Good Corporate Governance and Company Efficiency with Specific Reference to SOC's'* (LLM thesis, University of the Western Cape, 2021) 11. See also op cit. note 4 at 287.
[49] Section 76(3) of the Companies Act.

ethically owes special duties to the court like an attorney or advocate.[50] Practitioners therefore owe these fiduciary duties to all stakeholders, and not just to the company and its shareholders.

The court in the matter of *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others*[51] relied on the Companies Act commentary and the matter of *Standard Bank v Master of the High Court*[52] to substantiate the fact that the principles relating to the fiduciary duties of liquidators apply equally to practitioners. The court held that 'the liquidator stands in a fiduciary relationship to the company of which he is the liquidator, to the body of the creditors, and to the body of its members as a whole.'[53] By subjecting practitioners to the same fiduciary duties as directors in terms of s 76(3) of the Act, it is evident that the Legislature appreciated the fiduciary nature of practitioner's roles and responsibilities.

(e) Liability of the practitioner in terms of section 140(c)(ii) of the Act

Practitioners may be held liable for any act or omission which amounts to gross negligence.[54] A practitioner may be excluded from liability if it is proven that the act or omission was occasioned in good faith and in the 'course of the exercise of the powers and performance of the functions of the practitioner'.[55] Additionally, practitioners may be held liable in terms of s 77(2) of the Act for a breach of their duties as listed in s 76. Liability in terms of section 140(3)(c)(ii) of the Act is based on gross negligence, as compared to liability in terms of s 77(2) which imposes liability of ordinary negligence.

The matter of *Fisheries Development Corporation of SA Ltd v Jorgensen*[56] differentiates between "ordinary negligence" and "gross negligence" stating that gross negligence requires 'something more' than merely ordinary negligence and

[50]African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others 2015 (5) SA 192 (SCA) para 35. See also Knoop & Another v Gupta & Another All SA 726 (SCA) para 33.
[51] (83344/18) [2019] ZAGPPHC 411 (30 August 2019) para 61. See also *Standard Bank v Master of the High Court* [2010] 3 All SA 135 (SCA) para 112.
[52] [2010] 3 All SA 135 (SCA) para 112.
[53] Op cit. note 40.
[54] Section 140(3)(c)(ii) of the Companies Act.
[55] Section 140(3)(c)(i) of the Companies Act.
[56] 1980 (4) SA 156 (W) 158 & 169.

contemplates recklessness.[57] Gross negligence requires 'a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, [that] where there is found to be conscious risk-taking, a complete obtuseness of mind, or where [it is found that] there is no conscious risk-taking, [there was] a total failure to take care.'[58]

The element of conscious risk-taking played out in the matter of *Van den Heever N.O and Others v Van Tonder*[59] ("*Baobab Case*"), where the practitioner was faced with numerous challenges.[60] The proceedings involved a total of six companies in a group which operated together and were interdependent. The practitioner was presented with incomplete financial documents; and did not receive any support from the only remaining director of the group. The court concluded that the practitioner contravened s 134 of the Act by not obtaining the consent to dispose of Baobab's book debts. However, the court found that the practitioner's conduct was consistent with how the group of companies operated previously, which involved using Baobab's funds to pay the expenses of the other companies in the group.[61]

The court held that the practitioner was of the '*bona fide* belief that Baobab's funds should first be used to extinguish the expenses of the other companies in the group, thereafter investigations could be conducted.'[62] There was further testimony from the practitioner that without the payments, Baobab would have ceased trading.[63]

In the matter of *S v Dhlamini*[64] the court describes gross negligence under the common law as '[connoting] a particular attitude or state of mind characterised by a

[57] Ibid. See also Lézelle Jacobs & Johann Neethling 'The caring business rescue practitioner: an investigation into the appropriate measure' (2016) 13 (3) *LitNet Akademies* 773 at 786.
[58] *Transnet Ltd t/a Portnet v MV 'Stella Tingas' and Another* (378/01) [2002] ZASCA 145; [2003] 1 All SA 286 (SCA) (27 November 2002) para 7. See also Lézelle Jacobs & Johann Neethling op cit. note 56 at 786.
[59] (A5076/2018) [2021] ZAGPJHC 7 (20 April 2021).
[60] Ibid paras 3 and 8.
[61] Ibid para 58.
[62] Ibid.
[63] Ibid.
[64] 1988 (2) SA 302 (SCA) at 308D–E

total failure to grant consideration to the consequences of one's actions, i.e., an attitude of reckless disregard of such consequences.'[65]

The court in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others*[66] found the practitioner's conduct to be 'grossly improper conduct [and] deliberate'.[67] The practitioner was held liable in terms of s 140(3)(c)(ii). The court considered the fact that the practitioner did not act objectively and impartially in instituting legal proceedings. The practitioner acted in his capacity as an attorney and represented himself and the company undergoing business rescue. The practitioner was held liable for the costs of unsuccessful litigation, as would be the case for 'any other ordinary unsuccessful litigant'.[68] The court held that the practitioners conduct was deliberate, and the practitioner was found liable for the appellant's legal costs.[69]

III. RESPONSIBILITIES, DUTIES AND LIABILTIES OF THE DIRECTOR IN TERMS OF SECTIONS 75 AND 76 OF THE ACT

In addition to their responsibilities and duties, practitioners are subject to the responsibilities, duties, and liabilities of directors of the company as in ss 75 to 77 of the Act.[70] Along with the liabilities in s 77 of the Act, the practitioner may be held liable in terms of s 140(3)(c)(ii). The practitioner may also be liable in a civil action for damages or loss arising from the contravention of any provision of the Act.[71] Even though practitioners are subject to the roles, responsibilities and liabilities of directors, such directors are not absolved from liability and are still bound by their responsibilities and duties under the Act. The 2008 Act sets out the partial codification of directors' duties.[72] Directors are subject to statutory and common law duties which are to be considered in tandem.[73]

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[65] P Delport *Henochsberg on the Companies Act 71 of 2008* Vol 1 [issue18] commentary on section 20 of the Companies Act.
[66] 2015 (5) SA 192 (SCA) para 38.
[67] Ibid para 38.
[68] Ibid.
[69] Ibid
[70] Section 140(3)(b) of the Companies Act.
[71] Section 218(2) of the Companies Act.
[72] Dennis Davis (ed) & Walter Geach (ed) op cit. note 5 at 139 – 140.
[73] Ibid.

(a) The role of directors in a company

Section 66 of the Companies Act prescribes that the board of directors are mandated to manage the business and affairs of the company. Ordinarily, on a day-to-day basis, directors are required to operate and strategically steer a solvent company.[74] The King IV Report on Corporate Governance for South Africa 2016 ("King IV") sets out guidelines for operation of companies in South Africa. The King IV states that the role of the board of directors of a company is as follows:[75] to steer the company and determine its strategic direction; to develop the company's strategy; to formulate policies and operational plans; to give effect to the company strategy in alignment with the formulated policies; to oversee the implementation of the company strategy; and to ensure that the board of directors are held accountable.[76]

(b) The duty to disclose personal financial interests in terms of section 75 of the Act

In terms of the common law 'a director cannot have an interest in a contract with the company, whether direct or indirect, unless the company in general meeting approves the contract after disclosure to it of his interest'.[77] If no disclosure is made the contract is voidable at the company's instance.[78] This common law rule reinforces the fiduciary relationship between a director and a company and avoids a conflict of interest which may arise.[79] Section 75 of the Act requires a director of a company to disclose any personal financial interests or any personal financial interest of any related persons[80] to the director.[81]

Personal financial interests are defined as a direct material financial, monetary, economic interest or an interest which can be attributed to a monetary value.[82] It is in

[74] Ricky Klopper "Walking a tightrope: The business rescue practitioner's challenge of serving competing interests' available at https://www.derebus.org.za/walking-a-tightrope-the-business-rescue-practitioners-challenge-of-serving-competing-interests/ accessed on 14 January 2022.
[75] Referred to as the governing body in the King IV Report on Corporate Governance in South Africa 2016. See the definition of "governing body" in the glossary of terms on page 12.
[76] King IV Report on Corporate Governance in South Africa (2016) 21.
[77] P Delport op cit. note 64 at 292(6).
[78] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* (Case No 982/18) [2020] ZASCA 17.
[79] Ibid.
[80] Section 2(1)(a) & (b) of the Companies Act.
[81] Dennis Davis (ed) & Walter Geach (ed) op cit. note 5 at 141. See also Section 75(3) of the Companies Act.
[82] Section 1 of the Companies Act defines 'personal financial interests'.

the courts discretion to assess and determine what constitutes a personal financial interest in terms of s 75 of the Act.[83] The Act further defines material as 'significant to the circumstances' such that it determines a matter, or has the potential to reasonably affect a person's judgment or decision-making abilities.[84] In accordance with s 75 of the Act, in order for a personal financial interest to warrant disclosure, the interest must be direct, material, and have the potential to affect the judgement.[85] A director's interest is material when their judgment is affected and they are no longer able to objectively advance the interests of the company.[86] There is however, no precise definition of the term 'material' as such, this has to be determined on the merits of each case.[87]

Any transaction, contract or decision concluded by a director wherein he/she has a personal financial interest may be valid only if there has been disclosure of the interest, and the board has approved the transaction, contract or decision by an ordinary resolution.[88] The director is required to disclose any personal financial interests to the board of the company at a board meeting where the matter will be considered,[89] thus avoiding any conflicts of interest. The non-disclosure of any personal financial interest will amount to a violation of s 75 and the director may be held liable in terms of s 77(2)(a) of the Act.[90]

Theoretically, the Legislature's intention to impose the duty in terms of s 75 on a practitioner seems sensible, given that the impartiality and independence of the practitioner is paramount in the execution of their duties and responsibilities. However, the writer agrees with the *obiter* remarks made by Wallis JA in the matter of *Knoop and Another NNO v Gupta (Tayob Intervening).*[91] Wallis JA questions the practicality of imposing the duty in terms of s 75 on a practitioner. The practitioner would be compelled to make disclosures to the board and would require the board's approval to

[83] Farouk HI Cassim op cit. note 4 at 568.
[84] Section 1 of the Companies Act defines 'material'.
[85] Sindiswa Cynthia Jonas op cit. note 47 at 35.
[86] Ibid at 37.
[87] Farouk HI Cassim op cit. note 4 at 568.
[88] Ibid at 572.
[89] Section 75(5) of the Companies Act.
[90] Sindiswa Cynthia Jonas op cit. note 47 at 36.
[91] (116/2020) [2020] ZASCA 163; [2021] 1 All SA 726 (SCA); 2021 (3) SA 88 (SCA) (9 December 2020) para 34.

pursue any transaction, contract, or decision in which they have a personal financial interest. However, the board of directors are at the behest of the practitioner. It is therefore senseless that the practitioner would require the approval from the board, where the Act makes it unquestionably clear that the directors of a company are obliged to perform their duties 'in accordance with express instructions or direction of the practitioner.'[92] The Act further states that directors of the company remain subject to s 75, when read with s 140(3)(a) of the Act, it is implied that it is the practitioner who would make the final decision regarding the approval of the transaction, contract or decision where a director has a personal financial interest.

Wallis JA further remarked that the practitioner does not become a director of the company as contemplated in ss 75(1)(a) and 76(1) of the Act.[93] In the drafting of s 75 the Legislature purposefully identified categories of directors that would be subject to s 75.[94]

Given the practical difficulties which may arise, it is difficult to imagine how one would be successful in holding a practitioner liable for a breach of the duty to disclose any personal financial interests in terms of s 75. The Act provides, in the writer's opinion, more appropriate recourse in s 139(2)(e) of the Act, which lists a conflict of interest or a lack of independence as a ground for the removal of a practitioner.

(c) The standards of directors' conduct – The fiduciary duties in terms of section 76(3)(a) and (b) of the Act

Under the common law, directors have the 'fiduciary duties of good faith, honesty, loyalty', and the duty to avoid a conflict of interest, which have been partially codified in s 76 of the Act.[95] The partial codification of the fiduciary duties does not dispense with the common law principles. Instead, the partial codification allows the norms of society to develop and provides certainty of the law.[96] In terms of the Act, directors

[92] Section 137(2)(b) of the Companies Act.
[93] Ibid.
[94] Ibid.
[95] Farouk HI Cassim op cit. note 4 at 503.
[96] Ibid.

have two distinct duties namely, the fiduciary duties in terms of s 76(3)(a) and (b), and the duty to act with a degree of care, skill, and diligence in terms of s 76(3)(c).[97]

Fiduciary duties of directors are codified in s 76(3)(a) and (b) of the Act and require a director to act in good faith; exercise their powers for a proper purpose; and act in the best interests of the company. The test for assessing the element of good faith is subjective, and questions whether the director was of the honest belief that their conduct was in the best interest of the company.[98] The test evaluates whether the director's belief that they were acting in the best interest of the company was based on reasonable grounds.[99] Under this test, courts are not entitled to evaluate what the best interests of a company are, or what the best interests would have been.[100] It merely assesses whether a reasonable person would have regarded the conduct of the directors to be in the best interests of the company.[101] This was established in the matter of *Re Smith v Fawcett Ltd*[102] where the court held that it would not set aside a decision of a board member/the board merely because it appears to be illogical or unfair, it will only do so if it is apparent that the decision was taken in bad faith and contrary to the best interests of the company.[103]

Directors are further obliged to exercise their powers for a proper purpose.[104] This fiduciary duty compels directors to exercise their powers for the intended objective purpose of the power, and not to abuse the powers conferred on them by using it for ulterior purposes.[105] The test to determine whether a director has acted with a proper purpose is objective, and considers whether or not a director has exceeded the restrictions of the company or the limitations of his/her own authority.[106] The element of 'proper purpose' imposes a duty on a director not to exceed the constraints of his

[97] Section 76(3)(a) - (c) of the Companies Act.
[98] Op cit. note 4 at 524. See also *Greenhalgh v Arderne Cinemas Ltd [1950] 2 All ER1120 (CA); Regentcrest plc v Cohen* [2001] 1 BCLC 80 at 104.
[99] Ibid.
[100]MSP Mdunge *A Critical Analysis of the Fiduciary Duties of Directors and Evaluation of the Development of These Duties in Terms of the Common Law and Statutory Law* (LLM thesis, University of KwaZulu Natal, 2017) 23. See also *Shuttleworth v Cox* [1927] 2 KB 9 para 23.
[101] Ibid at 113.
[102] 1942 (1) All ER 542 at 306. See also MSP Mdunge op cit. note 99 at 24.
[103] Ibid.
[104] Section 76(3)(a) of the Companies Act.
[105] Farouk HI Cassim op cit. note 4 at 525.
[106] P Delport op cit. note 64 at 298(15).

own authority or the limitations of the company, thus not to exercise his or her power for an improper purpose.[107] The duty to act for a proper purpose is tested objectively and considers the following: the 'actual purpose the power was exercised for, the purpose the power was conferred for, and whether the actual purpose fell within the intended purpose.'[108]

The objective test to determine whether or not a power has been exercised for a proper purpose may be more complex when considering the goals of business rescue practice as envisaged in s 128(1)(b)(iii) of the Act. The objectives of business rescue proceedings are *either* to rehabilitate the company to operate on a solvent basis *or* to secure a better return for creditors upon the company's liquidation.[109]

The writer is of the view that a practitioner would not perform their duties in the same manner when seeking to achieve either of the aforementioned two objectives of business rescue. The results of each objective are on opposite sides of the spectrum, and a practitioner would therefore execute their duties in light of the identified objective. In the one instance the practitioner would exercise their powers in efforts to rehabilitate or rescue the company, whereas in the other instance the practitioner would exercise their power to attempt to realise the best return for creditors, which would result in the winding down of the company.

The *Baobab case* contemplated a claim against the practitioner for a breach of fiduciary duties in terms of s 76 of the Act.[110] The claim arose from an alleged loss suffered by Baobab. It was alleged that the practitioner was reckless in his disposal for the following reasons, amongst others: Baobab was financially distressed; the disposal was an undue preference; there was no certainty that the business rescue plans would be approved; and the other companies in the group were financially distressed.[111] It was further alleged that the practitioner was obliged to terminate the proceedings when he realised that there was no prospect of successfully rescuing

[107] Ibid at 298(13).
[108] *Visser Sitrus* (*Pty*) *Ltd v Goede Hoop Sitrus* (*Pty*) *Ltd and Others* 2014 (5) SA 179 (WCC) para 80.
[109] *Oakdene Square Properties (Pty) Ltd and Others o*p cit. note 2.
[110] Baobab Case op cit. note 58.
[111] Ibid para 62.

Baobab.[112] The court found that the practitioner acted reasonably, in 'good faith, for a proper purpose and in the interests of Baobab.'[113] The court considered the fact that had the practitioner not used the funds to extinguish Baobab's debt, Baobab and the entire group of companies would cease to trade.[114]

(d) The standards of directors' conduct – The duty to act with reasonable care, skill and diligence in terms of section 76(3)(c) of the Act

The common law duty to act with reasonable skill and care is rooted in the delictual liability for negligence and determines whether or not a director has acted negligently in the execution of their roles and responsibilities.[115] Section 76 of the Act codifies the common law principle of the non-fiduciary duty to act 'with the degree of care, skill and diligence that may be reasonably expected of a person' in the same position as the director, and with the same skills and expertise as that director.[116]

Under the common law, in the matter of *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson*[117] the court held that care and skill are not the same in that skill refers to the technical abilities of a director, and care refers to the way in which the skill is applied.[118] The Act further imposes the director's duty of diligence, which is described as 'attending to one's duties properly', which includes the director devoting their attention to the affairs of the company and the monitoring and supervision of the officers and employees of the company.[119]

The extent of the director's duty of reasonable care and skill is largely dependent on, but not limited to, the nature and size of the company, as well as the director's specific roles and responsibilities in the company.[120] The same holds true for a

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[112] Ibid.
[113] Ibid paras 70-71.
[114] Ibid para 71.
[115] Farouk HI Cassim op cit. note 4 at 555. See also Lézelle Jacobs & Johann Neethling op cit. note 56 at 777.
[116] Section 76(3)(c) of the Companies Act. See also Farouk HI Cassim op cit. note 4 at 554.
[117] (1996) 16 ASCR 607 (NSW); (1995) 37 NSWLR 438. See also Farouk HI Cassim op cit. note 4 at 556.
[118] Ibid.
[119] Farouk HI Cassim op cit. note 4 at 560.
[120] Ibid at 559. See also Lézelle Jacobs & Johann Neethling op cit. note 56 at 777. See also *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty)* Ltd1980 4 SA 156 (W).

practitioner, the extent of their duty of reasonable care will be dependent on the circumstances of the company. It is, however, important to note the earlier section which considers the roles and responsibilities of the practitioner and contrast this to the roles and responsibilities of a director of a company.

The test in terms of s 76(3)(c) is two-prong; the first prong is the objective test which considers the 'reasonable person' test and questions whether a director has exercised a degree of skill, care and diligence which may be reasonably expected from another director performing the same function.[121] The second prong is the subjective test contemplates the general knowledge, skill and expertise of the director in question.[122] The Legislature intended for this test to be applied to the practitioner in the same manner which it is applied to directors of a company. The test therefore questions the following: '(i) in his/her actions, did he/she display the same degree of care, skill, and diligence as a reasonable practitioner would have done in the same circumstances? (ii) Does his/her personal characteristics and qualifications cause him/her to have to meet a higher standard than just that of the reasonable practitioner?'[123]

(e) Directors' liabilities in terms of section 77 of the Act

Section 77 of the Act concerns the liabilities of directors for the contravention of the aforementioned detailed duties. Directors may be held liable in terms of the common law principles relating to a breach of their fiduciary duties,[124] or in accordance with the delictual common law principles for any loss, damage or costs sustained due to the contravention.[125]

Directors are however offered protection by our courts in terms of s 77(9) of the Act. Directors may be excused from their liability if the court is satisfied that the director is liable but has acted reasonably and honestly, or the court deems it fair to indemnify the director having regard for the circumstances of the case.[126] The onus rests on the

[121] Section 76(3)(c)(i) of the Companies Act. See also Farouk HI Cassim op cit. note 4 at 559.
[122] Section 76(3)(c)(ii) of the Companies Act. See also Farouk HI Cassim op cit. note 4 at 559.
[123] Lézelle Jacobs & Johann Neethling op cit. note 56 at 778-779.
[124] Section 77(2)(a) of the Companies Act.
[125] Section 77(2)(b) of the Companies Act.
[126] Section 77(9) of the Companies Act.

director to prove that they acted honestly and reasonably.[127] Once proven, the court has the discretion to determine whether or not it is fair to excuse the director from liability. In exercising its discretion, the court must have consideration for all the circumstances surrounding the matter.[128]

The court in the matter of *Van den Heever N.O and Others v Van Tonder*[129] had to consider whether the practitioner breached his fiduciary duties in terms of s 76(3) and was liable in terms of s 77(2)(b)(ii). The practitioner denied liability and relied on s 140(3)(c)(i), and in the alternative to be excused from liability in terms s 77(9) in the event that he was found liable of a breach of his duties. The court held that the elements of reasonableness and honesty in terms of s 77(9) of the Act are not the same, in that the reasonableness element is considered objectively, whilst the honesty element is evaluated subjectively.[130] The onus rests on the director to prove that they acted reasonably and honestly.[131]

The court found that the practitioner acted in good faith and exercised his powers for a proper purpose in the best interests of the company. Furthermore, that the practitioner acted with the care, skill and diligence as required in s 76(3)(c) of the Act.[132] The court additionally excused the practitioner from liability in terms of s 77(9) of the Act. In its determination, the court correctly considered the two goals and objectives of business rescue, and appreciated the complex nature of the practitioner's job such as the fact that the practitioner was appointed for six companies with 400 creditors across the Group, and received little or no assistance from the management.[133] It is evident that s 77(9) affords practitioners additional resource to escape liability for a contravention of their fiduciary duties, or the duty to act with reasonable skill, care and diligence.

IV. ROLES AND RESPONSIBILITIES OF FUNCTIONARIES IN A FIDUCIARY RELATIONSHIP

[127] Farouk HI Cassim op cit. note 4 at 579.
[128] Ibid.
[129] Baobab Case op cit. note 58 paras 53-54.
[130] Ibid para 57.
[131] Ibid.
[132] Ibid paras 70-71.
[133] Ibid para 60.

This section of the report seeks to outline the roles and responsibilities of other functionaries such as trustees and executors who stand in fiduciary relationships. Moreover, this section will briefly outline the unique role and fiduciary nature of these functionaries, as well as their liabilities in terms of the common law and statute. The purpose of this section of the report is to liken the fiduciary nature of the roles of trustees and executors to the fiduciary nature of the role of BRPs, and to further illustrate that the uniqueness of the aforementioned roles calls for the fiduciary roles to be regulated independently. Moreover, this section aims to demonstrate that even though these functionaries are considered to stand in fiduciary relationships, their statutory duties, and responsibilities flows from the purpose of their roles.

(a) Roles, responsibilities, and liabilities of trustees

A trust may be defined as a ' trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person'. [134] The ultimate purpose of a trust is to ensure the protection of trust property.[135] This is achieved through the proper administration of the trust by the trustee, who is required to act in utmost good faith.[136]

Trusts essentially comprise of four core elements. First, the fiduciary nature of the trustee who administers the trust property for the benefit of the beneficiaries. Secondly, the element of a separate estate, in that the trustee's personal estate should be separate from the trust estate. Thirdly, the principle of subrogation, the trustee has to ensure that any proceeds which arise from the trust property, belongs to the trust. Lastly, trusteeship as quasi-public office subject to the supervision of the Master of the High Court ("the Master").[137] Principally, a founder creates a trust instrument, and relinquishes control and ownership of their property to a trustee, for the benefit of the beneficiaries.[138] The trustee administers the trust and has no beneficial interest

[134] Section 1 of the Income Tax Act, 58 of 1962.
[135] D Kgole *A comparative analysis of the fiduciary duties of trustees in South Africa and Namibia* (LLM Thesis, the North-West University, 2020) 1. See also Du Toit South African Trust Law: Principles and Practice (Butterworth Cape Town 2002) 67.
[136] Ibid.
[137] D Kgole op cit. note 134 at 548-571.
[138] D Kgole op cit. note 134 at 19-20.

therein.[139] The trustee becomes the owner of the trust property in the interests of the beneficiaries, on whose behalf the trust property is administered.[140]

The term trustee implies that a fiduciary relationship exists between the trustees and the beneficiaries of the trust.[141] Trusts and the administration thereof are governed by the Trust Property Control Act 57 of 1988 ("TPCA"). Section 9 of the TPCA codifies the trustee's fiduciary duty to act with care, diligence, and skill in the exercise of their duties, reasonably expected from a person who manages the affairs of another. In the office of a trustee, the actions of the trustee 'relate to the trust in which the fiduciary relationship attaching to trusteeship reigns supreme and are completely divorced from his private circumstances.'[142]

In the administration to a trust, trustees are to give effect to the trust instrument, perform their duties and exercise their powers with care, diligence, and skill,[143] and exercise independent discretion.[144] Trustees, like directors and practitioners, have common law and statutory duties. Under the common law, broadly, trustees have the following duties: the duty to act in good faith and jointly, to give security to the Master, to observe the trust deed, to take possession of the trust property, to make the trust property productive, to keep the trust property separate from their personal property, to be impartial and independent, to actively supervise and inquire, to preserve the trust property, to account to beneficiaries, and to transfer income and capital to beneficiaries.[145] The trustee further has to comply with statutory duties as prescribed by the TPCA.[146]

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[139] RP Pace (Author), W Van Der Westhuizen (Author) *Wills and Trusts* (Lexis Nexis South Africa, 2016) B-4 Definition (find page)
[140] MJ de Waal and MC Schoeman-Malan *Law of Succession* (Fifth edition. Cape Town: Juta and Company (Pty) Ltd. 2015) 168.
[141] RP Pace & W Van Der Westhuizen op cit. note 138 at B-6 Parties to the Trust 6.2.1. Further see ss 1 and 6 of the Trust Property Control.
[142] RP Pace & W Van Der Westhuizen op cit. note 138 at B-6 Parties to the Trust 6.2.2.
[143] Section 9(1) of the Trust Property Control Act.
[144] Cameron E, De Waal M, Solomon P *Honoré's South African Law of Trusts* 6th ed Claremont: Juta 2018. See also RP Pace & W Van Der Westhuizen op cit. note 138 at B-14 General powers.
[145] RP Pace & W Van Der Westhuizen op cit. note 138 at B-15 Duties.
[146] In terms of ss 3 – 6, ss 9 – 11 and ss 16 -17 of the Trust Property Control Act.

Trustees can be held personally liable for a breach of their fiduciary duties.[147] A breach of a trustees fiduciary duties amounts to a breach of trust.[148] A trustee can then be held delictually liable for any loss.[149] Trustees generally have the fiduciary duties of care, impartiality, independence and accountability.[150] The basis of a claim for the breach of fiduciary duties by a trustee is unconscionable abuse of the trust by the trustee in the administration of the trust, through fraud, dishonesty or an improper purpose.[151] Notably, under s 9(2) of the TPCA, a trustee cannot be exempt from liability for a breach of their duties to act with care, diligence and skill.

As above mentioned, the primary role of the trustee is to oversee, protect and administer the trust property on behalf of, and for the benefit of the beneficiaries.[152] Trustees manage the trust property and do so on behalf of, and for the benefit of the beneficiaries. The provisions in the TPCA and the common law apply squarely to the office of the trustee considering the role and objectives of trusteeship. A further analysis of trusteeship and the role of the practitioner will be discussed below.

(b) Roles, responsibilities, and liabilities of executors

The administration of deceased's estates is regulated by The Administration of Estates Act 66 of 1985. The primary role of an executor is to wind up the estate of the deceased.[153] The executor is in a position of trust and is further expected to administer the deceased's estate with care and diligence.[154] The executor is further required to execute their duties in the best interests of the beneficiaries.

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[147] RP Pace & W Van Der Westhuizen op cit. note 138 at B-14 Administration of the Trust – General principles of trust administration 14.2.4.
[148] J Jamneck, C Rautenbach, M Paleker & M Wood-Bodley *Law of Succession in South Africa 2 ed* Second edition. Cape Town, South Africa: Oxford University Press Southern Africa. 2012 11.7.3. Breach of fiduciary duty.
[149] Ibid.
[150] RP Pace & W Van Der Westhuizen op cit. note 138 at B-14 Administration of the Trust – General principles of trust administration 14.2.1. See also Du Toit F US LR at 476 & Du Toit F "The Fiduciary Office of Trustee and the Protection of Contingent Trust Beneficiaries" Stellenbosch Law Review 2007 3 469 at 476.
[151] RP Pace & W Van Der Westhuizen op cit. note 138 at B-15 Duties and obligations of trustees 15.1.6. See also Ian M Shipley *'rust assets and the dissolution of a marriage: a practical look at invalid trusts, sham trusts, and piercing the veneers of trusts/going behind the trust form'* (2016) 28 SA Merc LJ 508).
[152] D Kgole op cit. note 134 at 1.
[153] J Jamneck & C Rautenbach op cit. note 147 at 16.3.2.1. See also s 1 of the Administration of Estates Act, which defines an executor as the 'person who is authorized to act under letters of executorship granted or signed and sealed by a Master…'
[154] J Jamneck & C Rautenbach op cit. note 147 at 16.3.2.1.

The executor's duties and responsibilities include determining the estate assets and liabilities, taking custody and control of the assets, realising the assets, paying creditors, recouping debts due to the estate, drawing up the liquidation and distribution account, distributing the assets to the beneficiaries, and complying with all statutory requirements in terms of the Administration of Estates Act.[155] It is evident that the primary role of the executor is to administer the deceased's estate. Fundamentally, the executor manages the affairs of the deceased's estates to ultimately liquidate the estate and distribute the estate to the rightful beneficiaries. The statutory duties and responsibilities assigned to the executor enable the executor to fulfil their role in the administration of the deceased's estate.

Executors stand in a 'fiduciary relationship to the beneficiaries in respect of [their] administration of the deceased's estate'.[156] It is therefore trite that executors are subject to common law fiduciary duties. The matter of *Brimble-Hannath v Hannath and Others*[157] highlighted the importance of the executor's duty to remain impartial and not have any conflicts of interest. In this matter, the executor held office as an executor of the deceased's estate and as a creditor of the same estate. The court reiterated the notion that fiduciaries cannot act in instances where they have a conflict of interest.[158] The court ultimately ordered the removal of the executor on the basis that the executor had a prima facie conflict of interest.[159] The court found that the mere existence of the conflict of interest constituted sufficient grounds for the removal of the executor, even in the absence of proof of any misconduct on the part of the executor.[160]

In the event that the executor does not fulfil their duties, or is negligent in doing so, the Master may; remove the executor from office,[161] withhold or reduce their remuneration, apply to court to compel the executor to comply with their duties, or

[155] Broadly see the Administration of Estates Act which sets out the statutory duties and responsibilities of the executor.
[156] Brimble-Hannath v Hannath and Others (3239/2021) [2021] ZAWCHC 102 (25 May 2021) at 12.
[157] Ibid para 11.
[158] Ibid para 12.
[159] Ibid para 17.
[160] Ibid.
[161] See s 54 of the Administration of Estates Act which sets out the grounds for the removal of an executor from office.

relieve the executor of their duties.[162] Moreover, an executor may be held personally liable for the following misconduct: making incorrect distributions;[163] non-compliance with the provisions of the Administration of Estates Act;[164] misconduct such as the submission of false accounts, wilful false valuations of property, the wilful distribution of the estate in contravention of the provisions of the aforementioned Act, and the wilful falsification or destruction of a will.[165]

Executors may also be liable for a breach of their fiduciary duties under the common law. The statutory duties and powers assigned to the executor enable them to fulfil their role as executors. The duties and powers are tailored for the particular purpose of the role of the executor. Although executors are fiduciaries, their statutory duties, responsibilities, and liabilities are distinct to their role.

V. ANALYSIS OF THE CONTRASTING ROLES, RESPONSIBILITIES AND LIABILITIES OF PRACTITIONERS AND DIRECTORS

In terms of s 140(3)(b), the Legislature has imputed the responsibilities, duties, and liabilities of directors onto practitioners. The writer, however, agrees with the sentiments expressed by author and academic Professor Anneli Loubser which reads as follows: 'it would have been preferable not to choose the shortcut by simply referring to the duties of directors, but rather to list the relevant and specifically adapted duties as they would apply to a business rescue practitioner'.[166]

In the matter of *Knoop*[167] Wallis JA states that s 140(3)(b) of the Act is 'an unfortunate legislative shortcut'.[168] The writer concurs with the views of Wallis JA and submits that it is apparent that the Legislature tailored ss 75 to 77 for its specific application to directors of a company considering the role, responsibilities, and potential liability which could ensue in the ordinary functions carried out by directors.

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[162] See section 54 of the Administration of Estates Act. See also *Faro v Bingham NO and Others* (4466/2013) [2013] ZAWCHC 159 (25 October 2013).
[163] Section 50 of the Administration of Estates Act.
[164] Section 102 of the Administration of Estates Act which addresses penalties for contraventions of provisions of the Act and listed misconduct.
[165] Ibid.
[166] Annelie Loubser op cit. note 10 364.
[167] *Knoop and Another* op cit. note 90.
[168] Ibid at 34.

Practitioners, however, do not become directors of the company. The pre-existing management and board of directors remain in their positions as same and retain their functions subject to the authority of the practitioner.[169]

The writer submits that the Legislature's imposition of directors' responsibilities, duties, and liabilities on the practitioner suggest that even though the Legislature appreciates the distinction between the two roles,[170] the responsibilities, duties, and liabilities of both are viewed through a single lens. This is further evident in s 138(1)(d) where a practitioner would be disqualified from holding office as a practitioner, in the event that they would be disqualified from acting as a director of a company in terms of s 69(8).[171] This section of the report aims to make a clear the distinction between the roles, responsibilities and duties, and liabilities of directors and practitioners.

(a) The role of directors compared to the role of practitioners

The ordinary grammatical meaning of the term role refers to the 'the position or purpose that someone or something has in a situation, organization, society, or relationship.'[172] Principally, the role of practitioners and directors are fundamentally different. The role of directors is to strategically steer a solvent economic entity. Whilst the role of a practitioner entails the rehabilitation of a company in financial distress or achieving a better return for creditors upon the company's eventual winding down.[173] It is evident that both functionaries have distinct roles.

Practitioners and directors, hold positions of trust and loyalty, and are obliged to act in the best interest of the company in an objective and unbiased manner.[174] Although the practitioner and director are both fiduciaries, the practitioner owes their fiduciary duties to all stakeholders, and not only to the company and shareholders, as is the

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[169] Ibid.
[170] The writer submits that the Act makes a clear distinction between the practitioner and directors of a company in that both roles are regulated separately namely in terms Chapter 6 and Chapter 1 Part F respectively.
[171] Section 69(8) of the Act disqualifies a director from holding office in the event that the director is prohibited by the court from holding office, is a unrehabilitated insolvent, prohibited from holding office in terms of any public regulations, has been removed from an office of trust on grounds of misconduct involving dishonesty, has been convicted of an offence.
[172] The definition of the term role as found on https://dictionary.cambridge.org/dictionary/english/role.
[173] *Oakdene Square Properties (Pty) Ltd and Others* op cit. note 2.
[174] Section 76(3) of the Companies Act.

case with directors. Section 7(k) of the Companies Act envisages that the rights and interests of all relevant stakeholders be balanced in the efficient rescue and recovery of the financially distressed company.[175] During the proceedings, the practitioner is compelled to duly consult and consider all affected persons.[176]

The writer agrees with the views expressed by Klopper in that practitioners have the complex task of acting in the interest of all stakeholders.[177] Creditors, shareholders, and employees all extensively participate in the proceedings and are afforded substantial rights in terms of the Act.[178] Given the interests of various affected persons, it is imaginable that practitioners may face difficulties in attempting to satisfy all affected persons during the proceedings, particularly where affected persons have conflicting interests.[179]

The common law and statutory fiduciary duties compel directors to exercise their powers for their intended objective purpose.[180] As discussed above, the duty to act for a proper purpose is tested objectively and considers the 'actual purpose the power was exercised for; the purpose the power was conferred for; and whether the actual purpose fell within the intended purpose.'[181] The writer submits that the aforementioned legal test objectively brings into question the purpose of powers conferred on a specific functionary. The objective facts considered in applying the test relate specifically to the purpose of the role of the functionary. The writer submits that the purpose of the powers is directly related to the purpose of the role.

Trustees and executors are specifically regulated by the TPCA and the Administration of Estates Act respectively. Both Acts specifically outline the duties and responsibilities associated with the role of trustees and executors. This includes the codification of general and specific responsibilities and duties. The duties and responsibilities of trustees and executors align with the purpose of their roles. The

[175] Naidoo, T., Patel, A. & Padia, N., 2018, 'Business rescue practices in South Africa: An explorative view', Journal of Economic and Financial Sciences 11(1) page 3.
[176] Section 150(1) of the Companies Act.
[177]Ricky Klopper op cit. note 73 accessed on 03 October 2022.
[178] See ss 144 to 150 of the Companies Act.
[179] Ricky Klopper op cit. note 73.
[180] Farouk HI Cassim op cit. note 4 at 525.
[181] *Visser Sitrus* (*Pty*) *Ltd v Goede Hoop Sitrus* (*Pty*) *Ltd* op cit. note 107 at para 80.

TPCA even goes so far as to codify the fiduciary duty of care, diligence, and skill.[182] The TPCA further exempts trustees from escaping liability for a breach of their statutory duty of care, diligence, and skill. The Administration of Estates Act codifies penalties and the liability of executors.

(b) The duties and responsibilities of directors as compared to the duties and responsibilities of practitioners

Given the fact that both directors and practitioners assume management control of the company in their respective capacities and are both in a fiduciary relationship with the company, it is conceivable why the Legislature would subject the practitioner to the responsibilities and duties. However, the writer contends that distinct underlying roles of directors and practitioners demand the imposition of responsibilities and duties specifically adapted to each role.

Practitioners substitute the pre-existing management and board of directors and fulfil the functions of a director, but in the capacity as a practitioner.[183] Although the practitioner assumes the management responsibilities and duties of a director, it is so done to give effect to the role of the practitioner and achieve the goals of business rescue.[184] The fundamental purpose of the practitioner is to take control of the financially distressed company and rehabilitate the company or secure a better return for creditors.[185] The practitioner achieves this by taking control of the company, investigating the affairs of the company, and drafting and implementing a business rescue plan. Directors of a company are not subject to similar responsibilities and duties.

As explored, the imposition of s 75, as envisaged in s 140(3)(b), on the practitioner presents practical challenges. The practitioner would be compelled to make disclosures and would require the board's approval to pursue any transaction,

[182] Section 9 of the Trust Property Control Act.
[183] (A5076/2018) [2021] ZAGPJHC 7 (20 April 2021) para 16.
[184] Section 128(1)(b) of the Companies Act.
[185] The Association of Certified Accounts state that the goals of business rescue are "… 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." See also Naidoo, T., Patel, A. & Padia, N., 2018, 'Business rescue practices in South Africa: An explorative view', Journal of Economic and Financial Sciences 11(1) 2.

contract, or decision in which they have a personal financial interest. However, the board of directors are at the behest of the practitioner and are obliged to perform their duties 'in accordance with express instructions or direction of the practitioner.'[186] To this extent, the applicability of s 75 to practitioners is therefore questionable.

The fiduciary duties of directors in terms of s 76(3)(a) and (b) are captured largely in s 140(3)(c)(i). Both sections require practitioners and directors to act in good faith and for a proper purpose.[187] In any event practitioners are subject to these duties in terms of the common law. The Act prescribes the general and specific responsibilities and duties of practitioners in s 140, s 141, and s 147 to s 154. As is the case with trustees and executors. The Legislature prescribes specific responsibilities and duties necessary to fulfil the role of each functionary.

(c) The liability of directors and practitioners

As discussed, practitioners may be held liable for negligence on two separate grounds,[188] namely ordinary negligence in terms of s 77(2), and gross negligence in terms of s 140(3)(c)(ii) of the Act. The writer does not argue that there is no legal overlap in the liability imposed on practitioners in s 140 and s 77 of the Act. The practitioner is subject to both statutory and common law fiduciary duties, as well as the separate duty of skill care and diligence. Therefore, even in the absence of being subject to the responsibilities and liabilities of a director as in ss 75 to 77, the practitioner could still be brought to book in terms of the common law for a breach of fiduciary duties.

The matter of *Commissioner of SARS v Louis Pasteur Investments (Pty) Ltd and others*[189] saw a practitioner held liable for costs *de bonis propriis*[190] on account of the practitioner's reprehensible conduct during the proceedings. This matter concerned

[186] Section 137(2)(b) of the Companies Act.
[187] Section 140(3)(c)(i) of the Companies Act.
[188] Lézelle Jacobs & Johann Neethling op cit. note 56 at 786.
[189] (12194/17) [2021] ZAGPPHC 89 (4 March 2021).
[190] "An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy." See *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others* 2009 (1) SA 565 (CC) para 54.

an application for the conversion of the business rescue proceedings to liquidation proceedings which was opposed by the practitioner on the basis that the creditor, SARS was not competent to bring the application and the practitioner's belief that the company was capable of being rescued in terms of the 10-year business rescue plan.[191] The court held that costs *de bonis propriis* are awarded in extraordinary circumstances. Furthermore, it is a cost order against persons in their personal capacity 'where their conduct showed a gross disregard for their professional responsibilities, and where they acted inappropriately and in an egregious manner.'[192] The court further held that 'it is an inflexible requirement that a business rescue practitioner execute his or her duties in good faith, bearing in mind that the benefit of earning fees should never outweigh the duty to act in good faith.'[193]

Similarly in the unreported matter of *Land and Agricultural Development Bank of South Africa v Agri Oil Mills (Pty) Ltd and Others; Agri Oil Mills (Pty) Ltd and Others v CIPC and Others (Land and Agricultural Development Bank of South Africa Intervening)*[194] the court held the practitioner is personally liable for costs *de bonis propriis.* In this matter the court found that there was no reasonable prospect of rescuing the company, Agri Oil Mills, and that the plan was rejected by the creditors. As a result, the practitioners were required to file a notice of termination of the business rescue proceedings, as required in s 153(5) of the Act. That obligation is a statutory duty which the practitioners had to perform promptly.'[195]

In both abovementioned cases there was no reliance on s 77 or s 140 of the Act. Although it is unclear why parties in both instances did not hold the practitioner personally liable, these cases illustrate that courts, of their own accord, hold practitioners personally liable for reprehensible conduct. These cases demonstrate

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[191] See Eric Levenstein *The case for South Africa's business rescue procedure – Commissioner of Sars v Louis Pasteur Investments (Pty) Ltd and others.* Accessed at https://www.werksmans.com/legal-updates-and-opinions/the-case-for-south-africas-business-rescue-procedure-commissioner-of-sars-v-louis-pasteur-investments-pty-ltd-and-others/ on 13 July 2022.
[192] *Commissioner of SARS v Louis Pasteur Investments (Pty) Ltd* op cit. note 188 para 50.
[193] *Commissioner of SARS v Louis Pasteur Investments (Pty) Ltd* op cit. note 188 para 51.
[194] (not yet reported) (KZP) case no: 3246/2019P (13 May 2021). See also Ricky Klopper *After a business rescue plan is rejected by creditors, when do business rescue proceedings terminate?* https://klopper.co.za/after-a-business-rescue-plan-is-rejected-by-creditors-when-do-business-rescue-proceedings-terminate/#_ftnref1 accessed on 15 July 2022.
[195] *Land and Agricultural Development Bank* op cit. note 193 para 27.

that even in the absence of reliance on s 77 or s 140 to hold the practitioner liable, courts still have recourse to punish reprehensible conduct of practitioners.

Practitioners may be held liable in terms of s 140(3)(c) as well as s77 of the Act. In the first instance if a practitioner is found to be liable on the grounds of gross negligence as envisaged in s 140(3)(c)(ii), the practitioner may rely on s 140(3)(c) to escape liability. In terms of s 140(3)(c) it must be proven that the practitioner acted in good faith and in the course of the exercise of their power and performance of their functions. Secondly, liability in terms of s 77(2) for a breach of fiduciary duties, on the basis of ordinary negligence may be escaped by reliance on the following statutory mechanisms: first, in terms of s 77(9) and s 76(4) of the Act. In terms of s 77(9) if a director is liable for a breach of their fiduciary duties in terms of s 76, but it is proven that the director acted reasonably and honestly, *or* the court excuses the director from liability based on fairness, considering all the circumstances surrounding the matter.

The Act codifies the statutory business judgment rule ("BJR") under s 76(4). The BJR tests whether a director has complied with their duty of reasonable care and skill or not. In brief, the elements of the test in the business judgment rule question the following; (i) whether the director has taken reasonable steps to become informed, (ii) the director should not have any personal financial interest in the matter, (iii) the director must have complied with the provision in terms of s 75 as earlier discussed, and (iv) the directors must have had a rational basis to believe, or in fact believed that the decision was in the best interest of the company.[196] Therefore, if the practitioner breaches their duty in terms of s 76(3)(c) of the Act their conduct or omission will be tested in terms of the business judgment rule.[197]

VI. RECOMMENDATIONS AND CONCLUSION

This report has purveyed the unique tasks and responsibilities of practitioner's during business rescue proceedings. It has also confirmed that practitioners are in a position of trust and thus considered fiduciaries, subject to common law fiduciary duties. This

[196] Section 76(4) of the Companies Act. See also DStefan Eisele *Codification of the Business Judgment Rule in Section 76 (4) Companies Act 2008: Comparing the South African with the German Approach* (LLM thesis, University of Cape Town, 2017) 2017 32-38.
[197] Lézelle Jacobs & Johann Neethling op cit. note 56 at 779-781.

report further demonstrated that during the business rescue proceedings, a practitioner does not become a director of a company but assumes the roles and responsibilities of one as envisaged in s 76 of the Act.

Central to this report is the writers' view that it is not appropriate to impose the responsibilities and liabilities of a director on the practitioner. This view is prompted by the distinct roles that each play during the proceedings. Directors provide strategic direction, steering a solvent company and do so on a day-to-day basis, whereas practitioners seek to either rescue a company or secure the best return for creditors in demanding circumstances. Moreover, the writer has considered the treatment of fiduciary roles such as trustees and executors where the responsibilities, duties and liabilities are specifically regulated, and codified.

This report has demonstrated that although directors, practitioners, executors, and trustees are all considered fiduciaries subject to common law and statutory fiduciary duties, the nature and purpose of the aforementioned roles differ. The writer does not dispute that practitioner, in the exercise of their duties, assumes the full management control of the company. However, the writer submits that this in itself does not form enough of a basis to impute the responsibilities and liabilities of directors on the practitioner. The writer submits that the underlying purpose of the role is what informs the responsibilities and liabilities of the practitioner and director respectively. The report has demonstrated that although the practitioner performs functions ordinarily performed by directors of a company, the purpose for which those functions are executed differ fundamentally. The liability of the practitioner in s 140(3) and 77(2) of the Act were deliberated upon. It was concluded that the liabilities in both sections, though based on different standards of negligence; gross negligence and ordinary negligence respectively; are not in conflict.

The writer submits that s 140(3)(b) should not broadly attribute the duties and liabilities of a director to a practitioner. Instead, the Legislature should establish responsibilities and liabilities specific to the practitioner, taking into account the *sui generis* nature of the practitioner's functions as earlier discussed. The practitioner is a fiduciary for whom parties and stakeholders can impose liability in terms of the common law for a breach of the practitioner's common law duties.

Therefore, the writer makes the following recommendations:

i. Section 140(3)(b) should be repealed, given the arguments that ss 75 to 77 of the Act should not be imposed on the practitioner; and

ii. The Legislature should consider expanding the duties, responsibilities, and liabilities of the practitioner in Chapter 6 of the Companies Act by further codifying the duties, responsibilities, and liabilities specifically applicable to practitioners.

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