THE GOAL(S) OF CORPORATE RESCUE IN COMPANY LAW: A COMPARATIVE ANALYSIS

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Abstract

The concept of corporate rescue lays emphasis on corporate sustainability than liquidation. This trend in corporate legislation which featured in the United Kingdom Insolvency Act of 1986, Australian Corporations Act 2001, Indian Sick Industrial Companies (Special Provisions) Act of 1985 (as replaced by Companies Act, 2013 and supplanted by the Insolvency and Bankruptcy Code, 2016) has been adopted in the South African Companies Act of 2008. The goal(s) of corporate rescue in some of these jurisdictions are not clearly defined. The paper examines, through a comparative analysis, the relevant statutory provisions in the United Kingdom, India, Australia and South Africa and the attendant judicial interpretations of those provisions with a view to discovering the goal(s) of corporate rescue in those jurisdictions. It is argued that while under the United Kingdom and Australian statutory provisions, the administrator could pursue alternative goals of either rescuing the company or achieving better results for the creditors; the South African and Indian statutory provisions do not provide such alternatives. The seeming ancillary purpose of crafting a fair deal for the stakeholders under the South African Companies Act's provision is not sustainable if the company as an entity cannot be rescued.

Keywords: Company, Corporate Rescue, Goals, Directors, Stakeholders, Statute, Courts

1. INTRODUCTION

South Africa as an emerging economy has, in realization of the importance of the corporate entities in the evolutionary courses of the commercial world, especially in the areas of the production of goods and services, as well as the creation of ever-increasing demands for employment opportunities for the teeming working populations in the country, adopted a scheme of business rescue in the Companies Act of 2008[1]. The scheme which follows the trend in the developed and developing economies, such as the United Kingdom and India respectively, is geared at ensuring the sustainability rather than the liquidation of the corporate entities where the latter could be avoided. In the United Kingdom, the Insolvency Act of 1986 and Schedule B1 thereof as substituted by section 248 of the Enterprises Act 2002 embodies the relevant provisions. The Australian version is found in Part 5.3A of the Corporations Act, 2001. In India, the Sick Industrial Companies (Special Provisions) Act 1985 (SICA)[2] as replaced by Chapter 19 of the Companies Act, 2013, bears provisions on the corporate rescue. The provisions of the Companies Act of India are now deleted and substituted by the provisions contained in the Insolvency and Bankruptcy Code, 2016[3]. The South African legislative scheme is reflected in Chapter 6 of the Companies Act, 2008. In all these jurisdictions, the relevant provisions are tailored in such a manner as would ensure corporate sustainability than corporate liquidation.

In South Africa, the provisions contained in the Companies Act, 2008 on business rescue supplant the now extinct provisions on judicial management under the 1973 Companies Act[4]. The cardinal features of the provisions in the 2008 Act are embedded in the liberal conditions for accessibility and applications to companies in financial distress. An instance of this new approach was succinctly stated by Eloff AJ in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*[5] as follows:

> In terms of section 427(1) of the previous Companies Act, no 61 of 1973, a rather

[1] Act 71 of 2008.
[2] SICA is now repealed by the Sick Industrial Companies (Special Provisions) Repeal Act 2003 with effect from 1 December 2016. See Sick Industrial Companies (Special Provisions) Act, 1985 repealed and BIFR/ AIFR dissolved, available at *https://www.pwc.in/assets/pdfs/news-alert-tax/2016/pwc_news_alert_1_december_2016_sick_industrial_companies_act_1985_repealed_and_bifr-aifr_dissolved.pdf* (accessed 26 January 2017).
[3] See Sch 11 para 8 of the Insolvency and Bankruptcy Code, 2016. The relevant provisions of the Code became effective on the 30 November 2016. See ibid.
[4] Act 61 of 1973, s 427.
[5] 2012 (2) SA 423 (WCC) paras 20-21. Emphasis the court's.

> cumbersome and ineffective procedure was provided for reviving ailing companies "…the mind-set reflected in various cases dealing with judicial management applications in respect of the recovery requirement was that, prima facie, the creditor was entitled to a liquidation order, and that only in exceptional circumstances would a judicial management order be granted. The approach to business rescue in the new Act is the opposite – business rescue is preferred to liquidation".

Justifications have been adduced by both the courts and commentators in different jurisdictions for the statutory preference to rescue instead of liquidation of companies. In *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*[6] Binns-Ward J, of the South African High Court, observed:

> It is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.

In the UK, the Cork Committee had, while recommending corporate rescue approach in the UK Insolvency Act of 1986, stated that "a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked"[7]. That observation heralded the inclusion of provisions on corporate rescue in the UK Insolvency Act, 1986[8] which was explicitly alluded to by Lord Brown-Wilkinson in *Powdrill v Watson*[9] as the "rescue culture" which seeks to preserve viable businesses and is fundamental to the Act of 1986[10].

A similar motive seemingly informed the enactment of SICA in India. Zweiten, commenting on some of the provisions of SICA, observed that "the decision of the… [government] to intervene in cases of industrial sickness during this period was not dependent on evidence of the company's ability to return to profitable trading. Instead, interventions were motivated by broader concerns, including a desire to strengthen the industrial sector in newly independent India, and an anxiety to protect the workers of sick industrial companies from unemployment"[11]. This observation is reflected in a number of the Indian courts' decisions preferring the protection of the interests of the workers to those of the creditors[12].

Realising the goal of corporate sustainability within the context of the statutory provisions in the various jurisdictions demands some level of explicitness in those provisions. The inherent ambiguities in the provisions in some jurisdictions have given rise to noticeable inconsistencies, if not contradictions, in the judicial pronouncements on the real intentions and applications of those provisions. Kgomo J in *Redpath Mining South Africa (Pty) Ltd v Piers Marsden NO*[13] Kgomo J, referring to the relevant South African Companies Act's provision, said:

> Our courts have already started pronouncing themselves on this new phenomenon, however, there is still in my considered view, quite a long way before the organised profession completely muster all the nitty-gritties, explore all the nooks and crevices of the new Companies Act and lay or cast a well-travelled path that would engender and ensure consistency and sure-footedness in the implementation and interpretation of this "*new baby*" (business rescue).

A similar observation was made by Hoffman J in *Re Harris Simons Construction Ltd*,[14] at the early stages of the operation of the UK Insolvency Act, to the effect that the Act is a new statute on which the judges of the Companies Court are still feeling their way to a settled practice.

Learning from hindsight, interpretational difficulties in legislation have often arisen from parliamentary sources which are reflected in the manner of presentation of the relevant provisions. The absence of brevity in legislation very often results in inconsistent judicial interpretations. The paper explores some aspects of those provisions that seek to define the goal(s) of corporate rescue in the selected jurisdictions.

2. MEANING OF CORPORATE RESCUE

Corporate rescue is generally described as the process of enabling companies in financial difficulties to return to a state of viability and to

[6] 2012 (2) SA 378 (WCC) para 14. A number of other courts decisions have a similar justification for business rescue. See *Chetty v Hart* [2015] 4 All SA 401 (SCA) para 28 per Cachalia JA who stated that «the obvious purpose of placing a company under business rescue is to give it breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability». See also *Madodza (Pty) Ltd v ABSA Bank Ltd* [2012] ZAGPPHC 165 para 12. In *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 (5) SA 422 (GNP) para 19 Makgoba J recognized that an important feature of business rescue as distinguished from liquidation is that the company will continue to exist on a solvent basis after payment of creditors. Claassen J in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2012] 2 All SA 433 (GSJ) para 12 stated that «the general philosophy permeating through the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name business rescue and not company rescue».

[7] Report of the Review Committee on Insolvency Law and Practice, (Cork Committee Report, 1982 (Cmnd 8558)) para 204, quoted in Alan Dignam & John Lowry, *Company Law 9th ed* (Oxford, Oxford University Press, 2016) pp. 425-426.

[8] See Schedule B1 to the Insolvency Act of 1986 now substituted with section 248 of the Enterprises Act 2002.

[9] [1995] 2 AC 394 at 442A.

[10] In Australia where the 'corporate rescue culture' has also been adopted in the companies' legislation, Young J in *Sydney Land Corp (Pty) Ltd v Kalon (Pty) Ltd* (1997) 26 ACSR 425 at 430 stated that the main reason for enacting corporate rescue provisions in the Australian Corporations Act 2001as being "undoubtedly because the company's business was employing Australians and it was in the interests of Australia that as much employment as possible be maintained. Thus, things were to be structured so as to maximise that chance."

[11] Kristin Van Zwieten, "Corporate Rescue in India: The Influence of the Courts" (2015) 15(1) *Journal of Corporate Law Studies* 1 at 6.

[12] See *Kanoria Jute and Industries Ltd v Appellate Authority for Industrial and Financial Reconstruction* [2009] 149 Comp Cas 555 (Calcutta), *Board Opinion v Hathising Mfg Co Ltd* 2003 43 SCL 146 (Gujarat).

[13] [2013] ZAGPJHC 148 para 40. Emphasis the court's.

[14] [1989] 1 WLR 368 at 370

prevent them from sliding into insolvency[15]. This process is, in the South African context, referred to as business rescue. Ironically, the target of business rescue is, in the South African provisions, portrayed the company as an entity and not the business of the company as such. This is one of the distinguishing features of the South African Companies Act's provisions.

In Indian, under SICA, companies in financial distress are referred to as sick companies[16]. The application of SICA to such companies was however restricted to industrial companies depicting companies in the production line of specified capacity[17]. The repeal of SICA has removed that restriction. Under the new dispensation, going back to the extinct provisions in the Companies Act of 2013, to the existing provisions in the Insolvency and Bankruptcy Code, 2016, the corporate rescue provisions apply to every registered company in India in similar manners as in the UK and South Africa.

Section 128(1)(b) of the South African Companies Act defines business rescue as "*proceedings* to facilitate the rehabilitation of a company that is financially distressed"[18]. The reference in that provision to 'proceedings' encompasses all the mechanisms geared at achieving the rehabilitation of the financially distressed company. Such proceedings could be set in motion by the voluntary act of the directors as provided in section 129(1) of the Act. That provision confers powers on the directors to commence business rescue proceedings if they reasonably believe that the company is in financial distress and that there is a reasonable prospect of rescuing the company.

Schedule B1 paragraphs 22(2) and 27(2)(a) of the UK Insolvency Act similarly empowers directors to initiate corporate rescue proceedings by appointing an administrator if they believe that the company is or is likely to become unable to pay its debt. In India, section 10(1) of the Insolvency and Bankruptcy Code (IBC) provides that where a corporate debtor has committed a default, a corporate applicant may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority[19]. A corporate applicant is broadly defined in the IBC to include a person who has the control and supervision over the financial affairs of the corporate debtor[20]. Such roles are usually performed by the directors,[21] as such the directors can, as in the other jurisdictions under focus, initiate the process of corporate rescue.

The circumstances under which the rescue process could be initiated vary in the different jurisdictions. In the India, there must be a default by the company in paying its debt which could be 'financial debt'[22] or 'operational debt'[23]. Under the UK statutory provision, it is sufficient that the company is likely to become unable to pay its debt. A company is unable to pay its debt if it is unable to satisfy the legitimate financial demands of its creditors, or if the value of the company's assets is less than the amount of its liabilities, both actual and contingent[24]. The South African Companies Act's reference to 'financial distress' is by contrast more focused on the future than the present financial status of the company. The Act provides that a company is financially distressed if: "(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months"[25]. This provision addresses issues of prospective insolvency whether factually or commercially,[26] but cannot be employed when the company is already insolvent[27]. This is one of the unique features in the South African Companies Act's provisions. As a rescue process, the aim is not to resurrect the dead, but to cure the sick company. The directors are expected to have a business vision and to plan ahead of time. But the adoption of the common law approach of determining the question of company's solvency by compartmentalising the usual consideration into 'cash flow' test and the 'balance sheet' test as reflected in the Act could be problematic. From a debtor's point of view, the critical concern is the company's ability to fulfil its debt obligations as they fall due[28]. The greater value of assets over liabilities could elicit some hope, but what is really in the worth of an asset in the books of the company if it cannot be realised to fulfil the existing debt obligations. A holistic approach should be the more appropriate in determining the question of solvency. This was alluded to by Owen J in *The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 9]*[29] where he stated that "it is possible that a company might be cash flow insolvent but show a positive balance sheet where assets exceed liabilities. A company may be, at the same time, insolvent and wealthy. It may have wealth locked up in investments that are not easy to realise. Regardless of its wealth (in this sense), unless it has assets available to meet its current liabilities, it is commercially insolvent and therefore liable to be wound up". The relevant consideration, as observed Coburn, is "in the light of commercial reality, all things considered, could the company pay its debts as and when they became due? Such an approach includes the balance sheet test and other

[15] Alan Dignam & John Lowry, *Company Law 9th ed* (Oxford, Oxford University Press, 2016) p. 425.
[16] See Chapter 1 section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 which defines «'sick industrial company' as an industrial company (being a company registered for not less than seven years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth and has also suffered cash losses in such financial year and the financial year immediately preceding such financial year».
[17] See Chapter 1 section 3 SICA which provides that «"industrial company" means a company which owns one or more industrial undertakings; and "industrial undertakings" means any undertaking pertaining to a scheduled industry carried on in one or more factories by any company».
[18] Emphasis supplied.
[19] Section 5(1) defines 'Adjudicating Authority' as the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.
[20] See s 5(5)(d) of the IBC.
[21] See s 166(2) of the Indian Companies Act, 2013.
[22] «'Financial debt' means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes money borrowed against the payment of interest». See s 5(8) of the IBC.
[23] «'Operational debt' means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority». See s 5(21) of the IBC.
[24] See s 123(1)(2) of the Insolvency Act.
[25] S 128(1)(f).
[26] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kvalami) (Pty) Ltd* [2013] ZASCA 68 para 7; *Newcity Group (Pty) Ltd v Pellow NO* [2014] ZASCA 162 para 11.
[27] *Redpath Mining South Africa (Pty) Ltd v Piers Marsden NO* [2013] ZAGPJHC 148 para 47; *Gormley v West City Precinct Properties (Pty) Ltd* [2012] ZAWCHC 33 para 11 per Traverso DJP; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Co (Pty) Ltd* [2013] ZAGPJHC 109 para 8 per Kgomo J.
[28] In *Bank of Australasia v Hall* (1907) 4 CLR 1514, 1521, Isaacs J said: 'The debtor's position depends on whether he can pay his debts, not on whether a balance sheet will show a surplus of assets over liabilities'.
[29] [2008] WASC 239 para 1070. See also *Re Tweeds Garages Ltd* [1962] Ch 406 at 460 per Plowman J.

commercial realities such as access to money from third parties, raising capital or credit and financial support"[30]. The law in the different jurisdictions does not permit the company to proceed with its normal business when insolvent as the interests of the creditors would intrude. The future conducts of the company's business should at that point be geared at settling the company's obligations and not at profit making[31]. Directors who disregard that injunction could be found to have flouted the statutory provision against reckless or fraudulent trading[32] with the attendant spiralling effect including the declaration of such director as being delinquent[33] and consequential disqualification from holding office as director[34].

In addition to the demands of financial distress in the South African law, is the requirement that there should be 'reasonable prospect of rescuing the company' which must flow from the belief of the directors founded on reasonable grounds. Both the UK and Indian statutes do not demand such condition when corporate rescue is initiated by the directors. However, section 8(1) of the UK Insolvency Act requires that when an application is made to the court to commence rescue proceedings, the court could only grant such an application if the court "(a) is satisfied that a company is or is likely to become unable to pay its debts…and (b) considers that the making of an order under this section would be likely to achieve one or more of the purposes [of corporate rescue]". This provision has been subjected to varying judicial interpretations. In *Re Consumer and Industrial Press Ltd*[35] Peter Gibson J considered that the phrase "likely to be achieved" as used in that provision, connotes more than 'mere possibility'. In the opinion of the judge, "the evidence must go further than that to enable the court to hold that the purpose in question will *more probably than not be achieved*." In *Re Harris Simons Construction Ltd*[36] Hoffmann J explained that the interpretation proffered by Peter Gibson J required that on a scale of the probability of 0 (an impossibility) to 1 (absolute certainty) the likelihood of success should be more than 0.5. Hoffmann J considered that such an interpretation would be placing the threshold too high for the following reasons:

> First, "likely" connotes probability but the particular degree of probability intended must be gathered from qualifying words (very likely, quite likely, more likely than not) or context. It cannot be a misuse of language to say that something is likely without intending to suggest that the probability of its happening exceeds 0.5… Secondly, the section requires the court to be "satisfied" of the company's actual or likely insolvency but only to "consider" that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change of language and I think it was to indicate that a lower threshold of persuasion was needed in the latter case than the former… For my part, therefore, I would hold that the requirements of section 8(1)(b) are satisfied if the court considers that there is *a real prospect* that one or more of the stated purposes may be achieved[37].

The judge admitted that phrases like 'real prospect' lack precision compared with 0.5 on the scale of probability, but was convinced that the courts are used to dealing in other contexts with such indications of the degree of persuasion they must feel such as 'prima facie case' and 'good arguable case' which all bear a certain degree of subjectivity on how they are interpreted[38].

Incidentally, most of the cases so far adjudicated by the courts in South Africa involving the interpretation of 'reasonable prospect of rescuing the company' are based on section 131(4) of the Companies Act which confers a discretion on the courts to grant an application by an 'affected person' to commence business rescue if satisfied that, among others, 'there is a reasonable prospect of rescuing the company'. That phrase was in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[39] described by Brand JA as 'problematic', a description which is vindicated by the judicial grapples in giving meaning to the phrase. Eloff AJ in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*[40] set the storm of this judicial interpretational quagmire. The judge adopted a purposive approach in seeking to give meaning to the phrase 'reasonable prospect' where he said:

> In terms of section 427(1) of the previous Companies Act, no 61 of 1973, a rather cumbersome and ineffective procedure was provided for reviving ailing companies. That section of the 1973 Companies Act used the

[30] Niall Coburn, *Coburn's Insolvent Trading* 2nd ed, (Sydney, Lawbook Co.,2003) 66.

[31] In *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, Lord Templeman held that «directors owe a fiduciary duty to the company and its creditors, present and future, to ensure that its affairs are properly administered and to keep the company's property inviolate and available for the repayment of its debts». See also *Lonhro Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 (HL) at 634 per Lord Diplock; *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 (CA); *Kinsela v Russell Kinsela Pty Ltd* (1986) 10 ACLR 395 (NSWCA); *Re Pantone 485 Ltd* [2002] 1 BCLC 266 (HC); *Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153.

[32] See ss 22 and 214 of the South African Companies Act, Section 339 of the Indian Companies Act, and section 993 of the UK Companies Act. In *Fourie NO and Others v Newton* [2011] 2 All SA 265 (SCA) at 271 para 29, Cloete JA held that «acting 'recklessly' 'consists in an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'. The determining factors include the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery. If when credit was incurred a reasonable man of business would have foreseen that there was a strong chance, falling short of a virtual certainty, that creditors would not be paid, recklessness is established». See also *Philotex (Pty) Ltd and others v Snyman and others; Braitex (Pty) Ltd and others v Snyman and others* 1998 (2) SA 138 (SCA) at 143G, [1998] JOL 1881 (SCA); *S v Dhlamini* 1988 (2) SA 302 (A) at 308D–E, [1988] 2 All SA 106 (A); *Ebrahim and another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para. 14, [2008] JOL 22698 (SCA); *Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporations of SA Ltd v AWJ Investments (Pty) Ltd and others* 1980 (4) SA 156 (W) at 170B–C [1980] 4 All SA 525 (W); *Klerk NO v SA Metal & Machinery Co (Pty) Ltd and others* [2001] 4 All SA 27 (E). See Anthony O Nwafor, "Fraudulent Trading and the Protection of Company Creditors: the Current Trend in Company Legislation and Judicial Attitude" (2013) 42 *Common Law World Review* 297–323.

[33] See s 162(5), of the South Africa Companies Act, section 342 of the Indian Companies Act and section.

[34] See s 69(8) of the South African Companies Act and generally the UK Company Directors Disqualification Act 1986. See *Msimang NO v Koteliibe* [2013] 1 All SA 580 (GSJ) para 32 per Kathree-Setiloane J who held that a director that has been declared to be delinquent, by an order of court, in terms of section 162 of the new Companies Act is disqualified, and prohibited from being a director of a company. There is no need for the Court to order the removal of the delinquent person because of the "automatic inherent effect" of the order declaring a person to be delinquent in terms of section 162(5) of the new Companies Act. See also *Kutama v Lobelo* [2012] JOL 28828 (GSJ) para 22 per Tshabalala J.

[35] [1988] BCLC 177 at 178, emphasis added.

[36] [1989] 1 WLR 368 at 370-371, emphasis added.

[37] See also in *Re Primlaks (UK) Ltd* 1989 BCLC 734 at 742 per Vinelott J who held that section 8(1) required the court to be satisfied that there is a 'prospect sufficiently likely in the light of all the other circumstances of the case to justify making the order'. Both interpretations were approved by the House of Lords in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44 para 21.

[38] [1989] 1 WLR 368 at 371.

[39] [2013] ZASCA 68 para 7.

[40] 2012 (2) SA 423 (WCC) paras 20-22. Emphasis the court's.

> phrase *"reasonable probability"* in respect of the recovery requirement…In contrast, section 131(4) of the new Act uses the phrase *"reasonable prospect"* in respect of the recovery requirement. The use of different language in this latter provision indicates that something less is required than that the recovery should be a reasonable probability. Moreover, the mind-set reflected in various cases dealing with judicial management applications in respect of the recovery requirement was that, *prima facie,* the creditor was entitled to a liquidation order, and that only in exceptional circumstances would a judicial management order be granted. The approach to business rescue in the new Act is the opposite - business rescue is preferred to liquidation… In exercising this discretion, the Court should give due weight to the legislative preference for rescuing ailing companies if such a course is *reasonably possible.*

The distinction between 'reasonable probability' and 'reasonable prospect' resonates with the distinction by Peter Gibson J in *Re Consumer and Industrial Press Ltd*[41] between 'mere possibility' and 'more probably than not' with the latter suggesting a higher degree of proof. But that cannot be the approach intended by the legislature when reading in the context of that provision as articulated by Eloff JA. Hoffmann J in *Re Simons Construction Ltd*[42] while interpreting a similar provision under the UK Insolvency Act, stated that the word 'likely' connotes 'probability' which in turn connotes 'real prospect' and when read in the context of that provision, demands a low threshold of proof. It would seem, therefore, that there is no difference as such between the phrases 'reasonable probability' and 'reasonable prospect'. The only difference lies in the context in which each phrase is used. Eloff JA's contextual exposition suggesting that the latter legislation demands a lower threshold of persuasion cannot be faulted. But the judge seemingly deviated from the stated course by demanding from the applicant such evidence as are more akin to 'more probable than not' than 'reasonable prospect' by holding that:

> It is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable… One would expect, at least, to be given some *concrete and objectively ascertainable details* going beyond mere speculation in the case of a trading or prospective trading company[43].

The nature of the factual details demanded by the judge were set down in the succeeding paragraphs of the judgment[44]. Those facts were accepted by Binns-Ward J in *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*[45] as demands of 'cogent evidential foundation' to support the existence of a reasonable prospect that the desired object can be achieved. The words 'concrete' or 'cogent' as indicative of the weight of evidence required from the applicants are creations of the courts. They are not found in the provisions which the courts were interpreting in the respective cases. The reason adduced by Eloff AJ for the change from reasonable probability to reasonable prospect cannot possibly support the imputation of such strong adjectives in the evidential details demanded from the applicant to initiate a business rescue. It was of little surprise, therefore, that in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd*[46] Van Der Merwe J lightly described the above decisions as placing the bar too high in that the adducing of concrete or cogent evidence would tantamount to requiring proof of a probability which would invariably limit the availability of business rescue proceedings. The reason is found, as shown by the judge, in a distinction between prospect and possibility where he said: "In my view, a prospect in this context means an expectation. An expectation may come true or it may not. It, therefore, signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable. In my judgment, a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds"[47]. In *Oakdene's case,*[48] the Supreme Court of Appeal sought to balance the two sides of the debate by accepting on one hand that the demands of reasonable prospect are less than that of reasonable probability, on the other hand, reasonable prospect requires more than a mere prima facie case or an arguable possibility. The court emphasised that the prospect must indeed be reasonable and that a mere speculative suggestion is not enough.

It is instructive that the Supreme Court of Appeal specifically indicated what does not constitute reasonable prospect, but not so specific in defining what constitutes reasonable prospect. Doing so would be encroaching on the discretion which the courts enjoy in deciding matters of that nature which border on business judgment. The courts are not equipped to engage in such decisions, they can only draw inferences from available facts which in some cases may not yield the expected outcome. This realisation informed the Australian court decision in *Vink v Tuckwell (No)*[49] where Robson J held that it is not necessary that there be a realistic prospect of a deed of company arrangement before an administrator may be appointed. Respecting the wishes of the stakeholders is therefore at the heart of the judicial reluctance in being prescriptive about the assessment of reasonable prospect of business rescue.

The power of the directors to initiate business rescue without recourse to the court is contained in

[41] [1988] BCLC 177 at 178.
[42] [1989] 1 WLR 368 at 371
[43] Ibid para 24. Emphasis supplied.
[44] They include: "the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business; the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available; the availability of any other necessary resource, such as raw materials and human capital; the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success". Southern Palace 2012 (2) SA 423 (WCC) paras 24.
[45] 2012 (2) SA 378 (WCC) para 17. See also *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 (5) SA 515 paras 18-19.
[46] 2013 (1) SA 542 (FB) paras 11 and 15.
[47] Ibid para 12.
[48] [2013] ZASCA 68 para 29. See also *Newcity Group (Pty) Ltd v Pellows NO* [2014] ZASCA 162 para 16 per Maya JA.
[49] [2008] VSC 206 para 178.

section 129(1) of the South African Companies Act which provides as follows:

"(1) Subject to subsection (2)*(a),* the board of a company *may resolve* that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board *has reasonable grounds to believe* that –

(a) the company is financially distressed, and

(b) there appears to be a reasonable prospect of rescuing the company[50]".

That provision was considered by the Supreme Court of Appeal in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*[51]. Leach JA, while delivering the judgment of the court, said:

> I am mindful of the warning by this court in *Oakdene*[52] against being prescriptive about the assessment of reasonable prospects of rescue. But there can be no dispute that the directors voting in favour of a business rescue must *truly* believe that prospects of rescue exist and such belief must be based on a *concrete* foundation.

Sections 129(1) and 131(4) are similar to the extent that both provisions deal with different ways of initiating a business rescue. While section 131(4) confers discretion on the court, based on available evidence, to decide whether the company should be placed under business rescue, the only condition for the exercise of that discretion by the board under section 129(1) is a belief founded on reasonable ground. The inclusion of 'truly' believe and 'concrete' foundation, in the Supreme Court's judgment, re-echoes Eloff AJ's decision in *Southern Palace* and that line of decisions which were rejected by the Supreme Court of Appeal in *Oakdene.* Section 129(1) resonates the business judgment rule which enjoins judicial deference to a business decision, so long as it lies within a range of reasonable alternatives[53]. In *Maple Leaf Foods Inc. v Schneider Corp*[54] Weiler JA of the Ontario Court of Appeal stated what should be the role of the court in business decisions as follows:

> The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of the several reasonable alternatives, deference is accorded to the board's decision.

In *BCE Inc. v 1976 Debentureholders*[55] the Supreme Court of Canada emphasised that "there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision". The statutory version of that rule is now embodied in section 76(4)(a)(iii) of the Companies Act as follows:

"(4) In respect to any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company –

(a) will have satisfied the obligations of subsection (3)(b) and (c) if –

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a *rational basis for believing, and did believe*, that the decision was in the best interests of the company[56]".

This provision complements the provision in section 66(1) of the Act which provides that "[t]he business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise." Both provisions do not only preclude unwarranted interference in management powers but also enjoins respect for decisions honestly taken by the directors which they consider to be in the best interests of the company.

This statutory position is drawn from the judicial disinclination to interfering in management decisions. Lord Wilberforce buttressed this judicial stance in *Howard Smith v Ampol Petroleum Ltd*[57] where he held that there is no appeal on merits from management decisions to courts of law nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at. In *Burland v Earl*[58] Lord Davey was very explicit in his objection to any form of judicial interference in matters of internal management of the company and in fact emphasised that the court has no jurisdiction to do so (Nwafor, 2016).

Respecting management decisions ensures corporate functionality though the necessary checks and balances should not be ruled out. This perhaps is what the parliament had in mind by demanding in section 76(4) that the decision taken by the director should have a 'rational basis'. The requirement of 'rational basis' for decision making demands some level of objectivity in the assessment of the relevant decision to ascertain its sustainability in the context of the director's acclaimed state of mind (Nwafor, 2016). An illustration is found in the decision of Jonathan Parker J in *Regentcrest plc v Cohen*[59] where he said:

> The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the

[50] Emphasis supplied.
[51] 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA).
[52] *Oakdene's case* n 31 above para 30. Emphasis supplied.
[53] See *BCE Inc. v 1976 Debentureholders* 2008 SCC 69 (CanLII) para 40.
[54] (1998) CanLII 5121 (ONCA) at 192. See also *Kerr v Danier Leather Inc.* 2007 SCC 44 (CanLII) para 54; *Arkansas Teacher Retirement System v Lions Gate Entertainment Corp.* 2016 BCSC 432 (CanLII) para 226.
[55] 2008 SCC 69 (CanLII) para 155.
[56] Emphasis supplied.
[57] [1974] AC 821 at 832 (HL). See also *Richard Brandy Franks Ltd v Price* (1937) 58 CLB 136.
[58] [1902] AC 83 at 93 (PC). See also *Shuttleworth v Cox Brothers and Co (Maidenhead) Ltd* [1927] 2 KB 9 per Scrutton LJ at 22-24. *Regentcrest v plc v Cohen* [2001] 2 BCLC 80 per Jonathan Parker J at 105.
[59] [2001] 2 BCLC 80 at 105. See also *Vivendi SA Centenary Holdings Iii Ltd v Richards & Ors* [2013] EWHC 3006 (Ch) para 147.

> director will have a harder task persuading the court that he honestly believed it to be in the company's interest.

'Rational basis' in section 76(4)(a)(iii) is analogous to 'reasonable grounds to believe' in section 129(1) of the same statute. Section 129(1) merely requires some level of objectivity in assessing the director's expressed belief with credence given to the director's honesty of purpose. The provision does not require that what the director says he believes must be 'true' or should have a 'concrete foundation' as suggested by Leach JA in *African Banking Corporation's case*. Neither section 129(1) nor section 131(4) opens the door for the court to enter into the arena of business decisions and in doing so substitute its own belief for that of the directors as was apparent in the decision of Eloff AJ in *Southern Palace*[60] that "more importantly, there is, on the vague and undetailed information before me, no *reason to believe* that there is any prospect of the business of the respondent being restored to a successful one." The court need not believe what the director believes. The role of the court is simply to draw a rational inference from the facts placed before it.

3. GOAL(S) OF CORPORATE RESCUE

The preamble to the now repealed Indian Sick Industrial Companies (Special Provisions) Act of 1985 depicts the goal of corporate rescue under that statute as "securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined". The IBC is caste in a different light. Though the IBC is not strictly focused on corporate rescue, however, there are glimpses in the Code suggesting that corporate rescues are certainly one of its objectives. Section 20(1) of the IBC provides that "the insolvency resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern". Section 20(2) further provides that "the interim professional shall have authority, among others, to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and to take all such actions as are necessary to keep the corporate debtor as a going concern[61]". It is apparent that the goal of corporate rescue in the old and the present statute in India is to restore the financially sick company to the status of business viability. That purpose informed the decision of the Delhi High Court in *B.P. Choudhury v Appellate Authority*[62] where, while ordering the Board for Industrial and Financial Reconstruction (BIFR) to reconsider the possibility of the revival of the company, the court held that:

> A careful reading of the scheme and the provisions of Sica would show that all possible endeavor and efforts for revival and rehabilitation of a sick industrial company are to be made and that in case there is no option left for such revival, the provisions of the said Act permits for, direction to be issued for winding up of the said sick industrial company. In case the promoters of the company can provide finances for the revival of the company and submit a workable scheme, the Bifr should give an opportunity to the said promoters to revive the company.

But some judicial decisions under the SICA seem to have other preferences. The preservation of employment for the employees (operational creditors) seem to be a more viable target than any other interests in the corporate scheme including the business of the corporation as a going concern. This stance is demonstrated in *Board Opinion v Hathising Mfg. Co. Ltd*[63] where Puj J, though admitting that the facts justify the winding up of the company, declined to make that order on the ground that the company is working and workmen are being paid their wages regularly. The court preferred an order on the company to pay an equivalent amount to the secured creditors in their respective proportion which the company is paying to the workmen every month. Similarly, in *Kanoria Jute and Industries Ltd v Appellate Authority for Industrial and Financial Reconstruction,*[64] the High Court of Calcutta set aside the orders of the Appellate Authority for Industrial and Financial Reconstruction (AAFIR) and the BIFR respectively. The BIFR was directed to reconsider "the question of revival of the company". For such purpose, the order stipulated that the BIFR should give "all parties" reasonable opportunity to submit their proposals and schemes, "and after making a detailed inquiry it shall explore the possibility of approving a scheme for revival of the company". The basis for that decision as appeared in the judgment of Sanjib Banerjee, J. is that:

> In a social welfare State that we are, it is the collective duty and responsibility of all the concerned to ensure the social and economic protection for the weaker Section, and there can perhaps be no dispute that the lower echelons of the working class in private sector industries, such as a jute mill, belong to the class. An order of remand as suggested by all the parties … with the only exception of the Indian Bank … will greatly serve the cause of the workers and employees of the company, though it may not serve the cause of creditors[65].

Although the extent socio-cultural considerations could be vital factors in the interpretation and application of statutory provisions, there is some level of certainty on the object of the corporate rescue provisions in the Indian law which is the revival of the financially sick company. It is axiomatic that only the revival of the sick company will guarantee the continuous payment of the workers' entitlements. The sustaining of the workers' employment can only in that context be seen as ancillary to the goal of corporate rescue in India.

[60] 2012 (2) SA 423 (WCC) paras 23. Emphasis supplied.
[61] See s 20(2)(d)(e) of the IBC.
[62] (1996) 86 Comp Cas 176 Delhi, 1996 (36) DRJ 105 para 7.
[63] 2003 43 SCL 146 (Gujarat) para 25.
[64] (2009) 149 Comp Cas 555.
[65] Ibid paras 12-13.

In the UK, the Insolvency Act, 1986, Schedule B1 paragraph 3 specified the goals of corporate rescue when a company is under administration as follows:

3(1) The administrator of a company must perform his functions with the objective of –

(a) rescuing the company as a going concern, or

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or

(c) realising property in order to make a distribution to one or more secured or preferential creditors.

Any of the stated objects could constitute the target or goal of corporate rescue. But the administrator does not seem to enjoy unfettered discretion on the various options to pursue. The statute has set the order of preferences in paragraph 3(3)(4) as follows:

(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either –

(a) that it is not reasonably practicable to achieve that objective, or

(b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if –

(a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and

(b) he does not unnecessarily harm the interests of the creditors of the company as a whole.

In *Re Harris Simons Construction Ltd*[66] Hoffmann J. stated that some of the purposes as set down in the provision are mutually exclusive. This is also the opinion expressed by some writers suggesting that the three objectives are listed in a hierarchical order, and that priority is given to rescuing the company as a going concern[67].

Although the courts are likely to respect the subjective decision of the administrator as a matter of business judgment, such a decision must be justifiable in the light of the prevailing circumstances.

The South African Companies Act provisions on the goals of corporate rescue do not enjoy as much clarity as the UK and Indian counterparts. The goals are combined with the definition of business rescue in section 128(1)(b) of the Act as follows:

(1) In this Chapter –

(b) *"business rescue"* means proceedings to facilitate the rehabilitation of *a company* that is financially distressed by providing for –

(i) the temporary supervision of *the company*, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against *the company* or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue *the company* by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of *the company* continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of *the company*[68].

The focus of the provision in its entirety is on the company as an entity. Ironically, in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[69] Claassen J. had observed that "[t]he general philosophy permeating through the business rescue provisions is the recognition of the value of the *business* as a going concern rather than the juristic person itself. Hence the name '*business* rescue' and not '*company* rescue'. This is in line with the modern trend in rescue regimes." A more detailed analysis of that provision would reveal that the law tilts more on the side of company rescue than business rescue.

A distinction exists between rescuing the company and rescuing the company's business. Part 5.3A of the Australian Corporations Act provides an illustration as follows:

The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

(b) if it is not possible for the company or its business to continue in existence…results in a better return for the company's creditors and members than would result from an immediate winding up of the company[70].

There is some sense in drawing a distinction between the company and its business. It ensures that in the event that rescuing the company becomes untenable, the rescuing of the business of the company could be pursued if that would benefit the stakeholders. Judicial expression was given to this legislative intent by the New South Wales Supreme Court in *Bidald Consulting v Miles Special Builders*[71] where Campbell J. said:

> Section 435A regards it as something to be aimed at that the company *or* its business continue in operation, in whole or part. This includes the possibility that, even though the company does not continue in existence, the business or part of it continues, perhaps run by some other entity. It is within the policy of the Part for the business to be kept alive so far as it can, regardless of who might be running it, rather than have the destruction of the business which sometimes comes with a liquidation where it is not possible for the liquidator to sell the business as a going concern.

Indeed, it has been suggested by writers that in spite of the hierarchical placing of the preferences of corporate rescue under the UK Insolvency Act, the objective of rescuing the company as a going concern is hardly ever pursued, because the usual solution to an insolvent company's problems is to sell its business to another person, leaving the

[66] [1989] 1 WLR 368 at 371.
[67] See Paul Davies, Sarah Worttington & Eva Micheler, *Gower Principles of Modern Company Law* 10th ed (London: Sweet & Maxwell 2016) p 1140.
[68] Emphasis supplied.
[69] 2012 (3) SA 273 para 12. Emphasis the court's. See also *Madodza (Pty) Ltd v ABSA Bank Ltd* [2012] ZAGPPHC 165 para 15.
[70] Part 5.3A, s 435A Corporations Act 2001.
[71] [2005] NSWSC 1235 para 220.

company to be wound up[72]. In that context, the business of the company could continue to thrive through a different entity, while the company attains a perpetual demise.

While the goals of business rescue as set down in paragraphs (i) and (ii) of section 128(1)(b) are fairly specific, paragraph (iii) is not so clear. The distinction between the company and the company's business could be of assistance in understanding the intentions of the legislature in paragraph (iii).

In Australia, although paragraph (a) of section 435A of Corporations Act makes a distinction between the company and its business, the courts have not treated them as two separate objects in spite of the disjunctive 'or' that stands between them. Another 'or' appears at the end of paragraph (b) which precedes the statement of the object in paragraph(b). It would seem that the courts in Australia construed paragraphs (a) and (b) as portraying two different objects by paying more attention to their placement in two different paragraphs than the mere use of the disjunctive 'or' in that provision. For instance, in *Dallinger v Halcha Holdings Pty Ltd*[73] Sundberg J construed that provision as follows:

> Section 435A does not in my view require Part 5.3A to be limited to the case where, at the date of the administrator's appointment, there is some prospect of saving a company from liquidation. Paragraph (b) does not appear to me to contemplate only the case where, in the course of administration, it becomes apparent for the first time that it is not possible for the company to continue in existence…The machinery provided by the Part should be available in a case where, although it is not possible for the company to continue in existence, an administration is likely to result in a better return for creditors than would be the case with an immediate winding up… I do not think the section is ambiguous or obscure.

A reliance on the disjunctive 'or' in that provision would have yielded three and not just two objects as reflected in the above decision. But even with the seeming distinctiveness of both paragraphs in section 435A, there is still no consensus among the courts in Australia that each of those objects could be pursued independently. In *Sydney Land Corp Pty Ltd v Kalon Pty Ltd*[74] Young J considered the provision in paragraph (b) as a "secondary consideration" which should be pursued only when it becomes impossible to realise the objective set down in paragraph (a). In *Blacktown City Council v Macarthur Telecommunications Pty Ltd*[75] Barrett J could see only one object in Part 5.3A which is the returning of the company to the mainstream of commercial life and every other provision in that Part are merely the purpose of pursuing the stated object. He said:

> Examination of Pt 5.3A as a whole shows that there are several purposes which together contribute to the widely stated object [not objects]. The provisions imposing the various moratoriums show that there is a purpose of allowing time for unpressured but reasonably prompt consideration of possible reconstruction possibilities... Another purpose is that, if the company is not capable of returning to the mainstream of commercial life, there will be some better outcome for creditors than that available in an immediate winding up.

In South Africa, the courts seem contented with construing the provision of section 128(1)(b)(iii) as prescribing two distinct objects. Reliance is found in section 128(1)(h) which provides that 'rescuing the company' means achieving the *goals* set out in the definition of business rescue in paragraph (b). Indeed, there are presumably three goals of business rescue as set down in paragraphs i, ii, and iii of section 128(1)(b) of the Act. In one case at least, *SARS v Beginsel NO*[76], Fourie J had acknowledged the existence of three goals in section 128(1)(b) where he stated that "[t]he third of those goals, set out in section 128(1)(b)(iii) is the following: the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company".

But some other courts decisions do not see the provision in paragraph (iii) as expressing one goal or object. In *Propspec Investments (Pty Ltd v Pacific Coast Investments 97 Ltd*[77] Van Der Merwe J defined a goal as "a desired end or result, and stated that the 'goals' set out in the definition are that the company continues in existence on a solvent basis or, if it is not possible for the company to so continue in existence, a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company". The judge would, obviously, be understood as identifying two, and not just, one goal, in paragraph (iii). Binns-Ward J's view in *Keon v Wedgewood Village Golf & Country Estate (Pty) Ltd*[78] is aligned to this line of reasoning as shown from his observation that the proposed business rescue should be as such as would achieve the continued existence of the company on a solvent basis, 'alternatively' allow the company's business to be managed for an interim period for a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

On the other side of the debate is the decision of Traverso DJP in *Gormley v West City Precinct Properties (Pty) Ltd*[79] which implicitly portrayed the existence of one goal in paragraph (iii) in that "a viable rescue plan must contain facts which show that if the intended resuscitation of the company should fail, the creditors will not be worse off. That line of reasoning was also adopted by Kgomo J in

[72] See Derek French, Stephen Mayson & Christopher Ryan, *Mayson, French & Ryan on Company Law 33rd ed* (Oxford: Oxford University Press, 2016) p 671.
[73] [1995] FCA 1727 para 28. See also *Scuderi v Morris* [2001] VSCA 190 para 13 per Ormiston JA who described the second object as intending that the company or corporation should be buried as efficiently and economically as possible under some arrangement which enables the creditors to get more than if it were to go directly into liquidation.
[74] (1997) 26 ACSR 427 at 430.
[75] [2003] NSWSC 883 para 19.
[76] 2013 (1) SA 307 (WCC) para 53.
[77] 2013 (1) SA 542 (FB) para 7.
[78] 2012 (2) SA 378 (WCC) para 17. See also *Newcity Group (Pty) Ltd v Pellow NO* [2013] ZAGPJHC 54 para 14 per Van Eeden AJ, referring to company being rescued if one of the objects in section 128(1)(b)(iii) is capable of being attained.
[79] [2012] ZAWCHC 33 para 13.

Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies[80] where he observed that "business rescue clearly envisages a restructuring of a company's business, followed, if all else fail, by a realisation of its assets by, for example, a sale of its business to a third party followed by a voluntary winding-up of the company." In *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd*[81] Coetzee AJ pointedly expressed doubt on the status of an alternative object in section 128(1)(b)(iii) as follows: "In my view the status of the alternative object in the South African Companies Act depends primarily on an interpretation of that Act. The creation of the alternative object will probably give rise to more litigation. It is, for example, strange to create an object for a new remedy in a definition section." While construing the true meaning of that provision, the judge stated that the intention of the legislature is seemingly that the company must have a reasonable prospect of recovery, and once the company is under business rescue, its rescue plan may be aimed at the alternative object, namely; a better return to the creditors than the return of immediate liquidation.

This line of construction of paragraph (iii) of section 128(1)(b) was not accepted by the Supreme Court of Appeal. In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*[82] Brand JA explicitly referred to that provision as "having two objects or goals: a primary goal, which is to facilitate the continued existence of the company in a state of insolvency and, a secondary goal, which is providing for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation". Borrowing from the Australian Corporations Act of 2001, section 435A thereof, which he said, "are not dissimilar in wording to ours 128(1)(b)"[83] and the interpretation of that provision by Sundberg J in *Dallinger v Halcha Holdings (Pty) Ltd,*[84] the Supreme Court of Appeal judge rejected the argument by counsel that "a proposed plan which holds out no hope for a return of the company to a state of solvency, but provides at best for achievement of the secondary goal, does not amount to 'rescuing the company'" as defined by section 128(1)*(h)* read with section 128(1)*(b).*[85] Brand JA thus concluded as follows:

> As I understand the section, it says that 'business rescue' means to facilitate 'rehabilitation', which in turn means the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation. This construction would also coincide with the reference in s 128(1)*(h)* to the achievement of the goals (plural) set out in s 128(1)*(b).* It follows, as I see it, that the achievement of any one of the two goals referred to in s 128(1)*(b)* would qualify as 'business rescue'[86].

There are a number of reasons to doubt the accuracy of the Supreme Court of Appeal's interpretation of section 128(1)(b)(iii). Firstly, the suggestion that that provision is not dissimilar to the Australian version in section 435A is not entirely correct. The Australian provision, which is explicitly presented as 'object of Part 5.3A of the Act', consists of two paragraphs numbered (a) and (b) respectively. The South African provision does not bear such distinctive numbering in paragraph (iii). Brand JA erroneously imputed that distinction in that provision. Secondly, the Australian provision embodies tenable distinction between rescuing the company and rescuing the company's business. This, in essence, suggests that even when the company could not be resuscitated, the object of resuscitating the business could still be pursued if that would yield better return for the company's stakeholders. Judicial decisions have shown that this is a realistic option as the business of the ailing company could be taken over by another company with the interests of creditors and shareholders firmly guaranteed under the new arrangement[87]. The South African provision is narrowly focused on rescuing the company, which implicitly suggests that the attainment of the alternative object should be pursued within the broad aim of rescuing the company. It does not seem to adorn the garb of an independent object as in Australia as suggested by the Supreme Court of Appeal[88]. Besides the inept inferences from the Australian provision, is the holding by Brand JA that "this construction would… coincide with the reference in s 128(1)(h) to the achievement of goals (plural) set out in s 128(1)(b). It follows, as I see it, that the achievement of any of the two goals referred to in s 128(1)(b) would qualify as 'business rescue'"[89].

Although section 128(1)(h) refers to the achievement of 'goals' set out in section 128(1)(b), there is still a question as to what constitutes the goals? The goals in section 128(1)(b) are listed in paragraphs i, ii and iii of that section. In *SARS v Beginsel NO*[90] Fourie J had correctly referred to the provision in paragraph (iii) as the third of those goals set out in section 128(1)(b). In other words, there is only one goal in paragraph (iii) and not two as suggested by Brand JA[91]. That goal is to rescue the company in financial distress by maximising the chances of the company's continuing in existence on a solvent basis. Ensuring better returns for the company's creditors and shareholders is secondary and should be pursued within the context of the main object. Where the primary object is untenable

[80] [2013] ZAGPJHC 109 para 5.
[81] 2012 (5) SA 515 paras 12.
[82] [2013] ZASCA 68 para 23.
[83] Ibid para 24.
[84] [1995] FCA 1727 para 28.
[85] *Oakdene*, n 57 above para 25.
[86] Ibid para 26.

[87] See *Bidald Consulting v Miles Special Builders* [2005] NSWSC 1235 para 220 where Campbell J alluded to the essence of that provision.
[88] Perhaps it should also be emphasised that even as distinctly presented in different paragraphs in the Australian provision, the opening sentence in paragraph (b) "if it is not possible for the company or its business to continue in existence", suggests that the stated object in that paragraph can only be pursued within the context of the main object in paragraph (a). This justifies the description of that object as secondary by the Australian court. See *Sydney Land Corporation Pty Ltd v Kalon Pty ltd* (1997) 26 ACSR 427 at 430 per Young J. Cf UK Insolvency Act 1986, Schedule B1 as amended by section 248 Schedule 16 para 3(1) of the Enterprises Act, 2002 which provides that «the administrator of a company must perform his functions with the objective of - (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were to be wound up (without first being in administration), or (c) realizing property in order to make a distribution to one or more secured or preferential creditors».
[89] *Oakdene* n 60 above para 26.
[90] 2013 (1) SA 307 (WCC) para 53.
[91] Ironically, the same Judge rejected the argument by counsel that a sale of the immovable property and payment of the creditors is likely to result in a cash surplus and which would have the effect of terminating the commercial insolvency of the company on the ground, as he said: "I do not believe it constitutes a 'business rescue' within the meaning of s 128(1)*(b)*(iii). What the section requires is 'the continuing existence of the business of the company on a solvent basis'." Thus indicating one and not two goals. See *Oakdene's case* n 64 above para 39.

ab initio, the secondary object cannot be pursued independently. The only alternative is to subject the company to a process of liquidation which allows the creditors at first instance to salvage whatever they can from the carcases of the failed company.

4. CONCLUSION

The corporate rescue scheme in jurisdictions under consideration is generally geared at ensuring the sustainability of the corporate enterprise. The realisation of the importance of the corporate entities to the economic development of the individual nations and the spiralling adverse impacts of a company's demise on the stakeholders and the society at large are the keys to this new trend in company's legislation. The adoption by South Africa of corporate rescue scheme in the Companies Act of 2008 follows the established practice in the United Kingdom and India.

A comparison of the South African Companies Act provisions on the business rescue with that of section 435A of the Australian Corporations Act suggests that the South African provision is narrowly focused on rescuing the company and not the company's business as such, even as the contrary could have been the legislative intention. The Australian provision explicitly refers to rescuing the company or business of the company. Although the courts in South Africa do not seem to have taken cognizance of that distinction in their pronouncements,[92] such a distinction would be indispensable in pursuing the seeming ancillary purpose of business rescue as provided in paragraph (iii) of section 128(1)(b) of the Act.

The UK Insolvency Act provisions, unlike its South African counterpart, is very explicit on the goals of corporate rescue and their other of preferences. The inconsistent pronouncements by the South African courts could be avoided by the adoption of the UK statutory pattern in future legislation on the matter.

In India, there is not much doubt as to the goal of corporate rescue. That concept is simply geared at ensuring that the company is restored as a going concern. Although some judicial decisions in that jurisdiction seem to have given preeminent consideration to the need to protect the welfare of the workers in the corporate enterprise, the inescapable facts remain that the welfare of workers can only be guaranteed in a viable corporate enterprise.

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[92] See, for instance, Binns-Ward J's statement in *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) para 14 that «business rescue is intended to serve the public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation».

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