AN ANALYSIS OF THE PROTECTION PROVIDED TO CREDITORS DURING BUSINESS RESCUE PROCEEDINGS

A Mini-Dissertation Submitted in partial fulfilment of the requirements for the degree

Master of Laws in Corporate Law

By

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2021

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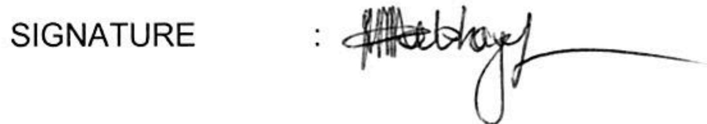

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DEDICATION

This dissertation is dedicated to my late father, **AVHAPFANI MATSHAYA**

ACKNOWLEDGEMENTS

This dissertation is a product of a peregrination that I did not travel alone. I thank my supervisor Mr Thabo Ngilande for directing the journey. I would not have made it without his guidance.

I am grateful to Mr Ishmel Moleya for the support that he has offered throughout the writing of this dissertation. "*U naka ahu fani nau divhiwa, ngazwo vhatshiri 'Mutuka wa haya ha vhifhi', ndo livhiwa*"

Lastly, I extend my gratitude to my wife Ndamulelo Matshaya for her support.

ACRONYMS

CC	Constitutional court
CIPC	Companies and Intellectual Property Commission
CODE	US Bankruptcy Code
GG	Government Gazette
GNP	North Gauteng High Court, Pretoria
GP	Gauteng Division, Pretoria
GSJ	South Gauteng High Court, Johannesburg
KZP	Kwazulu-Natal Division, Pietermaritzburg
IAC	Institute of Accounting and Commerce
SAICA	South African Institute of Chartered Accountants
SAIPA	South African Institute of Professional Accountants
SCA	Supreme Court of Appeal
SA	South Africa
PII	Professional Indemnity Insurance
US	United States of America
WCC	Western Cape division, Cape Town
ZAFSHC	South Africa**,** Free State High Court
1926 Act	Companies Act 46 of 1926
1973 Act	Companies Act 61 of 1973
2008 Act	Companies Act 71 of 2008

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CHAPTER 1

General Introduction

1.1 Introduction and background

The first South African corporate rescue mechanism was introduced in 1926 by the Companies Act 46 of 1926 ('the 1926 Act'). This rescue procedure was called judicial management. It had the objective of rescuing companies.[1] However, not all was well with this procedure. A Commission of Enquiry into the Companies Act was established under the 1926 Act in 1963, with a view to deal with, among other things, the aptness of maintaining the judicial management procedure under the 1926 Act.[2] There were calls to abolish the judicial management process. However, these proposals did not sway the Commission, which instead recommended the improvement of the judicial management procedure as opposed to its abolishment. What is important, and germane to the present disclosure, is that the Commission's conclusion that creditors should play a decisive role in determining whether a final order of the judicial management should be granted.[3] The judicial management process established under the 1926 Act was inherited by Companies Act 61 of 1973 ('the 1973 Act'). However, the name of the procedure was changed to judicial management and compromise with creditors.[4]

The judicial management process faced several criticisms, and has been regarded as a failure.[5] It was argued that the process was pro-creditors and that creditors under that process took advantage of the process and demanded immediate payment.[6] Several reasons were advanced regarding the failure of the judicial management process.[7] With the apparent failure of the judicial management procedure under the

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[1] Loubser 2004 *South African Mercantile Law Journal* 139.
[2] The Companies Act Commission of Enquiry under the Chairmanship of the Honourable Justice Van Wyk de Vries which was established in 1963 and published its main report in 1970, 2002 *South African Law Journal* 40.
[3] Benade 1970 *Comparative and International Law Journal of Southern Africa 307.*
[4] Sections 427 and 311 of the 1973 Act.
[5] Loubser 2007 *Comparative and International Law Journal of Southern Africa* 157; Kloppers *South African Mercantile Law Journal* 370.
[6] Loubser 2007 *Comparative and International Law Journal of Southern Africa* 157.
[7] In Zwane 2015 *Affected persons* 9, these reasons were advanced: the procedure was dependent on the courts, which made it unduly cumbersome and expensive; the lack of regulation for judicial managers despite the immense power they wielded; the judiciary's view of judicial management as an extraordinary procedure to be invoked only under exceptional circumstances ignored the fact that a

1973 Act, calls were made to have it changed. The procedure was replaced accordingly by the business rescue proceedings contained in chapter 6 of the Companies Act 71 of 2008 ('the 2008 Act'). The process under the 2008 Act was established with a view to balance the interests of all the stakeholders including shareholders, creditors and employees.[8] The process is no longer aimed at mainly protecting creditors as it was under the previous pieces of legislation. However, the process is not without problems. This research will argue that in seeking to strike a delicate balance between the interests of all stakeholders, the 2008 Act compromised the interests of the creditors. This argument will be bolstered by analysing the relevant provisions of the 2008 Act. It will be concluded that there are no sufficient protective measures to guard the interests of creditors during business rescue process. The research will propose how the protective measures can be strengthened.

1.2 Research problem

The main objective of a business rescue procedure is to prevent a financially distressed company from completely falling apart by, among others things, imposing a moratorium on all the claims against the company.[9] The procedure entails balancing the interests of various stakeholders of the financially distressed company.[10] The process is formidable and may result in the interests of some stakeholders of the company being compromised.[11] Regrettably, the process does not always yield intended results.[12] As Loubser correctly points out, only a small number of financially distressed companies have been successfully rescued.[13] The procedure poses a major problem for the creditors of the company as their interests are not sufficiently and equitably safeguarded during the process. For instance, section 130 (1) of the 2008 Act provides that an "affected person" may apply for an order requiring the business rescue practitioner ('Practitioner') to provide appropriate security. However,

successful turnaround of a failing company could potentially prove to be more beneficial to its creditors than liquidation.

[8] Section 7(k) of the 2008 Act.

[9] Rushworth 2010 *Acta Juridica* 375; Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Adapt or die) 2 and sections 128(b) and 133 of the 2008 Act.

[10] Section 7(k) of the 2008 Act.

[11] Mokoena 2019 *Journal of Corporate and Commercial Law and Practice* 6.

[12] Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Adapt or die) 6.

[13] Loubser 2013 *South African Mercantile Law Journal* 456. Low success rate is also acknowledged in Rajaram 2018 *Southern African Journal of Economics and management science* (Adapt or die) 2.

no such provision is made for creditors under a business rescue process in terms of section 131 (1) of the 2008 Act. Similarly, s 131 (5) of the 2008 Act requires the appointment of a practitioner under a business rescue process applied by affected person, to be ratified by creditors. No similar provision is made for creditors under a process commenced by a company resolution. The other issue concerns voting rights in terms of section 152(1)(e) and (2) of the 2008 Act. No provision is made for se*para*te voting by secured creditors and unsecured creditors and unsecured creditors are inexplicably given a say on the rights of the secured creditors.

Although section 134 (3) of the 2008 Act seeks to protect secured creditors, it is silent on whether their rights can be deprived through a business rescue process. If a business rescue plan ("plan") affects the rights of secured creditors they become vulnerable, if it does not, they should not have voting rights in that they may use same against unsecured creditors. Section 153 (1) (b) (ii) of the 2008 Act is incapable of protecting creditors who support a plan in that the "binding offer" can be rejected by dissenting creditors.[14] There is still uncertainty about the ranking of creditors in that section 135 of the 2008 Act is silent about pre-commencement secured creditors.[15] It allows the securing of post commencement finance without the consent of pre-commencement secured creditors and if a plan affects their rights, they must be provided with protection against post commencement finance. This research seeks to explore these problems. It argues that since all creditors have claims against a financially distressed, they must be afforded sufficient and equitable protective measures during the process. It argues that the 2008 Act fails to provide sufficient and equitable protective measures to all creditors during the process.[16] The position in the 2008 Act will be compared to that in Chapter 11 of the United States Bankruptcy Code

[14] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* 2015 (5) SA 192 [21].

[15] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd 2013 JDR 1019 (GSJ)* [21].

[16] This will be demonstrated by analysing sections 130 (1), 131 (5), 134 (3), 135, 152 (1) (e) and (2) and 153 (1) (b) (ii) of the 2008 Act.

as the South African business rescue procedure was developed from it.[17] The US system is debtor-friendly just like the current South African business rescue process.[18]

1.3 Research methodology

A qualitative research method will be used in this research to analyse the relevant provisions of the 2008 Act and compare them with Chapter 11 of US Bankruptcy Code.[19] A desktop study will be conducted to review primary and secondary sources that are used in the research. The sources include legislation, case law, journal articles, textbooks and other electronic sources.

1.4 Point of departure

The research will critically analyse the relevant provisions of the 2008 Act which deal with protective measures of creditors during a business rescue process, with a view to ascertain their sufficiency.[20] This will require a consideration of the appointment procedure of a practitioner,[21] his or her role and functions during a business procedure[22] and how that affects the protection of creditors. It will also require a consideration of the voting system of creditors among themselves[23] and how the system weakens the protection of the minority creditors during a business rescue procedure. The research will also consider, to some extent, how the protection of employees during a business rescue process weakens the protection of the interests of creditors during the process.

1.5 Limitation of the study

This research will only focus on the protective measures provided by the 2008 Act, that can be used by the creditors during business rescue proceedings. Although the research will consider the position of other stakeholders like a practitioner and

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[17] Chapter 11 of the Bankruptcy Code of 1978; *cf* Department of Trade and Industry and Entities "South African Company law for the 21st Century: Guidelines for Corporate Law Reform" Policy paper GN 1183 on *GG* 26493 of 23 June 2004.
[18] Calitz 2016 *De Jure* 276. In this regard, Calitz states: "It must be noted that the US has a debtor-friendly system which essentially entails that the legislation provides companies with protection from creditors in times of uncertainty."
[19] Sections 130 (1), 131 (5), 134 (3), 135, 152 (1) (e) and (2) and 153 (1) (b) (ii) of the 2008 Act.
[20] Sections 130 (1), 131 (5), 134 (3), 135, 139 (2) and152 (1) (e) and (2) of the 2008 Act.
[21] Sections 129 (3) (b) and 131 (5) of the 2008 Act.
[22] Section 140 of the 2008 Act.
[23] Sections 152 (1) (e) and 152 (2) of the 2008 Act.

employees, it does not consider the available protective measures for those stakeholders. It simply considers how their positions affect or weaken the protective measures for creditors.

1.6 Outline of chapters

This research comprised of four chapters, which are:

Chapter 1: Introduction

This is an introductory chapter which introduces the topic and further maps out how the questions raised will be answered.

Chapter 2: The creditors' protection against the Practitioner

This chapter will investigate the protection that the creditors have against the practitioner.

Chapter 3: The creditors' protection against other affected persons

This chapter will investigate the protection available for creditors against other affected persons. Affected person in this context will include individual creditors and employees.

Chapter 4: Conclusion and recommendations

This chapter will provide the conclusive remarks and recommendations on issues covered by the research.

CHAPTER 2

Protective measures against a business rescue practitioner

2.1 Introduction

Chapter 6 of the 2008 Act provides that a practitioner will be appointed to facilitate the rehabilitation of a company that has been placed under a business rescue process. The main objective of the process is to facilitate or ensure the financial recovery of a financially strained company insofar as that is practically possible. The process is overseen by a practitioner, a person or persons appointed in terms of Chapter 6 of the 2008 Act.[24] There are two ways in which a practitioner may be appointed.[25] The first is by a court order authorising the appointment of the practitioner. The second is a company itself when it starts a business rescue process, through the adoption of a company's resolution approving or authorising the appointment of a practitioner.[26] A practitioner is essentially the driver of a business rescue process and is vested with among others, powers which give him full control of the company and duties to develop and implement a business rescue plan.[27]

This chapter discusses the protection that the creditors of a company under a business rescue process have against a practitioner. The discussion covers the appointment stage up to the completion of the process. The chapter deals with the protective measures against a practitioner in order to show the importance for creditors to have effective and sufficient protective measures against a practitioner. To demonstrate this, the available protective measures against a practitioner are analysed and it is contended that they are not sufficient.

2.2 A business rescue practitioner appointed by an affected person

When a business rescue process is commenced by an affected person,[28] the affected person will make an application to court for an order authorising the commencement

[24] Section 128 (1) (d) of the 2008 Act.
[25] Wassman 2014 *De Rebus* 1.
[26] Sections 129 (3) (b) and 131 (5) of the 2008 Act.
[27] Section 140 (1) of the 2008 Act.
[28] Affected person is used as a generic term to describe, throughout chapter 6, the principal stakeholders in the business rescue proceedings, ie the creditors, shareholders and employees of the relevant company, see Delport https://www.mylexisnexus.co.za/Content/NavigationNodePage.aspx?nodeId=fec40d1c-a698-44b2-ad0a-6f2714242c0f&nodeText=Commentary# (Date of use : 1 October 2020).

of the process. The affected person will then nominate a practitioner who will be appointed by the court as an interim practitioner. The appointment is made subject to ratification by the holders of a majority of independent creditors voting rights at the first meeting of creditors.[29]

In an event that the majority of creditors hold the view that the interim practitioner appointed by the court is not suitable or incapable of effectively conducting the business rescue process or incapable of protecting their interests, they may not ratify the appointment at the first meeting of creditors. In this regard, Bradstreet points out that the fact that the nomination of a practitioner is made subject to ratification at the first meeting of creditors, vests an effective veto in the hands of the body of creditors and it enables them to guard their interests sufficiently.[30] It is submitted that the veto power given to the creditors is a good legislative safeguard but that the effectiveness of such a veto power will also depend on clear qualification requirements which will guide the creditors as to which practitioners are suitably qualified to achieve the objectives of a business rescue process and to protect the interests of creditors. The issue of qualifications will be dealt with in detail below. Bradstreet highlighted the shortcomings of the 2008 Act which, in his view, threaten the protection of the creditors.[31] He considered how the appointment of a practitioner affects the protection of creditors during a business rescue process.[32] In analysing section 131(5) of the 2008 Act, Bradstreet pointed out that the appointment of a practitioner by an affected person is subject to ratification by creditors, while the appointment of a practitioner by a company is not.[33] In this regard, the interests of those creditors who are not required to ratify the appointment become vulnerable when a practitioner is appointed by a company as they do not have a say in the appointment process. It is for this reason that Bradstreet pointed out that when a practitioner is appointed by a company there is no such early and accessible protection available to all creditors.[34] As a solution, he suggested that ratification of the appointment of a practitioner should be available to all creditors to strengthen protection. Bradstreet is also of the view that the

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[29] Section 131 (5) of the 2008 Act.
[30] Bradstreet 2010 *South African Mercantile Law Journal* 202.
[31] Bradstreet 2010 *South African Mercantile Law Journal* 198.
[32] Bradstreet 2010 *South African Mercantile Law Journal* 201.
[33] Bradstreet 2010 *South African Mercantile Law Journal* 202.
[34] Bradstreet 2011 *South African Law Journal* 375.

protection of creditors is available *in most part of the business rescue proceedings*.[35] This surely is an admission of the insufficiency of the available protective measures to creditors since protection is not available throughout the process. The lack of veto power on the part of creditors regarding the appointment of a practitioner is particularly problematic.

2.3 A business rescue practitioner appointed by a company's resolution

Where a business rescue process is commenced by a company resolution, the company will appoint a practitioner who satisfies the requirements of section 138 of the 2008 Act and who has accepted the appointment in writing. The appointment of the practitioner by the company is not made subject to ratification by the creditors.[36] There is no early and accessible protection to creditors where a practitioner is appointed in terms of section 129 (3) (b) of the 2008 Act and no veto power is therefore exercised by the creditors.[37] The affected persons are then notified about the practitioner's appointment. The recourse that an affected person has against the appointment of a practitioner is to apply to court for the appointment to be set aside.[38] The application to court must be brought on the following grounds: that the practitioner does not satisfy the requirements of section 138 of the 2008 Act and is not independent of the company or its management or lacks the necessary skills. The ground that one lacks the necessary skills required by the company's circumstances, is not mentioned as one of the requirements for appointment of a practitioner and it effectively introduces an additional requirement through the backdoor.[39]

Section 130 (1) of the 2008 Act provides that an affected person, which includes a creditor, may approach a court and apply for an order for a practitioner to provide security. This protective measure of demanding security from a practitioner is only available where the business rescue process is commenced by a company resolution. This application can be made any time before the adoption of a business rescue plan.[40] The potential impact of the appointment of a practitioner on the protection of

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[35] Bradstreet 2010 *South African Mercantile Law Journal* 212.
[36] Bradstreet 2010 *South African Mercantile Law Journal* 202.
[37] Bradstreet 2011 *South African Law Journal* 375.
[38] Section 130 (1) (b) of the 2008 Act.
[39] Loubser 2010 *Journal of South African Law* (Part 1) 507.
[40]Delport https://www.mylexisnexus.co.za/Content/NavigationNodePage.aspx?nodeId=fec40d1c-a698-44b2-ad0a-6f2714242c0f&nodeText=Commentary#. (Date of use: 1 October 2020).

creditors is acknowledged by Loubser.[41] She argues that it is necessary to secure the interests of affected persons (including creditors) by having a requirement that will force all practitioners to provide security and that such security must be a precondition to their appointment.[42] Such security may be in an amount and on the terms and conditions that the court considers necessary to secure the interests of the company and any other affected person.[43] Loubser and Joubert found it surprising that a provision for security is not mentioned as a precondition to the appointment of a practitioner as this weakens the protection of creditors.[44] The current position is that the application must be made to court to force a practitioner to provide security and it is only available with respect to the practitioner appointed by a company. It has been noted that only the practitioner appointed by the company is required to furnish security.[45] All practitioners should be required to furnish security and without court application. It is without a basis that the legislature has differentiated between a practitioner appointed by the company from that appointed by a court subject to ratification of the creditors. All creditors need protection and the fact that the creditors have ratified the appointment of a practitioner in the case of a business rescue process commenced by an affected person is not a valid ground not to require security from the practitioner. South African corporate and insolvency law have an established principle that any provisional or final liquidator, judicial manager or trustee must provide security for the proper performance of their duties.[46] The security from a practitioner serves as a protection that the practitioner will properly perform his duties.

2.4 Qualifications of a business rescue practitioner

Minimum qualifications of a business rescue practitioner

The qualifications requirements in terms of section 138 of the 2008 Act are meant to guide the creditors and the company of the people who qualify to be appointed as a practitioner. Section 138 of the 2008 Act provides that a person will be appointed as a

[41] Loubser 2010 *Journal of South African Law* (Part 1) 508.
[42] Loubser 2010 *Journal of South African Law* (Part 1) 508.
[43] Section 130 (1) (c) of the 2008 Act.
[44] Loubser 2015 *Industrial Law Journal* 28.
[45]Delport https://www.mylexisnexus.co.za/Content/NavigationNodePage.aspx?nodeId=fec40d1c-a698-44b2-ad0a-6f2714242c0f&nodeText=Commentary#. (Date of use: 1 October 2020).
[46] Loubser 2010 *Journal of South African Law* (Part 1) 508.

practitioner if the person meets the minimum qualification as per the 2008 Act.[47] The qualifications of a practitioner are significant in order to achieve the goals of business rescue proceedings. Rajaram *et al* argued that in most cases the poorly skilled practitioners are the cause of failed rescues.[48] Patel submitted that for a person to be a qualified practitioner, he should be required to have skills and abilities of lawyers, accountants and businessman and not just one set of skills. [49] Patel further submitted that it is vital for a practitioner to possess skills and knowledge of all three professional disciplines in that the process of business rescue is multidisciplinary in nature.[50] This is supported by Rajaram and Singh who submitted that the responsibilities of a practitioner are multidimensional as they require a variety of competencies.[51] Bradstreet pointed out that a practitioner will be the weakest link for creditors and further that there is a lack of legislative measures to ensure that practitioners appointed are competent.[52]

The minimum requirements are as follows: The person must be a member in good standing of legal, accounting or business management profession accredited by the Companies and Intellectual Property Commission ('CIPC'); The person must not be subject to a probation order; The person must not be disqualified as a director; The person must not have a relationship with the company that will lead to a reasonable and informed third party to conclude that the integrity, impartiality and objectivity of that person is compromised and is not related to a person who has relationship contemplated in section 138(1)(d) of the 2008 Act. The section regarding the minimum requirements on the qualifications of a practitioner is mute on the fact that practitioner must have knowledge from three different disciplines. A practitioner is expected to have knowledge from three disciplines. Whilst this is difficult to achieve, it is only

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[47] Minimum qualifications for a practitioner are as follows: Membership in good standing of legal, accounting or business management profession accredited by the CIPC; license by CIPC in terms of subsection (2); non-existence of an order of probation in terms of section 162 (7); non-existence of disqualification for a person to act as a director of the company in terms of section 69 (8); non-existence of relationship with a company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and non-existence of relationship to a person who has a relationship as contemplated in paragraph (d), See section 138 (1) of the 2008 Act.
[48] Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Adapt or die) 12.
[49] Patel 2018 *Business Rescue* 61.
[50] Patel 2018 *Business Rescue* 62.
[51] Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Competencies for effective management) 9.
[52] Bradstreet 2010 *South African Mercantile Law Journal* 211.

proper that there be a qualification that can be used as a minimum requirement for accreditation.

In all the requirements provided in section 138 of the 2008 Act, there is nothing which indicates that the person possesses such required qualifications will be capable of rescuing the company or protecting the interests of creditors. Bradstreet submitted that the qualification required by section 138 (1) (a) of the 2008 Act is neither here nor there in that 'membership' in good standing can hardly be equated to an ability to effect a successful rescue, unless such membership necessarily attests to such an ability and further that creditors cannot rely on such membership to conclude that a practitioner is able to effect what is their best interests without further details about practitioner's personal qualification.[53] The Companies Regulations[54] provides slightly more details regarding the formal qualification of a practitioner. The requirements are that a practitioner may be an attorney, an accountant, a liquidator or business turn around practitioner or a person holding a degree in law, commerce or business management who has experience in conducting business rescue proceedings. Experience of five or ten years is required depending on the type of company. The requirements do not seem to address the problems in that the experience can still be irrelevant and also that the inclusion of a liquidator as a person who can rescue a company is worrisome, in that the experience of a liquidator will not be relevant to rescue the company. Delport indicated that the fact that a person is a liquidator does not automatically render them qualified to be appointed as a qualified practitioner. [55]

There is a conducted study which shows that accounting is most ranked as the important qualification for a practitioner.[56] This is because the focus is effective cash management of a financially distressed company. [57] The qualification required from a practitioner should serve as some assurance of the practitioner's ability in this regard. In that way, the interests of the creditors will be protected. As things stand, the person who satisfies the requirements of section 138 of the 2008 Act may still not possess the

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[53] Bradstreet 2010 *South African Mercantile Law Journal* 205.
[54] Companies regulations, 2011, Government Gazette 26 April 2011, No 34239.
[55]Delport https://www.mylexisnexus.co.za/Content/NavigationNodePage.aspx?nodeld=fec40d1c-a698-44b2-ad0a-6f2714242c0f&nodeText=Commentary#. (Date of use: 1 October 2020).
[56] Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Competencies for effective management) 9.
[57] Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Competencies for effective management) 9.

necessary skills, knowledge and experience to facilitate a business rescue process. Section 138 of the 2008 Act is mute about the ability of a practitioner to rescue a company or safeguard the interests of the creditors and there is a greatest possibility of having incompetent practitioner in the office. The creditors' primary remedy in cases where an incompetent practitioner has been appointed would lie in their ability to pay for legal fees in order to make application in court.

With the additional requirements by the companies' regulations, the qualifications requirement is still not enough or adequate to protect the creditors or to have a suitable person in the office of a practitioner. This is because to the current position does not require a practitioner to have skills and knowledge from three professional disciplines whereas the process of business rescue is multidisciplinary in nature and such skills and knowledge from different disciplines is vital for the success of the rescue process. A practitioner is expected to have a variety of skills and experience acquired from different disciplines and for that reason it is important that business rescue should be a profession on its own with curriculum that addresses this crucial issue.[58] This will make it simple to regulate practitioners and ensure that they have necessary skills, knowledge and competencies to rescue a financially distressed company.

Accreditation of a business rescue practitioner

It is important to deal with the accreditation of a practitioner and the professional bodies with powers to accredit practitioners and the manner in which these bodies regulate practitioners. The CIPC has empowered several professional bodies to accredit their members as practitioner.[59] Amongst accredited professional bodies some are Institute of Accounting and Commerce (IAC), South African Institute of Professional Accountants (SAIPA) and South African Institute of Chartered Accountants (SAICA).[60] The IAC outlined the requirements for accreditation as a business rescue. In addition to the requirements set out in section 138 of the 2008 Act, the IAC has published that board examination/competency assessment must be

[58] Papaya 2014 *De Rebus* 3.
[59] Notice 14 of 2018 of Practice Notes Published by the CIPC on the 28th day of March 2018 http://www.cipc.co.za/index.php/notices/view/?upload_section_filter=0&displays=1&year=0 (Date of use: 11 October 2020).
[60] Notice 14 of 2018 of Practice Notes Published by the CIPC on the 28th day of March 2018 http://www.cipc.co.za/index.php/notices/view/?upload_section_filter=0&displays=1&year=0 (Date of use: 11 October 2020).

completed.[61] The IAC has continuous professional development programs for a practitioner and Professional indemnity insurance (PII).[62] Practitioners are required to have satisfactory PII for each and every business rescue appointment accepted by such a practitioner.[63] This should be seen as an assurance to stakeholders that practitioners will act accordingly. The examination for accreditation of a practitioner has been supported by Papaya who rightfully argued that there is a need to establish a new professional body to regulate practitioners, and such body should have its own examination that practitioner need to pass before accreditation.[64] The call for examination also finds support in the study conducted by Rajaram and Singh which shows that for accreditation of a practitioner there is a need to have examination for accreditation and is important for competency of a practitioner.[65] In the very same study the idea of having self-regulated body which accredits a practitioner is supported.[66] SAIPA in addition to minimum requirements of practitioner has added that for accreditation candidates will need to have a qualification on business rescue, business restructuring, or insolvency and liquidation from any recognised institution of higher learning.[67] It must be noted that SAICA has no additional requirements to that of the 2008 Act and regulations.[68]

The addition of examination by IAC and listed qualification by SAIPA is an admission that the minimum requirements set out by the 2008 Act and regulations are not enough. The approach that was taken by the CIPC of accrediting several professional bodies to accredit and regulate the practitioners has several challenges, among others, that there is no uniformity in the profession and practitioners are accredited and regulated by different bodies using different rules. Papaya rightfully argued that a code may be developed containing a code of conduct and ethics expected from a practitioner.[69] It is commendable that after one is in good standing with an accredited

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[61] https://iacsa.co.za/business-rescue-practitioner/ (Date of use: 11 October 2020).
[62] https://iacsa.co.za/business-rescue-practitioner/ (Date of use: 11 October 2020).
[63] https://iacsa.co.za/business-rescue-practitioner/ (Date of use: 11 October 2020).
[64] Papaya 2014 *De Rebus* 4.
[65] Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Competencies for effective management) 6.
[66] Rajaram 2018 *Southern African Journal of Economics and Management Sciences* (Competencies for effective management) 8.
[67] https://www.saipa.co.za/business-rescue-accreditation-green-light-saipa-member/ (Date of use: 11 October 2020).
[68] https://www.saica.co.za/Technical/LegalandGovernance/CompaniesAct71of2008/BusinessRescuePractitioners/tabid/4207/language/en-US/Default.aspx (Date of Use: 11 October 2020).
[69] Papaya 2014 *De Rebus* 4.

professional body, such a person will still need to apply for license to practice as a business rescue practitioner from the CIPC.[70] This is a good approach in attempt to centralise the regulation of business rescue practitioners.

2.5 Removal and replacement of a business rescue practitioner

It has been noted above that the remedy of creditors is having financial implications which burdens the creditors who seek to protect themselves. An affected person, which includes the creditor, may make an application to court to remove the practitioner.[71] Section 139 (3) of the 2008 Act is silent about time limit within which another practitioner should be appointed after the removal of the practitioner. This may create a problem for creditors in that the already financially distressed company in a situation where there is a delay in the appointment of a replacement a practitioner as the company may have to spend some time without a practitioner.[72] The mechanism provided for the creditors to ensure that the practitioner is capable to rescue the company or suitably qualified to ensure that their interests are sufficiently protected is through a court application. It is without a doubt that this type of recourse places financial burden to the creditors. Bradstreet submitted that creditors who are willing to incur legal fees will have sufficient protection.[73] Bradstreet holds a view that creditors should not be forced to spend more money on legal fees simply to protect their interests.[74] The legislature should have provided protective measures to be utilised without court proceedings, such as veto power which allows the creditors to ratify the appointment of the practitioner. The option to object ought to remain available to creditors subject to qualifications by limiting the ground on which the power may be exercised and thereby limit or restrict abuse by creditors without valid or legitimate grounds. The protection provided to creditors in terms of section 130 of the 2008 Act is costly and those unable to incur the necessary legal fees would have to rely on the legislative safeguards against a practitioner who is not suitably qualified.

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[70] http://www.cipc.co.za/files/5215/4720/0458/notice_02_of_2019.pdf (Date of use: 27 May 2021).
[71] Section 139 (1) of the 2008 Act.
[72] *Gupta v Knoop No and Others 2020 (4) SA 128 (GP)* [35].
[73] Bradstreet 2011 *South African Law Journal* 378.
[74] Bradstreet 2010 *South African Mercantile Law Journal* 203.

2.6 Remuneration of business rescue practitioner

The services of practitioners are payable.[75] There are tariffs prescribed for the practitioner to charge.[76] Apart from the normal fees as per the tariffs, the practitioner may propose an agreement with the company for further remuneration.[77] For agreement to be valid and binding, it must be voted for by creditors and shareholders.[78] It's worrisome that the legislature didn't set out the limit in which the practitioner and voters may agree on, in order to avoid huge bill as remuneration of a practitioner. The creditor or shareholder who voted against an agreement has a right to apply to court for an order setting aside the agreement.[79] Bagwandeen has described the voting process and avenue of approaching a court to set the agreement aside as a precautionary measure against the abuse.[80] The application to set the agreement aside must be based on the fact that the agreement is not just and equitable or that the agreed remuneration is unreasonable having regard to the financial circumstances of the company.[81] It is unfair that the agreement is final and binding without any recourse to the people who voted in its favour. It is possible that creditors may vote in favour of an agreement and later receive information that what they have voted for is not reasonable for purpose of rescuing the company. The legislature should have made it possible for the same voters to apply to set aside the agreement. The 2008 Act is silent about taxation of a practitioner's remuneration, disbursements and expenses, this opens floodgates for potential abuse by practitioners.[82] In *Caratco (Pty) Ltd*,[83] the court said that section 143 of the 2008 Act is silent about any other fee arrangements.[84] The court further held that there is nothing in section 143 of 2008 Act which suggests that a fee agreement falling outside it is void.[85] This decision is problematic in that the fee agreement outside the provisions

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[75] *Gupta v Knoop No and Others 2020 (4) SA 128 (GP)* [28], the court held that a practitioner should always keep in mind that remuneration should never outweigh the duty to act in good faith.
[76] Section 143 (1) of the 2008 Act; Regulation 128 of the 2008 Act.
[77] Section 143 (2) of the 2008 Act.
[78] Section 143 (3) of the 2008 Act.
[79] Section 143 (4) of the 2008 Act.
[80] Bagwandeen 2018 *Effectiveness of business rescue* 76.
[81] Section 143 (4) of the 2008 Act.
[82] Bagwandeen 2018 *Effectiveness of business rescue* 75; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2012 (3) SA 273 (GSJ)* [49].
[83] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA)* (Hereinafter "*Caratco*").
[84] *Caratco* [13].
[85] *Caratco* [14].

of section 143 of the 2008 Act will not protect the creditors' interests and can compromise the independence of the practitioner.[86]

2.7 US Bankruptcy: Debtor in possession.

In the United States of America ("US"), Chapter 11 of the Bankruptcy Code ("Code") is utilised for the reorganisation of a company.[87] This is also known as 'debtor in possession' as the debtor remains in possession of management.[88] The manager in the company will continue to manage a company.[89] After filing a petition for an order under chapter 11, the debtor assumes an additional identity as the debtor in possession.[90] There are circumstances in which a debtor may be removed from management and the trustee will be appointed.[91] The only way of bringing an independent third party into the process of Chapter 11 is through the appointment of a trustee. Such appointment is done by the court.[92] The purpose of appointing a trustee is to address shortcomings in the debtor's current management.[93] The management may be removed and trustee may be appointed where there was a fraud or mismanagement and where it's in the interest of the creditors, any equity security holders and other interests of the estate.[94] The court will remove the debtor from management and appoint a trustee if one of the above circumstances exists.[95]

The method of Chapter 11 of not unnecessarily removing the management is a good approach in that their experience will be needed for the success of the process. Unfortunately, Chapter 6 of the 2008 Act favours the removal of management without laying out grounds on which the management can be removed. It must be noted that

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[86] Cassims *et al* noted that practitioner's remuneration has a potential of impacting the impartiality and the independence of the practitioner, see Cassim *et al Business structure* 480.
[87] Chapter 11 of Code provides for the reorganisation of a financially struggling company. In that process, a company or debtor proposes a reorganisation plan which aims to make a company profitable again and to timeously pay its creditors. Under the reorganisation process, the management of the company continues to run the business of the company, this is called 'debtor in possession'. It must be noted that significant business decisions are made subject to approval by a bankruptcy court. See https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (Date of use : 03 May 2021).
[88] Stoop 2017 *PER* 5.
[89] Rubio 2016 *Business Law Today* 1.
[90] Kaup 2011 *GPsole* 49.
[91] Rubio 2016 *Business Law Today* 1.
[92] Zaretsky 1993 *South Caroline Law Review* 927.
[93] Zaretsky 1993 *South Caroline Law Review* 928.
[94] Zaretsky 1993 *South Caroline Law Review* 928.
[95] Rubio 2016 *Business Law Today* 7.

the board is not dissolved by the appointment of a practitioner although the practitioner determines the power to be exercised by the board.[96] The fact that the board doesn't dissolve automatically is good for the success of business but the 2008 Act needs to set out the grounds for removal of the board or management. The powers cannot be left to a practitioner to exercise and there must be guidelines to limit the abuse of powers. Mpofu *et al* argued that because expenditure should be reduced during rescue process, one of important measures should be an immediate dissolution of the board once practitioner assumes duty.[97] This argument fails to consider that the experience and knowledge in the business of the company is important and a practitioner will need to be familiar with a business before dissolving the board. The authors indicated that the nature of information required to develop a plan is that one needs to be knowledgeable about company's line of business.[98] The US Chapter 11 removes the management based on grounds that are clearly set out and that is not a position in SA. In SA, a third person is brought in as opposed to US Chapter 11. I do not canvass that the tradition be changed or aligned to US Chapter 11 but that the approach used by the US to remove the management can be utilised to remove the management or board of the company. It is clear that their experience and knowledge of business is important for the success of the company. The grounds to remove them must therefore be legislated.

2.8 Conclusion

A practitioner is at the centre of a business rescue process and his powers can pose risk to the interest of creditors if not properly exercised. The appointment stage of a practitioner has problems in that there is a lack of veto power to the creditor where the practitioner is appointed by a company and the practitioner appointed by an affected person is not required to furnish security. This exposes the lack of sufficient protection for all creditors. The minimum qualifications of the practitioner ensure that the appointed practitioner will be competent to rescue the company. Whilst there is a progress in the business rescue legislative framework, it is not sufficient. What the scholars defined as a competent practitioner is not in line with the minimum

[96] Mpofu 2018 *Corporate Board: Role, Duties and Composition* 23.
[97] Mpofu 2018 *Corporate Board: Role, Duties and Composition* 25.
[98] Mpofu 2018 *Corporate Board: Role, Duties and Composition* 23.

requirements for accreditation of a practitioner. For instance, it is said that a practitioner should possess skills and knowledge from different disciplines in that the process of rescue is interdisciplinary. The minimum requirements still need to be developed and it is important to incorporate business rescue qualification as a requirement of accreditation. In the US Code, there are no problems with appointment of a third person as the appointment is made by a court in exceptional cases. The process ensures that the company also benefits from the knowledge and skills of the management in that same cannot just be removed. It is submitted that in the process of removing the management, SA must borrow from the US Code, the fact that there must be grounds to remove the management and that such grounds must be legislated. With the above, it is submitted that the creditors' protection against the practitioner is still not sufficient.

This chapter has demonstrated that the applicable provisions of the 2008 Act do not provide sufficient protection to creditors against a practitioner. The protection of creditors during a business rescue process is not only impacted by the appointment of a practitioner. Their protection is also affected by the protection of the rights of other affected persons during the process. In this regard, it is of fundamental importance to evaluate the protection available for creditors against other business rescue participants or stakeholders. This issue is dealt with in the following chapter.

CHAPTER 3

The creditors’ protection against other affected persons

3.1 Introduction

The creditors’ protection against other affected persons guards the interests of the creditors against other affected persons.[99] This protection is made up by safeguards in the 2008 Act which automatically protect the creditors and measures which the creditors can take to protect themselves. There are many reasons which necessitate the creditors’ protection. For instance, it has been noted that the current Chapter 6 of the 2008 Act has led to considerable abuse of the business rescue process.[100] The moratorium of claims will be prejudicial to creditors and it is therefore important to have proper protection afforded to creditors during a rescue process.[101] Mokoena holds the view that the protection of creditors is primary under a business rescue process.[102]

This chapter explores the protection available to creditors against other affected persons, being individual creditors and employees. The chapter also deals with the protective measures that individual creditors have against each other and, to a limited extent, the protective measures they have against employees. The chapter also deals with the potential implications of the current voting mechanism and demonstrates that pre-commencement secured creditors’ rights are not sufficiently protected. It is argued that the current protective measures for creditors are not sufficient and comparison between business rescue under Chapter 6 of the 2008 Act and US Code is made.

3.2 Voting mechanism and dissenting creditors

The current voting mechanism for creditors in a business rescue process is problematic. The problems inherent in the current voting system of creditors during the process have been acknowledged by Da Costa.[103] A practitioner is tasked with facilitating the process and developing a plan with the participation of creditors, other

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[99] In this regard, other affected persons include creditors and employees, see section 128 (1) (a) of the 2008 Act.
[100] https://www.hoganlovells.com/en/publications/the-abuse-of-business-rescue-beware-the-serial-debtor (Date of use: 03 April 2021).
[101] Mmbara 2016 *Moratorium* 18.
[102] Mokoena 2019 *Journal of Corporate and Commercial Law Practice* 40.
[103] Da Costa 2018 *Without Prejudice* 2.

affected persons and the management of the company. The practitioner would then call a meeting for the consideration of the plan by all involved, including employees.[104] This ensures that the creditors cast an informed vote when the practitioner calls for voting on the business rescue process.[105] Only creditors are allowed to vote for the business rescue plan during the voting process. It is commendable that voting rights are reserved for creditors but it remains to be seen if same will sufficiently guard the interests of creditors. Holders of company securities may be allowed to vote for a plan if the proposed plan alters their rights.[106]

A business rescue plan is approved if it was supported by 75 percent of the creditors and 50 percent independent creditors.[107] Secured creditors have full voting rights and Chapter 6 does not differentiate between secured and unsecured claims in determining voting rights.[108] Although section 134 (3) of the 2008 Act seeks to protect secured creditors, it is silent on whether their rights can be deprived through business rescue process. It is submitted that if a business rescue plan affects secured creditors' rights, they would be vulnerable, but if it does not, they should not have voting rights as they may use same against unsecured creditors. Loubser criticises the voting system as a deviation from the established practice in which secured creditors usually exercise the value of the unsecured part of their claims.[109] The criticism is supported by Locke who advocated for a change in the voting system.[110] Locke argued that the 2008 Act does not provide for separate account of creditors and that the secured creditors' position is not considered separately.[111] She concluded that a business rescue process does not affect the existence of accessory security rights and that it is based on the reasoning that a plan cannot be used to reduce claims that are binding

[104] Section 151 of the 2008 Act.
[105] Section 152 (1) (e) of the 2008 Act.
[106] Section 152 (3) of the 2008 Act.
[107] Section 152(1)(e) and (2)(a) and (b) of the 2008 Act.
[108] Bradstreet 2015 *Journal of Corporate and Commercial Law and Practice* 14.
[109] Loubser 2010 *Journal of South African Law* (Part 2) 694.
[110] Locke 2018 *Journal of South African Law* 854; *Diener NO v Minister of Justice and Correctional services and Other* 2019 (2) SA 399 (SCA) [44].
[111] Locke 2018 *Journal of South African Law* 850. Regarding the categorisation of creditors, see *Commissioner, South African Revenue Services v Beginsel No and Others* 2013 (1) SA 307 (WCC) [25], where the court stated: "The categorisation of creditors is uncontentious and well known in legal parlance. Secured creditors are those who hold security over the company's property such as a lien or mortgage bond. Unsecured creditors are those whose claims are not secured, including concurrent. The unsecured creditors are either preferent or concurrent creditors."

whether secured on not. She recommends that the approval requirements should be changed and that a separate class of voting system should be introduced.[112]

There is support for this proposition in case law. In *African Banking Corporation of Botswana Ltd*,[113] the court held that there was no express provision in chapter 6 of the 2008 Act which provides that the adoption of a business rescue plan would deprive creditors of their rights against sureties.[114] The court further held that an offer in terms of section 153(1)(b)(ii) of the 2008 Act is automatically binding on the offeree immediately it is made. However, this approach was criticised by the Court in *Turning Fork (Pty) Ltd t/a Balanced Audio v Greeff.*[115] In that case, it was held that there is no provision which provides that the adoption of a plan would deprive creditors of their sureties nor is there one which preserves rights against sureties.[116] The court further held that whether the adoption of a plan will not affect a creditor's right against a surety will depend on the application of common-law principles to the actual terms of the plan.[117] The court held that the adoption of a business rescue plan will affect the position of sureties.[118] On appeal, the court in the case of *African Banking Corporations of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*[119] held that the offer is binding in the sense that the offeror cannot withdraw it until offeree has responded to it.[120] The court held further that the offer has to meet all the requirements of a valid offer.[121]

Delport criticises the approach adopted in *Kariba GNP* and submits that the compulsory obligations established in the judgement might have the effect that property would be expropriated without compensation.[122] The very same judgment received support from Levenstein, who submitted that *Kariba GNP* is in line with the

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[112] Locke 2018 *Journal of South African Law* 854.
[113] 2013 (6) SA (GNP) (Hereinafter "*Kariba GNP*").
[114] *Kariba GNP* [68].
[115] *Turning Fork (Pty) Ltd t/a Balanced Audio v Greeff and another* 2014 (4) SA 521 (WCC) [84] (Hereinafter "*Turning Fork*").
[116] *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) [55], They disagree with the findings in *Kariba GNP; Absa Bank Limited v Caine NO and Another* [2014] ZAFSHC [37].
[117] *Turning Fork* [84].
[118] *Turning Fork* [85-86].
[119] *African Banking Corporations of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* 2013 [2015] ZASCA [69] (hereinafter "*Kariba SCA*").
[120] *Kariba SCA* [21].
[121] *Kariba SCA* [52-53].
[122]Delport https://www.mylexisnexus.co.za/Content/NavigationNodePage.aspx?nodeId=fec40d1c-a698-44b2-ad0a-6f2714242c0f&nodeText=Commentary#. (Date of use: 1 October 2020).

intention of the legislature when it drafted section 153(1) *(b)*(ii) of the 2008 Act, that the offeror must be placed in a position where it can, with certainty put forward a binding offer to buy the dissenting creditors' voting interest at liquidation value, and the offeree must be forced to sell at such price.[123] It is commendable that the rights to vote for a plan are reserved to creditors. The patterns of voting pose a serious risk to the protection of creditors and the lack of separate voting class by secured creditors and unsecured creditors has inexplicably given unsecured creditors a say on the rights of the secured creditors. The lack of separate voting class leaves both unsecured and secured creditors vulnerable. The position of secured creditors will be dealt with below, save to mention that it is not clear if the secured claims will be affected by a business rescue plan, and if it is affected their position might be undermined, and if not affected it would be fair for them not to have full voting rights in order to properly protect unsecured creditors.

3.3 Dissenting creditors and 'binding offer'

If a business rescue plan is rejected, there are three alternative avenues to follow in order for the plan to be adopted.[124] A practitioner may request approval from holders of voting interests to prepare and publish a revised plan. A practitioner or an affected person may make an application to court to set aside the results of a vote based on the ground that it was "inappropriate", and the affected person may make a binding offer to buy the voting interests.[125] The 2008 Act does not define the term "inappropriate" in the context of setting aside a vote. There are no guidelines on the circumstances under which a plan may be rejected due to inappropriate grounds. The power to determine that is left in the hands of the court.[126] Section 153 (7) of the 2008 Act provides, among others, that a court must consider the interests of other stakeholders when setting aside the vote. Creditors do not only vote in their interests but must consider the interests of other stakeholders.[127] Creditors are not expected to consider the interests of other stakeholders, but rather their own interests, which should be bona fide.[128] It is argued that a creditor is not a proxy for all affected persons

[123] Levenstein 2017 *De Jure 258.*
[124] Section 153 (1) of the 2008 Act.
[125] Section 153 (1) of the 2008 Act.
[126] Ngobeni 2016 *In whose interests* 16.
[127] Ngobeni 2016 *In whose interests* 20.
[128]Delport https://www.mylexisnexus.co.za/Content/NavigationNodePage.aspx?nodeId=fec40d1c-a698-44b2-ad0a-6f2714242c0f&nodeText=Commentary#. (Date of use: 1 October 2020).

and cannot be expected to guard others' interests. It is inapposite to force creditors to vote in accordance with the provisions of section 7 (k) of the 2008 Act (that they must balance the interests of all stakeholders). It is not a requirement that a vote must be appropriate as this indirectly adds another voting requirement. This route of setting aside the vote based on the grounds of inappropriateness is not available to use by dissenting creditors against those who support a business rescue plan. The route is not equitable protection as it's not available for minority (dissenting) creditors. It is surprising that dissenting creditors cannot approach a court on the same ground to set aside the will of the majority. This is an attempt to strike a balance between affected persons at the expense of dissenting creditors. If an application to set aside a vote based on the ground of inappropriateness is successful, the plan is automatically approved.[129]

Levenstein submits that the "binding offer" principle is an attempt to ensure that a plan is ultimately approved and implemented by the practitioner.[130] The effect of binding offer is that it forces dissenting creditors to accept the terms of the proposed plan or be bought out on a liquidation value.[131] There is a different view that section 153(1)*(b)*(ii) of the 2008 Act is unfair. Loubser questioned why an offeror is not allowed to offer more than liquidation value of the voting interest and further submitted that the liquidation value to unsecured creditors will amount to nil or small amount of money.[132] The problem of freedom to state the price is when creditors state more and unreasonable price. The uncertainty of the binding offer will cause the business rescue process to collapse without just cause. In *Kariba GNP* the court favoured an interpretation which excluded a dissenting creditors' consent based on the principle of cram down which is part of US Code.[133] The court in *Kariba SCA* held the view that US Code cannot be relied on because SA business rescue process is different from the process in the US Code. The court confirmed that the reorganisation plan and section 1129 (a) of the US Code needs to be satisfied.[134] The SCA rejected the interpretation of "binding offer" as one that would effect a cram down based largely on

[129] *FirstRand Bank Ltd v KJ Foods CC* 2017 (5) SA 40 (SCA) [88] and [89].
[130] Levenstein 2017 *De Jure* 247.
[131] Levenstein 2017 *De Jure* 246.
[132] Loubser 2010 *Journal of South African Law* (Part 2) 697.
[133] A cram down occurs when a court orders that a reorganisation plan should be implemented irrespective of the objection by dissenting class of creditors. This principle allows the plan to be forced down upon the dissenting creditors, see *Kariba GNP* [28] and Stoop 2017 *PER* 5.
[134] *Kariba SCA* [16].

the fact that the legislation is unclear and that lack of judicial oversight would be prejudicial to the interests of creditors. The court did not reject the principle to be invoked in the business rescue proceedings and for that reason it is argued that the legislature must revisit the provisions of the 2008 Act. It is supported by Levenstein that there must be a way to allow the dissenting creditors to ship out the process that they do not support. [135]

3.4 Secured creditors and the discharge of security.

Secured creditors seem to enjoy the security before and during business rescue proceedings. There is no mechanism that they can use to protect their interests if a business rescue plan is adopted and is not favourable to them. Section 134 (3) of the 2008 Act provides that a company may dispose of the property over which there is security or title interest. In order to dispose of such property, the following requirements must be met: the company must obtain the prior consent of the person who has security, unless if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and the company must pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person or provide security for the amount of those proceeds, to the reasonable satisfaction of that other person. While section 134 (3) of the 2008 Act provides sufficient safeguard to the creditors, it is not clear to what extent this protection will be available.

It is noteworthy that section 154 of the 2008 Act provides that a business rescue plan may set out that, if it is implemented in line with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of the debt only to that creditor will lose the rights to enforce the relevant debt or part of it. If the plan has been approved and implemented in line with chapter 6, a creditor will not be entitled to enforce a debt except to the extent provided for in the plan. Thus, business rescue will discharge debts and claims, irrespective of security. A plan which is properly approved will extinguish the security that is afforded to secured creditors and this will be done without the consent of the secured creditors. The provisions of section 134 (3) of the

[135] Levenstein 2017 *De Jure* 249.

2008 Act can be rendered useless by the adoption of a plan which undermines the rights of the secured creditors. There is no express mechanism in the 2008 Act to keep separate account of the debt owed to the creditors who opposed the adoption of a plan, nor is there any mention of a procedure to consider secured creditors' position separately or to obtain their consent to the discharge of their claims.[136] The issue of voting mechanism is dealt with in detail above. The court in *Kariba GNP*[137] held that there is no express provision in chapter 6 of the 2008 Act which provides that the adoption of a plan would deprive creditors of their rights against sureties. The Court in *Turning Fork*[138] criticized *Kariba GNP* and held that there is no provision which provides that the adoption of a plan would deprive creditors of their sureties and that there is no provision in the 2008 Act which preserves rights against sureties. The court further held that whether the adoption of a plan will not affect a creditor's right against a surety will depend on the application of common-law principles to the actual terms of the plan. The court held that the adoption of the plan will affect the position of sureties. The current position regarding a business rescue process affects the surety and leaves the pre-commencement creditor without recourse. The position leaves secured creditors with no remedy wherein the adopted plan undermines their interests.

3.5 Post commencement finance

In order for a business rescue process to be successful, money or funding may be required to assist a financially distressed company during the process. This is termed post commencement finance.[139] Money may be secured through lending and lenders will be reluctant to lend money to a financially distressed company without proper

[136] Locke 2018 *Journal of South African Law* 850.
[137] *Kariba GNP* [68].
[138] *Turning Fork* [84].
[139] Post commencement finance is defined as the funding that may be made available to a company following the commencement of business rescue proceedings and which would enable such company to continue trading, Bagwandeen 2018 Effectiveness of business rescue 67; Post commencement refers to funding that is made available to a company after commencement of the business rescue proceedings, which confers preference on the claims in respect of such post commencement funding, Museta 2011 Development of business rescue 41; Section 135 of the 2008 Act provides that remuneration of employees that becomes due during rescue process and remuneration of a practitioner form part of post commencement finance; It is important at this stage to note that commencement refers to the beginning of the business rescue proceedings. Any reference to pre- commencement creditors is reference to creditors before business rescue proceedings and post-commencement creditors refers to creditors during business rescue proceedings including those mentioned by section 135 of the 2008 Act.

security that they will get their money.[140] It is difficult to secure or obtain finance for a financially distressed company, so the security must be attractive.[141] It is submitted that there is a potential concern with respect to ranking of creditors in that it undermines the rights and interests of pre-commencement creditors, particularly that their permission is not required for company to make new debts even though the ultimate result affects the pre-commencement creditors.[142] The court in the case of *Merchant West Working Capital Solutions (Pty) Ltd,*[143] sets out the ranking of creditors in a successful business rescue process.[144] In terms of such ranking, secured and unsecured post commencement creditors rank above pre-commencement creditors secured or not.[145] Pretorius and Du Preez support the interpretation afforded in *Merchant West* and submit that it is an encouraging development for distressed investing industry.[146] Their view is that there is a lack of post-commencement finance and they view the development/ ranking of creditors as set out in *Merchant West* as an encouraging factor for investors to finance company under business rescue in that they will rank above all pre-commencement creditors. In *Kritzinger v Standard Bank of South Africa Ltd,*[147] the court pointed out that Standard Bank was still a secured creditor post commencement of business rescue proceedings in the same way as it was prior to the commencement of such proceedings.[148] The court therefore took a different approach from the one adopted in the *Merchant West* case*.* The ranking of creditors in the *Merchant West* case is problematic in that it threatens the security of pre-commencement secured creditors. I support the view of not tempering with the

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[140] Zilwa 2019 *Raking of creditors* 57.
[141] Calitz 2016 De Jure Law Journal 270.
[142] Silangwe 2016 LLM dissertation 23.
[143] 2013 JDR 1019 (GSJ) [21] (hereinafter "*Merchant West*") (The court in the case of *Merchant West Working Capital Solutions (Pty) Ltd*, set out the ranking in the successful business rescue proceedings. Claims rank in the following order of preference: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.

[144] *Merchant West* [21].
[145] Kgomo J reiterated the same ranking in the case of *Redpath Mining South Africa (Pty) Ltd v Marsden* 2013 ZA GPJHC 148 [60].
[146] Pretorius 2013 *South African Journal Entrepreneurship & Small Business man* 171.
[147] *Kritzinger v Standard Bank of South Africa Ltd* 2013 ZAFSHC 215.
[148] *Kritzinger v Standard Bank of South Africa Ltd* [54].

rights of secured creditors.[149] Indeed, the raking of creditors in the *Merchant West* case has been rightly criticised. It is submitted that the ranking of creditors in the *Merchant West* case should be considered as *obiter* in that secured creditors are protected by section 134(3).[150] Stoop is of the view that the interpretation adopted by the court in *Merchant West* effectively undermines or renders obsolete the provisions of this subsection by negating the rights of the pre-commencement secured creditors almost entirely.[151] The consequences of *Merchant West* and *Red* cases is that they create super-priority without court oversight.[152] The ranking of claims needs to be clarified. Calitz submitted that the position of pre-commencement secured creditors has been excluded from the provisions of section 135 and that it was not the intention of the legislature to revise the position of secured creditors.[153] Calitz has outlined his own ranking of creditors and in that ranking, the pre-commencement secured creditor is not mentioned and is part of ranking under the provisions of section 135 but addressed and covered by section 134.[154]. If this interpretation is accepted, it will mean that pre-commencement creditors rank above all mention under section 135, including the practitioner's remuneration. Zilwa also submitted that the only reasonable inference to make is that secured pre-commencement creditors rank ahead of listed post commencement finance under section 135 of the 2008 Act.[155] It is not clear whether or not secured creditors pre-commencement rank higher than all secured post-commencement creditors. It is submitted that it is now a settled principle in company law that the remuneration of a practitioner will not take preference over secured claims in the event that a business rescue process fails and the company is placed under business rescue.[156] The court in the case of *Diener No*[157] settled the issue of the ranking of a practitioner's remuneration in liquidation proceedings by

[149] *Diener NO v Minister of Justice and Correctional services and others* 2019 (2) SA 399 (SCA) [44]; Osode 2015 *Penn State Journal of Law & International affairs* 486 and 487.
[150] Calitz 2016 *De* Jure 272.
[151] Stoop 2017 *PER* 20.
[152] Stoop 2017 *PER* 29.
[153] Calitz 2016 *De* Jure 273.
[154] According to Calitz, these claims rank as follows: (1) The practitioner's remuneration and costs arising from business rescue proceedings; (2) All post-commencement finance claims related to employment once business rescue has commenced but which have not yet been paid; (3) Claims for post-commencement loans obtained during business rescue, firstly secured claims in the order in which they were incurred; (4) All other unsecured claims against the company.
[155] Zilwa 2019 *Raking of creditors* 59.
[156] Kubheka 2019 *De Rebus* 4.
[157] *Diener No v Minister of Justice and Correctional Services and Others 2019 (4) SA 374 (CC)* (Hereinafter "*Diener CC*").

refusing leave to appeal and confirmed the findings of the Supreme Court of Appeal.[158] The Supreme Court of Appeal found that the legislature has clearly granted a preference for the claims of practitioner over secured creditors in terms of section 143. The court further held that section 143 does not allow for the claims of a practitioner to usurp the claims of all creditors, whether secured or not in liquidation.[159] The remuneration of a practitioner and expenses incurred during business rescue proceedings, if not paid during business rescue proceedings, during liquidation can only be paid after the costs set out in section 97[160] have been paid.

3.6 Implications of having an employees and trade unions as an 'affected person'.

It can hardly be gainsaid that the underlying philosophy of the 2008 Act is to balance the rights and interests of all relevant stakeholders during a business rescue process.[161] However, the 2008 Act does not define a stakeholder. The 2008 Act defines 'affected persons' as a shareholder or creditor of the company; any registered trade union, representing employees of the company and employees if they are not represented by trade union or employees 'representative.[162] It can be assumed that an "affected person" also refers to the relevant stakeholders as both terms refer to those who have interests in the outcome of a business rescue process.[163] The affected persons to be focused on here are employees. The legislature has given employees a powerful tool by classifying creditors and trade unions as affected persons.[164] The purpose of balancing the interests of stakeholders during the process leaves the process open for abuse from those who hold no claims against the company.[165] Mokoena is of the view that affected persons who are not creditors have a potential of frustrating the process for creditors who have valid claims against the company.[166] He

[158] *Diener CC* [44], [66] and [71].
[159] *Diener No v Minister of Justice and Correctional Services and Others 2018 (2)* [49].
[160] Section 97 of the Insolvency Act 24 of 1936, This section sets out the priority or ranking of the costs of the sequestration for purposes of clarifying who gets paid first.
[161] Section 7 (k) of 2008 Act.
[162] Section 128 (1) (a) 2008 Act.
[163] Mokoena 2019 *Journal of Corporate and Commercial Law Practice* 4.
[164] Joubert 2011 *The International Journal of Comparative Labour Law and Industrial Relations Impact* 11.
[165] Mokoena 2019 *Journal of Corporate and Commercial Law Practice* 18.
[166] Mokoena 2019 *Journal of Corporate and Commercial Law Practice* 13.

proposed that to limit and address conflict of interests, the focus should be on those who have a valid claim against the company.[167] Employees and trade unions have massive rights under chapter 6 of the 2008 Act as they can apply for business rescue process and approach court to set aside resolution which places the company under business rescue or to set the appointment of the practitioner.[168] Section 131 (4)(a)(ii) of the 2008 Act provides that an order to place the company under business rescue process may be made if the court is satisfied that the company has failed to pay employees any amount in terms of an obligation under a public regulation, or contract. This provision is detrimental to the creditors and shareholders in that it doesn't state the amount of money or months that will trigger the application of the same provision. This can be abused by employees and trade unionists. Bradstreet argued that these rights may be used as a bargaining tool for salary and wage negotiation by employees and trade union, and such parties would also have a right to appoint their own practitioner.[169] Joubert holds the same view that trade unions may use the process when their demands are not met.[170] Silangwe argues that there is a need to limit the right of employees and their right to apply for business rescue process should only be given to the trade unions that are creditors to the company.[171] Thus, employees should only be eligible to apply if the company owes them. Loubser suggested that a practice should be developed wherein an affected person can only approach the court for an order where the company has at least missed two consecutive payments. This will minimise abuse of this right. According to Mokoena the concept of affected person should only include those who have claims against the company and employees should be protected by labour law.[172] The employment contracts of the employees remain in force on the same terms and conditions and they can only be terminated through applicable labour laws which include retrenchment.[173] This provision is problematic in that the struggling company may be required to immediately reduce staff in order to survive and following retrenchment processes is time consuming which might reduce the chance of success. In *Numsa v South African Airways and Others*,

[167] Mokoena 2019 *Journal of Corporate and Commercial Law Practice* 19.
[168] Sections 130 and 131 (1) of the 2008 Act.
[169] Bradstreet 2011 *South African Law Journal* 358.
[170] Joubert 2011 *The International Journal of Comparative Labour Law and Industrial Relations Impact* 17.
[171] Silangwe 2016 *Affected persons* 33.
[172] Mokoena 2019 *Journal of Corporate and Commercial Law Practice* 40.
[173] Section 136 (1) of the 2008 Act.

the court held that a notice to commence a consultation process in terms of section 189 or 189(A) of Labour Relations Act, given by a practitioner in the absence of a business rescue plan would be premature and thus constitute an act of procedural unfairness.[174] This position was confirmed by the Labour Appeal Court.[175] The legal position set out in *Numsa*[176] will result in delay of the retrenchment process and has a potential to lead into greater jobs losses and can negatively affect the creditors. Burdette suggests that the same rules regarding contracts in insolvency should apply in business rescue proceedings.[177] In insolvency, the contracts of employment are suspended with effect from the date of sequestration order.[178] Employees' contracts are "executory contracts" which means that the debtor company is free to terminate them.[179] These kinds of rules were going be useful for the success of the business rescue process. The employees' outstanding remuneration will also enjoy the priority status as per ranking under the provisions of section 135 of the 2008 Act, in that it will rank after the remuneration of business rescue process. It is still problematic in that the employers' remuneration will form part of the liquidation and will still undermine the pre-commencement creditors. Section 98A of the Insolvency Act 24 of 1936 provides that any employee who was employed by the insolvent company will be paid any salary or wages for a period not exceeding three months. The payment will have preference to secured and non-secured creditors. If the company has more workers and their salaries are high, this will negatively affect the creditors. The only thing that will work in the favour of the creditors is that the payment will only be limited to 3 months.[180] The various interests of stakeholders cannot be balanced.[181]

It cannot be said that the creditor is sufficiently protected where the legislation has room for abuse of the system. In order to seek protection from such abuse one would have to approach the court, which is costly. Bradstreet is of the view that the creditor

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[174] *National Union of Mental workers of South Africa and Another V South African Airways (SOC) Limited (In business rescue) and Others*, Case no: J424/20 Labour Court of South Africa, Delivered on the 08th day of May 2020, [35].
[175] *South African Airways (SOC) Limited (In business rescue) and Others v National Union of Mental workers of South Africa and Another V South African Airways (SOC) Limited (In business rescue) and Others*, Case no: JA32/2020 (Labour Appeal Court), Delivered on 09th day of July 2020.
[176] Joubert 2011 *The International Journal of Comparative Labour Law and Industrial Relations Impact* 17.
[177] Burdette *SA Mercantile Law Journal* 425.
[178] Section 38 (1) of Insolvency Act 24 of 1936.
[179] Stoop 2017 *PER* 14.
[180] Section 98 A of Insolvency Act 24 of 1936
[181] Mokoena 2019 *Journal of Corporate and Commercial Law Practice* 39.

as an affected person is in a better place to protect his interest.[182] The challenge associated with this kind of protection is that it may be opposed by other affected persons. An affected person is given more rights and this may affect the creditors during the process. An affected persons' individual employees and trade unions are entitled to make an application to court for an order commencing business rescue proceedings.

3.7 US Bankruptcy position regarding voting mechanism, secured creditors, dissenting creditors and post-petition finance.

US bankruptcy reorganisation is widely accepted as a model of clarity concerning business rescue process.[183] As a result, most countries have considered and used US Bankruptcy Code ("US Code") in developing their business reorganisation system.[184] The South African legislature has consulted Chapter 11 of the US Code and some parts were used in developing chapter 6 of the 2008 Act which deals with business rescue process.[185] For these reasons the United States ("US") has been chosen as a comparison jurisdiction.

Under US Code, the reorganisation plan is confirmed by court after it is satisfied that all requirements are complied with.[186] In order for a reorganisation plan to be confirmed, every class that is affected by the plan must vote for a plan and attain the required majority of vote.[187] A class of claims is deemed to have approved a plan if it is voted by the holders of at least two-thirds in amount and more than one-half in number of the allowed claims of the class held by creditors two-thirds who voted for a plan.[188] A class of interests is deemed to have accepted the plan if it is voted for by holders at least two-thirds in the amount of allowed interests in the class that vote on

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[182] Bradstreet 2011 *South African Law Journal* 375.
[183] Loubser *2013 South African Mercantile law journal* 439; Stoop 2017 *PER* 3; Bagwandeen 2018 *Effectiveness of business rescue* 32; Zilwa 2019 *Raking of creditors* 20.
[184] Loubser *2013 South African Mercantile law journal* 439, Loubser also hailed the US Code and submitted that it has reached a cult status; Countries such as Germany, France, China and Japan have considered and used US Bankruptcy code, also see Zilwa 2019 *Raking of creditors* 20.
[185] Stoop 2017 *PER* 3; Cassim *et al* Business structure 459-460.
[186] Bracewell & Giuliani., 2012, *Chapter 11 of the United States Bankruptcy Code: Background and summary*, https://www.insol.org/_files/Fellowship%202015/Session%203/Chapter_11_Overview.pdf (Date of use: 8 February 2021).
[187] Pachulski 1980 *North Carolina Law Review* 949.
[188] Section 1126 (c) US Bankruptcy Code.

a plan.[189] In an event that the required majority vote is not attained but all other requirements are met, the plan is confirmed if it does not discriminate unfairly and is fair and equitable towards dissenting creditors. Under the US Code, the courts have massive power to confirm a reorganisation plan that imposes serious concession on dissenting creditors, shareholders and others. This is known as the "cram down" principle and it is used when referring to the forcing of modifications down the throat of unwilling party. [190]

For a cram down to be fair and equitable towards an impaired class of dissenting unsecured claims, one of the requirements[191] set out in section 1129(b) (2) (B) of the Code needs to be complied with.[192] In respect of an impaired class of dissenting secured creditors, one of the requirements set out in section 1129 (b) (2) of the Code must be satisfied.[193] In order to use the cram down principle on secured creditors, the requirements of section 1129 (b) (1) and 1129(b) (2) (A) must be satisfied. Section 1129(b) (1) provides that a plan must not discriminate unfairly and must be fair and equitable. The concept "discriminate unfairly" requires that creditors in same position or class should be treated equally.[194] The provisions of section 1129 (b) (b) (A) deal with the requirement of fair and equitable and it is provided that the plan must provide either for a secured creditor to receive sufficient deferred payment under clause(i); for the sale of collateral with the creditor's lien attaching to the proceeds under (ii); or for the creditors receipt of the indubitable equivalent under (iii).[195] Further that for a plan to be fair and equitable it must satisfy the absolute priority rule, that plan should not impose an unreasonable risk of the plan's failure on the secured creditors.[196] The cram down principle is good for continuation of a business rescue process and

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[189] Section 1126 (d) US Bankruptcy Code.

[190] Friedman 1992 *Cardozo Law Review* 1496. Cram down is a principle which allows a court to order the implementation of the reorganizational plan irrespective of the objections by dissenting class of creditors. This principle allows the plan to be forced down upon the dissenting creditors, see *Kariba GNP* [28], Stoop 2017 *PER* 5 and Friedman 1992 *Cardozo Law Review* 1496.

[191] Section 1129(b)(2)(B) of the Code provides: (b)(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
(B) With respect to a class of unsecured claims- (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain on account of such junior claim or interest any property.

[192] Pachulski 1980 *North Carolina Law Review* 949.

[193] Pachulski 1980 *North Carolina Law Review* 946.

[194] Friedman 1992 *Cardozo Law Review* 1501.

[195] Friedman 1992 *Cardozo Law Review* 1501.

[196] Friedman 1992 *Cardozo Law Review* 1543.

implementation of a plan. In the absence of such a principle, the dissenting creditors may hold willing creditors at ransom. Creditors receive greater protection under chapter 11 and one of the fundamental protection is that unsecured creditors have the “best interests of creditors” test. This test protects those creditors who votes against a proposed chapter 11 reorganization plan. “Best interests of creditors” test requires that individual creditors in chapter 11 must receive at least what they would have received if the company had been liquidated.[197] Creditors can waive the best interest tests if each creditor accepts less than liquidation value.[198] “Best interest of creditors” test protects individual not to receive less that what they would receive in liquidation. Chapter 6 of 2008 Act has no provisions to protect creditors and creditors can even receive less that liquidation value.

If an individual creditor votes against the plan, the plan must pass the best “interests of creditors test” whereas where a class of creditors vote to reject the plan, it must be implemented through the “cram down” principle.[199] The US Code post-petition finance is governed by the provisions of section 364 of the Code. Stoop has labelled section 364 as a carefully crafted section which is capable of balancing the competing rights and interests of debtors and creditors and ensures viable access to post petition finance.[200] The company under bankruptcy process may obtain unsecured credit in the ordinary course of business without the approval of the court.[201] This kind of finance will have the status of priority of an administrative expense and will rank above unsecured creditors with a priority claim on the assets of the company. The company may obtain unsecured credit with administrative expenses priority for uses other than in the ordinary course of business. For this to be done, there must be a notice and hearing in that it requires court’s approval.[202] In order to obtain post-petition secured credit, the provisions of section 364 (c) or (d) may be used. The provisions require notice and hearing. The difference between the two is that super-priority security can

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[197] Hicks 2005 Nevada Law Journal 821.
[198] Regoli 2005 *Texas Journal of Business Law* 15.
[199] Bracewell & Giuliani., 2012, *Chapter 11 of the United States Bankruptcy Code: Background and summary*, https://www.insol.org/_files/Fellowship%202015/Session%203/Chapter_11_Overview.pdf (Date of use: 8 February 2021). (The “best interests test” protects dissenting members of a class as distinguished from the cram down power which protects dissenting classes by requiring that each member should receive under the reorganisation plan at least as much as would be received under liquidation); see also Regoli 2005 *Texas Journal of Business Law* 15.
[200] Stoop 2017 *PER* 12.
[201] Section 364 (a) of the US Bankruptcy Code.
[202] Section 364 (b) of the US Bankruptcy Code.

be taken only under section 364 (d). Section 364 (d) provides that a court may authorise a granting of a super-priority finance which takes precedence over existing pre-petition secured claims. The court oversight in the post-petition finance under US Code is good legislative framework to guard the interests of creditors. The problem is that through same court sanction, pre-commencement creditors can be prejudiced in that creditors can jump the queue and rank ahead of pre-commencement secured creditors. This has an effect of attracting post commencement funding.

One of the noted factor that differentiates our business rescue process from the US turnaround regime is that a debtor in possession lenders will rank in super priority administrative claims whereas in SA, these finances are ranked below the practitioners remuneration, costs of the actual proceedings, as well as employees' claims.[203] It is submitted that post-commencement finance should deal with administrative expenses, and such administrative creditors will not rank ahead of secured creditors but will rank above creditors who claim are unsecured as well as ahead of statutory provisions such as taxes.[204] The US Code voting mechanism provides for class of creditors whereas Chapter 6 of the 2008 Act provides no voting class of creditors. The failure to have voting classes may negatively affect both secured and unsecured creditors. The US Code provides for cram down principle which effectively force the plan to be implemented irrespective of the dissenting creditors. On the other hand, Chapter 6 of the 2008 Act provides binding offer may be offered to the dissenting creditors. The interpretation of *Kariba SCA* has rendered the principle ineffective. The US Code has 'best interests of creditors' which protect the dissenting creditors to at least receive liquidation value. The US courts are available throughout the system to guard the interests of creditors.

3.8 Conclusion

This chapter has demonstrated that the protective measures for creditors during a business rescue process under the 2008 Act are inadequate. The lack of separate voting class leaves secured creditors vulnerable in that unsecured creditors will have a say on secured claims. The provisions provided for to forge ahead with a business

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[203] Calitz 2016 *De Jure Law Journal* 280.
[204] Calitz 2016 *De Jure Law Journal* 283.

rescue plan after it was rejected have challenges. The provisions which allow an affected person to apply to court to set aside the results of a vote on a ground of inappropriateness is only available against the dissenting creditors who voted against the plan and such an avenue is not available against the will of the majority creditors. The failure by the legislature to draft proper 'binding offer' which can be used as 'cram down' means that dissenting creditors can hold majority creditors at ransom. The inclusion of creditors as affected person can be said to be a good tool to the rights of the creditors but same poses serious risk on the interest of creditors. The Chapter 6 of the 2008 Act is poorly drafted and does not provide sufficient and adequate protection to creditors. The shortcomings in the 2008 Act regarding protective measures of creditors during a business rescue process need to be addressed. It is suggested that the voting mechanism should be changed and there must be a separate class of creditors with different voting rights. Creditors should only vote when a business rescue plan affects their claims. The ranking of creditors post commencement of business rescue process must be reformed to clearly state the priority of creditors. The 'binding offer' principle should be revisited and drafted in a way that can force the plan upon the dissenting creditors. The rights of employees should be curtailed and they must be protected by labour laws. The philosophy of balancing the interests of affected persons should be changed to allow only those who have a valid claim against the company to decide the way forward.

Chapter 4

Conclusions and recommendations

The aim of this research is to explore the adequacy and equitability of the protection afforded to creditors during a business rescue process. The research focused on the protective measures afforded to creditors against a practitioner and the protection afforded to creditors against affected persons. Affected persons include individual creditors (secured and unsecured creditors) and employees. The main conclusion of the research is that there is no sufficient protection afforded to creditors during business rescue process. There is no sufficient or proper protection available for creditors to utilise against business rescue participants or stakeholders which include a practitioner and other affected persons.

The protection afforded to creditors against a practitioner where the business rescue process is commenced by a company resolution differs from the one afforded to creditors where the process is commenced by affected persons through a court order. In this regard, the argument advanced in this research is that there is no just, equitable and sufficient protection afforded to creditors during the process. A just, equitable and sufficient protection would not differentiate its protection to creditors based on who started the process. The protection which unnecessary differentiates the creditors is not capable of providing sufficient protection. There are no grounds for providing different protection to creditors and such gaps leave creditors vulnerable.

The lack of a separate voting class in the voting mechanism is problematic. The extent to which the secured creditors can be bound by the business rescue plan remains unclear. The effect of the current voting mechanism is that unsecured creditors have a say on secured claims while secured creditors will have a say on unsecured claims. The two different classes of creditors might vote to the detriment of the other. The principle of 'binding offer' is not effective and the dissenting creditors may hold the majority creditors at ransom. The current post commencement ranking of creditors is not clear and maybe interpreted to the detriment of pre-commencement secured creditors. The comparative analysis that was done with the US illustrates that the voting mechanism of the US Bankruptcy code offers proper protection to the creditors. The cram down principle under US Bankruptcy is effective and can protect both the majority creditors and dissenting creditors. The post commencement finance under

the US Bankruptcy is subject to court oversight and interests of creditors are sufficiently guarded.

It is recommended that the 2008 Act should be amended to provide a just, equitable and sufficient protection to creditors. The other issue underscored in this research is that practitioners are currently accredited by different bodies using different requirements. The scope of professionals qualifying to be accredited as practitioners is broad and allows professionals from different professions, with different knowledge and skills to be accredited as practitioners. This reduces or minimises expertise and can consequently affect the success of a business rescue process. The fact that a practitioner has powers to remove the board of directors or management of the company under a business rescue process whilst there are no guidelines to do so can be detrimental to the company. The comparative analysis that was done in this research with the US demonstrates that in US Bankruptcy process, the management of the company is retained and the experience of such management is important to the success of the rescue process. This research advocates for centralisation of accreditation process by one regulatory body in terms of which the requirements of accreditation of practitioners will be reformed and made uniform. It is further recommended that the 2008 Act must provide guidelines to remove the management of the company. The unnecessary removal of the management without just cause is not a good approach and must be avoided.

The amendment of the 2008 Act must also address the voting mechanism by incorporating a separate voting class, making the 'binding offer' to be effective like cram down, and by ensuring that the post commencement finance provides a clearer ranking of creditors.

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