Business rescue in the construction industry in South Africa

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ABSTRACT

The business rescue regime was introduced into South African law on 1 May 2011 and now, almost six years since its inception, very little research has been conducted on how business rescue practitioners are achieving success.

This research seeks to firstly understand what business rescue practitioners consider as a successful business rescue process and secondly, flowing from this, the research seeks to identify the determinants of success of a statutory business rescue process in the construction industry in South Africa.

11 business rescue practitioners, some with financial backgrounds and others with legal backgrounds were interviewed in order to gather data. Of these participants, certain also had a background in liquidations.

Semi-structured interviews were conducted whereafter categories and themes were identified which are discussed and analysed.

The Companies Act defines the rescuing of a company as a process of restructuring in order to maximise the likelihood of the company continuing in existence on a solvent basis or, if this is not possible, providing a better return for creditors than what they would receive in a liquidation. While some of the respondents considered the so called wind-down business rescues, where all of the assets are sold and the proceeds thereof are distributed to creditors, much like a liquidation but in accordance with the latter part of the definition of rescue, to still be a successful business rescue, this research proves that a successful rescue should rather be viewed as a process that saves as many Public Interest Score points as possible (van den Steen, 2017). In other words there should be a focus on saving the business as a going concern.

In striving to save the business, the second leg of the research sought to identify the determinants of a successful business rescue process in the construction industry in South Africa. In striving to save as many Public Interest Score Points as possible, the key determinants of success identified by this research are as follows:

- Support from SARS and financial institutions

- Employee buy-in
- Post commencement finance
- Sound financial management / control
- Effective leadership
- Effective constant communication
- The ability to negotiate and reach consensus
- Overcoming legislative challenges
- Nature and extent of original causes of failure (reasonable prospect of rescue at the outset)
- Early filing
- Injecting skills
- The right business rescue practitioner

DECLARATION

I, Timothy Stokes, declare that this research report is my own work except as indicated in the references and acknowledgements. It is submitted in partial fulfilment of the requirements for the degree of Master of Business Administration in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Timothy Stokes

Signed at ……………………………………………………

On the …………………………….. day of ………………………… 20…..

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CHAPTER 1. INTRODUCTION

1.1 Purpose of the study

The purpose of this research is to examine the determinants of success in business rescue proceedings entered into by construction companies in South Africa.

This research investigated the factors that are deemed critical in the statutory process of rescuing financially distressed construction companies that have filed for business rescue in terms of Chapter 6 of the Companies Act in South Africa.

1.2 Context of the study

The context of the study stems from the challenging economic climate we find ourselves in at the moment globally and even more so in South Africa, with a potential downgrade to junk status on the cards at the time of writing (Karodia et al., 2016). Situations such as these bad economic times brings the need for business rescue into the spotlight, especially in the construction industry in South Africa.

Business Rescue was introduced into our law in 2011 through the promulgation of the Companies Act, Act 71 of 2008 (“the Act”). Business Rescue, as per its definition, provides for the temporary supervision of a financially distressed company, a temporary moratorium of claims against a company, and the development of a business rescue plan to rescue a company. Many business rescue practitioners have subsequently found out that upon taking over these financially distressed companies a common thread is that of bad management and in particular, bad financial management. Stefan Steyn, a Senior Business Rescue Practitioner, is of the opinion that in over 90% of companies that file for business rescue, the cause of the financial distress was bad management and bad financial management in particular.

The construction industry accounts for great number of jobs in South Africa and according to the CIPC, construction companies account for 13% of all companies that apply for business rescue.

With the state of our country and the bleak prognosis for the future, growing unemployment and inequality, growth in this sector is important. Growth is not only brought about by starting new companies but by rescuing financially distressed ones.

1.3 Problem statement

This research seeks to identify the key determinants of a successful business rescue process in the construction industry in South Africa.

1.4 Significance of the study

The study provides guidance to business rescue practitioners and turnaround specialists, CEOs and CFOs of construction companies as well as the labour force when considering filing for business rescue.

In terms of Section 129(7) of the Companies Act, if a company is financially distressed and the board of directors does not file for business rescue, or liquidate the company, the board has to notify all affected persons and provide reasons why it is not going to file for business rescue. It is imperative that the construction industry gains a better understanding of the determinants of a successful business rescue process in order to make proper informed decisions regarding business rescue.

1.5 Delimitations of the study

In order to provide focus, contain the research and make the research process more manageable, it was decided to limit the research as follows:

- Limited to construction companies.
- Limited to owner managed companies.
- Limited to small to medium companies, however, very small companies will be excluded. Companies with a public interest score of between 1 - 100 are considered small companies and scores between 100 - 500 are deemed medium companies in terms of the Act.
- While a successful business rescue process can be contingent upon an infinite amount of determinants, some very important and other not so, this research is limited to aspects concerning the success of the actual statutory business rescue process.
- This research is not intended to be a complex legal or financial study on the business rescue regime but rather from the perspective of the management of the process by the business rescue practitioner.

It is important to note that while many of the findings were obviously applicable to all business rescues, the research focused on the business rescue process of construction companies.

1.6 Definition of terms

- Section 128 (1) (b) of the Companies Act:
  "(b) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-
  (i) the temporary supervision of the company, and of the management of its affairs, business and property;
  (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
  (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the

company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company";

- Section 128 (1) (f) of the Companies Act:
  "(f) 'financially distressed' , in reference to a particular company at any particular time, means that -
  (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
  (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months";

1.7 Assumptions

The fundamental assumption of this research is that business is an ecosystem and not linear and, in this regard it is assumed that affected persons involved in business rescue realise that the forces of nature are at play in a business and that every action taken, or not taken, has a ripple effect (Capra, 2002).

CHAPTER 2. LITERATURE REVIEW

2.1 Introduction

This literature review firstly provides a brief introduction to business rescue as enacted into our law by the Companies Act, 108 of 2008.

The literature review then follows on to consider what constitutes a successful business rescue by considering the statutory rescue process and authority thereon.

Finally it looks at what determinants are specific to a successful rescue process of a construction company in South Africa. The literature in respect of rescuing construction companies in general was considered.

2.2 Background to business rescue in South Africa

The Companies Act, 71 of 2008 ("the Act"), came into effect on the 1st of May 2011. In terms of Section 7(k), one of the fundamental purposes of the Act 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."

The business rescue regime is contained in Chapter 6 of the Act, which has replaced the old judicial management regime of the Companies Act, 61 of 1973 (Stein, 2011).

The Act seeks to modernise our law to bring it into line with international standards. Stein (2011) states that the business rescue regime resembles the provisions found in Chapter 11 of the United States Bankruptcy Code.

According to Pretorius and Holtzhauzen (2008), Chapter 6 seeks to create a more debtor-friendly environment than a creditor friendly environment to successfully achieve business rescues.

Chapter 6 seeks to shift the mind-set from a corporate culture of liquidation to that of rescue (Levenstein, 2011).

2.3 The business rescue process

At the outset, in order to determine what the goal is (i.e. what the business rescue practitioner is trying to achieve) it is important to consider the business rescue process and its objectives from where it stems - in terms of Chapter 6 of the Act.

2.3.1 *Introduction to the process and important definitions*

Financial distress, in reference to a particular company at any particular time, as defined in Section 128 (1) (f), "means that it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months."

In terms of Section 128, the definition of "rescuing" the company is twofold. The primary objective "is the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis." The secondary objective is, "if it is not possible for the company to so continue in existence, the business rescue process results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."

It was held in Wellman vs Marcelle Props 193 CC & Another (2012) (CSJ) that "business rescue proceedings are not for the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which given time will be rescued and become solvent."

In terms of Section 128 (1) (a) of the Companies Act of 2008, an affected person means any shareholder, creditor, trade union, or employee of a company.

A business rescue practitioner is defined in Section 128 (1) (d) as “a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings.”

In terms of Section 145 (4) “a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company.” The Section goes on to state that a concurrent creditor who would be subordinated in a liquidation has a voting interest equal to the amount, if any, that the creditor could reasonably expect to receive in such liquidation of the company.

2.3.2 *Voluntary business rescue*

As provided for in Section 129 of the Act, the board of directors of a company may voluntarily place the company into business rescue and under supervision by passing a resolution to this effect and fling same with the CIPC.

There are certain prerequisites and conditions to this procedure, as set out in Section 129(1) and (2). The first prerequisite is that the company must be financially distressed. Business rescue is only available to financially distressed companies.

In terms of Section 129(1)(b), a second prerequisite for a company to file for business rescue is that there should be a reasonable prospect of rescuing the company. The Act falls short of stating exactly what is meant by reasonable prospect. If one bears the twofold definition of rescue in mind, there should be a reasonable prospect of rescue. Case law has dealt with this issue in the case of Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others (609/2012) [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) wherein it was held the reasonable prospect must be based on reasonable grounds.

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No resolution may be adopted if liquidation proceedings have already commenced and the resolution is of no force and effect until it is actually filed at the CIPC (Section 129).

Section 130 of the Act sets out the grounds upon which any affected person may object to a company placing itself into voluntary business rescue and the relief they may seek from the court.

2.3.3 *Compulsory business rescue*

Any affected person, being an employee, creditor or shareholder of the company may apply to Court in terms of Section 131 to place the company into business rescue.

The affected person bringing the application must, in terms of Section 131 (4) (a), convince the Court that the company is financially distressed, the company has failed to pay over an amount due or it is otherwise just and equitable to place the company into business rescue and that there is a reasonable prospect for rescuing the company.

2.3.4 *Duration of business rescue proceedings*

Section 132 deals with the duration of business rescue proceedings. The proceedings commence when the resolution is filed with the CIPC (voluntary) or when an affected person applies to Court in terms of Section 131 (compulsory). Business rescue can also commence when the Court places the company under supervision during liquidation proceedings. Business rescue proceedings come to an end when the business rescue practitioner files a notice of substantial implementation of the adopted business rescue plan or when the Court sets aside a resolution or converts the proceedings into liquidation proceedings. Further, if a business rescue plan has been presented and rejected and no affected person takes any action in terms of Section 153, the proceedings are deemed to have come to an end.

In terms of Section 132 (3), if the business rescue proceedings have not ended within 3 months, the business rescue practitioner must prepare a status report and publish same to all affected persons, the CIPC and the Court.

2.3.5 *The moratorium on legal proceedings*

Section 133 of the Act states that "during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum," subject to certain exceptions detailed in Subsections (a) to (f).

The statutory moratorium is what gives the company protection from creditors. This gives the company the necessary breathing space to come up with a business rescue plan (Museta, 2011).

2.3.6 *Duties of the business rescue practitioner*

Section 140 sets out the powers and duties of the business rescue practitioner. In terms of Section 140, the business rescue practitioner:

"(a) has full management control of the company in substitution for its board and pre-existing management;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

(c) may —

(i) remove from office any person who forms part of the pre-existing management of the company; or

(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and

(d) is responsible to—

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter."

It is further important to note that in terms of Section 140 (3), the business rescue practitioner is an officer of the court and has the responsibilities, duties and liabilities of a director of the company.

Stein (2011) summarises the duties of the business rescue practitioner as the duty to investigate the affairs of the company and then to make a decision on whether or not there is a reasonable prospect of rescuing the company. He goes on to say that if there is a reasonable prospect, the business rescue practitioner must develop a business rescue plan. After adoption of the business rescue plan the business rescue practitioner must implement same.

Davis et al (2013) are of the opinion that the primary duty of the business rescue practitioner is to develop the business rescue plan.

2.3.7 *Business rescue plan*

Section 150 sets out in detail the required contents of the business rescue plan that the business rescue practitioner must publish to all affected persons within 25 business days of his appointment, unless the business rescue practitioner is granted an extension from holders of a majority of the voting interests.

The business rescue plan must be divided into three parts and contain the information as summarised below:

PART A – Background

1. List of assets.
2. List of creditors.
3. A probable liquidation dividend that creditors in their respective classes would receive in a liquidation.
4. List of the holders of the company's securities.
5. A copy of the business rescue practitioner's remuneration agreement.
6. A statement whether the business rescue plan includes proposals made informally by a creditor.

PART B – Proposals

1. The nature and duration of any proposed moratorium.
2. The extent to which the company will be released from the payment of any debts or should there be a proposed conversion of debt to equity.
3. The ongoing role of the company and the treatment of existing agreements.
4. The property that will be made available to pay creditors claims.
5. The order of preference in which the proceeds of property will be paid to creditors.
6. The benefits of adopting the plan as opposed to the benefits of liquidating the company.
7. The effect that the plan will have on the holders of each class of the company's issued securities.

PART C – Assumptions and Conditions

1. The conditions that must be satisfied for the plan to come into operation and those that must be satisfied for it to be fully implemented.
2. The effect that the plan will have on the number of employees or the terms of their employment.
3. The circumstances in which the plan will come to an end.

4. A projected income statement and balance sheet for the ensuing three years.

2.3.8 *Adoption of a business rescue plan*

Within 10 days after publication of the business rescue plan, the business rescue practitioner must call a meeting in terms of Section 151 in order for the creditors and, if applicable, the shareholders to consider the plan in accordance with Section 152.

Should the business rescue plan be supported by more than 75% of the creditors voting interests that were voted at the meeting and these included at least 50% of the independent creditors voting interests that were voted, the business rescue plan will have been adopted on a preliminary basis in terms of Section 152 (2). Should the business rescue plan alter the rights of shareholders then shareholders will be called upon to vote and should more than 50% of the shareholders' voting interests support the plan it will be deemed as having been finally adopted. If the plan does not alter the rights of shareholders, it will be deemed to have been finally adopted if so adopted by the creditors.

A business rescue plan that has been adopted is, in terms of Section 152 (4), binding on all affected persons, whether or not they were present, voted in favour or proved a claim.

2.3.9 *Substantial implementation*

The filing of the notice of substantial implementation culminates the business rescue practitioner's statutory involvement in the company.

In African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others (228/2014) [2015] ZASCA 69; 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA) the Court was of the opinion that Section 132(3) means that the business rescue process should end within three months so that the process can be swift and cost effective.

According to van den Steen (2017), there has been much talk in the public domain on the lack of success of business rescue. He has also seen many abuses of the process. He notes that the definition of success is ambiguous and is of the opinion that success should rather be gaged by the number of Public Interest Score ('PIS') points saved. In terms of Regulation 26 of the Act, a company is awarded one PIS point for every employee, every R1 000 000 of third party liabilities, every R1 000 000 of annual turnover and one point for every shareholder. Therefore, there has to be a trading business for there to be any PIS points generated.

2.3.10 *Research Proposition 1*

Based on the literature review, the Act may provide a straightforward plain reading twofold alternative definition of rescue in Section 128 of the Act, however, a successful business rescue should rather be gaged by the number of PIS points saved in the process, therefore saving as much of the business as a going concern as possible (van den Steen, 2017).

2.4 Identifying the determinants of a successful business rescue process in the construction industry

In light of the above, the second part of the research, and the crux of the research, was to identify the determinants of a successful business rescue process in the construction industry in South Africa.

Jijana (2015) found that the following five factors were the main contributors to the failure of the business rescue process:

1. Ambiguity in some parts of the legislation.

2. Lack of a specialised court and specialised judges to deal with matters pertaining to business rescue.
3. Companies abusing the business rescue process.
4. Post commencement finance is hard to come by.
5. Incompetence of business rescue practitioners.

2.4.1 *Post Commencement Finance*

Post commencement finance is one of the critical elements necessary for a successful business rescue (Pretorius and Du Preez, 2013). Pretorius and Du Preez further state that it is near impossible to access finance when financially distressed.

In terms of Section 135, post-commencement finance is defined as follows:

"(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee—

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection (3) (a).

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1), and any such financing—

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in the order of preference set out in subsection (3) (b).

(3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—

(a) in subsection (1) will be treated equally, but will have preference over—

(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(ii) all unsecured claims against the company; or

(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation."

Du Preez (2012) identified a number of factors that influence the attainment of post commencement finance. She states that the process is dependent upon open transparent communication by the business rescue practitioner. She mentions further that the business rescue practitioner must engage with potential funders early in the process and a pre-assessment of the company's funding requirements is imperative.

The ranking of post commencement finance is important but sufficient security must be available with everything encompassed in a proper business rescue plan based on a sound business model (Du Preez, 2012).

In Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another (13/12406) [2013] ZAGPJHC 109, the Court, *obiter dictum*, at paragraph 21, set out the ranking of claims in business rescue as follows:

1. "The practitioner, for remuneration and expenses, and other persons (including legal and other professionals) for costs of business rescue proceedings.
2. Employees for any remuneration which became due and payable after business rescue proceedings began.
3. Secured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. post-commencement finance.

4. Unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began, i.e. post-commencement finance.
5. Secured lenders or other creditors for any loan or supply made before business rescue proceedings began.
6. Employees for any remuneration which became due and payable before business rescue proceedings began.
7. Unsecured lenders or other creditors for any loan or supply made before business rescue proceedings began."

In the recent case of Ludwig Wilhelm Diener NO v Minister of Justice and Others case number: 30123/2015, the Court found that when business rescue proceedings are superseded by liquidation proceedings, the unpaid business rescue fees and costs have to be paid out of the free residue and not out of the proceeds of secured assets. This decision is cause for concern for potential post commencement financiers.

2.4.2 *Early filing*

Pretorius and du Preez (2013) state that companies usually file for business rescue when they are already too far along in their distress timeline when they have already attempted all the turnaround and rescue strategies. Therefore, it seems as if the longer you wait to file for business rescue the harder it is to save the company.

Section 129(7) has the potential to encourage directors to file for business rescue early rather than late.

2.4.3 *Rescue team skill set*

Pretorius (2013) identified five principle tasks of the business rescue practitioner, namely, "taking control, investigating the affairs, compiling a rescue plan, implementing the plan and complying with the statutory process." He further identified fifteen activities and goes on to conclude that what is required of the business rescue practitioner is above one person's capacity. A team effort is required to navigate the process effectively.

2.4.4 *Hostility of affected persons*

Creditor participation is governed by, *inter alia,* Section 145 of the Companies Act. While certain of the creditors' rights are limited by the moratorium, they are entitled to fully participate in the process in terms of Section 145. The creditors ultimately decide on the outcome of the process in terms of Section 152 when they consider the business rescue plan. Therefore, it is imperative that the business rescue practitioner effectively engages and negotiates with creditors should he wish to have his business rescue plan adopted.

2.4.5 *Importance of leadership in crisis*

Van den Steen (2007) identified eleven essential skills and talents that turnaround CEOs in South Africa must possess. He lists these as "financial astuteness, excellent communication skills and emotional intelligence and engage with people at all levels, team builder, exceptional intelligence and well developed analytical skills and an integrated thinker, willing to make decisions and take risks and accept responsibility for those decisions – i.e. combined with self-belief, understand when it is necessary to be tough, uncompromising and ruthless – justified by reasoning based on saving the organisation from closure, mental toughness and tenacity, hands-on and a key eye for detail."

Leadership in crisis situations in business is treacherous (Heifetz et al, 2009). The authors go on to explain that leadership in a crisis is made up of two phases. The first phase, or emergency phase, concerns the stabilisation of the situation in order to play for time. The second phase is what they term the adaptive phase where the causes of the crisis are addressed in order to successfully progress.

2.4.6 *Business failure in the construction industry*

In light of the above, in order to identify the determinants of a successful business rescue process in the construction industry in South Africa, it is important to consider the determinants of business failure in the construction industry (Jagafa & Wood, 2012).

While there is little if no research on the determinants of a successful business rescue process in the construction industry in South Africa, it is necessary to consider the determinants of failure in construction companies.

Jagafa and Wood (2012) completed a study on the determinants of business failure in construction companies in their goal to develop a turn-around model for construction companies. Based on their extensive study of the literature, they compiled an exhaustive list of factors that contributed to the failure of construction companies which is set out, in order of importance, in Table 1 below.

Jagafa and Wood go on to say that managers of construction companies in distress should narrow their focus on the likely determinants of their problems in their quest to rescue them. One must note the statutory pre-condition to business rescue being that there must be a reasonable prospect to rescue the company. The problems that a company is facing and the extent thereof will speak directly to the reasonable prospect of its rescue.

Table 1: Determinants of business failure in the construction industry (Jagafa and Wood, 2012)

DETERMINANTS	
ORGANISATIONAL FACTORS	ENVIRONMENTAL FACTORS
Human, Organisational And Financial Capital	Macroeconomic, social and natural factors
1. Management incompetence/experience	1. Industry weakness
2. Insufficient capital/Scarcity of financial resources	i. Poor growth prospects
3. Lack of business knowledge	ii. Shrinkage in construction demand
4. Fraud	2. Disasters
5. Lack of organisational knowledge	3. High interest rate
6. Poor relations with clients/government	4. Economic fluctuations
7. Poor technical and technological capacity	5. Sudden death of the company leader
8. Poor investment decisions	6. Change in politics
9. Overexpansion/not expanding	7. Race
10. Wrong level of diversification	8. Social class
11. Family problems	
12. Poor project cost estimation	
13. Poor financial management	
14. Lack of line experience	
15. Lack of commitment	
16. Poor working habit	
17. Unexpected change within the workforce	
18. Poor value chain analysis at the corporate level	
19. Poor strategic planning	
20. Poor human resource management	
21. Poor leadership	
22. Poor communication	
23. Poor planning and scheduling	
24. Poor monitoring and control	
25. Poor organisation of resources	
26. Poor quality management and control	
27. Poor selection and management of supply chain	
28. Poor project risk management	
29. Poor change order and claim management	
30. Poor environmental scanning	
31. Saving non-value adding activities	
32. Unsuccessful restructuring/reorganisation	

2.4.7 *Research Proposition 2*

Based on the literature review the determinants for a successful statutory business rescue process with specific reference to the construction industry in South Africa are as follows:

- Overcoming legislative challenges
- Post Commencement Finance
- Early filing

- The ability to deal with (hostile) affected persons
- Team effort / injecting skills
- Effective crisis leadership
- The ability to overcome original causes of failure

2.5 Conclusion of Literature Review

The statutory business rescue process can seek to bring the company back to solvency and continue in existence or it can seek to achieve a better return than liquidation for affected persons, however, as van den Steen (2017) concludes, the success of business rescue should be gaged by the number of PIS points saved in the process.

The determinants of a successful business rescue process in the construction industry are undefined in the literature, however, certain key aspects emanating from the literature relate to the causes of business failure for the company at hand, availability of post commencement finance, early filing, the skillset of the business rescue team, leadership skills and constructive participation by affected persons.

2.5.1 *Research Proposition 1*

Based on the literature review, the Act may provide a straightforward plain reading twofold alternative definition of rescue, however, a successful business rescue should be rather be gaged by the number of Public Interest Score Points saved in the process, therefore saving the business as a going concern (van den Steen, 2017).

2.5.2 *Research Proposition 2*

Following the first research proposition, the literature review identified the determinants for a successful statutory business rescue process with specific reference to the construction industry in South Africa as follows:

- Overcoming legislative challenges
- Post Commencement Finance
- Early filing
- The ability to deal with (hostile) affected persons
- Team effort / injecting skills
- Effective crisis leadership
- The ability to overcome original causes of failure

CHAPTER 3. RESEARCH METHODOLOGY

This section describes the methodology that was followed in order to address and consider the research propositions identified in the previous section.

The methodology follows a qualitative and exploratory approach due to the limited research conducted on this topic locally, as well as abroad.

3.1 Research methodology /paradigm

Qualitative research approaches concentrate on “real world” phenomena and they focus on studying the complexity of those phenomena (Leedy & Ormond, 2014). The business rescue process is very much a “real world” problem/solution that has a far reaching impact on all affected persons.

It was very important to get a deep understanding of what it takes to be successful in the process with specific reference to the construction industry in South Africa with its unique challenges. In light of this need for a deep understanding of the complexity of the business rescue process, Leedy & Ormond (2014) advise that we need to collect numerous forms of data and analyse these from numerous angles “to construct a rich and meaningful picture of a complex, multifaceted situation.”

Further, due to the relative novelty of the business rescue regime in South Africa, an exploratory process of data collection was required.

3.2 Research Design

Semi-structured Interviews were conducted due to the lack of academic research done on the determinants of a successful statutory business rescue process in the construction industry in South Africa.

Rowley (2012, p261) states that, “interviews are generally used in conducting qualitative research, in which the researcher is interested in collecting “facts”, or gaining insights into or understanding of opinions, attitudes, experiences, processes, behaviours, or predictions.”

3.3 Population and sample

3.3.1 *Background*

According to the CIPC (2016):

- The total population of licensed business rescue practitioners is 218.
- The total number of companies that have commenced business rescue proceedings is 2148.
- In the period 2015-2016, 66 construction companies commenced business rescue proceedings which represents 13% of all companies that have commenced business rescue proceedings. This is the second highest industry after manufacturing which accounts for 19% of the filings.

3.3.2 *Population*

Therefore, the research population included all business rescue practitioners who have experience in the construction industry in South Africa.

3.3.3 *Sampling*

In order to consider the research propositions, persons that are suitably qualified and experienced in the field were required. Initially, it was estimated that a sample of 15-20 business rescue practitioners who have overseen at least one business rescue process in the construction would be required. However, after 11 interviews, it was found that there was data saturation, therefore, no telling additional value would be obtained by conducting any further interviews (Tuckett, 2004). The sample was a convenient, accessible and snowball sample, therefore, it was possible to conduct lengthy, detailed and rich interviews which was the primary goal of the research rather than interviewing a large number of respondents (Carey, 1995).

Table 2: Profile of respondents

Data source	Organisation	Position	Professional Background
Interviewee A	Undisclosed	Senior BRP	Lawyer & Liquidator
Interviewee B	Undisclosed	Senior BRP	Lawyer & Liquidator
Interviewee C	Undisclosed	Experienced BRP	Accountant & Liquidator
Interviewee D	Undisclosed	Senior BRP	Accountant
Interviewee E	Undisclosed	Junior BRP	Accountant
Interviewee F	Undisclosed	Experienced BRP	Accountant
Interviewee G	Undisclosed	Senior BRP	Accountant & Liquidator
Interviewee H	Undisclosed	Experienced BRP	Lawyer & Liquidator
Interviewee I	Undisclosed	Senior BRP	Lawyer
Interviewee J	Undisclosed	Experienced BRP	Lawyer

Interviewee K	Undisclosed	Senior BRP	Accountant

3.4 The research instrument

Semi-structured interviews were conducted with business rescue practitioners. Please see Appendix 1 for an interview guideline used when interviewing the business rescue practitioners.

3.5 Procedure for data collection

Interviews were conducted face to face. Only if this was not possible were interviews conducted via Skype or telephone. With the prior approval of the interview subjects, the interviews were recorded and transcribed. Data was collected from the respondents on condition that they would remain anonymous. This was done in order to ensure that the respondents were comfortable to give truthful and complete answers to questions posed to them.

3.6 Data analysis and interpretation

Due to the novelty of the research, an iterative approach to the data analysis was followed. It was foreseen that there would be “a repetitive interplay between the collection and analysis of data” (Bryman, A., 2012, p566).

Creswell, J (2007) offers what he terms “a data analysis spiral” as an approach to analysing qualitative data. His approach can be summarised in the following steps (Leedy and Ormond, 2014):

- Organise the data by filing, creating a database and breaking the text down into smaller units.

- Peruse the data to get a holistic sense of it taking note of preliminary observations and interpretations.
- Classify the data by making groups of themes and categories which will lead to identification of meanings and patterns.
- Synthesise or summarise the data by offering propositions after studying the relationships between the identified categories. Finally, present these in figures, diagrams, tables or hierarchies.

3.7 Limitations of the study

People's memory of past events may not be as accurate as one would like and this must be noted (Leedy & Ormond, 2014).

The sample is a limited number of business rescue practitioners of companies that have been through a statutory business rescue process.

The results to this research may not be generalizable to all business rescues and the reader must take cognisance of this fact.

Due to the complexity of a business rescue process and the immeasurable permutations of each case, the reader is cautioned that the findings of this research will not always be applicable and that exceptions may occur.

3.8 Data quality, reliability and transferability

Golafshani (2003, p. 604) states that "reliability and validity are conceptualized as trustworthiness, rigor and quality in qualitative paradigm."

There has been some debate regarding the relevance of concepts such as reliability and validity in qualitative research when compared to quantitative research as the latter is more preoccupied with measurement (Bryman, 2012). When applying these concepts to qualitative research Bryman (2012) is of the opinion that the concepts should be applied in the same manner, however, with less focus on the importance of measurement concerns.

Denzin (1970) explains that internal validity is achieved when the research findings correspond with reality and are not the effects of other variables. In the study at hand, the findings were aligned to the findings in Chapter 2, however, a greater understanding was gathered through the deep rich data, even though some opinions differed amongst the groups of respondents with similar professional backgrounds.

External validity, which refers to the applicability of the findings across groups (Denzin 1970), was achieved by interviewing a number of experts on the same topics and questions, which resulted in the patterns observed and discussed in Chapters 4 and 5 below.

The Interview Guide attached hereto as Appendix 1, was of great assistance in ensuring reliability. This helped ensure that the data collection and interview process could be replicated from one respondent to the next (Bryman, 2012).

Business rescue practitioners are officers of the Court in terms of Section 140 (3) (a), therefore, it is expected of them to be truthful. The majority are senior business rescue practitioners who are well respected, skilled and experienced.

Further, the business rescue practitioners that were interviewed are well known in the industry and it is expected that this will help ensure that the answers given are complete, truthful and accurate.

CHAPTER 4. PRESENTATION OF RESULTS

4.1 Introduction

Semi-structured interviews were conducted with business rescue practitioners. Categories and themes were then identified which are discussed hereunder.

Categories and themes pertaining to research proposition 1 are presented first and thereafter categories and themes pertaining to research proposition 2.

A summary of the results is presented in tables at the end of this chapter.

4.2 Research Proposition 1

It is necessary to determine exactly what constitutes success in a statutory business rescue process. While the Act may provide a straightforward plain reading twofold alternative definition of rescue in Section 128 of the Act, however, a successful business rescue should rather be gaged by the number of PIS points saved in the process, therefore saving as much of the business as a going concern as possible (van den Steen, 2017).

4.2.1 *General Perceptions on the business rescue regime*

<u>General thoughts the business rescue regime</u>

All participants, barring interviewee I, spoke very highly of the business rescue regime in South Africa. It is widely accepted as a great piece of legislation despite some of its short comings. Interviewee A and D stated that the regime is long overdue in our law with South Africa finally being brought up to speed with international standards and laws. Interviewee G welcomed its introduction to provide relief for distressed companies. Interviewee A went on to note that the regime does incredibly well to replace judicial management which was, “in the main, a failure." The only participant to express sincere disappointment with the regime in general was Interviewee I.

Interviewee B and C concurred with each other in that they both labelled the regime as useful and beneficial. They are of the opinion that it is a beneficial tool as a remedy for companies facing insolvency and a great alternative to liquidation as long as it is done correctly and there are sufficient resources. Interviewee D stated that "it is a fantastic tool for struggling companies". Interviewee H stated that, "It is an effective tool, when used properly, to restructure the debt and business activities of financially distressed entities."

Interviewee F made note of a very important factor in that business rescue is extremely necessary in the market due to the already high unemployment rate status quo of a culture of liquidation which should not be the only option. He noted that "unemployment is the highest it's been in last 12-14 years."

Best aspects

According to all of the participants (A to K), the best part of the business rescue regime was most definitely the ability to avoid liquidation closely followed or coupled with the statutory moratorium. The major driving factor behind all of the participants was saving jobs. Participant H summed it up well as follows, "The Legislative frame work, when properly utilised, is the perfect tool to restructure debt, save jobs and ensure the continued existence of entities that would otherwise have been liquidated." Participant G also noted that business rescue is great for creditors as it offers the potential for them to receive a greater return than liquidation.

Participant A stressed that as long as business rescue plans are implemented properly, the breathing space provided by the moratorium is the most valuable part of the process. He went on to state that if the company is kept in the process for too long then this is equally as bad. If implemented – "get in quick and get out quicker". His main goal is to avoid liquidation thereby saving the jobs which would otherwise be lost in a liquidation.

Participant B enjoyed the flexibility of the process and noted that the process is a novel remedy for insolvency without liquidation. Again, the breathing space provided through the moratorium was seen as fundamental.

Participant C added that, “creditors don’t realise that during the process you are able to give the creditors a return by trading with them they can do more business and make more profits from future trading than if the company were to be liquidated.”

Participant D mentioned that the fact that SARS is treated as a concurrent creditor and not preferent is a plus. He noted further that the internal file at SARS moves from the collections department to a specialised business rescue department which makes dealing with them much easier. He also praised the aspect of jobs preservation.

Participant D, E and F lauded the ability of the process to save good business models that would otherwise have been destroyed. The business rescue process keeps the business model intact and a liquidation more often than not destroys it or breaks it up.

Participant E was pleased in that it is the only available process where you can use innovation to find a better solution than liquidation with the protection of the process and the assistance of a skilled BRP. He states that the process allows for creativity by bringing in a new team, new thinking and new problem solving. This has a ripple effect of all the dependants that are employed. If used correctly it can change the whole attitude of all employees and get them to reunite behind a common goal. Participant G also praised the idea of an independent BRP with the appropriate skill set coming in to turn the business around.

Participant F was of the opinion that if one business rescue is a success out of 1000 then business rescue as a whole in our law is a success.

Worst aspects

All participants (A to K) mentioned that some of the legislative provisions, or lack thereof, hampers the process. All participants indicated that the most glaring oversight has been the lack of clarity regarding the ranking of post commencement finance, therefore it has been difficult to obtain. Participants D and J complained about the vagueness of legislative provisions regarding the forced purchase of a dissenting creditor's claim.

The majority of the interviewees made mention of unscrupulous business rescue practitioners and companies that have exploited the regime which has given rise to a bad reputation in some circles, however, on the whole it has been a resounding success.

Again, every single participant expressed great frustration for the lack of support from large institutions. Participants A and I went so far as to say that the financial institutions are not in favour of business rescue. Participant I was particularly scathing in that in his experience the financial institutions and SARS have been deliberately obstructive in wanting the process to fail.

Participant A stated that secured creditors are more than often sceptical about the process and that there is more and more doubt across trade creditors. Participants A and E mentioned that proper regulation is lacking from CIPC. Participant A commented on media reporting and stated that in general most press has been good despite the general bad reputation in the public domain. Participant B noted that the process is not uncomplicated and creditors are still unfamiliar. Participant H stated that very few affected persons understand the nuances of business rescue and this can lead to unintended issues in the process. He went on to say that directors and shareholders very often become obstructive to the process when the process does not suit their own agendas and it can be difficult for the BRP to balance the interests of all affected persons.

Participants A, B, D, F and J noted that the process is very expensive. Participant A noted the many reports of excessive charging. C and D made special mention in respect of SMEs in that the costs of business rescue can be too much if the business is too small so the process only benefits larger companies.

Participant A mentioned that proper taxation of business rescue fees and expenses is needed as there is a bad reputation in the market and a lack of confidence in the process due to a lack of trust in BRPs. Participant C mentioned abuse of the process by practitioners and directors. He has come to realise through subsequent liquidations that practitioners strip the assets and then in liquidation creditors are left with nothing. Participant E also mentioned abuse of the process by companies and BRPs. Participant E stated that many people have been getting away with dubious conduct and the system allows for fly-by-nights to come into a company a wreak havoc. In his opinion professional bodies have no teeth to keep these rouge BRPs in check, therefore the stigma is still bad. He states that affected persons either think it is a magic wand to cure all ills or it is a crooked scheme that only means bad news. Participant E stated that although the process holds great it is misunderstood and underutilised. He states that the market and the business sector in general do not grasp the potential that chapter 6 creates as it is seen as a last resort before death. He mentions that there are many missed opportunities to reposition companies, if only they had filed in time, therefore one must take advantage of the window of opportunity. Participant F also complained about the lack of regulation and control of BRPs which makes the process rife for abuse.

Participants C and I both complained that the process is still far too creditor driven.

Participant D complained of two aspects where the legislation is lacking. He would like to see a special court or process for Section 131 applications to court by affected persons to place companies into business rescue. In this regard he explains that it is very easy for the company itself to place a company into business rescue but it is not so easy for a creditor or employee to approach the court to do so.

Participants F and K both made mention that the business rescue regime has too much of an insolvency law flavour. Participant F was of the opinion that not enough consideration was made for the practical aspect of the process especially with regards to the adjudication and acceptance of creditors' claims. He is of the opinion that the Legislature took business rescue as an idea and tried to squeeze it in alongside existing insolvency laws. When it comes to the liquidation of claims he believes the rules and processes are too similar to the Insolvency Act and that the process is supposed to contrast liquidation but it is very similar. Participant F concurred in that the adjudication of claims is a problem and the process suits the winding up of companies in business rescue.

Participants F, G, I, J and K complained about the short time frames at the commencement of BR.

Participant G noted that many case law interpretations of the Act differ to the plain reading of the Act. Participant F also complained that certain case law interpretations have changes the whole strategy around the business rescue process. He gives the binding offer provisions as an example. In this regard participant K noted that leaseholders are now able to terminate contracts which goes against the plain reading of the Act. Participants F and J reasoned that a lot of the case law that has gone against BRPs because they have acted improperly.

4.2.2 *What constitutes success?*

Solvency or better return

Participant A stated that a business rescue, “where you are able to return the company to solvency is the best to be involved in because you get to save jobs.” He noted that the so called wind-down where you offer a better return to creditors than what they would receive in a liquidation is something that sometimes one cannot avoid and it may still not be great news but it is better than liquidation for the creditors. He stated that the majority of his business rescues have been wind-downs.

Participant B was of the opinion that a successful business rescue could be either. He stated that an adopted and implemented business rescue plan is a successful business rescue. His first prize is a return to solvency but it is just as successful if there is a better return. He stressed that it is the creditors who ultimately decide if the process is a success.

Participant C stated that a return to solvency is a successful business rescue, "but the way the process works it may lead to a better return." He also stated that it is the creditors who decide if it is a success or not. He states that a successful process can be either but he starts with trying to return the company to solvency and rescue it in the normal course. He notes that one must not consider the process a failure if one can only provide a better return than liquidation and not save the business.

Participant G advises that during the assessment phase one genuinely tries to see if there is a prospect of totally saving the business and returning it to solvency. He mentions that a lot of companies file for rescue very late so there is very little one can do and perhaps one is only able to offer a better return than a liquidation. Participant H concurred and stated that a BRP's first duty is to attempt to restore the business to solvency whether that is by way of compromise, a scheme of arrangement or payment in full to creditors. He adds that a proper restructuring must at the very least be better than liquation.

Participant E explains that it is dependent upon the situation and the definition of rescue makes provision for both. If there is a possibility for the company to return to solvency then this is what he strives for. If however, all one can do is provide for a better return than liquidation then he considers this as a success. He stressed, however, that only if it is not possible to return the company to solvency, will he consider a plan that only provides a better return than liquidation.

Participant I stressed that the whole point of business rescue is that the business has to continue. He states that one has to retain the business as opposed to winding it down. In his experience it is better to compromise creditors upfront and then build up the company to solvency as it is easier to implement a plan this way and it is better for the workforce because you have more certainty going forward.

Participants D, F, J and K were completely against the so called wind-downs in business rescue. Participant J stressed that one must save the business model and wind-downs or so called liquidations through the business rescue process must not happen as it opens the process to abuse and the Insolvency Act can better manage that process.

Participants F and K were all about saving jobs and providing creditors more than liquidation. Both F and K do not do wind-downs as they disagree with them entirely because it opens up the process for abuse. Participant F gave the example where liquidators prefer to wind-down a company under business rescue instead of liquidation as then they do not need to work with a joint liquidator. He went on to complain that these types of rescues skew the business rescue statistics. He notes further that some BRPs go into a business rescue with the primary objective to wind the company down and try and base their fees on a percentage of assets sold without even trying to save the business.

Participant D notes that one cannot simply look at the return to creditors. His first prize is always to make the company continue in existence on a solvent basis. He does recognise a place in the regime for so called wind-down business rescues and that in certain circumstances there might be value in that, however, he does not involve himself in such matters, therefore he only considers the extent of success by looking at the number of jobs saved, or even better, jobs created, increases in profitability and decreases in efficiencies.

<u>Just above liquidation or normal course</u>

Participants were asked when developing their business rescue plans and proposals to creditors, whether they begin with offering just above liquidation or begin with payment in the normal course and work their way up or down respectively.

Participant A endeavours to offer as much as possible to creditors. He advised that engagement with creditors through the process of developing a plan is key. He notes that proposals are also dependant on the terms of the PCF investor and raising PCF is a difficult process. He states that financial institutions are sceptical, do not provide PCF and cut off the company's credit facilities. He again reiterated that his first prize is to save the company and proposals are only presented after clear communication of all aspects.

Participant B starts his process of developing proposals by addressing the solvency issue and resumption of ordinary trading activity. He always tries to pay creditors in full if possible and states, “I consider the affected party as important as I consider the debtor company”.

Participant C also begins by trying to pay them in full. He states that it is a process of sending proposals back and forth and that creditors ultimately decide. He notes that the BRP must act independently and look after the interests of all affected persons as well as the company, therefore there needs to be a balance in order to avoid abuse.

Participant D also has a top down approach to proposal generation. He attributes this to the need to retain confidence from suppliers and credence in the industry. Interestingly, he noted that one must not be seen as a corporate raider even though it might be legal and some people might get away with considerable compromises. He warns that a short term solution might come back to haunt the BRP as his reputation will be at stake.

Participant E also starts with offering as high as possible subject to an affordability test and he makes his way down from there. He notes, however, that one must allow the company enough breathing space to give the company a fighting chance. “The idea is not to compromise first, the idea is to do what is necessary to save the company while remaining independent and balancing the rights of all affected persons against those of the company.” In summary he states that the BRP’s goal is not to help the company get rid of its liabilities, but rather his goal is to restore the company to solvency and in some instances it may be necessary to compromise creditors.

Participant F also begins with trying to offer 100% and works his way down from there. He notes however that if the company is going to be recapitalised by a PCF investor then in all probability the offer to creditors would be just above liquidation value but this offer is that of the PCF investor and not his. He has experienced some difficulties with shareholders and complains that they become obstructive. He states therefore that it is very important to engage with both shareholders and creditors and convince both.

Participant G starts with trying to develop a plan that will return the business to solvency. He states that one has to assess the sustainability of such a plan. His quest of trying to offer creditors as much as possible is driven by the ability of the business to perform at a level that will meet its overheads and if short term capital is required then it is also dependant on its ability to raise such PCF.

Participant H tries to offer payment in the ordinary course and works his way downwards according to what the company can afford.

Participant I notes that the offer in the first instance must be better than liquidation. His opinion was different in that he works his way up from a situation better than liquidation to payment in the normal course. He also noted that one must take cognisance of debtor creditor relationships to trade going forward and realise value.

Participant J again stated that it depends on if there is a PCF investor because ultimately it is their proposal that creditors vote on. He states that if there is no investor then he tries to offer as much as possible, however, in the circumstances the company must be able to afford it.

Participant K always tries to pay creditors in full. He stressed engagement with creditors is key because one must always bear in mind that one needs to do business with these creditors going forward. He tries to offer them a repayment proposal that is linked to or conditional upon future trading with the company.

<u>Trade out or compromise upfront</u>

Participants were asked whether it is best to trade out of distress and pay off debt over a period or offer creditors a compromise upfront and move forward free of historical debt.

Participant A was of the opinion that if there is money and you are able to pay upfront this is better. He states that this is easier as he has had very bad experiences with trading out. One reason he gives is that management loses interest and expects too much from the BRP which could lead to broken promises and mistrust. Again it is mentioned that creditors ultimately have the choice.

Participant B states that due to the uncertainty of the future trade and the belief by creditors that your first loss is your best loss, he believes creditors prefer upfront payments. With such a high level of uncertainty he sometimes gives creditors a choice and it obviously depends on the circumstances.

Participant C starts by trying to pay them in full, perhaps over a period. He sends proposals back and forth and creditors decide. He warns that the BRP must act independently and look after the interests of all affected persons and the company. Again it is mentioned that there needs to be a balancing of interests in order to avoid abuse.

Participant D states that each and every circumstance of business rescue requires a different strategy by the BRP. It depends on the underlying business model and/or the support or hostility of creditors as well as the type of PCF available. In most of the plans that he develops, debt is paid off over a period. This places less risk on the PCF investor and requires less upfront money from the investor.

Participant E usually requires a combination. His first stance is to pay everyone in full in the normal course. He notes however that in the construction industry on some materials the supplier has a lot of bargaining power and if that supplier is key to the company's operations, one would want him to be locked in over a longer period. He mentions that it has everything to do with the PCF, the relationship with creditors and the availability of suppliers in that if you have alternatives there will be less pressure and leverage from the creditors.

Participant F was of the opinion that it depends on working capital requirements. He explains that if debt is converted into long term debt then there are immediate working capital constraints. He states that it is really up to the creditors. He notes that one could convert debt to equity but creditors seldom choose this over cash. He states further that one must first consider the company's ability to repay and then see what is palatable to creditors in the situation. Similar to participant K, as a repayment proposal of historic debt, he likes to offer creditors a percentage of every new order placed with them going forward in order to keep them trading with the company. He too noted that any repayment proposal depends on the PCF investor.

Participant G's opinion is that creditors should accept a compromise upfront. He believes that this is one of the shortcomings of our system in that the mind-set of our creditors is that they want to be paid in full. He states that it is probably better for creditors to take a realistic cut upfront so if the business has potential it can gear itself to continue trading. He notes however that if an amount is paid upfront then it is a bigger compromise to creditors.

Participant H advises that the mechanism for the restructuring the debt of a business will depend on each business and its ability to trade solvently whilst under business rescue. He goes on to state that it is often easier to compromise pre-commencement debt and if there is merit in a trade out situation, then a compromise may only be necessary later in the business rescue or not at all.

In participant I's experience it is better to compromise upfront and then build up the company to solvency as it is easier to implement a plan this way. He states that this is also better for the workforce because you have more certainty going forward.

Participant J stated that it is all dependant on the PCF investor or lack thereof. He also mentioned that the hostility of creditors plays a role and the company's reliance on them also plays a major role. He is of the opinion that it is always good to clean up debt and move forward with a clean slate but this is not always possible and many trade out plans have worked well and over a period everybody gets a lot more.

Participant K prefers to restructure the balance sheet immediately and extinguish debt, offering an immediate compromise, however, each case is different. Again, he mentioned that he likes to encourage creditors to continue trading with the company. He will offer a percentage of each transaction towards settling historical debt and a higher percentage if the creditor offers credit facilities.

4.3 Research Proposition 2

Data was gathered from the participants in order to identify the determinants for a successful statutory business rescue process with specific reference to the construction industry in South Africa.

4.3.1 *Support from Stakeholders*

Support from SARS, financial institutions and other creditors

Participant A complained that SARS is very hostile. He noted that in his experience SARS is becoming increasingly irritated with business rescue and business rescue practitioners. He is involved in the liquidation of companies that were in business rescue and SARS insists on Section 417 Enquiries against the BRPs. He attributes this to the fact that BRPs completely forget about SARS. “VAT, PAYE – SARS is in a worse position after business rescue.” He finds that attorneys may lack the financial skill which results in SARS being worse off. Some BRPs just avoid paying SARS to try and make the business rescue work but they end up going deeper and deeper into a hole.”

Participant B states that support from SARS “varies from full participation and support to the opposite extreme of no support. Without a doubt, SARS is always a creditor.”

Participant C was of the opinion that SARS is, “nothing but a hindrance. They don’t even try and understand. Maybe because it is because their rights are somewhat prejudiced in business rescue compared to liquidation. They vote against plans by default it seems.”

Participant D stated that, “sometimes SARS has been great and understanding. The business rescue department at SARS is approachable and are much better than their collections departments. We have been able to successfully negotiate compromises with them. However, there have been an equal amount irrational decisions by SARS that have derailed the entire business rescue process. One would expect government to give effect to saving companies but this has not always been the case.”

Participant E was of the opinion that SARS and the banks usually take a very hard stance on business rescue. “It makes it difficult because they are involved in almost all rescues. They have been burned by the chancers in the industry because they are almost always creditors in every business rescue. If you can substantiate a plan and the benefit in supporting the process they are willing to cooperate and assist you. They are very reluctant to increase their risk.” He noted therefore that communication and engagement are key and, “the mistrust in the industry make this even more important.”

Participant F stated that his experience of SARS has been “shocking!!!” he stated further, “from a SARS perspective the VAT claw back is a problem. There is no deferral or engagement on that. They hold you ransom to tax clearance certificate which could stop the reasonable prospect of rescue. The assistance from SARS has been zero and banks have been even worse. Banks shut down accounts. They don’t recognise the powers of the BRP like they do for a liquidator. For example, a liquidator can take a provisional order and transfer money but the bank does jump with the BRP documents. It is very frustrating that the banks have such authority.”

Participant F was of the opinion that supplier relationships are key. In this regard he states, “in the past if one of the contributing factors has been slow decision making, making quick decisions can save the company. Supplier relationships and quick decision making. Inability of the board to make decisions in cost cutting. In one manufacturing matter we came in and shut down the Joburg plant which they weren’t able to do for 2 years.”

Participant G stated that SARS has been co-operative where the company has the potential to contribute to the fiscus going forward. “SARS has been cooperative as long as you pay your taxes that fall due in the rescue process. Banks will first protect their securities and will only assist if they are secured.”

SARS have both supported and not supported the business rescues of Participant H and he states that, “it depends very much on the SARS official’s knowledge of the process. On average however SARS, being a concurrent creditor in business rescue, do not support business rescues enough. The various Banks, when they have security, do often support the business rescue process."

When Participant I was questioned on the support he receives from SARS and the financial institutions, he replied with, "Zero. Negative. Destructive."

Participant J also spoke of different experiences from downright obstructive to very cooperative. He advised that one must engage with these creditors before publication of a business rescue plan.

Participant K also gave examples of some terrible and some good experiences and said that it depends on who you work with and if the institutions trust you. He also complained that SARS's default position seems to be to vote no.

Employees and Unions

Participant A noticed that in general initially there is a fear of losing their jobs. "Therefore, after the initial shock they are obviously happy that there is hope to save jobs." He has had some experiences of circumstances where there are militant employees with unreasonable expectations then it is very different. He states that overall employees buy in and try their best. "There are uncertainties therefore it is very important to communicate and calm them down." He states that many employees misunderstand the process and assume that it leads to liquidation therefore communication and leadership are fundamental. He has had good experiences with unions "They are getting more and more proactive." He gives one example where he liquidated a company that was in business rescue and the union brought a fresh application on behalf of the employees to commence another business rescue process.

Participant B stated, in respect of employees, that "immediately there is uncertainty. There is always a preference to favour a process which is an alternative to liquidation. The reactions of employees are overwhelming when it is successful." He has employees thanking him who have expressed firm belief in the process and a great gratitude. He advised that one has to manage the initial uncertainty through communication and engagement. “There must be constant engagement throughout the process. Education of union officials and shop stewards. A lack of an understanding of the complex process is prevalent. In regards to unions – in one matter they were fully supportive and in another matter the employees and conduct of the union lead to a shut down and made the business rescue process worse. They had unreasonable demands which makes the business rescue process much more contrite.”

Participant C mentioned that “initially there is a lot of uncertainty. But they are looking for any hope. Employees have usually lost confidence in management. Someone new in charge gives them hope and confidence. You have got to communicate and keep them motivated and in the loop. Don’t make promises that you can’t keep on things that you are not in control of. No false hopes. Be upfront. Unions don’t want to understand and they have their own agenda. Many times they are aggressive and militant. They want what they want and have unreasonable demands. If you don’t give an increase then they strike. They need more education on the process but it is very difficult in our climate. The mind-set and background is uncompromising.” Participant C advised that one has to get all affected parties to agree that this is the best course of action. He stated that everyone has to play their part and that it is more important to have internal buy-in to the process than external. “Communication and engagement with employees and stakeholders is important. You need the buy in and assistance – you will only get this through engagement, communication and convincing that it is the best way forward to save the business and their jobs.”

Participant D noted that the workforce is very uniformed in the beginning and the “reaction is skill level dependent. Skilled people have to be manged so they don’t leave. Unskilled don’t have much options so there is a different reaction. Where there are unions there can be unreasonable demands. It is important to communicate the gravity of the situation so that they in turn can mobilise there members to work productively”. He noted that the unions and labour are fundamental, and the importance of stabilising the often militant labour and unions. He has experienced irrational labour demands and advised that one needs to be prepared for this and effectively deal with it. Again he noted that communication and engagement is fundamental.

Participant E noted that employees are often sceptical, “which is a normal reaction to uncertainty but I find that those who are either informed or get informed in the process will participate. Many of the employees don’t have the luxury of walking out and finding new jobs so it is important to keep their fears at bay. This is done by constant communication and participative leadership. Even if they don’t participate in management they can participate in operations. Unions play a big role if the situation is already hostile. The unions need to understand the gravity of the situation.”

Participant F stated that “employees are all for it. I haven’t had an employee group that has gone against a business rescue plan. Proper change management is the biggest thing!! Their feelings are positive towards business rescue but their feelings towards change management can be bad and need to be managed.”

Participant G noted that in his experience the employees have been very co-operative. He stated that “initially there is uncertainty however once they have had sufficient information about the prospects they are fairly cooperative.”

Participant H said, “We take an active role with employees and unions and on average the reaction is positive.” Participant I concurred in that he stated, “in general it has been good. You must retain your workforce.”

Participant J also noted the initial reactions of fear and misunderstanding and stressed therefore that clear communication is key. He advised that there should be “continuous communication” and that the BRP must be visible and approachable.

Participant K said that, “the reaction of employees has been great. One has to however make sure that employees understand the process and you have to manage expectations. Employees must be managed and lead through the changes that the BRP implements therefore communication is important.”

Management

Participant A stated that "all stakeholders must buy in especially management who is the most important. You must instil trust in the process. And trust in the BRP!" He warned that knowledge is key therefore one cannot just take management's advice at face value. You have to make certain.

Participant B stressed the importance of the competence of the management of the company and its efficiency. He noted that this can be bolstered by the competence of the BRP and his team that he brings in. One needs support of the process by affected persons.

Participant C said that it is crucial to fulfil the contracts on the books and in this regard the skill sets of management are paramount. "Are we able to satisfy our orders and jobs. Management is where the problems lie. Must bring in skills on a management level and financial level to manage funds. Perhaps on a planning level but mostly financial level."

Participant H has enjoyed success where there are "transparent directors, accurate financial information and record keeping, and proficient legal advisors to the Company and BRP."

4.3.2 *Business rescue interventions*

PCF

All participants stressed that the availability of PCF is vital to the success of the business rescue process.

Participant F stated that success in a construction company comes down to the availability of capital. "If managed poorly then you need new capital." In most instances a PCF investor or a buyer of the business is required as construction companies are "asset heavy", therefore, one must quickly asses the company and attract a buyer.

Participant H noted that in the construction companies he has been involved in, it was necessary to have proper PCF in order to finalise projects and release retention monies. He states that, “this ensure that creditors receive a proper divided and not simply a liquidation related dividend.”

Participant G stated that securing a buyer for the distressed company is very often the only way to save the business. He explains that a sale as a going concern includes the business, assets and employees at the best possible value. He states that, although difficult, PCF is imperative if you cannot sell the company and effective communication and engagement is required in order to raise same.

Participant C said “cash is king” when referring to PCF. He said the one must either have cash available or access to PCF. He went onto state that since credit facilities are normally frozen when you file for business rescue, creditors then are only able to trade with you on a cash basis. Another caveat he states is, “the business must be able to generate cash.”

Participant E stated that access to PCF is the most important determinant. “Without PCF you will not be able to give effect to any business rescue plan. You need money to do anything.”

Participant I stated that, “PCF is obviously the biggest factor. The problem is that it is very difficult to marry that with trying to run the business. I found it very difficult to raise PCF. And it is difficult to repay therefore creating huge risk.”

Financial management

Participant A thought that debtors control was fundamental. He warns that one must not always rely on management for financial information. He states that, “you have to be certain of financial information on how contracts are structured in a construction company.”

Participant B stated that one has to be a “Jack of all trades and a master of all.”

Participant J also stressed the need for accurate information upon which to base your decisions. He stated this is imperative in the process of trying to raise PCF.

Participant K stated that proper financial management was the cornerstone of the process.

Participant D stressed that the BRP must take control of the finances. He enjoys the opportunity to "clean up the business and reboot it in a certain manner in order to start again on a clean slate without losing the whole business." He explains that business rescue gives more certainty and feelings of security to the employees than a liquidation or judicial management. "It is important to manage the uncertainty of employees as without employees there is no business." He went on to state that one has to "understand the cash flow implications of contracts, penalty clauses, timing of working capital and the approval process of the engineering certificate of work. Understanding and using the Gompertz S-Curve based on materials, contingencies and labour as materials are normally bought in the first quarter of the contract and the labour component is constant and the contingencies are erratic – using a statistical model developed by Gompertz it enables the cash flow forecasting and cash flow requirements more accurate. Proper financial acumen is fundamental, if it is lacking then it must be brought into the company."

Participant E too requires accurate information as soon as possible, "from production, operations, financials, HR, all areas of the business. Your decisions are only as good as the information upon which they are based". He states, "first thing is gather information. Second thing is proper planning based on the interpretation of the correct information. Realise what role players have an effect on that planning. Which people do you need to negotiate with and communicate with. You need to do an analysis of what you need to make it work. What resources to you require in the medium to long term." He is also of the opinion that communication and engagement with all affected persons continuously and throughout the process is essential.

4.3.3 *Leadership and communication*

At first when Participant A was new to business rescue he relied heavily on management and took a role in the background dealing only with formal statutory activities. It became more and more clear to him that he needed to take the lead. Even with highly skilled management he learnt that even these people cannot be trusted. He states that the process is akin to an intensive care unit in a hospital and the BRP is the doctor in charge and not there to make friends. He states that one has to be hands on, therefore, multiple appointments are impossible to properly lead.

Participant B warns that there is no clear cut way to lead and one must be reliant on the circumstances. He states that it is very important to have industry specific knowledge therefore the BRP must bring in skills to assist him. He states that one must constantly communicate the statutory deadlines and encourage the appropriate conduct from all affected persons in order to achieve the optimum outcome. In this regard, he warns that it is not always a good idea to be coercive or authoritarian but rather supportive as he has enjoyed the best results with this approach. Sometimes, however, he states that one needs a combination approach. He gave an example where he was too hard on the chief financial officer who would then buckle under pressure. He has therefore learnt to adapt his approach as he reads the situation. He advises that to get the most out of the situation one must inject additional leadership resources. He warns that one must never underestimate the impact of decisions taken as these must be carefully approached, considered and implemented. Again, it was noted that in order to be successful, intensive engagement with creditors and financiers is required coupled with clear communication with all stakeholders.

Participant C prefers to plan his approach after he has gone in to assess the situation. He then plans his approach to each person and each situation while feeding off of management who know their people the best. He explains that the BRP usually has very little expert knowledge of the industry, however, one must implement their own controls which must be adhered to. He explains that different approaches are required depending on the circumstances. For example he states that it may be more beneficial to engage with middle management than top management as you may get more information because they are usually in a position to give more as they are responsible for the day to day running and have more to lose.

Participant D adopts what he calls a “questioning style” of leadership. He asks a lot of questions. In this way he gets people to give up information easier and come up with solutions themselves. Not being an expert in the construction industry this is the best method for him. He is also of the opinion that being supportive helps the process more than being coercive. Sometimes he is required to lay down the law and put pressure on individuals but this approach has proven to cause more damage than good in his experience.

Participant E states that his approach is definitely different from case to case and time to time as different situations call for different actions. He states that his default leadership style could be classified as “participative leadership” for a number of reasons. He states that first of all “you need to boost employee morale. As soon as the feel they have a say then they commit and also find it easier to accept the outcome of the decisions regardless of whether they influence final decision or not. They just need to be heard and feel involved. When it is required, you will be a lot more autocratic if the situation is hostile but from a leadership perspective the idea is to equip and educate employees and management to continue trading successfully once the business rescue is done.”

Participant F explains that his leadership style is to “focus on the corporate finance and asses the managers and let them continue with their competency in that field. We rely on management and focus on the financial side of things. One must work with management.” He calls his leadership style a “supportive leadership” style with “a main focus on the corporate finance side of things.”

Participant G stated that, “one has learnt to be fairly firm through the years of business rescue. You have to be firm in terms of ensuring that costs are kept to a minimum. That people respond with discipline to the task at hand. It is not business as usual. One has to ensure that the statutory compliance has been met to ensure that directors have been properly appointed, shareholders etc. statutory records up to date. Very supportive but you also have to be firm.”

Participant H stated that he “takes an active role throughout the rescue process.” He explained that he adopts a “hands on and supportive” approach.

Participant I explains that one has to “channel the best efforts and ability of management as the BRP does not necessarily know the business.” He goes on to explain that it is fundamental to get the buy-in of management in order to take the business forward in a restructured streamlined manner. “It is the BRP’s job to lead them forward. He states that “the BRP must ensure that there is cooperation with management. He must ensure cooperation between all parties and communication is absolutely key between all stake holders.”

Participant J also noted that leadership in business rescue requires differing styles for different situations and people. He states that, “in limited instances coercive leadership works well. It is not nice but someone has to do it or everybody suffers. Otherwise equip the people and the team and encourage them.”

Participant K stated that, “one must work together with management and bolster the leadership team with outside skills where necessary. It must be a team effort to achieve success!”

4.3.4 *Legislative Challenges*

Participant A was of the opinion that while the legislation is young the vague issues will be best battled out through our courts as legislative changes will take long. He noted the serious problem with excessive charging of business rescue fees and stated that there should be a procedure for the proper taxation thereof much like legal fees. He stated that this is part of the reason why the business rescue industry has such a serious reputational problem. The ranking of PCF was also at the top of his list of vague provisions as well as the ranking of outstanding business rescue fees in a subsequent liquidation. He was of the opinion that while there was plenty of changes needed, the foundation is good and he can make it work despite the legislative shortcomings. He mentioned that more and more affected persons seeking clarity from the courts as it is a very specialised field.

Participant B was of the opinion that legislative intervention in the form of an amendment to the Act is required. He was of the opinion that many decisions of our courts in recent times have set precedents that go against the plain reading of the Act plain. He was of the opinion that more thought needs to go into the purchasing of claims from dissenting creditors as it could be a useful tool to overcome obstructive creditors. He noted that chapter 11 of the USA bankruptcy code only affords creditors voting rights equal to what they would expect to receive in a liquidation and not the full extent of their claim. He also complained that secured creditors should not get voting rights where they are adequately secured. He stated that PCF ranking requires clarity. He explained that there is a vacuum in our law when it companies to the rescue of groups of companies and he has to be creative to make it work. He also complained about having to secure 75% votes to adopt a plan and it take a very significant amount of negotiation to adopt a plan. He explained that in liquidation one can be more autocratic, especially with regards to shareholder interests and other vested interests.

Participant C complained about the confusion regarding the ranking of PCF. He complained about the ranking of business rescue fees and expenses in a subsequent liquidation as this affects his performance due to concerns over unpaid bills if the process fails. A further note was that he believes that more responsibility should be placed on the directors as he finds that the blame is shifted onto the BRP and it becomes his problem.

Participant D also noted the need to be able to buy the claims of obstructive creditors who try and derail the process. He was of the opinion that we are in need of a specialised tribunal to make it easier for employees and creditors to place companies into business rescue. In this regard it must be encouraged because they pick up signs of distress earlier than anybody else. He too noted that there is a need for clarity on PCF ranking and their corresponding voting interests. He also requires more certainty regarding the definition of solvency in terms of Section 4 of the Act with reference to business rescues at the adoption of the plan. Just for that moment liabilities must be valued at the amount they would receive in a liquidation as 99.9% of all business rescue plans the he sees fail the solvency test upon their adoption but will become solvent after full implementation. He reasons that institutionalised funders would then be able to advance PCF and will not be limited by banking laws regarding reckless lending.

Participant E has managed to do well with the current legislation, however, he too would like clarity on the ranking of PCF. Again, it was mentioned that the Act requires a clear mechanism to deal with obstructive creditors when trying to adopt a plan. He also noted the need “more teeth” like a liquidator when it comes to problem contracts etc.

Participant F complained about the ranking of PCF and their corresponding voting rights to adopt a business rescue plan. He was particularly concerned with the whole procedure on claims. He stated that the timing of summary of voting rights places a delay on the process and therefore the 25 days within which to publish a plan should be longer. He complained about the fact that it becomes the BRP’s problem to liquidate a company when the directors mislead him when there was never a chance of saving the company, therefore the BRP should be able to resign. He stated that the forced purchasing of claims could stop creditors and shareholders form being obstructive when there is a fair and just plan. He stated that verification of claims needs more clarity and a deadlock mechanism.

Participant G companied that the Act lacks clarity on the moratorium, PCF ranking, the binding offer provisions and he also complained about the short time frames.

Participant H does not believe that there is a need to have portions of the act repealed, there are however various inconsistences in Chapter 6 that allow for differing interpretations of wording used and this often results in litigation over procedural issues.

Participant I stated that while the whole concept of business rescue is great, he believes the Act requires a total overhaul as it has created huge risk for the BRP. He also complained about the short time frames and lacking powers of the BRP. He hopes for actual power of the BRP to restructure and run the business without exposing himself to an enormous amount of criticism and it must be looked at from a practical point of view. He too states that the ranking of PCF must clear as there is already so much pressure on the rescuing of the business. He also notes the uncertainty as to what extent one can provide security for the PCF investor. He too complained about large creditors derailing the process and hopes for legislation to curtail their rights when obstructive. He too complains about the voting interests and how they are allocated and states that this principle was taken directly from insolvency law and applied to business rescue.

Participant J only complained about the ranking of PCF and the need to be able to purchase the claim of an obstructive dissenting creditor.

Participant K noted that time frames are too short, PCF ranking is a problem and the BRP needs more powers to deal with obstructive creditors.

4.3.5 *Impact of original causes of failure on the chances of success of the business rescue process*

Participant A stated in no uncertain terms that if the cause of failure was government not paying or paying late, then, in his experience of construction companies, the business rescue will fail and the company will end up in liquidation.

Participant B was of the opinion that insufficient capital and management skills were the most fundamental aspects that required attention in this regard. He noted that the impact of the original causes of failure depends on the circumstances, nature and extent thereof in each case as the original causes of failure can have a massive impact on the prospects of rescuing the company. He concludes that if there are too many problems present then you should not be in business rescue in the first place but rather in liquidation, as there is no requisite reasonable prospect of rescue. He states that in many instances external factors for example demand and supply of steel and prices driven by market forces are outside of your control.

Participant C also stated that if too many problems are present then there will be no reasonable prospect of rescue and you will not be able to save the company. In this regard he states that you have to properly investigate the company beforehand during your initial assessment. If not enough attention is given to this by the BRP then he could be liable for negligence as the company should have been in liquidation and not business rescue, therefore you must do a thorough initial assessment.

Participant D is of the opinion that the original causes of failure have a major impact on the chances of rescuing the company. Again it was mentioned that if there are too many that are present then there is no reasonable prospect of rescue and you are duty bound to liquidate. He states that the BRP has to see a possibility to be able to do something about the problems.

Participant E also noted that it has a major impact. If there is a way to mitigate or manage that specific factor then you should be able to limit the impact if you have the right BRP or BRP support staff. If there are too many present or there is no way of mitigating or eliminating then there is no reasonable prospect of rescue.

Participant F concentrated on financial incompetence and the importance of leveraging in the matching of long term and short term debt which he says is critical. He also stated that it comes down to the ability of a BRP to identify these problems and make a decision on the reasonable prospect of rescue. Participant F relies on the management and states that if they are not teachable, manageable or replaceable then you will not be able to achieve success.

Participant G also noted that it depends on the extent of problems. He lists management incompetence as a major factor. In the South African construction industry many new companies have been awarded government contracts and because of management inexperience there is a large failure rate in completing projects successfully. He says this is due to funds being depleted upfront and not properly managed.

Participant I stated that the BRP is not a miracle worker and given the short time frames and pressure of the situation, there is little that can be done if the pre-existing problems are too immense. He stated that management incompetence and insufficient capital are two aspects that are capable of being addressed in business rescue. One can always bring in consultants and approach funders with a plan. Again, it was stressed by Participant I it is the duty of the BRP to assess and manage the causes of distress and determine if there is a reasonable prospect of rescue.

4.3.6 *Early filing*

All participants (A to K) were of the opinion that early filing is absolutely fundamental to your chances of a successful business rescue process.

Participant A stressed that companies have to go in early, especially in a construction company. In this regard he states that if company cannot pay reasonable business rescue fees and expenses, this is a high level early indicator that the process will result in a failure and end up in liquidation.

Participant H states that in his experience the majority of businesses are filing for business rescue when they are already insolvent which makes it extremely difficult to be successful and avoid liquidation. Participant B concurs and states that the earlier the filing the higher the rate of success and the later the less likely. He mentions a high level indicator of failure of the process is when a company leaves it so late that there are insufficient funds to pay salaries.

Participant C stated that “the earlier the better” is his “golden rule” as more can be changed if it is early. He also stated that in most cases business rescue is used a last resort. He also mentions that there is a downside to filing early as many creditors don’t understand process and their credit facilities could be withdrawn. “Early filing also opens the business to its competitors and there are reputational concerns to clients and creditors. There is the concern of incurring costs because business rescue is expensive. All in all still better to file early and manage the risks of filing through proper planning.” Participant D, in line with this, added that the fear of business rescue stigma is overestimated so it is not a good reason to hold back. In this regard, Participant E sated that a struggling company should engage with turnaround practitioner very early on. Rather change something small 6 months early than having to change everything when you are distressed and have your back against the wall. Accounts, auditors and attorneys should advise their clients to seek help and consider business rescue at the first sight of any problems. “Your corporate governance should point this out and necessitate a soft turnaround strategy which will save time and costs. The problem in South Africa is that most companies don’t have these structures in place. The directors and shareholders should take early action. They are driven by the carrot effect of always believing “next month will be better” “if only this contract will come through” while the business continues to deteriorate and it becomes more and more challenging to save when they eventually file for rescue.” Participant G also stated that the risks of early filing can be mitigated by engaging on at least a turnaround process. He warned that if filing is not properly planned and happens too soon it might impact on reputation and competitors can take advantage. He warned that the company does get exposed in the business rescue process and also advised that companies should look at informal process or prepacked business rescue.

Participant F and K expanded on the problem of leaving it too late in that relationships with suppliers could be broken and if bridges have been burnt then the process becomes very difficult. Participant F explains that by leaving it too late, supplier accounts would be higher than usual, and “if they feel that they have been burnt and over extended then they will withdraw credit facilities and force you to purchase on a cash basis.” Participant K also stressed the impact of the withdrawal of credit facilities and the pressure that this places on already limited cash flow.

Participants I and J shared the view and complained that the companies that have left it too late should actually have filed for liquidation instead. Participant I complained further that by leaving it too late it gives the banks “good reason to pull the plug.”

4.3.7 *Contract Negotiation*

It was obvious to all participants (A to K) that contracts are the lifeblood of a construction company.

Participant A said that a company needs proper advice when contracts are drafted. He has been appointed in matters only to find that due to sloppy drafting the company finds itself in problematic contracts and cannot walk away. He notes, however, that even if you have the best contract, environmental, price and external factors could result in failure. He offered some advice of caution to avoid taking on appointments where government is the client. Government is notorious for paying late or not paying at all. He notes a further problem that he has experienced in that companies have gone in too low in the tender process. Price fluctuations and increases in costs later make it loss making even if the government department is paying on time.

Participant B was slightly less focused on contracts in general in the interview. He stated that it was obvious and added that many times renegotiation of the contract is not the primary determinant of success. Wastage and inefficiencies are often more important. He posed the question, “what caused it to be badly negotiated in the first place?” Participant C also noted that you have to address the underlying problem that resulted in a contract not being properly costed during negotiation. Participant B noted that if the entire company is dependent on one contract or one big loss making contract, the ability to come to terms with the other party to the contract is a fundamental determinant of success. Participant B noted many examples where he was able to renegotiate the contact and achieve success however, every instance was dependant on client cooperation.

Participant C stated that a profitable contract in a construction company speaks directly to the heart of the reasonable prospect of rescue and an unprofitable contract could sink the sink the company. The BRP must attempt to negotiate this and if this is not possible then he will have to liquidate the company. It all depends on the nature of what needs to be negotiated.

Participant D went so far as to say that if the contract is a problem then you do not have a business to rescue. If you are not able to reach consensus with the other side there is a mechanism in the Act to use however the chances of success are slim if there is no consensus. Participant E concurred and stated that even though the Act allows for this, if you don't have willing buyer willing seller this could crumble the company. Participant F was able to attribute success to contract renegotiation however feels uncomfortable with the legislation and case law on this aspect. Participant K also made mention of the latest case law on termination of contracts in business rescue goes against the plain reading of the statutory moratorium and this has made it very difficult. He also concludes that it is therefore dependent upon client or creditor cooperation which makes it difficult with hostile parties. Participant G also stressed the need for cooperation even though the Act. He puts more emphasis on cooperation because the Act is not clear. From experience he is very cautious to not overstep his mark in his interpretation of the law. Participants H and J noted that they enjoyed success only due to cooperative clients that want the process to work. Both noted that they will find it impossible to force this upon an unwilling party.

Participant I has enjoyed very little success and he attributes this to the fact that people are too scared because they are not certain of the tenure of the contracts going forward. There is not enough clear definition as the extent of what you may and may not do. Again, mention is made of the reliance on client cooperation.

4.3.8 *Skills on board*

All participants stressed that skills are absolutely fundamental to the chances of being successful in the process.

Participant A noted that in most instances skills on the board of directors is important. He stressed that that the board has to be strong to overcome the process and very specific skills are required in a construction company. In certain of his matters, board and management skills were lacking which he attributes as one of the causes of the resultant liquidation. He notes that to replace management is very difficult. One needs to introduce outside industry specific knowledge. He states that while management plays a vital role, it is very necessary to replace the rot in certain instances. He states, however, that replacing of management must be done in an orderly and well thought out way as one does not want to make the impression that one is killing jobs.

Participants C and D stressed the obvious requirement for specialised skills, however, they made mention that in the construction business rescue matters that they were involved in, a lack of skills was not the cause of failure in the business rescue process. In participant C's experience of construction companies, one might have all the required skills but the process fails due to the nature of the business. Participant D concurred in that he states that while skills are hugely important, failure or success of the process depends on the extent of the problems – i.e. the nature and extent of the problems that caused the company to file for rescue. Participant E had the same train of thought in that he assesses failure or success by looking at the causes of distress and what factors influence the reasonable prospect of rescue. He states that if it was environmental factors that lead to the demise then skills will help little, otherwise skills are fundamental.

Participant E notes that the most important skills are financial, leadership and operational skills, in that order. Participant F's opinion was similar in that he states that his leadership style is to bring on finance skills through people in his own organisation. Participant E also stressed the importance to appoint the right practitioner. This relates to the experience, skill and industry specific knowledge of the practitioner. He notes that if you do not appoint the right practitioner everyone will carry on as normal and they would get the same result, being deterioration. In this regard he goes on to state that access to support skills is important as there is no complete and perfect BRP on this planet and there is no practitioner that possesses all the skills necessary to save a company. Some might get close but no one has all the skills. This talks again to having the right practitioner that knows his shortcomings and has a team around him to provide all the necessary skills required.

Participants K and E have strong financial teams at their respective organisations and they each bring their own team into each business rescue mater from the outset.

Participant E brings on external skills where necessary because skills are fundamental. He gives the example of one matter where he brought in external expert engineers. Participant G shares the same view stressing that if skills are lacking then import them if possible. He states that one must do everything practical to bring the right skills on board. Participant H stated that in hind sight, it may have assisted to have employed industry expert consultants as often the directors have poor knowledge of their own industry.

Participant B complained of one failure caused due to the loss of key personnel. He warns that one must be cautious and aware of external factors impacting on the process. In this regard he mentioned an example of a due diligence process by interested investors who then poached key staff which had a major setback on the company in rescue.

Participants B, I and J were very much in favour of subcontracting large amounts of work in the process, especially in a construction company. Participant I mentioned that he has been criticised for costs but it is absolutely necessary as he does not believe that a successful business rescue process turns only on the internal skills of the company.

4.4 Summary of results

4.4.1 *Research Proposition 1*

The main categories and themes that were identified are summarised in the following table:

Categories	**Themes Identified**

General Perceptions	• Spoke very highly of the regime (All participants except I) • BR regime is long overdue (A, D, G) • Great replacement of judicial management (A) • Great alternative to liquidation (B, C, F) • Fantastic tool for restructuring (B, C, D, H) • Disappointed in the regime (I)
Best aspects	• Alternative to liquidation (All participants) • Moratorium (breathing space) (All participants) • Saving jobs (All participants) • Flexibility of the process (B) • Enables creativity/innovation (E) • Future trading with suppliers that would’ve been lost (C, F) • Ranking of SARS as concurrent instead of preferent (D) • Saving good business models (D, E, F) • Introduction of skills (E, G)
Worst aspects	• Legislative shortcomings/ambiguity (All participants) • Lack of support from large institutions (All participants) • Lack of trust due to abuse of process (A, C, E, K, F) • Expensive process (A, B, D, F, J) • Short time frames (F, G, I, J, K) • Regulation of BRPs lacking (A, E, F) • Too creditor driven (C, I) • Too similar to liquidation – liquidation flavour (F, K) • Complicated process/lack of understanding (B, H) • Case law interpretations differ from plain reading of Act (F, G, K) • Obstructive shareholders (H)
Solvency or better return	• First prize is a return to solvency (All participants) • Saving jobs (All participants) • Consider a better return/wind down still to be a success or second prize (A, B, C, G, H, E) • Not willing to entertain the wind down option (D, F, I, J and K) • Wind-downs open the process for abuse (F, J, K)
Just above liquidation or normal course	• Downwards (A, B, C, D, E, F, G, H, J, K) • Upwards (I) • Dependant on input from or engagement with creditors (A, C, D, F, I, K) • Depends on PCF (A, F, G, J) • Start by addressing solvency (B, E, G, J)
Trade out or compromise upfront	• Upfront compromise preferred (A, B, G, I, J, K) • Trade out preferred (C, D, E)

	• Combination (E, F) • Dependant on circumstances (B, D, E, F, H, J)

4.4.2 *Research Proposition 2*

The main categories and themes that were identified are summarised in the following table:

Categories	**Themes Identified**
Support from SARS, financial institutions and other creditors	• SARS hostile (All participants) • Banks hostile (All participants) • Some good experiences with SARS (B, D, E, G, H, J, K) • Banks look after their security first before supporting the process (G, H) • Communication and engagement is key (D, E, F, J) • Trust/Reputation of the BRP is key (A, E, K)
Employees and unions	• Initial uncertainty and fear of losing jobs (A, B, C, D, E, G, J) • Some militant / unreasonable demands (A, B, C, D) • Communication and leadership are key (A, B, C, D, E, G) • Education of union officials and shop stewards key (A, B, C, D, E) • Employees happy that BRP assumes power from top management (C) • Noted only/mainly positive support from employees (F, G, I, K) • Change management is key (F, K)
Top Management	• Trust in the process/management buy-in is key (A, B) • Competence of management (B, C) • Management is where the problems usually lie (C) • Must supplement management (B, C) • Cannot assume information from management to be true/correct (A, C, H)
PCF	• PCF is vital (All participants) • PCF is difficult to attain (All participants)

Financial management	• Proper financial management is fundamental (All participants) • Taking control of finances (A, B, C, D, E, J , K) • Acquire accurate information to make decisions (A, J, C, E, F, K) • Understanding cash flow implications and debtors control (A, D, E)
Leadership and communication	• Communication is fundamental (All participants) • Take the lead (All participants) • Supportive/participative leadership approach works (B, D, E, F, G, H, I, J, K) • Approach is dependent on circumstances (B, C, D, E, J) • Coercive / Authoritarian approach is only necessary in certain instances and mostly does more bad than good (B, D, E, J) • Inject industry specific leadership resources (B, K) • Careful planning of decisions (B, C) • Cannot trust/rely only on management (A)
Legislative challenges	• To be successful you must work around challenges (All participants) • PCF Ranking (All participants) • Buying of claims / dealing with obstructive creditors (B, D, E, F, G, I, J, K) • BRP needs more powers when it comes to contracts (E, F, K) • Short time frames and deadlines (F, G, I, K) • Taxation of BR fees (A, C) • Specialised courts required (A, D) • Ranking of unpaid BR Fees in liquidation (A, B *note does not bode well for PCF) • Secured Creditors have too much say (B, I) • 75% requisite majority is too high (B, I) • Shareholder interests offered too much protection, allows obstructive behaviour (B, F) • Directors should assume some of the risk (C, I) • Lacking specific provisions for groups of companies (B)
Impact of original causes of failure	• Depends on circumstances, nature and extent (All participants) • Speaks to reasonable prospect of rescue (All participants) • Insufficient capital / financial management can be addressed in BR (B, F, G, I) • Management incompetence/inexperience can be addressed in BR (B, F, G, I) • Initial assessment is key (C, I) • Reliance on government contracts is massive determinant of failure (A, G) • External factors cannot be addressed in BR (B)

Early filing	• Early filing is paramount as the earlier the higher the chances of success (All participants) • Risk of filing too late outweighs risks of early filing (C, D, E, G) • Most filings are late or last resort (H, B, C)
Contract negotiation	• Contracts are fundamental to a construction company (All participants) • Renegotiation fundamental but dependant on client consensus (B, C, D, E, F, K, G, H, J, I) • Avoid government contracts (A, G) • Underlying wastage, inefficiencies and other factors primary focus (A, B, C)
Skills	• Skills are fundamental (All participants) • External construction specific skills (A, C, D, E, F, G, H, K) • The right BRP and BRP consultants (E, B, I, J) • Lack of skills not necessarily the cause of failure (C, D, E) • Own specialised team from own office (E and K) • Must keep key employees from being poached (B) • Strong board required (A) • Replace management if lacking (A)

CHAPTER 5. DISCUSSION OF THE RESULTS

5.1 Introduction

The categories and themes identified in the previous chapter will be discussed hereunder by firstly addressing the first research proposition and, resultant therefrom, thereafter addressing the second research proposition.

5.2 Demographic profile of respondents

It is important to note that throughout the interview process certain differing points of view were evident between the lawyers and accountants in the sample which will be discussed hereunder. Further to this, a number of the participants, both lawyers and accountants, also had a background in liquidations and some of their opinions differed from those participants who did not have a liquidations background.

5.3 Discussion pertaining to Research Proposition 1

5.3.1 *General Perceptions*

The general feelings on the business rescue regime in South Africa from all of the participants were positive, except for participant I who has only had bad experiences with the process, nevertheless he praised the idea.

The participants were particularly impressed with the process allowing for the saving of businesses and jobs which is in line with the fundamental purpose of the Act as defined in Section 7 (k) of the Act as providing for the efficient rescue and recovery of financially distressed companies.

Three participants made special mention that the process was long overdue in South Africa.

5.3.2 *Best aspects*

It was found that the business rescue process is a fantastic alternative to liquidation and a great replacement for judicial management which is in line with Stein's (2011) opinion.

All participants found the statutory moratorium on claimants in terms of Section 133 of the Act to be fundamental to the success of the process as it gives the company the necessary breathing space (Museta, 2011).

Three participants made special mention of the saving of good business models and jobs which drives them to succeed.

5.3.3 *Worst aspects*

Two of the recipients were scathing of part of the process in that it is still far too creditor driven. This is against Pretorius and Holtzhauzen's (2008) understanding of what Chapter 6 of the Act seeks to achieve in that they believe it creates a more debtor-friendly environment. However the general sentiment amongst the participants was in line with Pretorius and Holtzhauzen.

The lack of support from SARS and the large financial institutions like the banks was of major concern to all of the participants. A majority of the participants attributed this to a lack of trust in the process due to the many cases of abuse of the process (Jijana, 2015).

Levenstein's (2011) opinion that the process seeks to shift the mind-set from a corporate culture of liquidation to that of rescue has also proven to be true, however, two participants were of the opinion that the process is still too similar to a liquidation.

5.3.4 *Solvency or better return*

Section 128 of the Act is clear in that the primary objective "is the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis." The secondary objective is, "if it is not possible for the company to so continue in existence, the business rescue process results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."

Therefore by operation of law, the question as to what constitutes a successful business rescue seems straight forward, however, sentiments in the market differ quite drastically.

It was found that while all the participants considered a return to solvency as the first prize, five of the participants did not consider the second leg of the definition to be a successful business rescue. Some were of the opinion that while it may be better than liquidation, it should not form part of the business rescue regime. Three of the participants explained that the so called wind-down business rescues, in the name of a better return than liquidation, are opening up the process for abuse by unscrupulous business rescue practitioners. Six of the participants considered the wind-down option to still be a success. Of these, participant E stated that while there might be a place for it, he does not involve himself in such matters. The other five participants in favour of these types of rescue strategies all come from a liquidations background.

All of the participants had saving jobs as their main motivation and the fact that all participants found the first prize to be returning the company to solvency leads one to conclude that for the purposes, especially of business rescue in the construction industry, saving the business as a going concern is a successful business rescue. This confirms van den Steen's (2017) opinion on the gaging of success.

5.3.5 *Just above liquidation or normal course*

When developing a business rescue plan which must contain repayment proposals to creditors one has the choice to start your negotiations or proposals by offering as close to full payment as possible or start by offering as close to zero or the hypothetical liquidation dividend as possible. When posed with this question, ten of the eleven participants stated that it was their intention to offer as much as possible to creditors. Four of the eleven participants qualified their opinion by stating that they had to address the solvency issue while trying to offer as much as they can. One participant was of the opinion that you should start by offering just above the hypothetical liquidation dividend.

What was noted from four of the eleven participants is that when a post commencement financier or investor is on board, his offer to fund the company is often conditional upon creditors accepting a certain compromise. The creditors then have little choice but to accept the compromise or liquidate the company. The compromised amount has to at least be greater than what they would receive in a liquidation.

Another valuable learning which was mentioned by six of the eleven participants is that engagement and communication with creditors during the development of the business rescue plan is vital to securing the requisite majority of votes. The creditors ultimately decide on the plan therefore communication of key particulars and information is fundamental in order for the creditors to have sufficient information before them to decide whether or not to vote in favour of the proposals put to them.

5.3.6 *Trade out or compromise upfront*

Six out of the eleven respondents preferred to compromise creditors as soon as possible after the adoption of a business rescue plan while three of the respondents preferred to trade out of the distress over a period from their experiences. Two respondents mentioned that they sometimes prefer a combination of the two.

These results, however, are not conclusive as six out of eleven respondents stressed that any proposal is dependent on the circumstances. Again there was much said on the wishes of the post commencement financier.

5.3.7 *Conclusion – research proposition 1*

Differences in opinions were noticed, some slight and others substantial, between the attorneys and accountants that were interviewed. What was even more striking was the difference in opinion between the liquidators and non-liquidators regardless of whether they were accountants or lawyers. The most glaring difference was the willingness of the liquidators to consider winding down companies using the business rescue process in order to provide creditors a better return than liquidation while the business comes to an end.

All participants agreed in that the first prize in a business rescue process is saving the business and returning the company to solvency. This is in line with van den Steen's (2017) concept of success being gaged on the number of PIS points saved. Further to this, it speaks directly to the view of the Court in the Welman case discussed in chapter 2.

5.4 Discussion pertaining to Research Proposition 2

5.4.1 *Support from SARS, financial institutions and other creditors*

According to all of the participants, SARS and the financial institutions have been extremely obstructive and downright against the business rescue process in the main. It is understandable from a SARS perspective due to the fact that they rank as concurrent in a business rescue and preferent in a liquidation, however, the financial institutions' perspective is less understandable. From three of the participants it was gathered that the large financial institutions have lost trust in the process due to the many rogue BRPs that have acted improperly and abused the process which is in line with Jijana's (2015) main contributors to failure in the business rescue process. Perhaps, as stated by two participants, the banks are only interested in securing their position in as far as they are secured creditors.

Seven of the participants did, however, report on some good experiences with SARS and the financial institutions. They attribute this to trust that they have earned over the years but more importantly to communication and constructive engagement.

5.4.2 *Employees, Unions and Top Management*

Seven of the eleven respondents noted that initially employees are stunned in the beginning of a business rescue process. It is imperative that the BRP eases these fears through clear frequent communication and leadership.

Communication, leadership and engagement are even more important in the construction industry as in most instances employee unions form part of the mix of affected persons. Four of the respondents had experienced what they termed militant and unreasonable union representatives. Five of the participants overcame these challenges by communicating effectively, however, there is general consensus that education of union officials and shop stewards is needed. Employees must realise that unreasonable demands could result in the failure of the process which results in liquidation and the loss of all jobs. Two of the participants stressed the importance of change management. The understanding that the process requires a team effort (Pretorius, 2013) must be communicated to all affected persons, especially the employees and union representatives who have considerable influence and who have influence over the general body of employees.

5.4.3 *PCF*

Post commencement finance is absolutely vital in order to successfully navigate a business rescue process in a construction company. This view was unanimous amongst the participants. Pretorius and du Preez (2013) state that PCF is one of the critical elements of a successful business rescue, however, it is near impossible to access when a company is financially distressed. While all of the participants noted the difficulty of raising PCF, they have managed to do it and attribute this as a major determinant of success. The financial institutions, largely against the business rescue process according to the participants, have not been forthcoming with PCF, therefore, the participants have had to source same else ware. Since PCF is a *sine qua non* of a successful business rescue process, the difficulty raising same has resulted in many failed processes that would otherwise have been a success. Du Preez (2012) states that open transparent communication by the BRP is a major factor that influences the attainment of

PCF. This has proven to be true as effective communication was a chief unanimous theme attributable to the success of the process by the participants.

5.4.4 *Financial Management*

A major theme throughout the interview process was that prudent financial management is paramount if you are to achieve success and remain stable after business rescue has ended. Many of the determinants of failure in construction companies, as listed by Jagafa and Wood (2012), have a financial element to them. The participants were focused on instilling proper financial discipline through specialised systems, beginning the process by injecting expert skills to oversee the process and pass these skills on to the members of the company.

During the rescue process, the BRP is tasked with making many significant decisions that have far reaching consequences for all affected persons, therefore it is imperative that he bases these decisions on accurate financial information. This is why the majority of participants expressly stated that they take control of the finances of the company. This is in line with Pretorius (2013) in that he states that “taking control” and “investigating the affairs” are two of the five principle tasks of the BRP.

5.4.5 *Leadership and communication*

Van den Steen’s (2007) study on essential skills and talents of turnaround CEOs in South Africa identified eleven essential skills and talents as discussed in Chapter 2. The current research at hand has confirmed that the essential skills and talents identified by van den Steen (2007) are indeed determinants of success.

Again (repetition is required due to the recurrent unanimous theme of effective communication by the participants) communication in taking the lead during the process was identified by all participants as absolutely fundamental.

Nine of the eleven participants adopted a supportive or participative leadership approach to the process.

Heifetz et al's (2009) two tiered approach can be said to apply to the business rescue process in that two of the participants advised that initial careful planning is paramount and five of the participants adapt their approaches depending on the circumstances at hand.

Participant A advised that one should not instil much trust in the management of the company in rescue. In this regard, two of the participants specifically mentioned the importance of injecting external industry specific leadership skills into the company.

What was particularly notable and interesting was the fact that four of the participants warned that coercive or authoritarian approaches to leadership in business rescue only work in certain instances and often do more harm than good.

5.4.6 *Legislative Challenges*

At the top of the list of legislative challenges that the participants have to overcome in their quest to rescue companies is the ranking of PCF. Du Preez (2012) is of the opinion that open transparent communication by the BRP is one of the major factors influencing the attainment of PCF. Throughout the interview process, the theme of communication was abundantly noted by the participants.

Second to the ranking of PCF was the lack of a clear mechanism to overcome obstructive creditors in the process of attempting to have a business rescue plan adopted. The majority of the participants were of the opinion that one should be able to purchase the claim of a dissenting creditor at the hypothetical liquidation value thereof because, after all, that obstructive creditor essentially wants a liquidation and not a business rescue. Again, positive engagement, communication and negotiation with key affected persons is what is required to overcome the challenge and be successful and attain the requisite majority votes in favour of a business rescue plan.

A number of legislative challenges were identified by the participants, as set out above in chapter 4. The participants were proud to have achieved the levels of success that they have. Again, this is attributed to working around the challenges of the legislation and powers conferred on the BRP by being proactive and encouraging engagement through communication of key principles and ideas. The BRPs were able to achieve success despite the legislative challenges. The ability of the BRP to overcome these challenges and make the process work is a key determinant to success.

At the top of Jijana's (2015) list of factors that contribute to the failure of business rescues is ambiguity in some parts of the legislation. This research has proven this to be absolutely correct and this leads one to understand the notion that in order to be successful the BRP has to overcome these challenges in novel ways through communication and negotiation.

5.4.7 *Impact of original causes of failure*

Of Jagafa and Wood's (2012) list of factors that contributed to the failure of construction companies, four of the participants made mention of insufficient capital and management incompetence as factors that can be addressed in the business rescue process.

All participants were of the opinion that the factors that lead to the demise of the company were massively impactful on the chances of rescuing the company. They stated that this spoke directly to the business rescue prerequisite of a reasonable prospect of rescue. Jagfa and Wood (2012) state that managers of construction companies must concentrate their efforts and focus on the likely determinants of their problems in their quest to rescue them. In developing their turnaround model, Jagfa and Wood (2012) found it necessary to consider the determinants of failure. The participants in the study at hand expressed a similar view in that the nature and extent of the causes of distress speak directly to the reasonable prospect of rescuing the company.

Four of the participants were of the opinion that management incompetence can be address in the business rescue process, however, one participant importantly noted that external factors that lead to the demise of the company cannot be cured in the business rescue process.

5.4.8 *Early Filing*

It was unanimous in that all participants were of the opinion that the earlier a company files for business rescue after becoming financially distressed, the better the chances of rescuing it. Three of the respondents also specifically stated that most of the business rescue filings are late or as a last resort. This has found to be exactly in line with Pretorius and du Preez (2013) in that they conclude that the longer a company waits to file for rescue the harder it is to save it.

Four of the participants made mention of the business and reputational risks associated with filing for business rescue, however, the risk of complete failure outweighs these risks.

5.4.9 *Contract Negotiation*

The category pertaining to aspects around contracts in business rescue was found to be one of the major determinants of success in the rescue of construction companies by the participants. This seems fairly obvious as a construction company is dependent upon profitable contracts in order to survive.

Although, only mentioned by two participants, in the South African context, rescuing construction companies where government is the largest or only client, is extremely challenging.

Due to the obviousness of the fact that a construction company is reliant on profitable contracts, three participants were of the opinion that the business rescue practitioner’s primary focus should be on the underlying issues relating to wastage, inefficiencies and other problems.

It was almost unanimous in that ten out of the eleven participants expressly stated that renegotiation of contracts is dependent on client consensus. The renegotiation of contracts is a fundamental determinant of success in many cases but this can only be achieved if there is consensus between the company and the other party to the contract. The BRP must possess the skill required to communicate the gravity of the situation and must have the ability to convince the other party to agree or the process will result in liquidation.

5.4.10 *Skills*

Pretorius (2013) identified five principal tasks of a business rescue practitioner as, “taking control, investigating the affairs, compiling a rescue plan, implementing the plan and complying with the statutory process.” He further concludes that a team effort is required in order to achieve success given what is required of the BRP as no one person has the capacity to do it all.

All of the participants stated the obvious in that skills are fundamental to the success of the process. While only one participant placed high reliance on a strong board of directors, the majority of the participants placed their reliance on bringing in industry specific skills. Participant A, who relies heavily on the board, stated that if the board lacks in skills they must be replaced. This speaks directly to taking control of the company as identified by Pretorius (2013).

The theme that it takes a team effort to be successful was clear throughout the interview process. Two participants have their own teams from their respective offices that they bring on board. Three participants make use of the services of specialised business rescue consultants. Five of the participants bring on other external skills. It is this teamwork that assists the BRP to ensure each of the five principal tasks identified by Pretorius (2103) are performed optimally.

The most important skills, as mentioned by three of the participants, were financial, operational and leadership skills. As mentioned by participant B, these skills must be retained and it is difficult to retain specialised skills in business rescue as these persons are in high demand.

A very important notion, although only specifically mentioned by one participant, was that the right BRP is absolutely fundamental to the process. Companies must choose their BRP wisely based on a good reputation and experience in the construction industry.

5.4.11 *Conclusion – research proposition 2*

In Chapter 2, the literature provided the following determinants of a successful business rescue process in the construction industry in South Africa:

- Overcoming legislative challenges
- PCF
- Early filing
- The ability to deal with (hostile) affected persons
- Team effort / injecting skills
- Effective crisis leadership
- The ability to overcome original causes of failure

The above determinants were confirmed by the research. The research results went further in that in order to achieve success, the fundamental determinants of success as gathered from the participants are as follows:

- Support from SARS and financial institutions
- Employee buy-in
- PCF
- Sound financial management / control
- Effective leadership
- Effective constant communication
- The ability to negotiate and reach consensus
- Overcoming legislative challenges
- Nature and extent of original causes of failure (reasonable prospect of rescue at the outset)
- Early filing
- Injecting skills
- The right business rescue practitioner

5.5 Conclusion

In conclusion, the findings in relation to research proposition 1 were an unexpected result considering the plain reading of the Act. Considering the Courts interpretation in the Welman Case and the opinion of van den Steen (2017) together with the fact that all participants were of the opinion that saving the business was first prize one can only conclude that this constitutes a successful business rescue. While some of the liquidators were of the opinion that a simple wind-down that provides a greater return than liquidation to the creditors, it is difficult to conclude that this is a successful business rescue, especially in the construction industry where there are so many jobs at stake.

The second research proposition followed on from the first in that now that we know that rescue is all about saving the business and as many public interest score points as possible, it was vital to identify the determinants of a successful business rescue process in the construction industry. These can be summarised as follows:

- Support from SARS and financial institutions
- Employee buy-in
- PCF
- Sound financial management / control
- Effective leadership
- Effective constant communication
- The ability to negotiate and reach consensus
- Overcoming legislative challenges
- Nature and extent of original causes of failure (reasonable prospect of rescue at the outset)
- Early filing
- Injecting skills
- The right business rescue practitioner

It takes a very special BRP will a specific skills set to achieve success. The researcher noticed that many aspects have to fall in place and come together at the same time in order for the process to be a success. There was a lot wrong with the system, however, the participants are making it work and are achieving great success in saving businesses and jobs.

CHAPTER 6. CONCLUSIONS & RECOMMENDATIONS

6.1 Introduction

This chapter briefly summarises the conclusions of this research. With little research on business rescue in South Africa and even less so on business rescue in the construction industry, this research sought to contribute to a new body of knowledge around business rescue in the construction industry in South Africa.

This research highlights some of the challenges that the industry is facing and how BRPs are overcoming these challenges and making a success out of the process.

6.2 Conclusions of the study

The research confirmed that the success of a business rescue process must be gaged by the amount of PIS points saved (van den Steen, 2017). Therefore, the BRP should strive to save as much of the business, as a going concern, as possible.

In striving to achieve this, the most important determinants of a successful business rescue process in the construction industry in South Africa are as follows:

- Support from SARS and financial institutions
- Employee buy-in
- PCF
- Sound financial management / control
- Effective leadership
- Effective constant communication
- The ability to negotiate and reach consensus
- Overcoming legislative challenges

- Nature and extent of original causes of failure (reasonable prospect of rescue at the outset)
- Early filing
- Injecting skills
- The right business rescue practitioner

6.3 Recommendations

The study provides guidance to business rescue practitioners and turnaround specialists, CEOs and CFOs of construction companies as well as the labour force when considering filing for business rescue.

In terms of Section 129(7) of the Companies Act, if a company is financially distressed and the board of directors does not file for business rescue, or liquidate the company, the board is duty bound to notify all affected persons and provide reasons why it is not going to file for business rescue. Directors of construction companies must take cognisance of this and this study will assist them in their decision making process when considering business rescue as an option.

At the first sign of financial distress, directors should seek assistance from their attorneys and/or accountants and consider a business rescue or turnaround strategy because the longer one leaves it the more difficult it becomes to rescue the company (Pretorius and du Preez, 2013).

The right business rescue practitioner is absolutely key to achieving success. Companies must avoid unscrupulous practitioners and practitioners that do not have the required experience in the construction industry, regardless of whether they are experts in construction or not (Jijana, 2015).

Financial problems can be dealt with in the business rescue process, however, one should caution to assume that business rescue can solve problems caused by external factors.

Post commencement finance is a *sine qua non* of a successful business rescue process, however, same is extremely difficult to come by (du Preez, 2012). The BRP must initiate the process of raising PCF very early on in the process (du Preez, 2012). Effective communication of the details of the potential deal is fundamental. The BRP must be able to tout the deal to potential investors and should possess the skills required to effectively negotiate and close the deal (du Preez, 2012).

Poor management can be addressed by injecting external industry specific skills into the company in rescue. The BRP must take control (Pretorius, 2013).

The problems that the company is facing and the nature and extent of the issues that lead to its demise must be considered before filing for business rescue (Jagafa & Wood, 2012). This speaks directly to the statutory precondition of business rescue in that there must be a reasonable prospect of rescuing the company. Directors should be mindful of this fact because if there is no reasonable prospect of rescue, the process could have the result that the company is worse off when the business rescue fails than if it had originally been placed straight into liquidation.

Business rescue requires a team effort (Pretorius, 2013), therefore, the support of all affected persons is critical. Creditors, shareholders and employees should refrain from being obstructive and should do their utmost to assist the BRP in his quest to save the business.

BRPs must understand and appreciate the importance of effective regular communication to all stakeholders and affected persons in all aspects of the business rescue process. Communication and negotiation are key for overcoming the vagueness and shortfalls in the Act. A fundamental task of the BRP is to get all affected persons or possible PCF investors to buy in.

Coercive leadership does not work as well as one might think in the business rescue process. The participants advised that a supportive leadership style achieves the desired results from the employees and management.

The BRP must lead by taking control (Pretorius, 2013, van den Steen, 2007). The financial leadership and decision making was found to be paramount in the process and BRPs are advised to bring in external skills to oversee this process, if needed. The BRPs' decisions are only as good as the information upon which they are based as well as the speed at which this information reaches the BRP.

6.4 Suggestions for further research

- Qualitative research on the provisions of the Act that need to be amended from the perspective of the business rescue practitioner.
- Post commencement finance and how and where these investors are sourced.
- Managing labour and stakeholder participation in the business rescue process.
- A study on the difference between what was projected in adopted business rescue plans and what financial results actually transpired in the implementation of the adopted plan. In this regard the three year requisite projection must be measured against the three years actual financial results that followed.
- A study on the difference between the hypothetical liquidation dividend projected in the business rescue plan and what the actual liquidation dividend was when the business rescue failed and the company ended up in liquidation.
- Different leadership approaches to business rescue.
- Business rescue management approaches to the administration and running of the statutory business rescue process.

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Appendix 1: Interview Guide

1. What do you think about the business rescue regime?

2. What are the worst aspects of the regime?

3. What are the best aspects of the regime?

4. How many business rescues have you been involved in?

5. Number of voluntary and number of compulsory?

6. How many of those business rescues resulted in a liquidation?

7. What do you consider as a successful business rescue? A return to solvency or just a better return than liquidation?

8. When developing your plan and proposals to creditors, do you start with just above liquidation or do you start with payment in the normal course and work your way up or down respectively?

9. Do you think it is best to trade out of distress and then service debt, or should creditors accept a compromise upfront?

10. What support did you receive from institutions like SARS and the banks?

11. What do you think are the factors that were instrumental in the success of the rescue process?

12. What have you done to ensure success in the process in a construction company?

13. What impact do the original causes of failure have on the probability of a successful business rescue process?

14. What is your leadership style in a business rescue of a construction company and does it differ from time to time and case to case?

15. What aspects of the legislation would you like to see repealed and how?

16. What impact would early entry have on the success rate i.e are businesses going in too late?

17. What has been the reaction of employees to business rescue? Unions?

18. Have you managed to renegotiate contracts?

19. Could liquidation have been avoided if you had better skills on board?

Appendix 2: List of Abbreviations

BR – Business rescue

BRP – Business rescue practitioner

CIPC – Companies and Intellectual Property Commission

PCF – Post commencement finance

PIS – Public interest score