

# EXPLORING THE ROLE OF THE BUSINESS RESCUE PRACTITIONER IN RESCUING A FINANCIALLY DISTRESSED COMPANY

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## Abstract

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The emphasis on corporate sustainability as against liquidation in the South African Companies Act 71 of 2008 creates an important figure in the person of the business rescue practitioner. The practitioner in that capacity supplants the board and is insulated from the relevant elements of shareholder control in the discharge of the task of rescuing the financially distressed company. The article interrogates, through doctrinal approach, the efficacy of the statutory provisions relating to the role of the business rescue practitioner in the business rescue process and argues against the disqualification of juristic persons from appointment as business rescue practitioners. While respecting the subjective decision of the practitioner in the preparation of the rescue plan, the paper considers that such subjective decision should withstand some level of objective assessment to enjoy credibility, just as the practitioner should conform to a high level of judicial scrutiny as an officer of the court to be absolved from any liability arising from a breach of duty.

**Keywords:** Company, Financial Distress, Practitioner, Rescue, Sustainability, Liquidation

## 1. INTRODUCTION

The principal companies' regulatory instrument in South Africa, in the realization of the importance of the corporate entities to the social and economic development of the nation, presently lays emphasis on corporate sustainability rather than liquidation. Sustainability demands that structures be put in place to ensure that companies in financial distress are resuscitated and not liquidated. Thus, the rescue and recovery of financially distressed companies are captured as one of the objectives of the Companies Act<sup>5</sup>. That objective is to be attained through the process of a business rescue plan which is anchored by the business rescue practitioner. A South African High Court presided over by Fourie J alluded to that process in *Commissioner for the South African Revenue Services v Beginsel and Rennie NNO*<sup>6</sup> where the judge observed that at the heart of business rescue proceedings, is the preparation of a business rescue plan by a business rescue practitioner for consideration and possible adoption by the relevant stakeholders.

The business rescue practitioner is the central figure in galvanizing the resuscitation of the company in the difficult financial situation. The role of the business rescue practitioner, in the South African context, is synonymous with that of the administrator of an insolvent company in cognate jurisdictions<sup>7</sup>. Thus, the observation in the United Kingdom by Cork Committee that the achievement of an efficient and reliable insolvency system relies upon its administrators and that if the administrators do not have the respect and confidence of the courts, the creditors, the shareholders and the general public, the insolvency system would fall into disrepute and disuse<sup>8</sup>, similarly applies in defining the role of the business rescue practitioner in rescuing a financially distressed company in South Africa.

The practitioner, however, appointed, supplants the board and enjoys the status of an officer of the court reporting only to the court in the discharge of the vested responsibilities<sup>9</sup>. This status is expected to insulate the practitioner from control and influences from the stakeholders in the

<sup>5</sup> See s 7(k) of the Companies Act 71 of 2008 ("the Act").

<sup>6</sup> 2013 (1) SA 307 (WCC) para 38.

<sup>7</sup> See for instance, the UK Insolvency Act of 1986 as amended by the Enterprises Act of 2002.

<sup>8</sup> The Report of the Insolvency Review Committee on Insolvency Law and Practice 1982 Cmnd 8558 para 758.

<sup>9</sup> See s 140(3) of the Act.

discharge of the responsibilities vested on the practitioner. The assumption of the role of the board, seemingly by an outsider, demands some close statutory monitoring to ensure that the business rescue practitioner remains the solution and not add to the problem that led the company into financial distress. This article focuses on those statutory measures which are in place to ensure that the objective of business rescue through the instrumentality of the business rescue practitioner is attained with the aim of ascertaining the efficacy of those provisions, and where necessary, recommending modifications as would enhance the realization of the stated objective.

## 2. WHO IS A BUSINESS RESCUE PRACTITIONER

A business rescue practitioner is defined in section 128(1)(d) of the Act as a person appointed, or two or more persons appointed to work jointly, to oversee the company during business rescue proceedings. In ordinary terms, a business rescue practitioner is one or more persons appointed to manage the affairs of a company in financial distress. A broad definition of the word "person" in the Act includes a juristic person<sup>10</sup>. This implicitly suggests that a corporate body could be appointed as a business rescue practitioner. But that inference may not be sustainable in the context of the other provisions of the Act. While laying down conditions for the appointment of the business rescue practitioner, the Act provides in section 138(1)(d) that a person may be appointed as the business rescue practitioner of a company only if the person would not be disqualified from acting as a director of a company in terms of section 69(8). In other words, only persons eligible to act as directors of a company could be appointed as business rescue practitioner. The provision places the status of the business rescue practitioner at the same managerial level as that of the company's director. Thus, those factors that could disqualify a person from being a director equally apply to the business rescue practitioner.

One of the disqualifying factors as laid down in section 69(8)(b)(ii) of the Act is that a person cannot be a director of a company if the person is prohibited in terms of any public regulation to be a director of a company. A "public regulation" as defined in the Act includes an Act of parliament such as the Companies Act<sup>11</sup>. Section 69(7)(a) of the Act disqualifies juristic persons from being appointed as directors of a company. This invariably implies that a juristic person is ineligible for appointment as a business rescue practitioner.

A possible ground for restricting the appointment of the business rescue practitioner to natural persons by parliament could have been the same question of holding a corporate body liable for criminal conducts which is at the heart of the disqualification of juristic persons as directors. The courts had in the past adopted a position that corporations are not liable for the criminal for the conduct of its officers. This was based on the absence of the moral or blameworthy element of the crime which cannot be attributed to a juristic person. But the modern approach in the judicial circle dwells on flexibility, laying emphasis on the functional role of a particular officer or servant of the company in imputing conduct of such person on

the company<sup>12</sup>. However, this judicial solution has seemingly not been fully assimilated by the South African corporate law jurisprudence as juristic persons are still disqualified from holding the office of a director<sup>13</sup>. Thus, juristic persons cannot be appointed as business rescue practitioners in South Africa. But such a discriminatory approach between juristic and natural persons in the holding of office is no longer justifiable in the modern corporate law. The question of corporate liability is now judicially well settled, and from a pragmatic perspective, corporations should ordinarily be better equipped to run businesses than individuals. The outreaches of corporate bodies with highly skilled manpower and financial resources are not easily tenable by individuals. Such enduring business skill and wide connections could become invaluable tools in resuscitating a financially distressed company.

## 3. APPOINTMENT OF BUSINESS RESCUE PRACTITIONER

The appointment and managerial acumen of the business rescue practitioner are pivotal to a successful execution of the business rescue process. There are two broadsides to such appointment as provided by the Companies Act, namely: appointment by the board of directors, or appointment by the court.

The board appoints the business rescue practitioner where the business rescue process is initiated by the board. It is the requirement of the Act that such an appointment be made within five days of filing the resolution by the board with the Companies and Intellectual Property Commission to place the company under business rescue<sup>14</sup>. The Act goes further to demand in section 129(4)(b) that after appointing a practitioner as required by subsection (3)(b), a company must – "(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and (b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed".

The specification of time frames for the appointment of the practitioner and filing of the requisite notice are indications of the desire by parliament that the process of business rescue should not be unduly prolonged<sup>15</sup>. The need to mitigate any adverse impacts such proceedings could have on the creditors whose rights are placed in abeyance by the statutory moratorium while the process endures<sup>16</sup>, justifiably demands that the rescue proceedings be handled with dispatch. The

<sup>10</sup> See s 1 of the Act.

<sup>11</sup> See s 1 of the Act.

<sup>12</sup> See *Meridian Global Funds Asia Ltd v Securities Commission* [1995] 2 AC 500, *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685CA), *Canadian Dredge and Dock Co. v The Queen* (1985) 1 SCR 662, 19 DLR 4<sup>th</sup> 314 (Ont. SCC), *The Rhone v The Peter A.B. Widener* (1993) 1 SCR 497, 101 DLR 4<sup>th</sup> 188 (SCC). For a detailed discussion of these cases and principles see Nwafor, A. O. (2016). Examining the concept of de facto director in corporate governance. *Corporate Board: Role, Duties and Composition*, 12(2), 12-21.

<sup>13</sup> Cf the UK Companies Act 2006 position as expressed in section 155(1) which permits the appointment of a corporate director on the board so long as at least one of the directors of the company is a natural person.

<sup>14</sup> See s 129(3)(b) of the Act.

<sup>15</sup> The business rescue process should not ordinarily extend beyond three months from the start of the proceeding unless such extension is granted by the court. See s 132(3) of the Act.

<sup>16</sup> See s 133(1) of the Act which provides that "During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except- (a) with the written consent of the practitioner; (b) with the leave of the court and in accordance with any terms the court considers suitable." For detailed discussion on moratorium during business rescue, see 8. Nwafor, A. O. (2017). Moratorium in business rescue scheme and the protection of company's creditors. *Corporate Board: Role, Duties and Composition*, 13(1), 59-67. <http://doi.org/10.22495/cbv13i1p6>

Act declares a resolution to commence business rescue a nullity for non-compliance with the five days period for the appointment of the business rescue practitioner or the filing of the requisite notice<sup>17</sup>. Those provisions have received judicial approval in *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS*<sup>18</sup> where Fabricius J, drawing from the purpose of the provisions, said:

It is clear from the relevant sections contained in chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the resolution beginning rescue proceedings. The purpose of section 129(5), is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with section 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to "substantial compliance". The requirements contained in the relevant sub-sections were either complied with or they were not.

The court may appoint, on a temporary basis, a business rescue practitioner who is nominated by an affected person. Such an appointment is subject to ratification by a majority of the independent creditors voting at the first meeting of the creditors after the appointment<sup>19</sup>. This serves as an affirmation of the importance of the creditors in the process of business rescue. By conferring power on the creditors to ratify the appointment of the practitioner, the creditors are placed in a position to determine the suitability of the person nominated by the affected person and appointed by the court to undertake the task of restoring the company to financial sustainability. It is expected that in the exercise of the ratification power, the creditors will consider, among others, the business skill, experience and independence of the business rescue practitioner. However, the power of the court to appoint a practitioner is exercisable only when the process of business rescue is initiated by an affected person<sup>20</sup>. Although the Act has an all-encompassing definition of "affected person"<sup>21</sup>, it would seem that the primary concern of the court when the company is in financial distress is the protection of the interests of the company's creditors. This was the judicial position in *Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd*<sup>22</sup> where the court held:

Where a company is insolvent or of doubtful solvency or on the verge of insolvency and it is the creditors' money which is at risk the directors when

carrying out their duty to the company, must consider the interests of the creditors as paramount and take those into account when exercising their discretion.

The court will not, however, decline to appoint a practitioner simply because a creditor does not want that particular individual or would prefer someone else. The concern of the court is more on the compliance with the qualification threshold as set down in the Act than the personal sentiments of the creditors which are better addressed at the meeting of the creditors. In *Van Nierkerk v Seriso 321 (FirstRand Bank Ltd intervening)*<sup>23</sup> the court proceeded to appoint the nominated person as interim business rescue practitioner despite objections from the intervenor as in the court's opinion; "Firststrand Bank would...be entitled to raise any concerns regarding the interim practitioner at the first meeting, there being nothing to suggest that the practitioner nominated does not meet the requirements of Section 138." A decision in the above respect suggests that the creditors should not take lightly any meeting convened to consider the suitability of the person appointed as the business rescue practitioner. It is expected that objections raised by the affected creditor and overruled at the meeting would be a strong ground for future proceedings seeking judicial review of such an appointment.

The Act provides that where the court has set aside the appointment of a business rescue practitioner appointed by the company, the same court must also appoint another business rescue practitioner who satisfies all the requirements stipulated in section 138<sup>24</sup>. If a practitioner resigns, or is removed from office or dies a new practitioner must be appointed by the board of directors or the creditors depending on who made the initial appointment<sup>25</sup>. All these provisions are aimed at ensuring an uninterrupted process of business rescue bearing in mind the limited time frame and the suspended rights of the creditors.

#### 4. POWERS AND DUTIES OF A BUSINESS RESCUE PRACTITIONER

The powers of the business rescue practitioner are split into two broadsides, namely: managerial and investigative powers. The managerial powers are provided in section 140 of the Act which declares unequivocally that the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management<sup>26</sup>. What this portends is that upon the assumption of office as a business rescue practitioner, the board is supplanted and all powers previously exercised by the board in relation to the company are now vested in the practitioner. The Act erases any doubt or dispute that may arise between the board and the practitioner as to who is in control by descending to details on what the practitioner can do in relation to the board, among which are that the practitioner; "may delegate any power or function of the practitioner to a person who was part of the board or the pre-existing management of the company, may remove from office any person who forms part of the pre-existing management of the company; or appoint a person as

<sup>17</sup> See s 129(5).

<sup>18</sup> Unreported Case number 72522/11, delivered on 6 June 2012 para 26. This decision was referred to with approval by Tolmay J in *Madodza Pty Ltd (in business rescue) v ABSA Bank Ltd* [2012] ZAGPPHC 165 para 24. See also *Home; Trailers and Bodies (Pty) Ltd (under supervision) v Standard Bank of South Africa Ltd* [2013] ZAGPPHC 465 (27 September 2013) and *ABSA Bank Ltd v Ikageng Construction (Pty) Ltd* [2014] ZAGPPHC 684 and *Newton Global Trading (Pty) Ltd v Corte* [2014] ZAGPPHC 628. Cf *Panamo Promoties (Pty) Ltd v Nel and Another NNO* [2015] 3 All SA 274 (SCA) (27 May 2015) para 29 where the Supreme Court of Appeal per Wallis JA held that "If there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity and is liable to be set aside under s 130(1)(a)(iii). In all cases the court must be approached for the resolution to be set aside and business rescue to terminate.

<sup>19</sup> See s 131(5).

<sup>20</sup> See s 131(1).

<sup>21</sup> An "affected person" as defined in the Act means (i) shareholder or creditor of the company; (ii) any registered trade union representing employees of the company; and (iii) other employees who are not represented by the registered trade union.

<sup>22</sup> [2002] EWHC 2748 (Ch) para 74. 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).

<sup>23</sup> [2012] ZAWCHC 63 (CC) para 34.

<sup>24</sup> Section 130(1)(b).

<sup>25</sup> Section 139(3).

<sup>26</sup> See s 140(1)(a).

part of the management of a company whether to fill a vacancy or not<sup>27</sup>. In *Murgatroyd v Van den Heever NO and others*<sup>28</sup> the court held that “the provisions of Chapter VI are not unduly prescriptive or restrictive as far as a practitioner’s functions and duties are concerned. His functions and duties are broad and require a variety of steps to be taken. The nature of a practitioner’s powers implies that he may in appropriate circumstances appoint advisors, valuers, auctioneers, forensic accountants, lawyers and other experts or persons to assist him in the carrying out of his plenary functions”. Perhaps, a more concise way of expressing the scope of the powers of the practitioner is to see it in the context of the UK Insolvency Act of 1986 Schedule B1 where it is provided that the “administrator of a company may do anything necessary or expedient for the management of the affairs of the company”<sup>29</sup>. The same should apply to the business rescue practitioner appointed under the South African Companies Act in the exercise of his powers to administer the affairs of the company.

What is important here is that the board is not dissolved by the appointment of the business rescue practitioner, however, the extent of the power that the board exercises is determined by the practitioner<sup>30</sup>. Not much credit would be given to the Act for preserving a dormant board whose members will continue to earn salaries and other allowances from a financially distressed company while the company is undergoing a rescue process. This would be in addition to the remuneration of the practitioner which is entirely the responsibility of the company in financial distress. The declaration of the practitioner as an officer of the court by the Act<sup>31</sup> is primarily to guarantee the independence of the practitioner. The company will certainly be better served at this moment of distress by cutting down on some of the administrative expenses. This could be achieved by dissolving the board which would free the funds for the directors’ salaries and channelling them towards the attainment of the objective of the rescue process.

The major responsibility of the business rescue practitioner is to develop a business rescue plan and or implement any business rescue plan that has already been adopted by the company<sup>32</sup>. The nature of information required in the business rescue plan demands that the practitioner should be knowledgeable about the relevant company’s line of business. *Eloff AJ in Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*<sup>33</sup> alluded to the nature of information required in a business rescue plan as follows:

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.

Such “concrete and objectively ascertainable details” as identified by the judge 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”<sup>34</sup>.

Placing this decision in the right perspective demands, first, the consideration of the investigative role of the business rescue practitioner. The power to investigate the affairs of the company is conferred on the practitioner by section 141(1) of the Act which provides as follows:

As soon as practicable after being appointed, a practitioner must investigate the company’s affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.

This is the very first responsibility which the business rescue practitioner is expected to undertake and which must be done expeditiously. The commencement phrase “As soon as practicable” in that provision conveys a wrong impression that the practitioner could undertake this assignment at the practitioner’s convenience. That cannot be the case as business rescue proceedings are required to be an expeditious exercise considering that a moratorium is placed on the legal and proprietary rights of the company’s creditors<sup>35</sup>. The consultation meetings with the creditors and the employees of the company are required to be held within ten days of the appointment of the business rescue practitioner<sup>36</sup>. The practitioner is required to inform those stakeholders at such meetings whether the practitioner believes that there is reasonable prospect of the company being rescued. Any suggestion by the practitioner that the company at that point has a bright prospect of being rescued must be born out of a preliminary inquiry conducted on the state of the company’s affairs. It is expected that the practitioner should have had in place a draft copy, at least, of the business rescue plan. The Act requires that the final copy of the plan must be published by the company within 25 business days after the date on which the practitioner was appointed. An extension beyond the specified period of 25 business days can only be granted by the court or the majority of the company’s creditors’ voting rights<sup>37</sup>. Implicit in these provisions is that section 141(1) of the Act does not confer an unfettered discretion on the practitioner in deciding when to produce a rescue plan. The phrase “As soon as practicable” in that provision has to be construed within the 25 business day’s window as granted by section 150(5) of the Act.

Section 141(1) creates the impression that the reasonable prospect of the company being rescued rests entirely on the practitioner’s subjective belief. That inference is strengthened by section 152(1)(b) which provides that at a meeting convened in terms

<sup>27</sup> See s 140(1)(b)(c).

<sup>28</sup> [2014] 4 All SA 89 (GJ) para 17.

<sup>29</sup> Insolvency Act of 1986, 1A 1986 Schedule B1 para 59 (1).

<sup>30</sup> See s 137(2)(a) of the Act which provides that during a company’s business rescue proceedings, each director of the company must continue to exercise the functions of director, subject to the authority of the practitioner.

<sup>31</sup> See s 140(3)(a).

<sup>32</sup> See s 140(1)(d).

<sup>33</sup> 2012 (2) SA 423 (WCC) para 24. Emphasis supplied.

<sup>34</sup> *Southern Palace* 2012 (2) SA 423 (WCC) paras 24.

<sup>35</sup> See s 133 of the Act.

<sup>36</sup> See ss 147 and 148 respectively.

<sup>37</sup> See s 150(5).

of section 151, the practitioner must inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued. This provision resonates section 129(1) of the Act which grants powers to the board to commence business rescue if the board has reasonable grounds to believe that there appears to be a reasonable prospect of rescuing the company<sup>38</sup>. Those provisions suggest that the business rescue process is entirely a business decision. The judicial attitude towards such matters is generally that of none interference as the courts believe that businessmen should be allowed to conduct their own affairs as the courts are not equipped to make business decisions. In *Howard Smith v Ampol Petroleum Ltd*<sup>39</sup> Lord Wilberforce emphasised 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”. A similar position was earlier adopted by Lord Davey in *Burland v Earl*<sup>40</sup> where the judge adopted a stance against any form of judicial interference in matters of internal management of a company and emphasised that “the court has no jurisdiction to do so”.

However, the requirement by the Act that the belief in the prospect of rescuing the company should be reasonable introduces some level of objectivity in the decision of the practitioner and creates room for a judicial scrutiny of such belief. Leach JA of the Supreme Court of Appeal had while interpreting the subject of reasonable belief in the context of section 129(1) of the Act in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*<sup>41</sup>, stated that:

I am mindful of the warning by this court in *Oakdene*<sup>42</sup> 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.

It cannot be an over-arching demand to suggest that a business rescue plan which is drafted by the practitioner after an extensive consultation with the stakeholders should bear sufficient information to support any assertion by the practitioner that the company has a good prospect of being rescued. Even as the courts are inclined to defer to business decisions, such decisions when contested must pass a certain threshold of objectivity to give credence to the belief upon which the decision is founded. Such objective scrutiny would enable the court to distinguish between a genuine business rescue process aimed at achieving any of the goals of business rescue (which, as stated in section 128(1) of the Act, are to facilitate the recovery of a company that is financially distressed or to achieve a better return for the company’s creditors or shareholders), from a mere contraption aimed at merely postponing, if not frustrating, the rights of the creditors to recover debts owed to them by the company. In *Catalyst Fund General Partner Inc v Hollinger Inc*<sup>43</sup> Campbell J emphasized that the

*subjective* belief of a self-interested director that he is acting in the best interests of the corporation is insufficient where objectively that is not the case and the subjective belief is unreasonable.

The suggestion that the reasonability of a business rescue plan cannot solely rely on the subjective belief of the practitioner is lent credence by the provision contained in section 150(2) of the Act to the effect that the business rescue plan “*must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan*”<sup>44</sup>. The provision goes on to provide guidelines on the contents of the various parts of the business rescue plan. The need for the plan to contain ‘information reasonably required’ to make a decision, again indicates an objective assessment of the level of information provided by the practitioner to enable the stakeholders to reach an informed decision. Granted that the Act cannot be unduly prescriptive as stated by the court in *Commissioner for the South African Revenue Services v Beginsel and Rennie NNO*<sup>45</sup> where Fourie J held:

A perusal of section 150(2) of the Act shows that the legislature has prescribed the content of a proposed business rescue plan in general terms. The content can, by its very nature, not be exactly and precisely circumscribed, as it would differ from case to case, depending on the peculiar circumstances in which the distressed company finds itself... substantial compliance with the requirements of the section will suffice. This would... mean that, where sufficient information, along with the lines envisaged by section 150(2), has been provided to enable interested parties to take an informed decision in considering whether a proposed business rescue plan should be adopted or rejected, there would have been substantial compliance.

What is reflected in the extant legal position is that so long as the practitioner’s subjective belief in the reviving of the company as captured in the rescue plan is to be assessed and approved by the relevant stakeholders, such belief must attain a certain level of objective threshold to confer credibility on the rescue plan.

While the practitioner is executing or implementing the rescue plan, the practitioner is expected to conduct the company’s affairs in accordance with the responsibilities, duties and liabilities of a director of the company as provided in sections 75 to 77 of the Act. The provisions referred to demand from a director (practitioner) the highest level of probity in the conduct of the affairs of the company. Section 75 of the Act, for instance, demands a full disclosure of every financial interest however acquired either before or in the course of the rescue proceedings. The judicial position at common law is that where there is an obligation to disclose an interest, such disclosure must be sufficiently detailed as would give a true picture of what the interest actually is. In *Imperial Mercantile Credit Association v Coleman*<sup>46</sup> Lord Chelmsford declared that the director’s declaration of interest must enable his colleagues to be “fully informed of the real state of things”. It was similarly observed by Lord Radcliffe in *Gray v New Augarita Porcupine Mines*<sup>47</sup> that “there is no precise formula that will determine the extent of detail that is called for when a director declares his interest or the nature of his

<sup>38</sup> See s 129(1)(b).

<sup>39</sup> [1974] AC 821 at 832 (HL). See also *Richard Brandy Franks Ltd v Price* (1937) 58 CLB 136.

<sup>40</sup> [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. *Regentrest plc v Cohen* [2001] 2 BCLC 80 per Jonathan Parker J at 105.

<sup>41</sup> 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA).

<sup>42</sup> *Oakdene Saure Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] ZASCA 68 para 7. Emphasis supplied.

<sup>43</sup> 2006 CanLII 23918 (ON SC) para 35.

<sup>44</sup> Emphasis supplied.

<sup>45</sup> 2013 (1) SA 307 (WCC) para 38.

<sup>46</sup> (1873) LR 6 HL 189 at 201.

<sup>47</sup> (1952) 3 DLR (PC) 1 at 14.

interest. The amount of detail required is determined by the nature of the contract or arrangement and the context in which it arises". The judge, however, concluded that a director cannot simply say "I must remind you that I am interested and to leave it at that". These line of judicial reasoning lend justification to the statutory specifications in the Act that the interest to be disclosed by a director in a proposed matter must include "the general nature of the interest, any material information relating to the matter that is known to the director, and any observations or pertinent insights relating to the matter if requested to do so by the other directors"<sup>48</sup>. Where the interest is in an existing matter, the disclosure must include "the nature and extent of the interest, and the material circumstances relating to the director or related person's acquisition of that interest"<sup>49</sup>.

While directors who have interests in the company's transactions are statutorily required to disclose such interests to the board, there is no clear indication in the Act as to whom the business rescue practitioner should disclose an interest. It may not safely be assumed that such disclosure should be made to the board in the same manner as a director would have done. This is because a practitioner could be appointed either by the board<sup>50</sup> or by the court where nominated by an affected person<sup>51</sup> depending on how the rescue proceedings are initiated. It is arguable that a practitioner who is appointed by the board would have satisfied the disclosure requirement by disclosing any interest to the board, while the practitioner nominated by an affected person and appointed by the court should disclose to the affected person or to the court. But the Act has specifically declared that the practitioner is an officer of the court during the duration of the rescue proceedings and must report to the court in accordance with any applicable rules of, or orders made by, the court.<sup>52</sup> That provision presupposes that the practitioner is accountable to the court and not to the board of directors or the affected person notwithstanding how the practitioner is appointed. The only rightful disclosure in that context should, therefore, be made to the court and an absolution of conflict of interest can only be granted by the court. The inference here is that a greater level of indulgence is demanded from the business rescue practitioner as the individual sentiments and collegiality often attendant to directors' decisions in such matters will be lost where such decisions are made by the court.

## 5. CONCLUSION

The definition of business rescue practitioner in section 128(1)(d) of the Act with reference to persons fails in clarity. The word 'person' as defined in section 1 of the Act encompasses both natural and juristic person. The combination of sections 138(1)(d) and 69(7)(8) of the Act disqualifies from appointment as business rescue practitioner any person who cannot be appointed as a director of a company. Juristic persons are among those who cannot be appointed as directors under those

provisions, as such, juristic persons cannot be appointed as business rescue practitioners in spite of section 128(1)(d). The prohibition against juristic persons in this context reinvents the rather extinct common law initially perceived legal impossibility in holding corporate bodies accountable for wrongful conducts of their officers. The courts have since surmounted that difficulty through the doctrine of attribution that seeks to hold the company liable for the conducts of its officers and servants. The question of accountability of the corporate body is therefore insufficient reason to disqualify corporate bodies from being appointed as business rescue practitioners.

The consideration for the interests of the creditors pervades every aspect of the appointment of the business rescue practitioner, whether that appointment is made by the board or by the court. While appointment by the board must adhere strictly with the five days rule as prescribed by section 129(3), an appointment by the court of a person nominated by the affected person is subject to ratification by the creditors<sup>53</sup>. The strict enforcement of these provisions by the courts ensures that the legal and proprietary rights of the company's creditors are not unreasonably curtailed through the process of business rescue. The same is equally true with the judicial insistence that the rescue plan as drawn up by the business rescue practitioner should satisfy some level of objective standard. Although such rescue plans are made from the subjective business skill and knowledge of the practitioner after the requisite consultation, the creditors are required to approve the plan before implementation. Such an approval can only be given if the creditors are convinced that the plan as constituted stands a good chance of achieving the goal of the rescue process. It is therefore not sufficient that the practitioner subjectively believes in the contents of the rescue plan.

The business rescue practitioner, upon the assumption of office, displaces the board in the exercise of the managerial powers of the company as provided in section 140 of the Act. The board which is at best dormant at that point, except to the extent permitted by the practitioner, remains in place and is not dissolved. There is some difficulty in defending the retention of a dormant board in a financially distressed company. The financial exertion on the company in sustaining the board in addition to the practitioner whose remuneration remains the responsibility of the company could become a heavy strain on the company's dwindling resources. Every effort should be made to cut down on expenditure during the rescue process, and one of the important measures should be an immediate dissolution of the board once the practitioner assumes duty. This will not affect the prerogative of the practitioner to assign roles and seek assistance and advice from those members of the board that are considered vital to the success of the rescue process.

In the discharge of the practitioner's duties of rescuing the company, the Act expects the same level of indulgence which is demanded from the directors of the company under sections 75 to 77. However, while the directors are generally agents of the company and are accountable to the company, the practitioner is presented by the Act as an officer of the court and accountable to the court<sup>54</sup>. The real

<sup>48</sup> S 75(5) SA CA 2008.

<sup>49</sup> S 75(6) SA CA 2008. For a detailed discussion on directors' duty to disclose interest in company's transactions, see Nwafor, A. O. (2015). Transparency in corporate governance: Extent of directors duty to declare interest in company's transactions. *Corporate Board: Role, Duties and Composition*, 11(1-1), 137-148. <http://doi.org/10.22495/cbv11i1c1art6>

<sup>50</sup> See s 129(3)(b).

<sup>51</sup> See s 131(5).

<sup>52</sup> See s 140(3)(a).

<sup>53</sup> See s 131(5).

<sup>54</sup> See s 140(3).

implication of this status differential finds expression in the standard of performance of duty and absolution from failure. While shareholders or even the board, may condone or rectify a director's

breach of duty as prescribed by the Act, it is only the court that can absolve the business rescue practitioner from any such breach of duty and that process cannot be lightly attained.

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