

An explorative view of business rescue practitioners in SA

Purpose: Business rescue proceedings attempt to rehabilitate businesses that are in financial distress. In spite of its importance, there is a seemingly low rate of success of the current business rescue regime (at just 13.6% as at June 2015). This article seeks to understand the issues that may be hindering the current rate of success of business rescue proceedings, provide insight to practicing accountants in their capacity as business rescue practitioners and to give corporates in need of rescue a fighting chance. This is achieved by exploring whether the current rescue regime meets its intended objectives and identifying any obstructions to the success of the regime from the practitioners' point of view, in an effort to provide better understanding and context of some of the shortcomings in current practice, which can then be used as areas for potential improvement for accountants and other practitioners of business rescue.

Design Methodology: The article focusses on practical issues and an investigation is undertaken through the use of interviews with local business rescue practitioners (of which almost half were accountants), who are the facilitators of this practice.

Findings: The findings show that there is a lack of clarity of the definition of success which may be cause for concern and that in spite of its consistency with other jurisdictions, in the view of practitioners, the success rate is expected to improve. This study provides details on four key insights to business rescue practice in South Africa: namely, the practitioners' perceptions of success, their perceptions of the trust of stakeholders during the course of business rescue, their perceptions of the impact of the qualifications and experience of the business rescue practitioner, and their perceptions on the preparation of the business rescue plan.

Originality/value: Given that the Minister of Trade and Industry has acknowledged that this regime may have shortcomings (Companies and Intellectual Property Commission (the Commission), 2014) and given the current low rate of substantial implementation of business rescue plans, these findings will contribute to increased success of the business rescue regime in South Africa and will provide accountants and business rescue practitioners from other backgrounds with a better understanding of the issues surrounding business rescues and will allow them to better perform their duties

Key Words: *Business Rescue, Success; Rescue practice.*

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1. Introduction and Background:

Business rescue proceedings attempt to rehabilitate businesses that are in financial distress and provide them with an alternative to liquidation (Companies Act No. 71 of 2008). This is intended to enhance the viability of those businesses, as well as the economy as a whole. A successful rescue will encourage entrepreneurship and growth of the private sector of the economy (Kaulungombe, 2012). The business rescue provisions of the Act aim to rescue the business (Bradstreet, 2011). This article, through an investigation of the issues facing business rescue, will provide insight to practicing accountants in their capacity as business rescue practitioners

Prior to business rescue provisions being enacted, judicial management was used for this purpose but this was traditionally seen as a precursor for liquidation (Levenstein, 2008). The business rescue provisions introduced in 2008 brought South African company law in line with international provisions for corporate turnarounds (Levenstein, 2008) and aimed to address the shortcomings inherent in judicial management (Loubser, 2010). Despite the provisions made in the Act to rehabilitate businesses, business rescue proceedings do not always succeed in rehabilitating the company as reflected by the current low rate of success (the Commission, 2014; the Commission, 2015b). The Minister of Trade and Industry acknowledges that the regime has a number of shortcomings that have come to light in the implementation of business rescue, such as “sanctions applied to business [rescue] practitioners and the regulation of their activities” (the Commission, 2014, p. 6). The purpose of this article is to elicit four insights on the current practice of business rescue in an attempt to understand the regime better and thereby improve on its success, namely, the practitioners’ perceptions of success, their perceptions of the trust of stakeholders during the course of business rescue, their perceptions of the impact of the qualifications and experience of the business rescue practitioner, and their perceptions on the preparation of the business rescue plan. These insights will allow accountants, in their capacity as business rescue practitioners and advisers, to better perform their duties

2. Literature Review:**2.1. Business Rescue Success:**

The provisions for business rescue in the Act are vital to the functioning of a healthy economy (Kaulungombe, 2012). There are two requirements for the use of business rescue provisions: the company must be financially distressed and there must be a reasonable prospect of rescuing the company (Companies Act No. 71 of 2008). Financial distress refers to the appearance that the company will not be able to pay its debts as they fall due in the following six months or that the company will become insolvent in the following six months (Companies Act No. 71 of 2008). Business rescue can be entered into voluntarily by the company, or applied for by creditors, shareholders and employees (Companies Act No. 71 of 2008). The Association of Chartered Certified Accountants states that the objectives of business rescue proceedings are:

“...to save the company as a going concern. If this is not possible, then the secondary object or goal is to restructure the company in such a way that shareholders and creditors will still get a return on their investments, which is better than the return that they would have received should the company be liquidated” (ACCA, 2014)

Despite the provisions made in the Act, business rescue proceedings do not always succeed in rehabilitating the company — only 12% of the businesses that entered into business rescue between May 2011 and March 2014 concluded these proceedings successfully (the Commission, 2014) and, up to and including June 2015, this success rate was 13.6% (calculated from figures provided by the Commission (the Commission, 2015b)).

While the regime may be an improvement on its predecessor (judicial management), there are seemingly low success rates of business rescue. There has been a reduction in the number of liquidations and this is “probably as a result of more financially distressed companies considering the business rescue route” (Hubbard, 2013). However, of the 1338 notices filed with the Commission by March 2014, only 1121 started (the remaining were invalid findings) and of these, only 129 were successfully concluded (the Commission, 2014). This translates to a rate of only 12%. Success, in this instance, refers to ‘substantial implementation’ of the business rescue proceedings (the Commission, 2014). Substantial implementation refers to the business having substantially carried out the activities that were set out for it to achieve through the duration of business rescue in the business rescue plan (the Commission, n.d.).

In June 2015, the collective success rate, measured on the same criteria, increased marginally to 13.6% (239 business rescue plans substantially implemented of 1756 business rescues started (the Commission, 2015b)). Several factors have been identified from the literature as contributing to the low rate of success; these include the nature of relationship between practitioner and management, the lack of availability of funding, the irrelevant

qualifications and experience of the practitioner, the inconsistency of court judgements, lack of prompt action, the impact of international provisions and the rights of affected parties. This article will focus on a few of these key issues to establish their significance and reality, based on South African business rescue practitioners' perceptions.

2.2. The Business Rescue Plan

Upon commencement of business rescue (whether voluntary or as a result of application by an affected person), a business rescue practitioner is appointed to conduct the business rescue proceedings. This practitioner must be of good legal, accounting or business standing; must be licensed by the Commission; must not be on probation or disqualified from acting as a director; and must not be related to the company (Companies Act No. 71 of 2008). The business rescue practitioner has full management control of the company, may delegate any power or function to a person who was part of the board of the company, may remove a person of the management of the company from office and is responsible for the development and implementation of a business rescue plan (Companies Act No. 71 of 2008). Once appointed, it is the practitioner that will facilitate the business rescue proceedings through this plan.

The commencement of business rescue proceedings, as facilitated by the business rescue practitioner, grants a temporary moratorium on most legal proceedings against the company, including enforcement action against the company and claims in relation to any property in the company's possession (Companies Act No. 71 of 2008). The practitioner must commence the proceedings by investigating the affairs and financial position of the company and determine whether there is a reasonable prospect of rescuing the company (Companies Act No. 71 of 2008) (this is despite the company or affected person making its own assessment prior to entering into business rescue). If no such prospect exists, the practitioner must inform the affected persons and the court and apply to the court for the cessation of business rescue proceedings and the commencement of liquidation proceedings (Companies Act No. 71 of 2008).

Within ten days of the publication of this plan, the practitioner must convene a meeting of creditors in which he introduces the plan, informs the attendees whether there is still a reasonable prospect of rescuing the company, gives representatives of employees an opportunity to address the meeting, invites discussion and conducts a vote on any

amendments, adjournments and preliminary approval of the plan (Companies Act No. 71 of 2008). A plan must be approved by 75% of the creditors' voting interests and 50% of the independent creditors' voting interests (Companies Act No. 71 of 2008). The prompt acceptance of the plan is of utmost importance in the success of the rescue (Lamprecht, 2008). Once approved, the plan is binding on the company, the creditors and holders of securities (Companies Act No. 71 of 2008). The company, under the supervision of the practitioner, must take all necessary steps to attempt to satisfy any conditions on which business rescue is contingent and implement the plan (Companies Act No. 71 of 2008).

2.3. Qualifications and experience required

It is crucial that skilled business rescue practitioners manage the business rescue process (Bezuidenhout, 2012). A factor identified as contributing to the failure of business rescue is the fact that, at present, there exist no clear requirements in South Africa for the qualification as a business rescue practitioner (Pretorius, n.d.). Business rescue practitioners are locally claimed to be "flying blind" (Pretorius, n.d., p. 4). The risk is that these practitioners do not know the reason for business failure and do not understand the warning signs present (Pretorius & Holtzhausen, 2013). At present, there is no clear framework against which to perform their duties and this may accordingly be a contributing factor to the low success rate of business rescue. Qualification, for persons of good legal or accounting standing, amounts to a course addressing knowledge and skills (Pretorius, n.d.).

There have also been a large number of people inappropriately acting as business rescue practitioners, due to it being viewed as a lucrative practice, and the current "ad hoc licensing methodology adopted in South Africa" contributes to the existence of practitioners that are ineffective (Pretorius & Holtzhausen, 2013). Finch (2005) identifies, as a critical aspect of a good corporate rescue regime, expertise "in making commercial or financial judgments and in devising strategies that advert to all creditor interests" (Finch, 2005, p. 385). Conducting corporate rescue will involve many different areas of expertise (Finch, 2005) and complex competencies to perform this "emergency-ward business" (Pretorius, n.d., p. 2), but a wide-range of expertise in many areas of business is not currently a requirement for qualification as a business rescue practitioner.

The expertise and knowledge of the practitioner is especially important given that s/he is able to exercise the powers of management and is responsible for the development of the business rescue plan discussed above. It is also of particular concern when there is consideration of the fact that turnaround managers and rescue practitioners may face several liabilities in turnaround situations (Pretorius & Holtzhausen, 2013).

2.4. Balancing the rights of stakeholders

As per Section 7(k) of the Companies Act, a company is required to balance the rights and interests of all relevant stakeholders and provide for the efficient rescue and recovery of the financially distressed company (Companies Act No. 71 of 2008). Business rescue provisions generally recognise the value of the business as a going concern, thereby catering for a wider variety of interests and moving away from primarily serving the interests of creditors (Claasens, 2012).

A good working relationship between the practitioner and management is understood to be crucial to successfully turning around a financially distressed company. A relationship of trust and a cohesive vision shared by management and the practitioner are imperative to success (Levenstein, 2008). Regarding the management of these stakeholder rights, it must be born in mind that the opportunity afforded to, for example employees and a single shareholder, to bring forward an application for business rescue is not comparable to any other rescue regime (Loubser, 2010). While shareholders have every right to be involved in corporate rescue procedures because they have a “real interest in the outcome” (Loubser, 2008, p. 372), shareholders do not necessarily have all the information required for an application and may not be able to meaningfully participate in the development of a rescue plan (Loubser, 2010).

Furthermore, disgruntled employees have the power to apply to the court for the company to be placed under business rescue (Loubser, 2010), even if this is not the best course of action for the company. This opportunity given to individual shareholders and employees may result in there being a lack of commitment to the business rescue plan by the other stakeholders and this may ultimately cause the proceedings to be unsuccessful. Finch (2005) identifies commitment to the rescue enterprise and the varying incentives each person involved has to pursue the rescue of the enterprise. Directors may be distrustful of business rescue practitioners, as they may see practitioner’s main incentive as satisfying the banks rather than rescuing the company (Finch, 2005). It is, however, noted that changes in the senior management team may have a role to play in a successful recovery as this may be a means of restoring stakeholder confidence (Smith & Graves, 2005).

2.5. Summary of Literature Review

It is clear that business rescue proceedings are, in the present state, not very successful, even when success is only measured by the substantial implementation of the business rescue plan. Certain critical factors for success are not necessarily considered prior to the institution of business rescue proceedings, as mentioned above. Beyond these factors, the level of qualification and expertise of the business rescue practitioner has been singled out

as a major factor that may contribute to the failure of business rescue, as thus far there are no clear requirements for qualification as a business rescue practitioner. The unique provisions of the South African business rescue regime may cause its lack of success- that is, certain provisions impede the legislation from allowing for the objective of business rescue to be met – such as granting too much power to a single shareholder or employee and affording the practitioner full management control of the company, or the execution of a comprehensive business rescue plan in spite of other legislative challenges. As a result of the identification of these potential factors, it is necessary to investigate and understand these crucial factors from the view point of practitioners.

3. Methodology:

This study is qualitative and exploratory in nature as the results are formulated based on the insights and experiences of business rescue practitioners. Interviews were used to extract views of business rescue practitioners with experience (having more than ten years of experience). The literature reviewed (see Section 2) pointed out some of the potential shortcomings of the regime from which themes were developed, which then formed the basis for an interview agenda. The transcripts from these interviews were coded with reference to common themes in order to address the four sub-questions of this study. Please refer below for more information in this regard. Due to the use of purposive sampling, interviews were deemed to be the most appropriate method. The length and number of interviews (together with constant comparison) led to theoretical saturation being achieved (Willig, 2008; Creswell, 2007).

Business rescue practitioners have been selected as constituents of the population as they are likely to have the most relevant knowledge for the study, as they facilitate business rescue proceedings in South Africa (Companies Act No. 71 of 2008). From the 85 experienced and senior registered business rescue practitioners based in Gauteng (as at 31 March 2014), a total sample of thirteen were selected (Chen, et al., 2014; O’Dwyer, et al., 2011; Rowley, 2012) from the Commission’s database, as data saturation was expected to occur at this point. Interviews were conducted in Gauteng between June 2015 and November 2015. Interviewees comprised business rescue practitioner of different backgrounds (based on information available from the Commission (the Commission, 2015)): interviewees comprised six practitioners from an accounting background, one member of the Institute of Directors, two business consultants, two attorneys, one financial advisor and one other professional. Thus, the results of this study reflect, in part, the views of accountants practicing as business rescue practitioners.

Data collection and analysis made use of a continually iterative process of interview responses being considered in terms of the literature and each other (Willig, 2008). The authors alternated between analysing interview data and reading literature based on the emerging themes (Willig, 2008). The data was processed using a systematic set of procedures to derive findings (O'Dwyer, et al., 2011). The use of the standardised interview agenda allowed for comparisons between responses of different participants to be made. In addition, the research was performed using semi-structured interviews, which allowed interviewees to talk freely about the topic, which, in turn, allowed for a deeper understanding of the interviewees' practice and perceptions of business rescue (Holland, 1998).

The transcripts of the interviews were analysed through a formal process of data reduction and data verification (O'Dwyer, et al., 2011). Data reduction occurred, where key themes were established (O'Dwyer, et al., 2011) through a detailed reading of transcripts and rereading of the literature (as mentioned above). Themes were then individually coded to assist with analysis (Rowley, 2012). Open coding was conducted first, in which the data was segregated into categories and common themes, followed by axial coding, in which relationships between categories were identified (including an identification of the central phenomenon and surrounding conditions), and finally selective coding, in which the categories and their interconnections were considered together, with connections being drawn between different categories (Leedy & Omrod, 2013; Creswell, 2007). Consideration of any apparent contradictions within a specific transcript or between interviewees was also made (O'Dwyer, et al., 2011). In addition, the responses were considered in conjunction with the literature to identify similarities and differences. Once theoretical saturation occurred, theory was then developed from the coded data.

To ensure that the findings of the research are more reliable, interviewees were sent a transcript of the interview conducted to review and make any additions/corrections (Leedy & Omrod, 2013). External validity was also established through a peer review process wherein the classification and coding was assessed (Rowley, 2012).

4. Findings:

4.1. Perceptions on Success

When the participants were asked whether business rescue proceedings meet their intended objective of rehabilitating companies that are in financial distress, less than half of them felt that this was true. Some participants did not provide a clear answer to the question posed and three participants felt that while the proceedings can meet their intended objective, the

provisions were easily abused. Another practitioner stated that the regime should not have been called 'business rescue' as it creates the perception that "you are going to rescue something and it is going to come out on the other side fine and strong" which does not cater for part (b) of the definition (i.e. a return better than liquidation).

Some practitioners also explained that the rescues they have performed were successful due to them being selective in which cases were taken on by them (it is notable that the majority of practitioners interviewed seemed to have well-established business rescue practices and may be in a position to be able to afford to be selective, while a less established practitioner may not be in a position to do so.) This supports the literature in that not every business is a candidate for business rescue (Olivier, 2014). This also shows that there should be careful consideration of whether a distressed company is rescuable before it is placed under business rescue.

In a follow-up question, asking specifically about success (as opposed to simply meeting of intended objectives), the majority of participants did not provide a clear answer on whether they believed that business rescues are generally successful. Of those that did answer clearly, only half felt that business rescues are generally successful which reflects the fact that there exists some uncertainty on the success of the regime. One participant explained that many statistics (on the success rate of business rescue) have a "flawed premise" (in terms of the way in which success is defined to produce these statistics), but if business rescue's success rate was compared to success rates of similar regimes around the world, it is successful. Another practitioner also felt that the current statistics on business rescue success are incorrect and commented that the statistics reflect that "15-17%" of business rescues are successful but fail to show that only "50% of plans get approved". This is in contrast to the literature which shows a 12% success rate (the Commission, 2014) up until 31 March 2014 and 13.6% up until June 2015.

Another practitioner remarked that some people think it is a "natural progression to use business rescue and, if that doesn't work, then go into liquidation - but some should go straight into liquidation". A large majority of interview participants felt that, without business rescue, there would be unnecessary liquidations, with only two participants of the view that this would not be the case. This reflects on the impact that business rescue may have on corporate rescues, and supports the literature which states that business rescue reduces the number of liquidations and assists in maintaining a greater tax base from which government generates revenue (Kaulungombe, 2012). Of the two participants that did not believe that business rescue prevented unnecessary liquidations, one noted the following:

“Sometimes there should be liquidation, because when the economy is booming, some companies make money because the tide is high and some of these may need to be eliminated”.

Another practitioner, however, explained that “there was no other alternative” and that “business rescue has filled a big hole where there wasn’t actually a methodology to restructuring”. This shows that business rescue has a role to play in assisting ailing businesses in need of rescue.

When asked to define success as it relates to business rescue, the responses of practitioners varied widely. An interviewee remarked that this is a “grey area”. One practitioner felt that a successful business rescue resulted in a sustainable business, with debts addressed and stakeholder expectations met. Other practitioners explained that it is the successful implementation of the business rescue plan that constitutes success. Some practitioners referred to the definition (and its implied objectives) per the Act, and two others felt that affected parties receiving more than they would have under liquidation constituted success. These differing definitions are directly in contrast to the definition of success implied by the Commission, which measures the success rate based on the ‘*notices of substantial implementation*’ filed. This lack of clarity, however, shows that business rescue may actually be more successful than it is currently perceived to be.

Most practitioners felt that the success rate of business rescue would improve over time, due to better understanding of the regime. One practitioner did not, however, think the success rate would improve as it is currently in line with that of similar regimes in other jurisdictions in the world. Other participants observed that “many Boards have heard of business rescue but don’t know what it means” and that, as publicity and the number of court judgements increase, awareness will grow and the success rate will improve. This is due to the fact that increased awareness may lead to Boards to apply for business rescue earlier on, leading to a better chance of success for the rescue. This increased awareness may also play a role in removing the stigma associated with business rescue and remove its close association with liquidation, which may increase the availability of funding for the business under rescue.

4.2. Perceptions of preparing the Plan

When practitioners were asked to rank how influential a variety of factors are on the success of business rescue (on a scale of one to five, where five is highly influential and one is barely influential), practitioners ranked comprehensive business rescue plan with which to rescue the business fairly highly. Seven participants ranked it as a 5 and one at 4.5, while three ranked it as 4 and two ranked it as 3, suggesting that the comprehensiveness of the plan

has a significant bearing on the success of the business rescue. All practitioners found a comprehensive business rescue plan to be of importance (as shown by a ranking of 2.5 or higher), which highlights its importance in facilitating the rescue.

A participant stated that the business rescue plan is the “single-most important aspect of your business rescue” and is the “foundation of the business going forward”. “A good plan has a long-term view, but has short term milestones”. This participant explicated that the problem is that the plan is done as a “one-year thing, which may not create a sustainable business”. It was also stated that there are some plans that use a boilerplate template which does not address the strategy or economics of the company being rescued and that a competent business rescue plan should “properly combine business strategy, restructuring measures and the legal protections of Chapter 6 [of the Act] to rehabilitate the company”. This emphasises that Rescue plans are an integral part of the rescue and must consider the specific circumstances of the company and should take a long-term view.

It was also noted by participants that the plan should be “equitable to all parties” must be “sustainable and must not be discriminatory”. Participants’ remarks on the plan included “the simplest plans work the best” and that the plan must “stay away from grey areas”. Another participant noted that the plan has to withstand some degree of scrutiny because creditors have to approve it. One of the key issues, as identified by one participant, is to allow the creditor to be able to compare the return from a rescue as a dividend versus the return from liquidation. This practitioner also explained that an independent expert should be used to perform valuations and that the plan should give some visibility into the future. This indicates that reliance will be placed on the plan and emphasises the importance of its appropriate preparation.

On the ranking scale, creative strategies with which to rescue the business was ranked highly by the majority of participants as a factor that is highly influential on the success of business rescue proceedings. The average ranking for this factor was four, suggesting that creative strategies may have a significant influence on the success of the business rescue. This reiterates the idea that boilerplate strategies will not enable a successful rescue.

Ranking of creative strategies through which to rescue the business (Practitioner view of importance of factor)

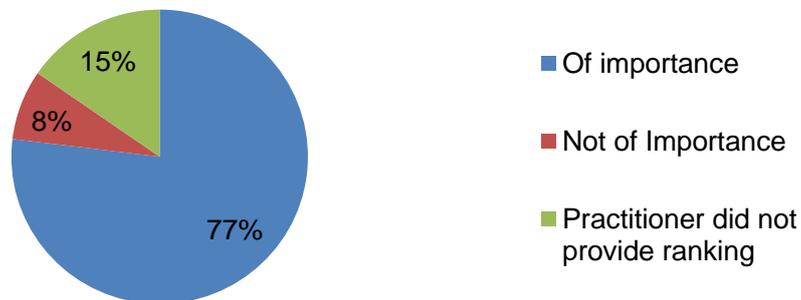


Diagram 1: Ranking of creative strategies through which to rescue the business (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean 'of importance')

Many difficulties in developing the plan were explained by practitioners, such as having a long-term vision but needing to use short-term steps to see it through, and the fact that various assumptions had to be used. The difficulty resulting from assumptions was reiterated by a practitioner pointing out the fact that forecasting had to be used. Another difficulty noted was putting a document together which is compliant with the Act but understandable by the ordinary businessman. This shows that there are several intricate considerations that need to be made in developing the business rescue plan and that adequate time needs be dedicated to it.

It was also observed that companies enter into business rescue "too far down the road". Lack of information and lack of transparency were also pointed out as difficulties, as was prejudice to business rescue from major creditors or a lack of understanding by creditors. The fact that management has to run the business and give the practitioner information to populate the plan was also noted as a difficulty, as was the difficulty in getting information from management, while one practitioner considered the fact that management may not like the plan to be a difficulty. It was explained that a lack of quality in the information provided also presents a difficulty and that the use of an audit firm to verify whether information is valid may be necessary. (This is indicative of a further area in which accountants can be involved in business rescue and indicates a need for them to understand the issues surrounding business rescue.) The fact that both legal and accounting competencies are required to develop the plan was also mentioned as a difficulty, reiterating the need for the practitioner to have a multitude of competencies. The lack of quality information and the lack

of assistance from management is a significant difficulty in conducting a successful business rescue.

The majority of practitioners ranked an extended time for the preparation of the business rescue plan highly, with an average ranking of four, suggesting that the current restrictions thereon may be preventing the current regime from achieving success. Three practitioners, however, did not place importance on this factor and ranked it as one on the above-mentioned scale.

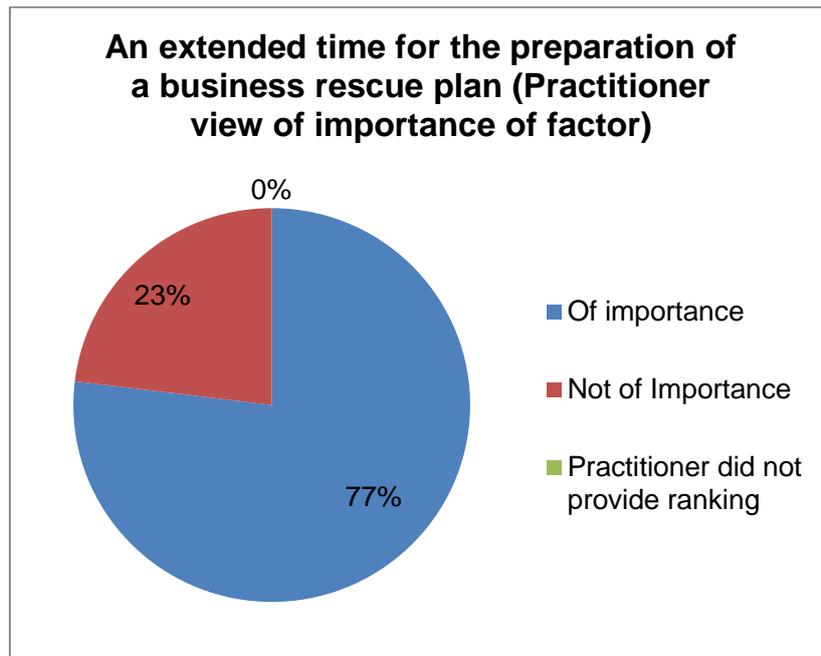


Diagram 2: Ranking of an extended time for the preparation of a business rescue plan (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean 'of importance')

Most participants felt that a longer time should be available for the preparation of the business rescue plan and a few explained that they have been able to complete very few plans within the allocated 25 days. Two did not feel that a longer time was necessary, while many also explained that it is currently possible to apply for an extension, with creditor approval, and one stated that because the Act provided this mechanism an extended time was not necessary. One practitioner explained that while 25 days is not sufficient, the Act should also not provide for a longer period, because “there is a mechanism whereby you can get an extension, but the extension is becoming the norm”. It was explained that it is a good thing “to put time limits and procedures on these things”. One practitioner explained, however, that 25 days is not sufficient because “if you publish a plan, it must work” and that 25 days was insufficient because “80% of normal creditors don’t even understand the

difference between debt counselling, business rescue and liquidation” and this needed to be explained before they granted permission for the plan to be extended. Another practitioner commented that the practitioner needed to think “five years down the line” but had only 25 days in which to do so.

A few practitioners stated that the time allocated to developing a rescue plan should be dependent on the size and complexity of the business with one suggesting that the time allocation be linked to the Public Interest Score of the company. This is because a greater amount of time would be required where there is greater complexity and size, due to additional considerations that need to be made. An interviewee, however, explained that the board itself must consider whether there is a reasonable prospect of rescue and that this evidence provided by the Board should be used to develop the business rescue plan. This practitioner, however, explained that that in trading conditions in South Africa at present, this is unrealistic, because there are not good practices regarding corporate governance and it is not possible to get information needed for the plan in the required 25 days. Thus, additional time is needed for suitable business rescue plans to be drawn up.

4.3. Perceptions on experience and qualifications required

On average, practitioners ranked the experience of the practitioners (in general) in conducting business rescues as a five. The qualification of the practitioner was, however, ranked lower, at four on average. Seven practitioners, which constitute just more than half, ranked qualifications of the practitioner as a five, while eleven ranked experience of practitioners as five, suggesting that experience is more influential on the success of business rescue than the qualification of the practitioner. One practitioner commented that “the real qualification is qualification by experience”. All practitioners believed the experience of the practitioner to be of importance, while all but one believed that the qualification of the practitioner was of importance.

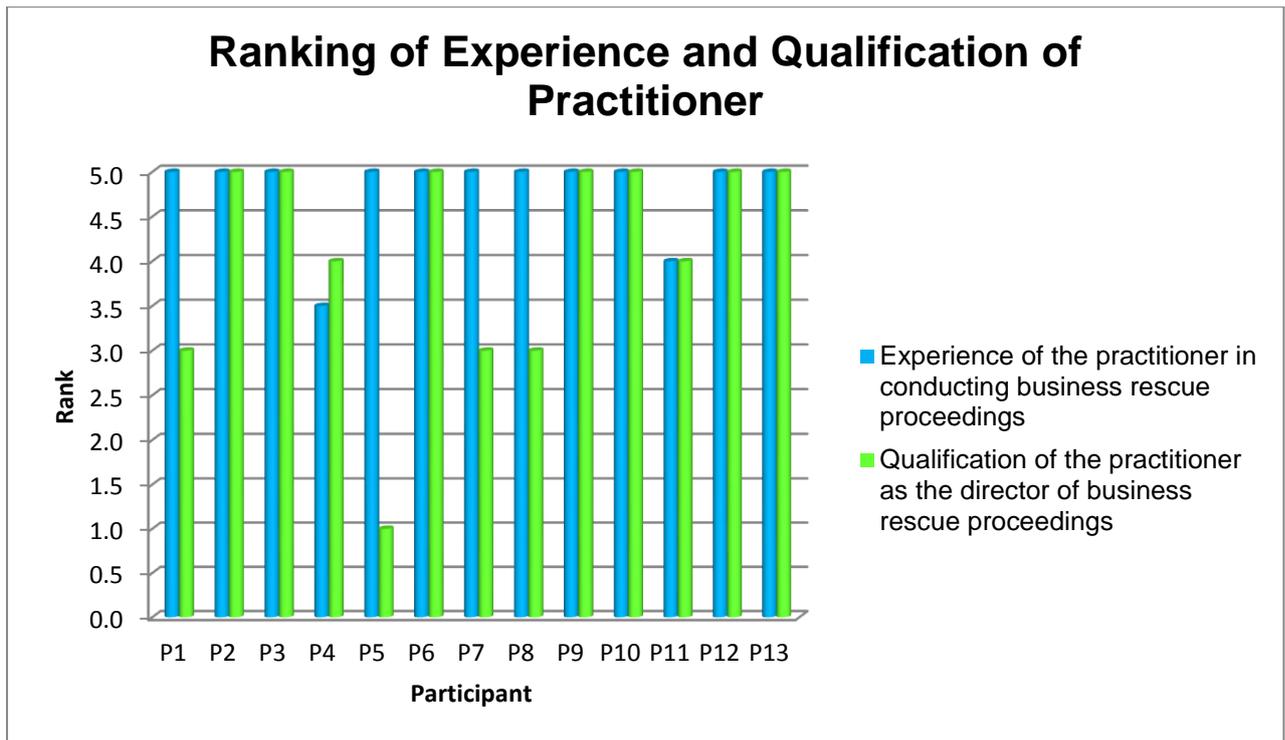


Diagram 3: Ranking of Experience and Qualification of Practitioner

Many practitioners felt that business rescue practitioners (in general) were not adequately qualified to conduct business rescue proceedings. It was, however, pointed out that “there are some very well-qualified and competent practitioners and a large number who are hopelessly underqualified”. One practitioner pointed out that the business rescue regime is only three years old and that the practitioner was being asked to “handle a complex legal process in a difficult environment without a regulatory framework”. Another practitioner stated that there is “just a complete lack of competencies”. This shows that practitioners may lack the necessary competencies, in terms of knowledge and experience, to conduct business rescue proceedings.

When asked if there were any requirements that they would like to be introduced into the criteria to qualify as a business rescue practitioner, practitioners made two main suggestions. Firstly, was the issue of experience - one practitioner explained the importance of experience by stating that “without practical experience, it is like learning to drive a motor car while sitting at your desk”. It was pointed out that “very few business rescue practitioners have run companies themselves” and that there is “no replacement for experience”. A practitioner explained that there are many issues in business rescue that required different skills and, while not everybody can have all of them, “experience is a good remedy for fixing up on a lot of the shortfalls”. It was suggested that the problem of a lack of experience be addressed by the implementation of a requirement for junior practitioners serve an

apprenticeship with senior practitioners, which could take the form of a joint appointment. One practitioner also suggested that reference checks on practitioners include the validity of relevant experience.

The second suggestion related to additional qualifications. While one practitioner explained that more qualifications similar to the CA (SA) or LLB designations would be beneficial (as is the requirement in Australia, as an example), it was also suggested that a specialist course form part of the criteria to qualify as a business rescue practitioner. One practitioner suggested that an accounting degree coupled with specialist courses would “provide the best launching pad”; while another stated that a financial or legal qualification combined with a course should form part of the requirements. This practitioner stated that while practitioners may be qualified as attorneys, auditors or liquidators, they lack experience. These views support the literature which showed that there are no clear requirements for qualification as a business rescue practitioner (Pretorius, n.d.). An interviewee, pointed out that there is a flaw in performing business rescue from a purely accounting and legal perspective. One participant went as far as to state that there should be “fewer liquidators and more experienced businessmen”, while another stated that “you need a lawyer and an accountant” and suggested this be addressed by joint appointments. This re-emphasises the need for greater experience and the need for that experience to be widespread.

Another participant, however, stated that there needed to be competence on the part of business rescue practitioners in four main areas, due to the multidisciplinary nature of business rescues: finance, accounting and tax; management; law; and ethics. The identification of the multidisciplinary nature of business rescue supports the literature which states that conducting corporate rescue will involve many different areas of expertise (Finch, 2005). This shows the need for greater requirements to be allowed to qualify as a business rescue practitioner.

4.4. Perceptions on Trust

When asked about the relationship of trust between management and the practitioner and its influence on the prospects of the company’s rescue, on average, the practitioners ranked this to be fairly influential. Four practitioners ranked this factor as five, while four ranked it as four and two as three. Two practitioners ranked this factor as two and a half (out of five) while one practitioner ranked this as one. The majority ranked this factor as having some influence on the success of business rescue, showing its importance and supporting the literature. However, one practitioner that ranked this factor to be less influential on success explained that “trust has no place in business rescue”.

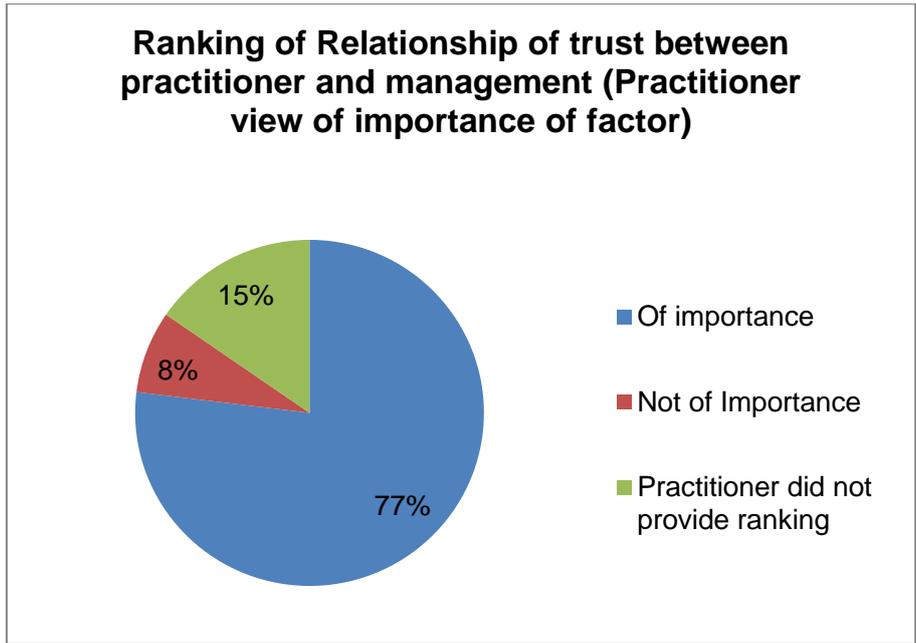


Diagram 4: Ranking of relationship of trust between practitioner and management as a means of facilitating actions aimed at rescuing the company (Practitioner view of importance of factor, where a ranking of 2.5 or more is considered to mean 'of importance')

Despite this, there was general consensus amongst interviewees that the relationship between the practitioner and management will have a significant impact on the prospects of the company's rescue. This supports the literature which states that a good working relationship between the practitioner and management is the key to a successful turnaround (Levenstein, 2008). Some participants explained that there is some level of reliance on management, due to the practitioner not being an expert in every field but it was also cautioned that healthy skepticism on the part of the practitioner is important and that, while management and the practitioner must work as a team, the practitioner could not be "beholden" to management.

It was also explained that, while the practitioner does have to work with management, if the practitioner finds management to be "incompetent and lying" or frustrating implementation of the plan, the practitioner can remove management. This participant pointed out that the Act allows for the removal of a person as director, but does not remove the person as an employee of the company. This suggests that, while the person will still retain their employment, they will no longer be able to make managerial decisions. It was stated, by another practitioner, that the speed of the rescue is enhanced if there is a good relationship between the practitioner and management. Another participant corroborated this view in stating that "a good cooperative relationship with management is a good ingredient for a successful outcome". This participant, however, remarked that, if this relationship does not

exist, the practitioner must have the courage to remove management. This reflects the importance of the relationship with management and the significant impact it can have on the success of the rescue.

It was emphasised that the relationship between management and the practitioner must be highly ethical and must have clear goals. One practitioner explained that shareholders cannot be excluded because, unless the company is a big corporate, shareholders may be directors and may have vested interests in the business and cannot differentiate between the two different roles they hold. This reiterates the need to include all affected parties (stakeholders). The practitioner further explained that they (the shareholders that are also directors) may have a skewed view of the business and that, if they could not be brought around to the practitioner's way of thinking, the rescue will undoubtedly fail. This reiterates the issue of management delaying the rescue due to mismatched priorities, and can be considered to be obstructing the success of the regime.

5. Conclusion:

In light of the significance of a well-functioning business rescue regime and the current low level of success (as identified by the Commission), this study has highlighted that it is necessary, now more than ever before, to determine whether the current business rescue regime addresses the intended objectives (per the Act) and needs of distressed companies. Further, it is vital that we understand and create a much-needed dialogue on the issues that may be hindering the current rate of success to allow corporates in need of rescue a fighting chance.

This study addresses this key area of concern by exploring whether the current rescue regime meets its intended objectives and identifying obstructions to the success of the regime. In doing so, this study has provided key insight into the practice of business rescue from the point of view of practitioners and has thereby provided an understanding of some of the shortcomings in the current practice, which can then be used as areas for potential improvement. Overall, the study has found that while business rescue may have a role to play in reducing the number of liquidations, in its current form is not very successful (when success is measured by the substantial implementation of the business rescue plan).

In terms of success, the majority of participants interviewed in this study (of whom nearly half were accountants) did not feel that business rescue meets its intended objectives and some

felt that the regime was sometimes abused. The findings revealed that there is a lack of a clear definition of success from participants and the flaws in current measures of success were highlighted. Thus, this study shows that the seemingly low current rate of success may be as a result of mismeasurement of the rate of success. It was, however, noted, by many participants that without business rescue, there would be unnecessary liquidations, showing the usefulness of business rescue, despite of its low rate of success. Practitioners generally believed, in line with the literature, that the success rate of business rescue will improve. Practitioners also agreed that business rescue was more beneficial than judicial management.

The experience and qualifications of the practitioner in conducting business rescue proceedings were considered by this study, and it was found that business rescue practitioners in South Africa generally rank experience to be more important than the specific qualifications of the practitioner. The study showed, however, that a lack of experience and qualification by practitioners is a flaw in the current practice of business rescue and that experience in this practice is exceptionally necessary. Specifically, experience was considered to be very valuable and apprenticeships and joint appointments were suggested as means to address the lack of experience of junior practitioners. Short courses to enhance understanding and ability to run businesses were also recommended by practitioners.

The relationship between management and the practitioner was also considered in this study and found that practitioners are directly influencing on the success of the rescue. It was noted by practitioners that, while a good relationship may be beneficial, the practitioner can remove management if necessary. Lastly, the study looked into the perceptions of the business rescue plan, and it was found that practitioners considered the plan to be vital to the rescue, but noted many difficulties in the development of a successful business rescue plan. Quality of information and the lack thereof, as well as difficulties in forecasting was mentioned, amongst others. A few practitioners recommended that the time allocated to the development of the plan be based on the size and complexity of the business, because it is not always sufficient. It was also shown that a lack of quality information and a lack of sufficient time in which to process that information is an impediment to the success of the regime.

In conclusion, while the success rate of business rescue seems to be low (13.6% as at 30 June 2015 (the Commission, 2015b)), the lack of a clear definition of success may cause the effectiveness of the regime to be underestimated. This study has shown that certain issues need to be urgently addressed to give business rescues a fighting chance of success. There needs to be careful consideration of the prospects of rescue prior to a business rescue being

initiated. Management need to be forced to protect the interests of the company and should be held accountable for a failure to do so. There should be a good working relationship between management and the practitioner but this should be balanced so that they work as a team without the practitioner being restricted by management. More stringent requirements should be introduced for qualification as a practitioner, particularly in terms of experience, and could be addressed by apprenticeships for junior practitioners. This finding may have a particular impact on accountants who may wish to broaden their expertise in order to better themselves as practitioners and deliver better value to their clients.

Reliance is placed on the business rescue plan and this document should be carefully prepared, but its careful preparation is hindered by the lack of available information and lack of cooperation by management. While there is a mechanism by which to extend the 25 days allocated to the preparation of the plan, the time allocated should be based on the size and complexity of the business. However, companies sometimes come into business rescue too late and an earlier start to the rescue would increase the chances of success. Better enforcement of current legislation would assist in this regard.

Practitioners generally believed, despite the issues raised, that the success rate of business rescue will improve in time. They also agreed that business rescue was a more beneficial, appropriate and effective corporate rescue procedure than judicial management and liquidation, and that there was a strong hope for corporate rescue success in South Africa in the years ahead.

5.2. Future Research

This research report is limited to the success of the South African business regime as legislated by the Act and practitioners involved in facilitating this process. While many studies have been undertaken comparing the South African business rescue regime to corporate rescue regimes of other jurisdictions, this study (and those studies) could be expanded to include the views of practitioners from these other jurisdictions. Comparisons could also be made of practical difficulties faced in different jurisdictions and an analysis can be undertaken to evaluate whether certain difficulties are more prevalent in developing countries.

The study is further limited to business rescue proceedings that have commenced before 30 June 2015. A future study could be conducted to evaluate whether the difficulties and issues identified above (as impediments to the current business rescue regime) persist as the regime matures.

This study also did not extensively examine the difference between business rescue and liquidation. The ability of the company to choose business rescue or liquidation, when it is in financial distress, could be examined further, with specific focus on the reasons why the company may select business rescue over liquidation and vice-versa.

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