

https://dspace.org/

Conservative judicial approaches to the business rescue procedure: can the new procedure succeed where judicial management failed?

Dhliwayo, Willard Zwananai

2018

https://hdl.handle.net/10539/26806

Dhliwayo, Willard Zwananai (2018) Conservative judicial approaches to the business rescue procedure :can the new procedure succeed where judicial management failed?, University of the Witwatersrand, Johannesburg, <http://hdl.handle.net/10539/26806>

Downloaded from a DSpace repository. https://dspace.org/

UNIVERSITY OF THE WITWATERSRAND
FACULTY OF COMMERCE, LAW & MANAEMENT
SCHOOL OF LAW

TITLE:

CONSERVATIVE JUDICIAL APPROACHES TO THE BUSINESS RESCUE PROCEDURE: CAN THE NEW PROCEDURE SUCCEED WHERE JUDICIAL MANAGEMENT FAILED?

By WILLARD ZWANANAI DHLIWAYO

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS BY COURSEWORK AND RESEARCH REPORT AT THE UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

ABSTRACT

This research report seeks to interrogate whether some of the notable limitations which led to the dismal failure of the Judicial Management as a corporate rescue mechanism effectively remain subversive to the business rescue procedure which is intended to prevent the same experiences of the past. The research will thus be limited to the consideration of only those limitations which were problematic under Judicial Management and yet appear not to have been sufficiently addressed by Chapter six of the Companies Act 71 of 2008. It will be acknowledged that the business rescue procedure stands to be largely progressive. However, the bulk of this research is intended to show that the complicated nature of the business rescue provisions coupled with some drafting oversights on the part of the Legislature leaves the procedure vulnerable to the same issues which affected its predecessor. Specifically, the imprecise and complicated nature of sections 131(4) and 133(1) of the 2008 Companies Act makes the procedure vulnerable to judicial conservatism, the same challenge which was most contributory to the failure of Judicial Management. This has in turn resulted in several inconsistent decisions in the interpretation of these provisions which causes unnecessary uncertainties deleterious to the intended purpose for which the business rescue mechanism was enacted.

CONTENTS

I Introduction 1

II An outline of Judicial Management and its Subsequent failure 2

a) Nature and overview of the Judicial Management procedure 2

b) The accepted reasons for Judicial Management's failure 4

(i) Judicial Management's failure as a result of its formulation 4

(ii) Judicial Management's failure as a result of judicial conservatism 7

III An outline of Chapter six's business rescue procedure 12

a) The legislative framework for business rescue in South Africa 13

b) The purpose of business rescue 15

IV Whether the failure of Judicial Management has been carefully appreciated? . 16

a) The incontrovertible positive reforms within Chapter six 17

b) Continued conservatism resulting in judicial uncertainty 19

(i) Interpretation of the commencement requirements 20

(ii) Interpretation of the moratorium provisions 24

V Recommendations and Conclusion 35

VI Bibliography 37

I Introduction

There is general consensus that 'Judicial Management' as a corporate rescue or restructuring mechanism for financially distressed companies in terms of the Companies Act 61 of 1973 (the '1973 Companies Act') failed in South Africa.[1] As a result, the Legislature introduced Chapter six ('business rescue' provisions) in the Companies Act 71 of 2008 (the '2008 Companies Act'), the purpose of which is to 'provide for the efficient rescue and recovery of financially distressed companies …'[2] While it seems to be too early to pass judgment on the success or failure of business rescue procedure only six years since its inception, it is nonetheless, vital to interrogate whether this procedure is on the right course of achieving its intended purpose.

This research report illustrates that while Chapter six of the 2008 Companies Act introduces a progressive corporate rescue strategy, nonetheless, its drafting or formulation as a reforming mechanism fails to fully appreciate and address the nature of the complications which led to the failure of Judicial Management. Despite the progressive nature of the new provisions in Chapter six, some of the limitations which existed under Judicial Management still exist. These limitations pose a potential threat to the success and effective implementation of the business rescue procedure and thus undermine the purpose for which the reform was made. The purpose of this research report is to show that the simple adoption of the so-called debtor-friendly corporate rescue mechanism,[3] despite its perceived or even proven successes elsewhere cannot, without more, guarantee the same success within the South African context.

The aim of this research report is to highlight that despite the progressive wholesale shift from the ineffective creditor-protective Judicial Management model to the highly foreign law influenced debtor-friendly model of business rescue[4], the success of corporate rescue in South Africa is not guaranteed. The conservative culture of the Courts towards corporate rescue, while it was instructive to the dismal failure of Judicial Management, has

[1] A Loubser 'Judicial Management as a Business Rescue Procedure in South African Corporate Law' (2004) 16 *SA Merc LJ* 137 at 138.
[2] Companies Act 71 of 2008, section 7*(k)*.
[3] FHI Cassim et al *Contemporary Company Law* (2012) at 866. The author describes the new business rescue provisions in terms of the 2008 Companies Act as 'debtor-friendly' as a result of the influence of Chapter 11 of the US Bankruptcy Code, infra note 82. This description probably develops from the fact that under the Chapter 11 rescue procedure, the debtor company or its management remain in control of the business during the rescue process and such proceedings are also known as 'debtor in possession' proceedings. See R Parry 'Is UK Insolvency Law failing struggling Companies' (2009) 18 *Nottingham Law Journal* 42 at 49 – 52.
[4] A Loubser 'Tilting at Windmills? The Quest for an Effective Corporate Rescue Procedure in South African law' (2013) 25 *SA Merc LJ* 437 at 439. The author notes and criticises how the drafting of the business rescue model in SA was influenced by foreign jurisdictions, particularly Chapter 11 of the USA Bankruptcy Code.

also manifested in the Courts' decisions dealing with the interpretation of section 131(4) and more recently section 133(1) of the 2008 Companies Act. This poses significant complications in that; several inconsistent Court decisions have in turn resulted thereby causing legal uncertainties to the interpretation of business rescue.

II An outline of Judicial Management and its subsequent failure

The system of Judicial Management as a corporate rescue mechanism has its South African origins from the country's first consolidated Companies Act 46 of 1926[5] (hereinafter referred to as the '1926 Companies Act'.) It is notable that while it may have been influenced by the old English system of 'receivership in equity'[6] which had also been adopted in the USA during the industrial revolution,[7] the provision for Judicial Management in South Africa was one of the first consolidated corporate rescue systems in the world.[8] From 1926, Judicial Management had to undergo almost half a century of several amendments until its final form under the 1973 Companies Act.[9] However, despite the Legislature's willingness to develop the initial mechanism in line with the prevailing insolvency culture, Judicial Management could not to be implemented effectively and largely remained 'a novel concept'.[10] It is critical to understand the character of Judicial Management at the time of its replacement by the new business rescue provisions and also consider the general and accepted reasons for its failure.

a) Nature and overview of the Judicial Management procedure

Under the 1973 Companies Act[11], Judicial Management was provided for in Chapter XV (sections 427 to 440) of that Act. Judicial management was adopted to protect 'vital industries in a young developing country which could not afford to have commercial enterprises "dissipated by winding-up and dissolution due to some temporary setback."'[12] In

[5] Companies Act 46 of 1926, sections 198 – 198.
[6] A.H Olver *Judicial Management in South Africa – Its Origin, Development and Present-Day Practice and a Comparison with the Australian System of Official Management* (LLD thesis, University of Cape Town, 1980) at 16. See also, R Parry op cit note 3 at 48 for an account of the old English system of receiverships which has now been replaced by the current system of 'administration'.
[7] See AH Olver, ibid, where he noted that the American government had adopted the receivership system to foster the reorganisation of railroad corporations, an industry which was considered critical at the time. In 1987, however, a system of 'debtor in possession' was adopted through the US Bankruptcy Code. See W.C Robinson 'Entry Requirements: A Comparative Analysis of the Corporate Rescue Regimes in Australia, the United Kingdom and the United States of America (1995) 8 *Corporate & Business Law Journal* 129 at 146 – 150, for a comprehensive analysis of the US corporate rescue system.
[8] H Rajak & J Henning 'Business Rescue for South Africa' (1999) 116 *SALJ* 262 at 262.
[9] AH Olver, op cit note 6 at 1 – 14.
[10] Ibid at 2.
[11] Companies Act 61 of 1973.
[12] A.H Olver, op cit note 6 at 28.

that regard, the 1973 Companies Act, like the 1926 Companies Act provided a 'process whereby distressed companies could restructure debt without having to go into liquidation.'[13]

Summarily, in terms of section 427 of the 1973 Companies Act, a Court could grant a Judicial Management order, if it appeared 'just and equitable', in a circumstance where the company was 'unable to pay its debts or meet its obligations' and there was a 'reasonable probability' that if this company is placed under Judicial Management, it will in turn be able to meet those obligations and become a successful concern.[14] In terms of section 427(2) of the 1973 Companies Act, either the company itself, a creditor, or any of its 'members' could apply to Court for an order to put a company under Judicial Management.[15] The Court could then grant a provisional Judicial Management order containing directions that the company will be under the supervision of a provisional judicial manager to assume the management of its affairs subject to the Court's supervision.[16] Within sixty days of the provisional order, the Court at the return date, had to either discharge the provisional order. Alternatively, where it appeared that Judicial Management in the circumstances was just and equitable and would in turn enable the company to become a successful concern, the Court could grant a final Judicial Management order.[17] The wishes of creditors, among other factors, were an important consideration in this latter determination.[18] In terms of section 428(2) of the 1973 Companies Act, a provisional order among other conditions could also contain a stay or moratorium on creditor's enforcement actions or proceedings and other processes against the company.[19] Upon interpretation of this provision, a major limitation was that the moratorium was not automatic but had to be specifically pleaded within the application for Judicial Management.[20]

While it had been noted that the commencement requirements for the granting of a provisional order and those requirements for a final order for Judicial Management in terms of section 427 and 432 of the 1973 Companies Act respectively differed to some extent, Loubser correctly opined that the Legislature most likely intended them to be the same.[21] In

[13] E Levenstein *An Appraisal of the new South African Business Rescue Procedure* (LLD thesis, University of Pretoria, 2015) at 53.
[14] The 1973 Companies Act, supra note 11, section 427.
[15] Ibid. The section entitled the same persons who would have been entitled to apply for the liquidation of the company in terms of section 346 of the same Act.
[16] Ibid, supra note 11, section 428 and 430.
[17] Ibid, section 432.
[18] Ibid, section 432(2)(a).
[19] Ibid, section 428(2)(c).
[20] E Levenstein, op cit note 13 at 59.
[21] A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (LLD thesis, University of South Africa, 2010) at 20. It is notable that the Court in *Tenowitz v Tenny Investments Pty Ltd*

that respect, the requirements to be satisfied for a provisional order were also similarly applicable upon the application for a final order despite the respective difference in the wording of section 427 and 432 of the 1973 Companies Act. Considering the above provisions, Judicial Management as a mechanism, whether upon the granting of a provisional order or the final order, had the effect of 'taking away management and control from the directors and placing it in the hands of the judicial manager'[22] and as a result afford the company a chance of successful corporate rescue.

It was generally acknowledged that the provisions of Judicial Management did not intend the procedure as a supplementary mechanism to liquidation but rather as an 'alternative' mechanism.[23] However, at some point the Judicial Management 'became established as a process of winding-up without any kind of control by the Court.'[24] The commencement requirements and conditions of the procedure ended up posing several challenges, either as a matter of their formulation or more importantly for the purposes of this research, because of the conservative interpretation by the Courts, particularly, of section 427 of the 1973 Companies Act.

b) The accepted reasons for Judicial Management's failure

This research report now turns to consider several reasons which contributed to the ineffectiveness of Judicial Management as a rescue mechanism and thereby leading to its failure. It is submitted that these reasons can be classified as either a result of the legislation's formulation itself or a conservative judiciary interpretation.

(i) Judicial Management's failure as a result of its formulation

Several accepted reasons which led to Judicial Management's ineffectiveness can be attributed to the Legislature's formulation of the procedure in Chapter XV of the 1973 Companies Act. From the outset, the commencement standard or requirements for eligibility

---

1979 (2) SA 680 (E) at 683 considered this issue specifically relating to the interpretation of the requirement of 'reasonable probability' and it favoured a stricter approach in relation to an application for a final order. However, several other cases later concluded that the application of the requirements should be tested the same, whether in an application for a provisional order or a final order. See, generally, the cases of *Ladybrand Hotel (Pty) Ltd v Segal* 1975 (2) SA 357 (O) and *Kotzé v Tulryk Bpk* 1977 (3) SA 118 (T).

[22] A.H Olver, op cit note 6 at 142.

[23] Ibid at 41.

[24] Ibid at 6. See also, H Rajak & J Henning, op cit note 8 at 264 – 265, where the authors noted that in most circumstances Judicial Management proceedings by a company were usually ended by a Court application seeking the liquidation of the company in question rather than the process's intended purpose of rescue.

of the procedure were problematic even without the added burden of judicial interpretation.[25] In terms of sections 427 and 432 of the 1973 Companies Act, for an order for Judicial Management to be granted by the Court, whether provisional or final, the company in question should have been unable to pay its debts. In addition, the Court quite controversially had to be satisfied that Judicial Management, if instituted, would enable that company to pay its debts in full.[26] The debtor company was not only required to be commercially insolvent. In its application to the Court, it also had to show that commercial solvency would as a matter of 'reasonable probability'[27], be achieved because of the procedure. These kinds of requirements under Judicial Management perhaps prompted Loubser to befittingly comment that under this procedure, 'more emphasis was placed on the protection of the interests of creditors.'[28] It is quite clear that these requirements were aimed at insulating the interests of creditors at the expense of applicants by ensuring that only companies that could show the ability of achieving solvency, not as a mere possibility but quite onerously a 'probability', could access the corporate rescue procedure. According to Rajak & Henning this requirement was 'outdated, unrealistic and often contrary to the wishes and interests of both debtor and creditors'.[29] Indeed it was quite detrimental to the functionality of the procedure. It is not difficult to see how companies which would be in financial distress would struggle under such a legislative formulation, to prove either their commercial insolvency or more importantly, an expected recovery as a fact. This is especially true when considered within the context of the stringent judicial interpretation afforded to the requirement of 'reasonable probability' as shall be considered below.

Intrinsically intertwined to the above accepted cause for the ineffectiveness was another recognised reason leading to Judicial Management's failure; the fact that applications to put a company under Judicial Management were instituted far too late for successful rescue of the company to be achievable.[30] The reason for such delayed applications by companies can be attributed to the above stringent commencement requirements which would obviously make companies more hesitant to the procedure. However, another critical reason for such delayed applications was the prevailing pro-creditor culture existing at the time especially

[25] A Loubser 'Business rescue in South Africa: a procedure in search of a home?' (2007) 40 *Comparative and International Law Journal of Southern Africa* 152 at 157 – 158. This article also gives an outline of the reasons for failure of Judicial Management. See also, Loubser op cit note 1 for a comprehensive analysis of the reasons for failure to which this research is indebted to.
[26] The 1973 Companies Act, supra note 11, section 427
[27] Ibid.
[28] A Loubser, op cit note 1 at 162.
[29] H Rajak & J Henning, op cit note 8 at 268.
[30] E Levenstein, op cit note 13 at 60, see footnote 172.

among debtor companies which were disinclined to rescue and this meant that applications were only made 'at a stage when it was unlikely that the business could in fact be saved.'[31]

In addition, it has also been suggested that Judicial Management, by its nature, was an expensive procedure which in turn meant that only large companies could afford it as a rescue mechanism.[32] In addition to the fact that the procedure required the hiring of expensive professionals in the form of judicial managers, the procedure itself also relied on many Court applications which included the provisional order application, final order application and also an application for an order to end the proceedings.[33] According to Rajak & Henning, this reality was 'self-defeating' to the rescue mechanism considering the 'supreme irony' that the process was meant to assist financially distressed companies.[34]

Moreover, regarding the formulation of section 428(2)(c) of the 1973 Companies Act, the moratorium to protect debtor companies against the enforcement of claims and against the institution of legal proceedings by creditors was not automatic but had to be specifically requested by the applicant who bore the onus to justify its necessity to the Court. Burdette argues that the failure of the provisions for Judicial Management to provide for an automatic moratorium also meant that the procedure failed to meet the internationally accepted corporate rescue standards.[35] Indeed, it has been submitted that the application of an automatic moratorium is one of the fundamental advantages of corporate rescue.[36] In that regard, Levenstein submitted that without its automatic application, Judicial Management was never likely to succeed.[37] The understanding is that under Judicial Management, it was too burdensome on the applicant to prove its necessity to the Court and yet it is difficult to imagine a company being successfully rescued or restructured while in a situation where creditors can still enforce their claims during the process.

It was also recognised that the fact that Chapter XV of the 1973 Companies Act failed to make adequate provisions for competent judicial managers also contributed to the

[31] DA Burdette 'Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa' (Part 1) (2004) 16 *SA Merc LJ* 241 at 248 – 251. The author provides a summary of accepted problems which were affecting the effectiveness of Judicial Management at the time.
[32] Ibid. See also, DA Burdette 'Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process' (1999) 32 *De Jure* 44 at 57 – 58. Here, the author submits that the little notable rescue successes by large companies was because their capacity allowed them to absorb the costs attached with the applications for Judicial Management.
[33] See, generally, Chapter XV of the 1973 Companies Act, supra note 11.
[34] H Rajak & J Henning, op cit note 8 at 268.
[35] DA Burdette, op cit note 32 at 57 - 58
[36] United Nations Commission on International Trade Law (UNCITRAL) *Legislative Guide on Insolvency Law* (2005) para 26. This Commission, noted back in 2005 that the provision of an automatic moratorium was vital to a corporate rescue system and insolvency law in general.
[37] E Levenstein, op cit note 13 at 59.

ineffectiveness of the rescue procedure. Loubser submitted that the fact that Judicial Management had not provided for 'any requirements regarding qualifications; training or experience' for prospective judicial managers before they could be appointed was a major reason for it 'not having a high success rate'[38] The understanding was that since most judicial managers at the time had usually and ordinarily acted as liquidators before, they did not possess the required skills to manage the successful restructuring of a company.[39] Rajak & Henning are also of the opinion that the 1973 Companies Act's failure to provide for a professional body by which to license, supervise and monitor judicial managers posed a 'considerable danger of irremediable incompetence and fraud …'[40] Loubser concurred with this view and stated that without a professional body, there was 'virtually no control over the activities of negligent, dishonest or incompetent judicial managers.'[41]

(ii) Judicial Management's failure as a result of judicial conservatism

For the purposes of this research report, it is submitted that the conservative interpretive approach of Chapter XV of the 1973 Companies Act by the Courts also contributed to Judicial Management's failure to usher a successful corporate rescue system in South Africa before 2008. It is imperative to outline what is meant by judicial conservatism in the context of corporate rescue systems. Straus correctly opines that judicial conservatism generally consists of 'judicial restraint' which connotes a situation where Courts, in their interpretation of the law, are generally inclined to follow 'a view that was clearly and forcefully articulated at one point in our history.[42] Generally, South African insolvency law regime is creditor-friendly in the sense that the interests of creditors are instructive in any matter of insolvency. However, the Legislature's adoption of corporate rescue mechanisms seeks to introduce a shift from this culture. Chapter six of the 2008 Companies Act aims for the preservation of companies in order not only to satisfy creditor's claims but also the interests of other stakeholders in a company. On this basis, it is submitted that judicial conservatism will be effectively displayed where Courts continuously interpret corporate rescue procedures restrictively based on the creditor-protectionist historical position, while disregarding the legislative intended purpose of the corporate rescue procedure. Judicial conservatism towards corporate rescue in South Africa was indeed acknowledged by the Court in *Le Roux Hotel*

[38] A Loubser, op cit note 1 at 155.
[39] Ibid.
[40] H Rajak & J Henning, op cit note 8 at 268.
[41] A Loubser, op cit note 1 at 156.
[42] D.A Strauss 'The Death of Judicial Conservatism' (2009) 4 *Duke Journal of Constitutional Law and Public Policy* 1 at 7.

Management v E Rand[43] where it noted that the 'inherent conservatism of the Courts' had thwarted the development of a corporate rescue culture as intended by the Legislature.

Judicial conservatism is invariably contrary to judicial liberalism in the context of corporate rescue. According to Easterbrook, while conservatism encourages and '… praises restraint …', liberalism recognises the need for Courts to 'engage in independent analysis, which might lead to a different conclusion.'[44] In the South African context, therefore, Courts can be liberal and thus progressive where they acknowledge the change intended by the Legislature in introducing a new corporate rescue mechanism. A purposive interpretation which recognises the mischief that the corporate rescue procedure seeks to address will thus be liberal. This liberalism was endorsed in *Southern Palace Investments 265 v Midnight Storm Investments 386*[45] in respect of the business rescue provisions in Chapter six of the 2008 Companies Act. The Court recognised that the Legislature had intended a stark shift to the corporate rescue culture and it was in this context that the provisions had to be interpreted.[46]

The Legislature's formulation of the commencement requirements provisions under Judicial Management proved to be relatively creditor-protectionist; Courts enhanced or at the very least aided the thriving of this creditor-protectionist culture due to their controversial interpretations of the same provisions. The Courts' interpretation of the Judicial Management procedure, more than its statutory formulation, instructively created the basis on which the nature and functionality of the procedure was to fail. The practical application of the procedure upon interpretation entrenched the conservative creditor-friendly insolvency culture which informed much of South Africa's insolvency regulation at the time.[47] The result was that the failure of companies to be successfully restructured through the mechanism was 'the norm, with rescues being very few and far between.'[48]

First, in their interpretation of 'reasonable probability' in section 427(1) of the 1973 Companies Act, Courts' have appropriately been criticised to have been restrictive and thereby deleterious to Judicial Management as a rescue procedure.[49] It was required that before an order for Judicial Management could be granted, the applicant should have satisfied

[43] *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) and Another* 2001 (2) SA 727 (C) para 39.
[44] F.H Easterbrook 'Do Liberals and Conservatives Differ in Judicial Activism?' (2002) 73 *University of Colorado Law Review* 1403.
[45] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC)
[46] Ibid, see para 1 – 3 & para 21.
[47] E Levenstein, op cit note 13 at 61.
[48] H Rajak & J Henning, op cit note 8 at 265.
[49] A Loubser, op cit note 1 at 145 – 150. See also Levenstein, op cit note 13 at 61.

the Court that there was a 'reasonable probability' that the procedure, if instituted, will enable the company to pay its debts and become a successful concern.[50] The most influential construction given to this phrase was made while the 1926 Companies Act was in effect[51] in *Silverman v Doornhoek Mines Ltd.*[52] In this case, the Court stated that an applicant was required to show a 'strong probability' that Judicial Management would enable the company to pay its debts.[53] This decision shaped the line of thought of the Courts that followed under the 1973 Companies Act. *In Tenowitz v Tenny Investments Pty Ltd*,[54] the Court considered a question whether the test for 'reasonable probability' should be more stringent during the application for a final order because there would have been enough time for more investigations about the distressed company during the period of the provisional order.[55] The Court concluded that 'something more than a 'reasonable probability' is required before it can grant a final order',[56] thereby interpreting the provision even more restrictively. A restrictive interpretation of the phrase was also taken in *Porterstraat 69 (Pty) Ltd v PA Venter Worcester (Pty) Ltd*[57] where the Court accepted an argument that 'reasonable probability' required the Court to make 'an enquiry as to whether it is reasonably probable that the company is viable and capable of ultimate solvency.' This approach was also endorsed in *BOE Bank Ltd v Upbeatprops 63 (Pty) Ltd*[58] which refused to grant an order for Judicial Management on the basis that there was no evidence that the debtor company would be able to secure financing. It is not difficult to imagine the burden an applicant would bear to be successful in their application for a Judicial Management order. The task was close to impossible.

The second area of controversy can be found when looking at another requirement in section 427(1); that Courts could only grant an applicant with an order for Judicial Management if it appeared 'just and equitable'. The construction of this phrase by the Courts has been suggested to have been quite controversial and in turn detrimental to the functionality of the procedure.[59] The interpretation of the Court in *Silverman v Doornhoek Mines Ltd* also proved instructive in this regard. In this case, the Court considered Judicial

[50] The 1973 Companies Act, supra note 11, section 427.
[51] The 1926 Companies Act, supra note 5. See section 195(1) which provided for the requirement of 'just and equitable'.
[52] *Silverman v Doornhoek Mines Ltd* 1935 TPD 349.
[53] Ibid at 353.
[54] *Tenowitz v Tenny Investments Pty Ltd* 1979 (2) SA 680 (E)
[55] Ibid at 683.
[56] Ibid.
[57] *Porterstraat 69 (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 615.
[58] *BOE Bank Ltd v Upbeatprops 63 (Pty) Ltd* 2001 JDR 0821 para 67 - 68.
[59] A Loubser, op cit note 1 at 148 – 150.

Management as a 'special privilege given in favour of a company'.[60] In that regard, the granting of the procedure would only be considered just and equitable 'in very special circumstances.'[61] After this decision, a long line of judgements ensued, entrenching the same stringent and conservative approach even after the promulgation of the 1973 Companies Act. The Courts generally felt that creditors had an initial existing right to liquidation and since an order for Judicial Management precluded this possibility, such an order would only be just and equitable in extraordinary circumstances.[62] An example of such extraordinary circumstances would be where no domestic remedies in the company seem to exist.[63]

In 2001, Josman J in *Le Roux Hotel Management v E Rand*[64] quite acrimoniously recognised how detrimental and unjustified the restrictive approaches taken by previous Court decisions in interpreting Judicial Management provisions were. However, the Court refused to 'disregard the existing body of precedent' stating that an intervention by the Legislature would be required in that regard.[65] It is submitted that this decision was quite unfortunate because although the requirements of 'reasonable probability' and 'just and equitable' had been legislative formulations, their subsequent restrictive and in fact detrimental meanings were a direct product of Courts' conservatism and creditor-protectionist inclination. The Court therefore missed an opportunity to rectify some of the problems its predecessors had created, even though that would have likely been too late to have rescued Judicial Management from its impending downfall.

Several factors have been noted to have been influential to these conservative restrictive approaches by the Courts under Judicial Management. It has been submitted that too much respect was afforded to old conservative precedent which should not have been applicable within the interpretation of the 1973 Companies Act.[66] It has also been noted that the 'social perceptions' towards bankruptcy at the time may have also informed the approaches taken by the Courts.[67] In addition, it has further been noted internationally that

[60] *Silverman v Doornhoek Mines Ltd* supra note 52 at 352.
[61] Ibid.
[62] See the cases of *Kotze v Tulryk Bpk* 1977 (3) SA 118 (T) at 120 and *Ben Tovim v Ben Tovim* 2000 (3) SA 325 (C) at 332.
[63] See, *Makhuva and Others v Lukoto Bus Service (Pty) LTD and Others* 1987 (3) SA 376 (V) at 394. See also, A Loubser, op cit note 2 at 148 – 150, for a comprehensive consideration of the Courts' interpretation of 'just and equitable at.
[64] *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) and Another* 2001 (2) SA 727 (C) para 39 & 60.
[65] Ibid, para 60 – 63.
[66] A Loubser, op cit note 1 at 161 – 162. A case in point in that regard is how the outdated 1935 decision of *Silverman v Doornhoek Mines Ltd* enjoyed so much influence even after 1973.
[67] Ibid.

public attitudes poses a big hurdle in achieving successful corporate rescue systems.[68] Regardless of such influences however, Kloppers correctly submitted that there was nothing within the legislation in issue 'that merits the requirement that Judicial Management be treated as an extraordinary measure'.[69] The significance and ramifications of judicial conservatism towards corporate rescue were succinctly stated by Loubser when she observed that, '[n]o legislative measure introduced to reform Judicial Management, irrespective of its inherent merits, would succeed unless the Courts, and creditors, ceased to regard liquidation as a right and corporate rescue as a very special privilege reserved for exceptional cases.'[70] This begs the question whether such an attitude by the Courts has survived in the era of business rescue?

Even though there were many reasons for the failure of Judicial Management, it is nonetheless, submitted that the most contributory and fatal of these reasons was the smothering of the statutory provisions at the judicial alter because of the prevailing scepticism of corporate rescue at the time. In that regard, Burdette candidly submitted that, 'the main problem' causing the ineffectiveness of Judicial Management '*lay* in the fact that the Courts *saw it* as an extraordinary procedure and not as a viable alternative to liquidation.'[71] The Court in *Le Roux Hotel Management* conceded to this view when stated that, it was 'unfortunate … that the progressive initiative taken in South Africa' by the Legislature through introducing Judicial Management 'did not follow a different course' because the judiciary 'ensured that a restrictive interpretation rather than a purposive one would be applied in developing the culture of business rescue.'[72]

It can be argued that where the relevant legislative provisions do not provide sufficient certainty on the extent to which a rescue culture is to be embraced by either the judiciary or creditors against the background of an existing liquidation culture, the judiciary can suffocate any attempts which the Legislature may have made towards a culture of corporate rescue. It is therefore important to interrogate, as this research seeks to do, whether by the mere introduction of a new debtor-friendly rescue provisions, in the absence of sufficient clarity and certainty within the statutory formulation, is enough to extinguish such a threat posed by the old culture and inclination of the judiciary against corporate rescue. It is worth

[68] See R Parry, op cit note 3 at 52 where noted a study done in the European Union which showed that in that region, public attitudes against corporate rescue represented substantial challenges.
[69] P Kloppers 'Judicial Management – A Corporate Rescue Mechanism in Need of Reform?' (1999) 3 *Stellenbosch Law Review* 417 at 426.
[70] A Loubser, op cit note 1 at 162. See also E Levenstein, op cit note 13 at 64.
[71] DA Burdette, op cit note 31 at 247.
[72] *Le Roux Hotel Management*, supra note 64 para 39.

investigating whether the mere adoption of Chapter six of the 2008 Companies Act has been enough to cure the interpretive limitations which are accepted to have been detrimental to its predecessor or whether such limitations remain minatory to the new era.

III An outline of Chapter six's business rescue procedure

The term 'rescue' in relation to company law has been defined to mean 'a reorganisation of the company to restore it to a profitable entity and avoid liquidation.[73] Procedures which are aimed at providing for 'rescue' have either been referred to as 'reorganisations', 'corporate rescue' or 'business rescue' procedures. While there may be notable differences of these phrases[74], for the purposes of this research report, the term 'corporate rescue' will be preferred to broadly mean all mechanisms aimed at achieving 'rescue', while 'business rescue' will specifically relate to the provisions of Chapter six of the 2008 Companies Act. On this note, it is imperative to understand the values and purposes which are served by corporate rescue mechanisms. These mechanisms are premised on the acceptance that interests of the general society other than those of the insolvent company and its creditors are affected because of the company's insolvency, hence provision should be made for the 'preservation of viable commercial enterprises capable of useful contributions to the economy as a whole'.[75] In that respect, it is therefore recognised that the 'going-concern value of a business is generally greater than the liquidation value.'[76]

In the South African context therefore, it was noted that 'the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods.'[77] Therefore, business rescue is aimed to serve the public interest by limiting the consequences of liquidations through salvaging a financially distressed company or securing better returns for creditors.[78] Business rescue can thus be defined as a mechanism whose function is to allow a company some 'breathing space' through the provision of temporary stay or moratorium from claims of

[73] Farouk HI Cassim et al, op cit note 3 at 861.
[74] R Bradstreet 'The leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy' (2010) 22 *SA Merc LJ* 195, see footnote 2.
[75] G McCormack *Corporate Rescue Law: Anglo-American Perspective* (2008) at 36.
[76] Ibid at 1.
[77] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para14.
[78] Ibid.

creditors while the company is under the process of restructuring its affairs for the purposes of saving it as a going-concern.[79]

In the quest to come up with an effective rescue mechanism, Mongalo submits that the Legislature had to be guided by the principles of 'predictability, effectiveness and flexibility.'[80] The business rescue provisions in terms of the 2008 Companies Act are therefore uncontestably laden with foreign influences,[81] quite notably, the Chapter 11 of the USA Bankruptcy Code[82] and the UK system of administration[83] among others. The extent to which such influences were warranted or justified has been subject to several discussions and criticisms.[84] While the UK system envisages other subsidiary objectives of achieving better returns for creditors and more advantageous realisation of the company assets in the event of subsequent liquidation,[85] it is accepted that the prime objective of both the UK and the USA systems of corporate rescue is the rehabilitation of ailing companies.[86] It is therefore laudable that in its quest for an efficient rescue mechanism, South Africa sought assistance from jurisdictions which not only recognise the importance of efficient rescue but are also liberal and progressive enough to recognise that efficient rescue should not only be limited to the achievement of solvency by the distressed company.

a) The legislative framework for Business Rescue in South Africa

Business rescue provisions have been incorporated into Chapter six of the 2008 Companies Act. This chapter has moved away from a defunct creditor-friendly system of corporate rescue under Judicial Management to a debtor-friendly system of business rescue.[87] Section 128(1) of the 2008 Companies Act defines 'business rescue' as 'proceedings to facilitate the rehabilitation of a company that is financially distressed'[88] in a manner that achieves either of the two set goals of rescue: 'maximises the likelihood of the company continuing in existence

[79] R Parry, op cit note 3 at 45.
[80] T.H Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act, 2008' (2010) *Acta Juridica* xiii at xviii.
[81] A Loubser op cit note 4 at 438. The author cites a 2004 policy document by the Department of Trade and Industry (DTI) in which it was specifically stated that in the drafting of the new corporate rescue system, foreign standards would be considered, especially the USA system.
[82] Bankruptcy Reform Act 1978 (11 USC 1978).
[83] United Kingdom Enterprise Act 2002 (c.40) read with the United Kingdom Insolvency Act 1986.
[84] See, generally, A Loubser op cit note 6.
[85] WC Robinson op cit note 7 at 129. The author also notes that the same liberal approach has also been adopted in Australia.
[86] Ibid, see generally.
[87] C Lamprecht 'Business rescue replacing Judicial Management: An assessment of the extent of problems solved' (2008) 22 *South African Journal of Accounting Research* 183.
[88] The 2008 Companies Act supra note 2, section 128(1). *Note my emphasis.*

on a solvent basis or … results in a better return for the company's creditors or shareholders than would result from immediate liquidation.' This rehabilitation is in turn to be achieved through the provision of three indispensable and corresponding instruments: a temporary supervision and management of the company's affairs by a qualified business rescue practitioner;[89] a temporary automatic moratorium (or stay) on the rights of claimants against the company or in respect of property in its possession.[90] It also incorporates the development and implementation of a business plan by the business rescue practitioner to restructure the company's affairs where such a plan has been approved by creditors.[91]

Chapter six of the 2008 Companies Act provides for two ways by which business rescue proceeding can be commenced. First, in terms of section 129 of the 2008 Companies Act a company through a resolution by the board of directors can voluntarily pass a resolution by a majority vote to begin rescue proceeding thereby invoking the three corresponding mechanisms above.[92] The board can only pass this resolution where it believes, on reasonable grounds, that the company is financially distressed and there appears a reasonable prospect of rescuing it.[93] The company is considered to be 'financially distressed' where it either appears that it will be commercially insolvent within six months or where it appears to be reasonably likely that the company will become factually insolvent within the same period.[94] It is also required that the resolution, if passed, be filed at the Companies and Intellectual Property Commission (hereinafter referred to as 'the CIPC') before it can have force.[95]

Secondly, in terms of section 131 of the 2008 Companies Act where there has not been the voluntary commencement of proceedings as outlined above, an 'affected person' may apply to the High Court for an order to place the company under supervision and commence business rescue proceedings.[96] The term 'affected persons' includes shareholders; creditors; employees or their registered trade unions.[97] All of these persons have the right to participate in the hearing of an application for an order for business rescue proceedings.[98] The

[89] Ibid, section 128(1)*(b)*(i) read with sub-section *(d)*.
[90] Ibid, section 128(1)*(b)*(ii) read with section 133(1).
[91] Ibid, section 128(1)*(b)*(iii) read with sub-section *(d)*. See also sections 150 – 153.
[92] Ibid, section 129(1).
[93] Ibid.
[94] Ibid, section 128(1)*(f)*.
[95] D Davis et al *Companies and other Business Structures in South Africa* (2013) at 238 – 239. See also, the 2008 Companies Act, supra note 2, section 129(2).
[96] The 2008 Companies Act, supra note 2, section 131(1).
[97] Ibid, section 128(1)*(a)* read with 131(3).
[98] Ibid.

Court after considering the application may either make an order dismissing the application[99] or it may order the commencement of business rescue proceedings where it is satisfied that the company is financially distressed; or where it has failed to pay an amount due under a public regulation or under contract, in respect of employment matters, or where it is otherwise just and equitable to do so for financial reasons.[100] In addition to any of the above requirements for the Court's satisfaction, it must secondly be satisfied that there is a reasonable prospect for rescuing the company.[101] The grounds under which a Court application can succeed are thus more extensive than those in respective of a voluntary resolution as they are not only limited to situations of financial distress.[102]

b) The purpose of Business Rescue

It is quite apparent that the Legislature was sufficiently appraised of the limitations which affected Judicial Management. It has been noted that it was necessary to intervene on a distressed company at an early stage with the objectives either to 'salvage, save or rescue it.'[103] In terms of section 7*(k)* of the 2008 Companies Act, the purpose of Chapter six is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.'[104] It is worth noting that while efficient rescue is of paramount importance, a balancing of the competing interests including those of the debtor company, creditors, employees and other persons that maybe recognised as 'relevant stakeholders' must be exercised. On this basis, Osode correctly submits that 'any interpretation *of Chapter six* that is hostile to *the stakeholders'* rights and interests without compelling justification … would actually be inconsistent' with section 7*(k)* as intended by the Legislature.[105]

Under Judicial Management, what constituted a successful corporate rescue was restricted to achieving solvency for the payment of creditors' debts by the debtor company.[106]

---

[99] Ibid, section 131(4)*(b).*
[100] Ibid, section 131(4)*(a).*
[101] Ibid.
[102] J Rushworth 'A critical analysis of the Business Rescue Regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 375 at 381.
[103] See Levenstein op cit note 13 at 263 where he quotes some extracts on the Parliamentary Debates proceedings in the National Assembly.
[104] The 2008 Companies Act, supra note 2, section 7*(k)*
[105] P Osode, 'Judicial Implementation of South Africa's New Business Rescue Model: A preliminary Assessment' (2015) 4 *Penn State Journal of Law & International Affairs* 459 at 477, footnote 70. Note *my emphasis*.
[106] A Loubser, op cit note 1 at 162 criticises the fact that the intended purpose of rescue sought to be achieved under Judicial Management was narrowly defined to achieve the full payment of the company's debts 'and nothing more.'

The intended purpose of Chapter six of the 2008 Companies Act is progressively broader as it requires more interests to be considered. This actuality coupled with the fact that the 'goal' of invoking the procedure is no longer limited to the continued existence of the debtor company, sufficiently substantiates the claim that the meaning of 'rescue' has thus significantly developed under the Chapter six procedure. This research report does not attempt to answer the question whether the business rescue procedure in past six years has been either successful or not, but rather reflects on its effectiveness. This can be done by assessing whether Chapter six meets the recognised best standards which have been usually associated with effective rescue systems. Where such standards are met, then the business rescue procedure is on the right path to effectiveness. McCormack suggests several such standards as 'entry routes' associated with successful corporate rescue systems as experienced in both the UK and the USA to include the following: the fact that rescue proceedings should be invoked at an 'appropriately early stage; the fact that 'legislation creates the right set of incentives for companies' to make use of rescue proceedings; and finally, that legislation should not erect too high set of hurdles in the way of companies accessing the procedure.'[107] In a nutshell, it has been submitted that legislative standards should be 'swift and significantly clear of blockages.'[108]

Bradstreet, with respect, incorrectly suggests that the above standards have been achieved by Chapter six in the context of South Africa.[109] While it is conceded that the procedure has proven to be more accessible than its predecessor, it will be demonstrated that business rescue procedure in its current formulation contains some provisions which are difficult to interpret. This in turn has created a platform for the old judicial conservatism to survive the new era. As a result, several decisions seem to be inconsistent in their interpretation and thereby creating room for uncertainty. In addition, it will also be demonstrated that Chapter six fails to adequately deal with the limitations that were accepted as detrimental to Judicial Management relating to the competences of business rescue practitioners and the early invocation of rescue proceedings. In that respect, it will be submitted that the legislation thus also fails to create the 'right set of incentives' for companies to use business rescue proceedings.

[107] G McCormack op cit note 75 at 118 – 119.
[108] Ibid
[109] Richard Bradstreet 'The New Business Rescue: Will Creditors Sink or Swim? (2011) 128 *SALJ* 352 at 379.

IV Whether the failure of Judicial Management has been carefully appreciated?

The problems which led to the failure of Judicial Management are not overly intricate. Even though Loubser conceded that it would not be easy to achieve a change of the creditor-protectionist culture in South Africa,[110] she also held the view that amending the provisions of Judicial Management to achieve an effective rescue system would not have been a complicated exercise since 'its weaknesses have been clearly identified and should therefore be fairly easy to eliminate.'[111] The Legislature chose an even more progressive route, that of a system overhaul from Judicial Management to business rescue. In that regard, the Legislature should have appreciated the nature of the limitations associated with Judicial Management to inform its drafting and avoid their continued survival into the future.

a) The incontrovertible positive reforms within Chapter six

Bradstreet correctly points out that 'despite some potential problems', the business rescue mechanism in terms of Chapter six of the 2008 Companies Act 'shows promise … in being more effective' than its predecessor.[112] In fact, it can be argued that the mechanism consists of several laudable and progressive reforms aimed at extinguishing some the limitations which affected Judicial Management.

First, Chapter six of the 2008 Companies Act commendably allows for the voluntary entry of companies into business rescue through the mere passing of board resolutions unlike under Judicial Management where the mechanism was only available through Court orders. According to Levenstein, this reflects the intention to make corporate rescue 'an easier mechanism to secure a "fresh start", and supports a shift to a … company focused approach.'[113] In addition, the commencement requirements of corporate rescue in South Africa have uncontestably been liberalised. While the Judicial Management procedure limited the institution of rescue proceedings to commercially insolvent companies, in terms of the outlined business rescue provisions, the 'financial distress' of a company also includes potential insolvency (commercial or factual) that is reasonably likely to occur within half a year. Furthermore, regarding Court order instituted proceedings, business rescue proceedings

[110] A Loubser, op cit note 1 at 163.
[111] Ibid at 162.
[112] R Bradstreet, op cit note 109 at 380.
[113] E Levenstein 'South Africa's Business Rescue regime – Firing on All Cylinders?' available at https://www.werksmans.com/wp-content/uploads/2016/12/061998-WERKSMANS-dec-insol-world.pdf, accessed on 20 November 2017.

are not limited to financially distressed companies. Moreover, in place of the old controversial test under Judicial Management that required an applicant to prove the achievement of rescue as a 'reasonable probability', the requirement has been liberally developed under Chapter six of the 2008 Companies Act to the effect that the rescuing of the company should only appear as a 'reasonable prospect.'[114] It is however, unfortunate that the tests for satisfying this commencement requirement especially in regard to Court order proceedings has also been subjected to some problematic interpretations by the Courts. Quite commendably, however, the procedure is now less reliant on Court applications as companies now have an option of voluntarily instituting proceedings without the behest of Courts and thus lessening the burden of costs on distressed companies and thereby making corporate rescue more accessible.

Moreover, while it has been noted that one of the identified causes of Judicial Management's failure was the fact that emphasis of rescue was placed on the interests of creditors, the purpose of rescue is no longer limitedly oriented to the full payment of creditors and the achievement of solvency. Chapter six now also recognise the likelihood of creditors achieving better returns than would be achieved through liquidation as a sufficient goal for 'rescuing the company'[115] and thus less cumbersome hurdles for debtor companies. In that regard, it has been correctly submitted that the Chapter six procedure 'has addressed this problem without unduly prejudicing creditors' and although it is 'debtor-friendly, sight is not lost of creditors' interests.'[116]

Another notable reform brought by the business rescue mechanism under Chapter six of the 2008 Companies Act is the provision of an automatic moratorium or stay on legal proceedings and proceedings in respect of property in the company's possession.[117] Thus, while an applicant bore the burden to request and justify the application of a moratorium under Judicial Management, the provisions of business rescue make it available to the debtor company automatically upon commencement of the proceedings. However, though the provision of a moratorium seems normative and generally expected by international standards, its scope in the context of South Africa has also proven quite uncertain.

In respect of these notable reforms, it is laudable that there was a clear attempt by the Legislature to address the limitations which affected the preceding procedure. However, it

[114] The requirement of 'reasonable prospect' of rescue applies to both Court order instituted proceedings and voluntary proceedings instituted by the company itself. See and compare the 2008 Companies Act, supra note 2, section 129(1)*(b)* and section 131(4)*(a)*.
[115] The 2008 Companies Act, supra note 2, section 128(1)*(b)*(iii) read with subsection *(h)*.
[116] R Bradstreet, op cit note 109 at 379.
[117] The Act, section 133(1).

appears that the procedure also fails to adequately address several other issues which had been identified as detrimental to the ineffectiveness of its predecessor. While this research seeks to limit itself to the issue of judicial conservatism as a continuing limitation, it seems pertinent to summarily note other considerable issues here.

Notably, Chapter six of the 2008 Companies Act fails to provide for appropriate measures that ensure the competence of business rescue practitioners. In terms of the Act and its Regulations, there is no special training required for person to be accredited as a business rescue practitioner and neither is there a specific profession.[118] This is worrisome considering the powers and functions a practitioner possesses which include the implementation of a rescue plan. These functions suggest that the effectiveness of the Chapter six procedure 'will depend, to a large extent, on the way in which the business rescue practitioner in any particular case implements the business rescue plan, and therefore also on the practitioner's competence.'[119] In this regard, Bradstreet is of the view that 'the practitioner is the weakest link …' and 'may - because of incompetence, partiality or otherwise - serve to undo the measures taken in Chapter six aimed at protecting all interested parties.'[120]

In addition, the Act further fails to sufficiently incentivise debtor companies to institute business rescue proceedings at an early stage. Pretorius, in his report prepared for the CIPC (the Commission), while identifying issues that had notably restrained the success of the business rescue in its first three years since inception, he notes that 'firms wait too long before they acknowledge problems that may exist.[121] In that regard, it has been further noted that 'many businesses that apply for rescue go into liquidation quite soon after the proceedings have started, owing to the fact that there is simply nothing left to save.'[122] This is probably because of the 'sense of failure and shame' among company directors which is culturally associated with a company becoming insolvent.[123] Unfortunately, the change of this culture is not something that can practically be legislated. However, where judicial inconsistencies resulting from the continued conservatism are successfully extinguished, confidence in business rescue proceedings will increase because of legislative and judicial certainty. The increase in confidence can gradually change the culturally negative

[118] Ibid, section 138 read with the Companies Act Regulations in GN R351 *GG 34239* of 26 April 2011, reg 126.
[119] R Bradstreet, op cit note 109 at 380.
[120] R Bradstreet, op cit note 74 at 198.
[121] M Pretorius *Business Rescue Status Quo Report* (2015) Business Enterprises, University of Pretoria
[122] Debtsource Credit Management Specialists 'Business Rescue- Does it work?' available at http://www.debtsource.co.za/2016/10/business-rescue-does-it-work/, accessed on 15 November 2017.
[123] E Levenstein op cit note 113.

perspectives associated with insolvency and may in turn lead to timeous institution of business rescue proceedings.

b) Continued conservatism resulting in judicial uncertainty

The formulation of Chapter six of the 2008 Companies Act does not seem to be addressing some of the concerns which affected Judicial Management and it has been justifiably criticised. Loubser describes some of the provisions for business rescue as 'unclear, confusing and sometimes alarming.'[124] She accurately submits that the drafters of the new procedure failed to exercise sufficient 'care' and this actuality may lead to the continuation of scepticism and negative attitudes towards corporate rescue, something which affected Judicial Management.[125] According to Osode the deficiencies of the Chapter six provisions heighten the risk of business rescue suffering the same fate as Judicial Management through judicial interpretation.[126]

While a remarkable attempt was made to foster a corporate rescue culture through adopting a debtor-friendly corporate rescue regime, it is submitted that the technicality and convoluted nature of the business rescue provisions of the 2008 Companies Act have allowed judicial interpretation of such provisions to remain oscillating between the old conservative creditor-protectionist approach and the recently favoured debtor-friendly approach and thereby causing judicial inconsistency. It is submitted further that the apparent judicial conservatism towards Chapter six, a direct result of the troublesome nature of Judicial Management has at times proven quite contradictory to the intended purpose of business rescue as outlined in s7*(k)* of the 2008 Companies Act. The analysis that follows will demonstrate that the notable survival of the limitations which were entrenched but later proving detrimental under Judicial Management may still prove minatory to the effective implementation of corporate rescue in South Africa six years into its inception.

(i) Interpretation of the commencement requirements

Judicial conservatism poses a threat to the effectiveness of the business rescue procedure. Section 131(4) of the 2008 Companies Act which provides the requirements to be met by an 'affected person' before a Court order for the commencement of business rescue proceedings

[124] A Loubser 'The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2) (2010) *TSAR* 689 at 701. It should be noted that here the author was mainly criticising the provisions which outline the termination of rescue proceedings in Chapter six.
[125] Ibid, at 700 – 701.
[126] P Osode, op cit note 105 at 462.

can be granted has received a fair amount of scrutiny from the Courts. From the outset, the section invariably involves balancing the interests of the applicant in question and those of creditors who would in most cases be opposed to business rescue while favouring the easier and faster route of liquidation. The decision *of Swart v Beagles*[127] is unfortunate on this issue of balancing of interests in terms of section 131(4) of the 2008 Companies Act especially since it was one of the first decisions interpreting the section. In this case, the Court correctly concluded that there had been no reasonable prospects of rescuing a business which had been in financial distress for more than a year and to which the applicant being the sole director and shareholder had failed to disclose details of its financial standing to both the Court and opposing creditors.[128] However, it made some controversial remarks which were unnecessary for the purposes of reaching its conclusion. The Court in *Swart v Beagles* stated that an application for business rescue involved the balancing between the competing interests of the applicant, usually a debtor company and those of creditors opposed to business rescue proceedings. In this exercise, 'as was the case in applications for judicial management … the interests of the creditors should carry the day.'[129] *Swart v Beagles* remarkably brings back the difficult memories of Judicial Management where the emphasis of rescue was placed on the interests of creditors. It contradicts the public policy informed purpose of balancing of all stakeholders' interests as intended by the Act and thus creating an unwarranted precedent. Indeed, this decision was notably criticised in *Nedbank Ltd v Bestvest 153*[130] where the Court favoured the decision of *Southern Palace Investments 265 v Midnight Storm Investments 386*[131] which recognised the intended difference between Judicial Management and business rescue, the latter being less onerous.

Section 131(4) of the 2008 Companies Act provides several grounds which can individually sustain the application for business rescue provided that it is proven that there is a 'reasonable prospect' of successfully rescuing the company. The replacement of the test of 'reasonable probability' under Judicial Management with that of 'reasonable prospect' has proven to be contentious. This is because the 2008 Companies Act fails to outline and instead leaves the Courts to determine the scope and meaning of 'reasonable prospect'. It is submitted that the 2008 Companies Act could have been more intelligible by providing that the scope of what amounts to 'reasonable prospects' would depend on the circumstances of

[127] *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP).
[128] Ibid, para 40 & 42.
[129] Ibid, para 41.
[130] *Nedbank Ltd v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC) para 27.
[131] *Southern Palace Investments*, supra note 45.

each case. In fact, this was what the Supreme Court of Appeal (SCA) in *Oakdene Square Properties v Farm Bothasfontein*[132] later concluded. However, that was not before the Court in *Southern Palace Investments*[133], though well intentioned, had created a restrictive precedent.

In *Southern Palace Investments,* the Court had correctly noted that the change in the phrasing meant that the new business rescue procedure required a lower threshold than required under Judicial Management.[134] The Court even criticised the restrictive approaches which had been adopted by Courts under Judicial Management to the extent that they treated the procedure as an extraordinary one.[135] However, in its attempt to outline the scope of evidence an applicant would have to adduce to prove that reasonable prospects of successfully rescuing the company existed, the Court ironically ended up creating an even more cumbersome threshold for prospective applicants. The Court required that an applicant must provide a business rescue plan the substance of which is as follows: In respect of an applicant attempting to prove the first recognisable goal or object of rescue in terms of section 128(1)*(b)* of the 2008 Companies Act, that is, the company's prospects of continuing in existence on a solvent basis, the Court stated that:

> '[o]ne would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of:
> [1] The likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;
> [2] the likely availability of the necessary cash resource to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;
> [3] the availability of any other necessary resource, such as raw materials and human capital;
> [4] the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.'[136]

In respect of proving the 'prospects' of the alternative object of rescue, that of achieving better returns in terms of section 128(1)*(b)* of the 2008 Companies Act, the Court stated that the applicant would be expected to 'to provide concrete factual details of the source, nature

[132] *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2013 (4) SA 539 (SCA) para 29 – 31.
[133] *Southern Palace Investments*, supra note 45.
[134] Ibid para 21 – 22.
[135] Ibid.
[136] Ibid para 24.

and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available.'[137]

This approach was also followed unreservedly in *Koen v Wedgewood*[138] where the Court required that in respect of either goals of rescuing a company, whether achievement of solvency or better returns, an applicant must provide a 'cogent evidential foundation' in the form of 'sufficient detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task.'[139]

Osode justifiably opines that the approaches developed by these two decisions in interpreting the test for 'reasonable prospects' threatens the effectiveness of the Chapter six procedure and in fact 'smacks of judicial apathy.'[140] The evidentiary burden placed upon an applicant by these two decisions contradicts the finding that business rescue requires a lower threshold than its predecessor. Notably, the Supreme Court of Appeal (SCA) *as per* Brand JA in *Oakdene Square Properties* criticised the decisions of the above two cases to the extent that they created an objective standard of evidence which must be adduced to satisfy the requirement of 'reasonable prospects'.[141] Brand JA favoured the approach taken in *Propspec Investments v Pacific Coasts Investments 97*[142] where the Court noted that the interpretation of 'reasonable prospects' in *Southern Palace Investments* had placed 'the bar too high'. Brand JA in *Oakdene Square Properties* was of the view that 'reasonable prospects' must mean prospects 'based on reasonable grounds' and thus an applicant must present 'more than a mere prima facie case or an arguable possibility'.[143] While he conceded that 'a mere speculative suggestion would not be enough', he correctly pointed out that 'to require, as a minimum, concrete and objectively ascertainable details … is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.'[144]

The decision of *Southern Palace Investments* also seemed to impose the duty to develop a rescue plan upon an applicant, a duty specifically imposed on the business rescue practitioner in terms of section 150 of the 2008 Companies Act. In that regard, Osode correctly reflects that this holding by the Court is 'more troubling'.[145] The imposition of a duty to develop a business rescue plan on an applicant is controversial especially since the

[137] Ibid para 25.
[138] *Koen v Wedgewood*, supra note 77.
[139] Ibid, para 17.
[140] Osode, op cit note 105 at 469.
[141] *Oakdene Square Properties*, supra note 132 paras 30 – 31.
[142] *Propspec Investments v Pacific Coasts Investments 97 (Pty) Ltd* 2013 (1) SA 542 (FB) para 11.
[143] *Oakdene Square Properties*, supra note 132 para 29.
[144] Ibid paras 29 – 31.
[145] Osode, op cit note 105 at 468 – 469.

scope of applicants under Chapter six includes 'affected persons' who may not be able, either financially or because of their status, to provide a rescue plan with sufficient objective details as required in *Southern Palace Investments*. The decision of *Employees of Solar Spectrum Trading 83 v AFGRI Operations* [146] provides a substantive model situation in that regard and further clarifies this point. In that case, the employees of Solar Spectrum Trading as 'affected persons' applied for an order to put the company into business rescue as the proposed liquidation would have led to them losing their jobs.[147] On the question of what information would be required to be adduced by the applicants to prove that a 'reasonable prospect' of rescuing the company existed, the Court correctly found that the type and amount of information required by the Courts must be case specific.[148] Its rationale was that 'a shareholder is likely to possess greater details of a company's financial position than an employee' and in that respect, the Court must have regard to what information the affected party who brings the application is able to present 'given its own position vis-á-vis the company.'[149]

While the SCA in *Oakdene Square Properties* seems to have put the interpretation of 'reasonable prospects' in section 131(4) of the 2008 Companies Act to finality through a laudable purposive and more progressively approach, it is quite apparent that the drafting of this section provides room for the thriving of unjustified restrictive interpretations by the Courts. Subsequently, it also provides room for different judicial interpretations which can lead to inconsistent outcomes and thereby resulting in legal uncertainty. In fact, the Court *a quo* in *Oakdene Square Properties*[150] noted another potential problem regarding one of the several grounds for granting an order for business rescue in section 131(4) of the 2008 Companies Act which may be a subject of further legal uncertainty. The Court was at pains in understanding the provision that an order may be granted where 'it is otherwise just and equitable to do so for financial reasons' and it found that the phrase 'for financial reasons' was 'extremely vague.'[151] Bradstreet also fittingly criticises the punctuation of section 131(4) of the 2008 Companies Act to potentially create further uncertainty.[152]

---

[146] *Employees of Solar Spectrum Trading 83 (Pty) Ltd v AFGRI Operations Ltd and Another* (6418/2011)/ [2012] ZAGPPHC 359.
[147] Ibid paras 1 – 7.
[148] Ibid paras 16 – 17.
[149] Ibid.
[150] *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2012 (3) SA 273 (GSJ) para 17.
[151] Ibid.
[152] R Bradstreet 'Business Rescue Proves to be Creditor-Friendly: CJ Claassen J's Analysis of the New Business Rescue Procedure in *Oakdene Square Properties* (2013) 130 *SALJ* 44 at 48.

(ii) Interpretation of the moratorium provisions

In terms of the Chapter six of the 2008 Companies Act, the rehabilitation of a company is facilitated through the provision of three things; a temporary supervision; a temporary moratorium and the development of a business rescue plan.[153] The attention here is on the interpretation that has been afforded by Courts to the provisions regarding the temporary moratorium, specifically, section 133(1) and section 134(1)*(c)* of the 2008 Companies Act. It is incontestable that this moratorium as provided in terms of the above sections read with section 128(1)*(b)*(ii) of the 2008 Companies Act runs automatic from the moment business rescue proceedings are effectively commenced. It should be borne in mind that the failure to provide an automatic moratorium together with judicial conservatism were some of the most contributory reasons for the failure of Judicial Management. Although a moratorium is generally temporary, it effectively 'insulates a company undergoing (business) rescue from legal or enforcement proceedings either pending or in prospect' by its creditors.[154] Koen & Fuhrmann argue that 'creditors have become loathe of the word moratorium' even though this mechanism is quite apparently the 'cornerstone of business rescue procedures.'[155] It is not difficult to understand this position by creditors. The successful restructuring of a company under business rescue to a position where its creditors can finally claim their debts whether in full or in part cannot be guaranteed. In any case, even where the debtor company successfully recovers, a moratorium prolongs the period for the repayment of the debt which can be financially detrimental to some creditors.

However, it should be noted that the 2008 Companies Act provides some protection to creditors. Section 7*(k)* of the 2008 Companies Act provides that the purpose of Chapter six is to provide for 'efficient rescue and recovery of financially distressed companies'. However, this must be achieved 'in a manner that balances the rights and interests of all relevant stakeholders'.[156] To this extent, it is submitted that protection is afforded to creditors as 'relevant stakeholders' in that their interests must also be considered even upon the application of an automatic moratorium in terms of section 133(1) and section 134(1)*(c)* of the 2008 Companies Act. Moreover, in terms of Chapter six of the 2008 Companies Act, creditors collectively hold a right to 'reject' a business rescue plan through a majority vote

[153] The 2008 Companies Act, supra note 2, section 128(1)*(b)*.
[154] Osode, op cit note 105 at 464.
[155] D Koen & T Fuhrmann 'How General is the General Moratorium in Business Rescue' available at http://blog.corprecover.co.za/?p=107, accessed on 05 October 2017.
[156] The 2008 Companies Act, supra note 2, section 7*(k)*.

and where that vote is 'appropriately' exercised, that could effectively end the business rescue proceedings and thereby precluding the application of a moratorium against their claims.[157]

The importance of a moratorium to corporate rescue mechanisms cannot be gainsaid. Indeed, the SCA in *Cloete Murray v First Rand Bank*[158] accurately noted that the moratorium 'is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs'. This understanding accords itself with the generally accepted international standards which consider the moratorium as 'one of the fundamental principles of insolvency law …'.[159] However, in several judgements, while attempting to outline the scope of the moratoriums provided under Chapter six in terms of section 133(1) and section 134(1)*(c)* of the 2008 Companies Act, the Courts have tended to interpret the application of these provisions restrictively.[160] It is submitted that these restrictive approaches by the Courts are unjustified and in fact smacks of the conservatism experienced under Judicial Management.

Section 133(1) of the 2008 Companies Act essentially provides that subject to several specified exceptional instances, where a company has duly commenced business rescue proceedings, creditors will be barred from instituting 'legal proceeding(s), including enforcement action(s)' in relation to its property or that in its 'lawful possession'[161] The meanings of 'legal proceedings' and 'enforcement actions' have remained fairly unproblematic.[162] Several Courts have been tasked with interpreting the meaning of 'lawful possession' in relation to the application of the moratorium in a situation where a creditor, as the owner, seeks to claim its property that would have been in the possession of the debtor company at the time when the company commenced business rescue proceedings.[163] It is quite apparent from the formulation of section 133(1) of the 2008 Companies Act that a creditor will only be excluded or interdicted from enforcing its property claim or rights where

[157] Ibid, section 145 and section 152(3)*(a)* or *(c)* read with section 153(1)*(a)*(ii). It is notable that the creditor bank in *JVJ Logistics (Pty) Ltd v Standard Bank* infra, note 190, based on section 145 essentially voted against the rescue plan in which its vehicle was the sole capital in the possession of the applicant debtor company. The applicant debtor company sought that vote to be set aside on the basis that it was inappropriate.
[158] *Cloete Murray and Another NNO v First Rand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 14.
[159] UNCITRAL, op cit note 36 para 26.
[160] See the judgments of *Cloete Murray v First Rand Bank*, supra note 158; *Kythera Court v Le Rendez-vous Café CC*, infra note 179 and *JVJ Logistics (Pty) Ltd v Standard Bank*, infra note 190.
[161] The 2008 Companies Act, supra note 2, section 133(1).
[162] See the decision of *Cloete Murray*, supra note 158 paras 31 -32 where the SCA considered the meaning of both phrases and concluded that the 'cancellation of an agreement' did not constitute either of the phrases for the purposes of section 133(1).
[163] See the judgments of *Madodza (Pty) Ltd v ABSA Bank Ltd* infra note 164; *Southern Value Consortium v Tresso Trading 102* infra note 169; *Kythera Court v Le Rendez-vous Café CC*, infra note 179 and *JVJ Logistics (Pty) Ltd v Standard Bank*, infra note 190.

the debtor company was not in 'lawful possession' of the said property when it duly commenced business rescue proceedings. It is nonetheless, not clear what constitutes 'lawful possession' for the purposes of the application of this moratorium provision. Again, it is quite unfortunate that the 2008 Companies Act fails to define the scope of this phrase. It is submitted that this has created a platform for inconsistent judgments oscillating between restrictive interpretations which are conservative in nature and liberal interpretations.

It is pleasing that there are judgments wherein the moratorium provisions in Chapter six of the 2008 Companies Act have been interpreted quite liberally and thus providing a welcome break from the conservatism experienced under Judicial Management. *Madodza (Pty) Ltd v ABSA Bank Ltd,*[164] was the first case where a Court was tasked with the interpretation of 'lawful possession' in terms of section 133(1) of the 2008 Companies Act. This case involved a hire purchase agreement of certain vehicles between a debtor company and a bank to which the bank remained the owner of the vehicles until final payment by the debtor company.[165] When the debtor company became financially distressed, the bank cancelled the agreements and obtained Court orders for the repossession of its vehicles before the debtor company duly commenced business rescue proceedings.[166] The bank then sought delivery of the vehicles relying on the Court orders but the debtor company relied on section 133(1) of the 2008 Companies Act to the effect that its possession of the vehicles was protected by the moratorium and thus the bank could not claim them. The sole question before the Court was whether the debtor company had been in 'lawful possession' of the vehicles when the bank sought delivery.[167] The Court correctly concluded that because the agreements had been cancelled and Court orders obtained for the return of the vehicles before the debtor company had duly commenced business rescue, the debtor company had not been in 'lawful possession' at commencement of rescue proceedings and thus could not rely on the section 133(1) of the 2008 Companies Act.[168]

This reasoning of the Court in *Madodza (Pty) Ltd* is laudable especially because it considered the sequence of events. In fact, this reasoning found support in *Southern Value Consortium v Tresso Trading 102*[169] where the Court was faced with a closely similar situation; a cancellation of an agreement coupled with a Court order for ejectment before business rescue proceedings had been commenced. The Court correctly held that upon cancellation of

[164] *Madodza (Pty) Ltd v ABSA Bank Ltd* 2012 JDR 1350 (GNP) para 17.
[165] Ibid, para 1 - 7
[166] Ibid, para 7.
[167] Ibid, paras 16 – 17.
[168] Ibid, para 17.
[169] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC).

the lease agreement, the debtor company lost its 'lawful possession' and in that sense the creditor as the owner of the property possessed a 'real right' to reacquire the property.[170] It is clear from these cases that the sequence of events is essential in establishing whether a debtor company would be in lawful possession of the property in question. Where the cancellation of the agreement coupled with enforcement Court orders (whether ejectment orders or repossession orders) only occurs after the commencement of business rescue proceedings it is quite clear that the debtor company in that case should be taken to be in lawful possession and in that regard, should be afforded the moratorium protection in terms of section 133(1) of the 2008 Companies Act.

The above two judgments provide a preferable yardstick to the interpretive approach of the Chapter six moratorium provisions in the 2008 Companies Act. Even though the factual circumstances before the Courts in those cases were relatively uncomplicated, these judgments must be applauded. To the extent that both judgments recognised the importance of the sequence of events, their approach to the interpretation of 'lawful possession is straightforward and yet progressive in light of the purpose for which a moratorium is provided for under Chapter six.

However, despite these judgments, the scope of the moratorium provisions in terms of section 133(1) and section 134(1)*(c)* of the 2008 Companies Act remains uncertain within the Courts. The legislative formulation of section 134(1)*(c)* of the 2008 Companies Act also intensifies the difficulties of interpreting the scope and application of the moratoriums under Chapter six. Section 134(1)*(c)* of the 2008 Companies Act is couched under a different section and under a different heading to the general moratorium provision found in section 133(1) of the 2008 Companies Act. Section 134(1)*(c)* essentially prohibits anyone from exercising 'any right in respect of any property in the lawful possession of the company' during a company's business rescue proceedings, unless with the written consent of the business rescue practitioner.[171] It is quite apparent that both section 133(1) and section 134(1)*(c)* of the 2008 Companies Act are aimed at providing for an automatic 'moratorium' although on different kinds of claims. Both provisions require the satisfaction of 'lawful possession' for their application. However, while section 133(1) of the 2008 Companies Act is limited to 'legal proceedings' and 'enforcement actions', section 134(1)*(c)* same Act seems broader to include 'any rights', although unlike the former, it specifically applies in 'respect of property' only. It is unclear why these provisions are provided for in different sections and

[170] Ibid paras 24 – 34.
[171] The 2008 Companies Act, supra note 2, section 134(1)*(c).*

different subheadings. The problem surrounding this structuring is magnified in the *Cloete Murray v First Rand Bank*.[172]

In 2014, the SCA decided *Cloete Murray v First Rand Bank*. The judgment contains controversial remarks regarding the application of section 133(1) and section 134(1)*(c)* of the 2008 Companies Act and more importantly reveals the unfortunate complicated structure of Chapter six. In this case, the creditor or owner of the property which was subject to an instalment agreement cancelled the said agreement after the commencement of business rescue proceedings by the debtor company. While the factual circumstances in *Cloete Murray* seemed more intricate, they appeared to be somewhat similar to the facts in *Madodza (Pty) Ltd*. The only substantial difference was that, whereas the cancellation of an agreement in *Madodza (Pty) Ltd* had been followed up by Court orders for the repossession of property that was not the case in *Cloete Murray.* Here the owner just relied on the cancellation itself to seek repossession of the property without any other enforcement mechanism which had been invoked before the commencement of business rescue proceedings by the debtor company.[173] The debtor company relied on the moratorium in section 133(1) of the 2008 Companies Act to stop the owner from claiming the property. The SCA therefore had to decide whether mere 'cancellation of an agreement' itself constituted either a 'legal proceeding' or an 'enforcement action' for the purposes of that section.[174] It correctly interpreted that the cancellation of an agreement could neither constitute a legal proceeding or an enforcement action.[175] On this basis, the application by the debtor company failed without the SCA having to consider the meaning of 'lawful possession'.

Regarding the confusing structuring of the moratorium provisions in Chapter six of the 2008 Companies Act, it is imperative to note that the SCA in *Cloete Murray* made interesting remarks. It correctly noted that on those given facts, the debtor company could have succeeded in claiming the protection of a moratorium against the owner of the property had it timeously relied on section 134(1)*(c)* of the 2008 Companies Act in its application.[176] The reasoning was that, although the mere cancellation of an agreement could not satisfy the requirements of section 133(1) of the 2008 Companies Act, such a cancellation could however amount to an 'exercise of any rights in respect of any property' which would fall within the scope of 134(1)*(c)* of the 2008 Companies Act. The debtor company had made a

[172] *Cloete Murray v First Rand Bank*, supra note 158.
[173] Ibid paras 2 – 10.
[174] Ibid.
[175] Ibid paras 33 – 34.
[176] Ibid paras 25 – 27.

justifiable error in pleading its cause of action under the 'general moratorium' provision in section 133(1) of the 2008 Companies Act instead of section 134(1)*(c)* of the same Act. It thus unfortunately failed to successfully claim the moratorium protection afforded to companies under business rescue proceedings in terms of Chapter six of the 2008 Companies Act in a situation where it could have but for the incorrect pleading. This error was probably because of the separate structuring of the two provisions. In terms of Chapter six of the 2008 Companies Act, section 133(1) falls under the heading '[g]eneral moratorium on legal proceedings against company' while section 134(1)*(c)* falls under the heading '[p]rotection of property interests'.[177] These headings create the misleading impression that a moratorium in respect of a company in business rescue, whether to protect against the claiming of monetary debts or against the claiming of property, can only be found under the former heading which provides for the 'general moratorium'. It is submitted that it will be more intelligible for these two moratorium provisions to be couched under the same heading providing for a general moratorium, even though they provide protection to claims of different interests.

In addition, despite having correctly concluded that section 133(1) of the 2008 Companies Act was not applicable in that case, the SCA in *Cloete Murray* made more remarks about the scope of this moratorium provision which were not only unnecessary to reaching its outcome but are also clearly quite restrictive. It stated that, the moratorium was not intended 'to interfere with contractual rights and obligations of the parties to an agreement' as such intention would be 'contrary to the tenet of our law.'[178] These remarks seem to suggest that the moratorium provisions whether in terms of section 133(1) or section 134(1)*(c)* of the 2008 Companies Act will not be applicable to the extent that they infringe with the prior contractual agreement between the debtor company and the owner. It is difficult to imagine a situation where the application of a moratorium would not infringe on the existing agreement between the debtor company and the creditor. In that regard, the remarks of the Court in *Cloete Murray* are very restrictive to the scope of the moratorium intended by the Legislature under Chapter six of the 2008 Companies Act.

The remarks in *Cloete Murray v First Rand Bank* unfortunately found support in *Kythera Court v Le Rendez-vous Café CC*[179]. In *Kythera Court*, a tenant or debtor company which had failed to meet its rental obligations towards an owner of property had duly commenced rescue proceedings and the creditor or owner only successfully cancelled the lease agreement three

[177] See generally, the structure of the 2008 Companies Act, section 133 and 134.
[178] *Cloete Murray* supra note 158 paras 40 – 41.
[179] *Kythera Court v Le Rendez-vous Café CC and Another* 2016 (6) SA 63 (GJ).

months later while seeking 'leave' to apply for a Court order for the tenant company's ejectment.[180] The Court had to consider whether the debtor company could rely on either section 133(1) or section 134(1)*(c)* of the 2008 Companies Act for a moratorium against the owner of the property.[181] It stated little about what constituted 'lawful possession'. This was despite the Court having correctly noted that 'lawful possession' had to be proven in respect of either section 133(1) or section 134(1)*(c)* of the 2008 Companies Act.[182] Instead, after accepting the remarks in *Cloete Murray* regarding the sanctity of contractual rights and obligations, the Court in *Kythera Court* held that, 'the failure to vacate properties when there is an obligation to do so renders the lessee an unlawful occupier'. In that respect, it concluded that 'the general moratorium in s 133(1) does not encompass legal proceedings for ejectment where a lease has been validly cancelled and the company in business rescue is an unlawful occupier.'[183] The Court was of the view that, whether a debtor company has commenced business rescue or not, the cancellation of a lease by the owner of the property renders the possession of that property by debtor company to be unlawful.

The Court in *Kythera Court* did not make any consideration of the fact that the tenant or debtor company had already commenced business rescue proceedings when the owner cancelled the lease and sought to apply to the Court for leave for an eviction order. In that sense, the debtor company was in 'lawful possession' of the property when business rescue proceedings commenced. The Court failed to consider the sequence of events as was done in *Madodza (Pty) Ltd v ABSA Bank Ltd*. It is submitted that the facts in *Kythera Court* warranted the granting of the moratorium in terms of section 134(1)*(c)* of the 2008 Companies Act since the owner sought to exercise a right to cancel the lease in respect of its property which remained in the lawful possession of the debtor company at the time business rescue proceedings commenced. Instead, the Court in *Kythera Court* seemed to have been influenced by the remarks in *Cloete Murray* especially where it noted that to apply the moratorium to situations where persons 'legitimately seek to vindicate or protect their property would be a drastic interference with their common-law rights of ownership' and it could not have been the intention of the moratorium to render property owners 'remediless during business rescue proceedings.'[184] It is quite clear that the Court in *Kythera Court,* as

[180] Ibid paras 1 – 6.
[181] Ibid.
[182] Ibid paras 9 – 12.
[183] Ibid, paras 14 - 16
[184] Ibid para 12.

was the SCA in *Cloete Murray*, was of the view that the moratorium provision in terms of Chapter six should not be interpreted to interfere with existing contractual rights.

These restrictive views are difficult to understand especially considering the nature of a moratorium in general. According to Beukes a statutory moratorium amounts to a 'defence *in personam*' which provides 'immunity' for a period of time on obligations which remain in existence and are 'unimpaired.'[185] In respect of contractual relationships specific to the application of the moratorium in section 134(1)*(c)* of the 2008 Companies Act, Rushworth correctly reflects that the application of the moratorium 'overrides any contrary contractual provision' and 'would limit the rights of a party who had leased property to the company'.[186] The nature of a moratorium is therefore to inherently interfere with existing contractual obligations. While the protection of owners of property may seem precarious, it has been noted that the restriction imposed is temporary.[187] In addition, important protective safeguards for creditors like voting rights in terms of section 145 of the 2008 Companies Act[188] and the restrictions on the disposal property in terms of section 134(1)*(a)* of the 2008 Companies Act[189] are also available to creditors. While section 7*(k)* of the 2008 Companies Act seeks to balance interests of the debtor company and that of its creditors which include owners of property, the nature of a moratorium itself is inherently infringing on contractual obligations, whether common law or otherwise. However, given that a moratorium is 'cardinal' to the purpose of an 'efficient rescue', it would not be unjustified for courts to restrict its application based on its inherent nature as this would defeat the intended purpose of Chapter six of the 2008 Companies Act. It is submitted that such restrictive construction of the scope of the Chapter six moratorium by the Courts in *Cloete Murray v First Rand Bank* and in *Kythera Court v Le Rendez-vous Café CC* bears the stamp of judicial conservatism which led to the failure of Judicial Management.

In *JVJ Logistics (Pty) Ltd v Standard Bank*[190], the Court was also presented with a factual scenario relatively similar to that in *Madodza (Pty) Ltd*. The creditor, a bank, had successfully obtained Court orders for the repossession its property (vehicle) before the

[185] H Beukes 'Business rescue and the moratorium on proceedings' (2012) *De Rebus* 34.
[186] J Rushworth op cit note 102 at 384.
[187] Ibid.
[188] See footnote 157 above for a short discussion of creditors voting rights.
[189] See the 2008 Companies Act, section 134. In terms of this section, a company in business rescue can effectively dispose of movable property in its possession without the owner's consent in terms of s134(3). However, such disposal will be subject to the requirements in s134(1)*(a)* that it must be in the ordinary course of business and must also be bona fide.
[190] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD).

debtor company (JVJ) duly commenced rescue proceedings.[191] JVJ however, still sought to rely on the moratorium in terms of section 133(1) of the 2008 Companies Act. It was common cause that the bank's attempt to repossess the vehicle in question amounted to an 'enforcement action' for the purposes of that section. Thus, the only question before the Court was whether JVJ had been in lawful possession of that vehicle at the time its business rescue proceedings commenced. [192] Olsen J in *JVJ Logistics (Pty) Ltd* accepted the decision in *Madodza (Pty) Ltd.*[193] However, he also found it necessary to interpret the specific meaning of 'lawful possession.' On that exercise, he correctly noted that unlawfulness could either be in terms of 'civil unlawfulness' or 'criminal unlawfulness' but neither of these forms of unlawfulness could be protected by the moratorium in terms of section 133(1) of the 2008 Companies Act.[194] In that respect, the Court in *JVJ Logistics (Pty) Ltd* correctly concluded that JVJ's possession of the vehicle had become unlawful in the civil sense before the commencement of rescue proceedings and in that sense, it could not rely on the protection of the moratorium to keep the vehicle in question.

However, the above reasoning was not the only consideration that led the Court in *JVJ Logistics (Pty) Ltd* to its conclusion that section 133(1) of the 2008 Companies Act was not applicable. While the Court's conclusion was correct in relation to the factual scenario, to further justify it, it ventured further into the interpretation of section 133 and 134 of the 2008 Companies Act. The result of the further interpretation makes that judgment problematic considering the understanding of the moratorium and thus resulting in more uncertainty. The Court in *JVJ Logistics (Pty) Ltd* seemed to have been overly concerned about the 'burden' that is imposed on property owners because of the application of a moratorium and in fact relied on section 7*(k)* of the 2008 Companies Act which requires a balancing of interests of all stakeholders for its further findings.[195] Olsen J was of the view that 'owners' of the property that would be in possession of a debtor company in rescue were likely not to be considered as other ordinary 'creditors' in terms of the 2008 Companies Act and thus would not enjoy the protective voting rights afforded to other creditors in section 145 of the same Act. In that respect, the moratorium should apply differently in respect of owners of property.[196] The Court's reasoning was that the 2008 Companies Act does not refer to property owners specifically as creditors. Specifically, the provisions of section 134 which

[191] Ibid para 2 – 5.
[192] Ibid para 9 – 10.
[193] Ibid para 11.
[194] Ibid, paras 27 – 29.
[195] Ibid, paras 37 – 41.
[196] Ibid paras 40 – 46.

deal with the 'protection of property interests' refer to owners of property as a 'person' and not creditors.[197] In addition, the Court further reasoned that the interests of an 'owner' of property in the possession of the company were also quite different to those of ordinary creditors with claims sounding in money.[198] It noted that, while the latter's monetary interests would have been affected by the financial distress of the company in issue, the interests of the former would remain 'unaffected' by the distress and would in any case never improve even upon successful rescue.[199] In that regard, Olsen J then stated that:

> '[i]t is inconsistent with the intention behind the Act that the rights of such an owner should be trampled upon by a moratorium in the same way as are those of creditors whose claims sound in money, but that only the latter should have decision-making rights and powers in connection especially with the formulation and adoption of a business plan.'[200]

The Court concluded that the applicability of a moratorium to situations of property in the possession of a debtor company in rescue would thus be too cumbersome to the owner of the property.[201]

It is submitted that this construction by the Court will make it difficult for a debtor company duly under business rescue to effectively rely on the moratorium provisions against the repossession of property in its possession by the owner even where such possession meets the standard of both 'civil' and 'criminal' lawfulness in the sense that rescue proceedings commence before the repossession orders are obtained. In fact, the sequence of events in cases involving owners of property would not matter as they could validly cancel an agreement. In addition, this interpretation makes the moratorium in terms of section 134(1)*(c)* of the 2008 Companies Act (which refers to a 'person' and not creditors) inoperative because the application of this moratorium will invariably be sought to be enforced by property owners in most cases.

It is further submitted that these findings in *JVJ Logistics (Pty) Ltd* were unnecessarily restrictive and in fact creates more confusion. The finding that property owners may not be creditors for the purposes of the Act and thus should not be affected by the application of the moratorium should, with respect, be rejected as it bears the hallmarks of judicial conservatism as experienced under Judicial Management. The fact that section 134 of the 2008 Companies Act refers such owners as merely 'persons' is not enough to justify a construction that they cannot be considered creditors for the purposes of the protective rights

[197] Ibid.
[198] Ibid para 47.
[199] Ibid.
[200] Ibid, para 41.
[201] Ibid paras 49 & 50.

in terms of s145 of the 2008 Companies Act or other rights conferred in terms of the same Act. It is notable that section 133(1) of the 2008 companies Act itself does not specifically refer to 'legal proceedings' or 'enforcement actions' by creditors. It can however, be inferred that it relates to creditors. In addition, where section 134(1)*(c)* of the 2008 Companies Act is accepted to be a moratorium provision just like section 133(1) of the same Act, although specifically referring to property, it should also be conceded that property owners should be regarded as creditors even though their claims do not sound in money. Indeed, at some point the Court in *JVJ Logistics (Pty) Ltd* conceded that 'owners of property' in other matters of insolvency had previously been recognised as 'creditors'.[202] That recognition is desirable as it acknowledges the importance of the application of a moratorium in respect of companies under business rescue as intended by Chapter six of the 2008 Companies Act. Owners of property if considered as 'creditors' will be afforded such 'participation' and 'voting rights' in terms of section 145 of the 2008 Companies Act and other protective measures. In that regard, section 7*(k)* of the 2008 Companies Act cannot be considered to have been infringed. It is submitted that the purpose of business recue would be fostered through a more liberal application of the automatic moratorium which is 'cardinal' in increasing the chances of 'effective rescue'.

V Recommendations and Conclusion

Chapter six brings a systemic shift to the approach of corporate rescue in South Africa. It attempts to remove the creditor-protectionist culture that was engraved within all stakeholders, especially the Courts under its predecessor. However, in this attempt, the drafters underappreciated the amount of influence Courts possess in shaping the corporate rescue system. The Legislature seems to have left so many loopholes in its drafting which lie at the mercy of the judicial interpretation. The provisions dealing with business rescue are characterised by vague or unspecific statutory tests together with a cumbersome and complicated structure. Unfortunately, on several occasions where the judiciary has been tasked with clarifying points of legal contestations, its decisions have remained largely oscillating between applying the provisions more liberally or purposively as intended by the Legislature and applying them more restrictively by giving more respect to the interests of creditors as experienced under Judicial Management. It is quite clear from the Court decisions relating to the interpretation of the commencement requirements and the

[202] Ibid, para 39

interpretation of the automatic moratorium application that the Legislature through its overly complicated drafting, seems to have failed in extinguishing judicial conservatism which was functional to the failure of Judicial Management.

It is incontrovertible that 'a crucial ingredient for the success of the new procedure is a change in mindset regarding corporate reorganisation.'[203] In fact, the judiciary should take more care in interpreting Chapter six lest they become apathetic to the Legislature's intention. It is recommended that Courts should interpret the provisions for business rescue liberally. A liberal interpretation would recognise the fact that the purpose of the shift from Judicial Management to Chapter six of the 2008 Companies Act is to lower the threshold for companies to commence business rescue provisions and to ensure that more companies are successfully rescued as opposed to being liquidated. Although examples of liberal approaches to corporate rescue by Courts in foreign jurisdictions influential to the conception of Chapter six cannot be directly applied in South Africa, they can however, be instructive. In respect of commencement requirements for corporate rescue, it has been noted that in the USA, the Courts have only been more concerned about whether the application for rescue proceedings is made in 'good faith' and nothing more.[204] In Australia, it has also been noted that the Courts would only be disinclined to allow the institution of rescue proceedings only 'where there appears to be an ulterior purpose …'.[205] In both jurisdictions, it is quite clear from the above that the Courts seem to interpret rescue procedures purposively other than giving unjustified respect to the interests of creditors. In that regard, South African Courts also ought to be more concerned about the purpose for which the Chapter six procedure in the 2008 Companies Act was enacted to avoid conservative interpretations and in turn ensure that the procedure does not suffer the same fate as Judicial Management.

However, it is also notable that the most effective way legislation can change the mindset of the judiciary is by drafting more concise provisions devoid of complicated structures. In this regard, Loubser correctly states that the Legislature must 'recognise the need to clarify, rectify or replace'[206] some of the provisions in Chapter six. It must be recognised that success cannot be guaranteed by the mere adoption of a debtor-friendly solvency system. It is recommended that more should be done in terms of the structure and formulation Chapter six, particularly section 133 and 134 of the 2008 Companies Act.

---

[203] R Bradstreet, op cit note 109 at 380.
[204] See W.C Robinson op cit note 7 at 148.
[205] C Anderson 'Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective' (2008) 11 *Potchefstroom Electronic Law Journal* 1 at 8.
[206] A Loubser op cit note 124 at 701.

Bibliography

Legislation

South African Companies Act 71 of 2008.

Companies Act Regulations in GN R351 *GG 34239* of 26 April 2011.

South African Companies Act 61 of 1973.

South African Companies Act 46 of 1926.

United Kingdom Insolvency Act 1986.

United Kingdom Enterprise Act 2002 (c.40).

United States of America Bankruptcy Reform Act 1978 (11 USC 1978).

Case law

Ben Tovim v Ben Tovim 2000 (3) SA 325 (C)

BOE Bank Ltd v Upbeatprops 63 (Pty) Ltd 2001 JDR 0821.

Cloete Murray and Another NNO v First Rand Bank Ltd t/a Wesbank 2015 (3) SA 438 (SCA).

Employees of Solar Spectrum Trading 83 (Pty) Ltd v AFGRI Operations Ltd and Another (6418/2011)/ [2012] ZAGPPHC 359.

JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others 2016 (6) SA 448 (KZD).

Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others 2012 (2) SA 378 (WCC).

Kotzé v Tulryk Bpk 1977 (3) SA 118 (T).

Kythera Court v Le Rendez-vous Café CC and Another 2016 (6) SA 63 (GJ).

Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) and Another 2001 (2) SA 727 (C).

Madodza (Pty) Ltd v ABSA Bank Ltd 2012 JDR 1350 (GNP).

Makhuva and Others v Lukoto Bus Service (Pty) LTD and Others 1987 (3) SA 376 (V).

Nedbank Ltd v Bestvest 153 (Pty) Ltd 2012 (5) SA 497 (WCC).

Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others 2012 (3) SA 273 (GSJ).

Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others 2013 (4) SA 539 (SCA).

Porterstraat 69 (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C).

Propspec Investments v Pacific Coasts Investments 97 Ltd 2013 (1) SA 542 (FB).

Swart v Beagles Run Investments 25 (Pty) Ltd 2011 (5) SA 422 (GNP).

Silverman v Doornhoek Mines Ltd 1935 TPD 349.

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm investments 386 Ltd 2012 (2) SA 423 (WCC).

Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others 2016 (6) SA 501 (WCC).

Tenowitz v Tenny Investments Pty Ltd 1979 (2) SA 680 (E).

Books

Denis Davis et al *Companies and other Business Structures in South Africa* (2013) Oxford University Press.

Farouk HI Cassim et al *Contemporary Company Law* (2012) Juta.

G McCormack *Corporate Rescue Law: Anglo-American Perspective* (2008).

United Nations Commission on International Trade Law (UNCITRAL) *Legislative Guide on Insolvency Law* (2005) United Nations Publication, New York.

Articles

A Loubser 'Judicial Management as a Business Rescue Procedure in South African Corporate Law' (2004) 16 *SA Merc LJ* 137.

A Loubser 'Business rescue in South Africa: a procedure in search of a home?' (2007) 40 *Comparative and International Law Journal of Southern Africa* 152.

A Loubser 'The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 1)' 2010 *SALJ* 501.

A Loubser 'The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 2) (2010) *TSAR* 689.

A Loubser 'Tilting at Windmills? The Quest for an Effective Corporate Rescue Procedure in South African law' (2013) 25 *SA Merc LJ* 437.

C Anderson 'Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective' (2008) 11 *Potchefstroom Electronic Law Journal* 1.

C Lamprecht 'Business rescue replacing judicial management: An assessment of the extent of problems solved' (2008) 22 *South African Journal of Accounting Research* 183.

DA Burdette 'Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa' (part 1) (2004) 16 *SA Merc LJ* 241.

DA Burdette 'Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa' (part 2) (2004) 16 *SA Merc LJ* 409.

DA Burdette 'Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process' (1999) 32 *De Jure* 44.

D.A Strauss 'The Death of Judicial Conservatism' (2009) 4 *Duke Journal of Constitutional Law and Public Policy* 1.

F.H Easterbrook 'Do Liberals and Conservatives Differ in Judicial Activism?' (2002) 73 *University of Colorado Law Review* 1403.

H Beukes 'Business Rescue and the Moratorium on Proceedings' (2012) *De Rebus* 34.

H Rajak & J Henning 'Business Rescue for South Africa' (1999) 116 *SALJ* 262.

J Rushworth 'A critical analysis of the Business Rescue Regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* 375.

P.C Osode 'Judicial Implementation of South Africa's New Business Rescue Model: A preliminary Assessment' (2015) 4 *Penn State Journal of Law & International Affairs* 459.

P Kloppers 'Judicial Management – A Corporate Rescue Mechanism in Need of Reform?' (1999) 3 *Stellenbosch Law Review* 417.

R Bradstreet 'Business Rescue Proves to be Creditor-Friendly: CJ Claassen J's Analysis of the New Business Rescue Procedure in *Oakdene Square Properties* (2013) 130 *SALJ* 44.

R Bradstreet 'The leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy' (2010) 22 *SA Merc LJ* 195.

Richard Bradstreet 'The New Business Rescue: Will Creditors Sink or Swim? (2011) 128 *SALJ* 352.

R Parry 'Is UK Insolvency Law failing struggling Companies' (2009) 18 *Nottingham Law Journal* 42.

T.H Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act, 2008' (2010) *Acta Juridica* xiii.

W.C Robinson 'Entry Requirements: A Comparative Analysis of the Corporate Rescue Regimes in Australia, the United Kingdom and the United States of America (1995) 8 *Corporate & Business Law Journal* 129.

Theses

A.H Olver *Judicial Management in South Africa – Its Origin, Development and Present-Day Practice and a Comparison with the Australian System of Official Management* (LLD thesis, University of Cape Town, 1980).

A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (LLD thesis, University of South Africa, 2010).

E Levenstein *An Appraisal of the new South African Business Rescue Procedure* (LLD thesis, University of Pretoria, 2015).

Reports & Internet Sources

D Koen & T Fuhrmann 'How General is the General Moratorium in Business Rescue' available at http://blog.corprecover.co.za/?p=107, accessed on 05 October 2017.

Debtsource Credit Management Specialists 'Business Rescue- Does it work?' available at http://www.debtsource.co.za/2016/10/business-rescue-does-it-work/ accessed on 15 November 2017.

E Levenstein 'South Africa's Business Rescue regime – Firing on All Cylinders?' available at https://www.werksmans.com/wp-content/uploads/2016/12/061998-WERKSMANS-dec-insol-world.pdf, accessed on 20 November 2017.

M Pretorius *Business Rescue Status Quo Report* (2015) Business Enterprises, University of Pretoria.