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The naked truth: creditor understanding of business rescue: A small business perspective

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ABSTRACT

Purpose: to study the level of knowledge and awareness of business rescue of entrepreneurs who are potential creditors of businesses filing for rescue, and to identify the major issues and concerns from the creditors' point of view.
Methodology: the design of the study was a survey to examine the level of knowledge, awareness and experience of Chapter 6 of The South African Companies Act No. 71 of 2008 and to seek to describe the status from a creditor's perspective.
Findings: The literature revealed the role that creditors have to play in the business rescue process. It indicated the potential for creditors to emerge with a better return than the one that liquidation would offer. The primary data demonstrated that the respondents' level of knowledge and awareness of and about rescue and the roles and powers associated with the Companies Act is extremely low and of grave concern to the industry.
Practical Implications: there is a large gap between the level of knowledge available and what is actually known. The result is entrepreneurs who do not comprehend the significance of this legislation and its potential consequences for their business.
Originality: this paper addresses the limited research available on business rescue issues. Due to the newness of the Act, sparse case law exists and little scientific research data is available.

Key words: Companies Act, business rescue, creditors, knowledge, awareness

INTRODUCTION

"The penalty for declaring bankruptcy in Ancient Rome was slavery or being cut into pieces; the choice was left to the creditors"

(Author Unknown)

Today, creditors in South Africa also have powers in decision making according to Chapter 6 of the new Companies Act (71 of 2008). The final vote lies with the creditors. But what is the value of such powers if you do not know the rules of the game?

South Africa's insolvency industry was experiencing a crisis prior to the Companies Act 2008. Not only was the industry perceived as being corrupt, but the opinion was raised that insolvency should not be the only solution when businesses are in financial distress (Alberts, 2004). The new business rescue model emerged at a time when the South African business environment found itself in a recession, with liquidation statistics increasing every month. Some industries and labour unions had approached the government for bail-outs of struggling companies. The President of South Africa stated that the productive capacity of our economy should be kept intact, to be able to respond to the revival in demand as the global economy recovers; he further mirrored the spirit of Chapter 6 by stating that we must do our absolute best to retain skills and labour (SAPA, 2009).

After the Companies Act no 71 of 2008 came into effect in May 2011, the Companies and Intellectual Properties Commission (CIPC) had 175 filings from companies seeking rescue during the first five months of its implementation (Makholwa, 2011). Comparing statistics of liquidations since the Companies Act was implemented; the following are of interest. An increase of 151.4%, from 107 liquidations in May 2011 to 269 in May 2012, was reported. According to Statistics South Africa (2012) the reason for this high increase is the implementation of the business rescue process, hence the low base in May 2011. Surprisingly, the voluntary liquidations increased by 189%, while compulsory liquidations (liquidations arising from financial distress) decreased by 27 in year-on-year data (CRS Business Rescue, 2011). To date (end January 2013), 807 filings have been registered.

The reason for the decrease in compulsory liquidations may be the fact that businesses are pursuing the new business rescue option. The total number of business rescues for the first year of its regulation totalled 438 (Pelser, 2012). In addition, Eliot, in Visser (2012) states that of the 169 cases where there had been a result in the business rescue process, only 56% had been successful. From the 25 court judgements for business rescue, only two had been associated with successful rescues.

Entrepreneurs and small business owners are potential creditors of businesses in rescue. When these businesses are under a moratorium because of filing for rescue (Companies Act, 2008), creditors are at risk of potential "knock-on effects" when it comes to their own business liabilities pertaining to debtor businesses facing a turnaround. The purpose of this article is therefore to describe the level of knowledge and awareness that entrepreneurs have with regard to the Companies Act and whether they are acquainted with their liabilities as creditors and the potential consequences. To achieve the above outcome, a comprehensive literature review was done, utilising a synthesis review process and content analysis supported by primary research. This article closes with conclusions and recommendations.

The business rescue process and the involvement of creditors

The "new" rescue model for South African businesses, as outlined in the Companies Act no 71 of 2008 (Section 128), states that if a business faces financial distress, and there is a

reasonable prospect of saving the company, it may proceed to facilitate rehabilitation through filing for rescue. The stipulation is that the management of the company is placed under temporary supervision of a business rescue practitioner; there is a temporary moratorium on the rights of claimants (creditors, employees) against the company; and a plan/proposal to rescue the company must be developed and implemented.

The following are "key infliction points" that have direct bearing on the relevance of creditors regarding the filing process. Within five business days (Section 5 of the Companies Act defines business days) after filing the resolution with the CIPC (Delport, 2011:142), the creditors (and every other affected person) must be notified of the distressed company's filing for business rescue, the date on which it became effective and the grounds upon which the decision was taken (Davis, Cassim & Greach, 2011:230). Bradstreet (2011:366) believes that the primary reason for notifying the persons involved is to protect the 'affected parties'.

This is followed by the appointment of a business rescue practitioner, also within these five days, to oversee the rescue proceedings. This is followed by the filing of a notice of the appointment with CIPC within two days. A copy of the appointment must be made available to every affected person within five days after notice has been filed (Davis *et al*, 2011:230; Delport, 2011:142). During 'investigation of the affairs', the next step is to convene a creditors' meeting within ten days of the business rescue practitioner's appointment, to inform the affected persons of the future of the company and allow them to prove their claims against the company (Davis *et al*, 2011:243). Two meetings are to be held, the first an employees' meeting (S148), and the second a creditors' meeting (S147).

Business rescue and the rights of creditors

Creditors have the right to appoint other independent creditors as members of a creditors' committee, who may collaborate with the rescue practitioner about matters relating to business rescue. They also have the right to receive and consider reports relating to the business rescue and act independently of the rescue practitioner to ensure fair representation of the creditors' interests (Delport, 2011:146). A creditors' committee cannot, however, dictate to the practitioner. Each creditor has a voting strength equal to the value of its claim on any decision regarding the rescue proceedings. The business rescue plan must be published within 25 business days after the appointment of the business rescue practitioner. The business rescue practitioner then has ten days after publication of the plan to convene a meeting with the creditors, when the creditors then vote for or against the plan. The affected persons must be notified of this meeting at least five days before it is due to take place (Davis *et al*, 2011:245). A majority vote for the business rescue plan will be binding on the company, creditors and shareholders (Delport, 2011:149), whether they were present at the meeting or not and proved a claim or not.

The business rescue plan must be approved by 75% of the votes, and 50% of those votes must be derived from independent creditors (Levenstein, 2012:30). The business rescue plan may call for the company to restructure its affairs, business, property, debt and any other liabilities and equity in a way that would optimise the continuation of the company's existence on a solvent basis. If this is not possible, the second alternative is to seek a better return for the creditors or shareholders than they would earn if an immediate liquidation of the company took place (Bradstreet 2011:356). If the business rescue plan is not approved, the affected person/s may buy the opposing votes at liquidation value (Levenstein, 2012:30). If creditors feel that they have been disadvantaged with regard to the process (or any steps thereof) or even the liquidation value offered for their votes, an application to court to set aside the result of that vote is acceptable (Davis *et al*, 2011). Creditors have the responsibility to make sure their rights will not be unfairly affected by the business rescue plan (Bonnet for DeVries Attorneys, 2011).

Section 128 of the Companies Act defines a company in financial distress as one that is unable to pay all of its debts as they fall due and payable, or appears to be unable to do so within the immediately ensuing six months, thus is currently insolvent or may be potentially insolvent within the next six months. A key component of a successful rescue endeavour is whether the company is still economically viable. This decision falls within the rescue practitioner's domain (Pretorius & Holtzhauzen, 2008:90), and may influence the creditors to a large extent when it comes to extended terms of payment and the like.

Given the above information, it is safe to postulate that the creditors, which often include small businesses and entrepreneurs, have several functions, contributions and decision-making powers. These include applying for rescue through the court procedure, opposing the appointment of the BRP, forming or joining the creditor committee, cooperating with the rescue practitioner; proposing an alternative plan and/or ultimately voting for the plan.

The potential benefits of this new regime include the fact that the affected parties (creditors) may intervene by application to the court. This is an interaction between the company, rescue practitioner and any affected parties planning the business rescue (Lamprecht, 2010). Pretorius and Holtzhauzen (2008:89) state that the spirit of the legislation seeks the best possible outcome for all stakeholders involved. What is important to note is that Close Corporations are entitled to have access to the new legislation, which they did not have under the old Companies Act of 1973 (Bradstreet, 2011:360).

If the process becomes inclusive of the parties involved and lends itself to a consultative procedure, the affected parties may participate in the business rescue (Moosa, 2009). This suggests that the moratorium against legal proceedings may provide breathing space for the company and result in a fruitful turnaround (Davis *et al*, 2011:227). When the company is unable to exist on a solvent basis, the aim of business rescue is to return the company to a solvent position, or alternatively pursue better returns for the creditors and shareholders. With the change in legislation, fewer creditors are affected by the process in a normal liquidation case (Moosa, 2009; Loubser, 2010a). Authors such as Levenstein (2011), Braadtveld (2010) and Bradstreet (2011:353) support the view that the rescue process satisfies the claims of the creditors more effectively than an ordinary liquidation process.

The new business rescue legislation does raise some concerns. Even though the business rescue process, according to Section 133 of the Act, does not free the company from its obligations to satisfy the claims of the creditors, it does nevertheless delay payment (Coertser, 2012). Delaying of the process to avoid the claims of the creditors for as long as possible may result in a higher number of 'business rescues' than expected (Harris, as quoted in Pelser 2012). It is therefore imperative that the company file for the right reasons – if not, creditors can and should intervene.

The competing interests of the different affected parties can have a negative effect on the business rescue. McKenzie-Skene (2011:31) notes that in South Africa, with the new legislation in place, the creditors now have the choice as to how they will participate within the guidelines of the Act. Davis *et al* (2011:235) state that one of the consequences of business rescue proceedings is that the disposal of the company's property is restricted. Rajak (2011:5), for example, warns of fraudulent collusion between the debtor and a creditor to strip the debtor of his estate when the interests of other creditors are at stake. This could put at risk the 'just and equitable' treatment of all creditors involved.

Business rescue and the preferences of creditors

Jacobs (2012:95) stated that post commencement financing in essence seems to be a necessity but its biggest drawback is the adverse impact thereof on the company's unsecured creditors. However, post commencement funding is a banking issue and not the concern of this paper.

The ranking order with regard to creditor pay-outs is of importance (Elliot, 2012). This portion should be divided into the effect of pre-commencement debt and then the priority of post-commencement debt. Employees who render services after the commencement of the business rescue are ranked before post-commencement finance. Payment to staff post commencement should be on a current basis and not on credit. (If the company cannot afford post-commencement salaries, there is no reasonable prospect of saving the company and it should be liquidated.) Next in line are secured creditors "in the order in which they were incurred" (Companies Act sec 135). A secured creditor is ranked on the same level and will benefit from its security depending on the extent of its realisation of the underlying asset/s (Eliot, 2012).

The next-ranked claims are those of unsecured creditors who provided finance to the company after the commencement of business rescue, in the order in which claims were incurred (Eliot, 2012), thus ranking below rescue costs and secured creditors but above all other creditors, including 'preferent' creditors. The ranking of unsecured post-commencement finance is therefore of vital importance to the prospective financiers, as the feasibility of recovering these claims could determine whether it is feasible or not to rescue the business. The next-ranking claims are ordinary preferent claims in terms of sec 97–102 of the Insolvency Act of 1936.

The final ranked claims are those of the concurrent creditors. By the time the final claims are reviewed, the final liquidation account is probably exhausted and it is therefore unlikely that these claims could be satisfied. The best remedy for these creditors would be the hope that the business rescue proceedings do not fail, or that the assets can be realised before liquidation, in order to perhaps yield a better dividend (Eliot, 2012). While creditors have confirmation inputs towards the appointment of the practitioner at the first creditors' meeting, the Act does not state what the prescribed minimum qualifications must be in order for a turnaround manager to take on this role (Pretorius & Holtzhauzen, 2008:90).

The effect of the above is summarised by Holtzhauzen (2013 pers. com.) as follows: "Due to the priority of the business rescue practitioner's fees, secured creditors will closely monitor the practitioner's fees, as these will 'reduce' their dividend in liquidation. Secured creditors will not bother about the post-commencement funder's position, as it does not affect them at all. The preferred creditors will obviously monitor the post-commencement funding, as this will reduce their dividend in liquidation. Overall, the concurrent creditors stand to lose all in liquidation. As such, they will have serious concerns about additional post-commencement debt acquired by the practitioner".

There are several potential concerns of creditors. Based on the liabilities approach proposed by Pretorius and Holtzhauzen (2008), these concerns and effects are shown in Table 1.

Table 1: Creditor concerns based on the liabilities of turnaround situations

Liability	Concern	Effect on Creditors
Legitimacy	Does the business rescue practitioner have the necessary capacity to turn the business around?	Does the business rescue practitioner have the relevant skills to protect their interests?
Resource Scarcity	As creditors are ranked, are there enough assets for claims?	Depending on the creditors' rank, their claim might not be processed or ranked too low.
Strategy Options	The reason for the decline could have been affected by either internal or external strategies – the core problem needs to be defined	Will the business rescue practitioner's 'strategic' options be viable with regard to the business recovering in order to ensure continued business with said creditors?
New Leadership	Leadership's inability and resistance to change	Creditors require a business rescue practitioner to be able to influence the leadership of the debtor business and make decisions in the interest of all parties involved
Data Integrity	Top management is a key source of information and the quality thereof	Top management could deliver biased information to act in the best interest of the debtor business and not the stakeholders / creditors
Integration	Holistic integration of all strategies, activities, information, people and overcoming the above liabilities	Envisioning a successful rescue, the creditors might not be fully satisfied with the outcomes with regard to distribution

Source: Adapted from Pretorius & Holtzhauzen (2008)

Business rescue and the creditors' influence on the rescue practitioner

Creditors are entitled to interrogate every step the practitioner takes – and most of them do. Thus they are well informed with regard to the status of the company and the rescue processes. Often banks are the largest creditors and dominate during the vote, while small business as concurrent creditors may stand last in line.

A major concern from the creditors' point of view is that they are not always informed in time of the company's being in distress; effective communication would be a key factor when encountering this problem. If the creditors vote in favour of releasing whole or part of the debt owed to them, they will be prohibited from enforcing that debt recovery against the debtor (CIPC, 2012). Thus, as stated in section 154 (1), the creditor will lose the right and to enforce the relevant debt. It is very important that the creditor understands his or her options under section 154 and insists on this "protection".

Despite the new legislation's shift towards a debtor-friendly environment, several more benefits for the creditor exist than with the previous Companies Act of 1973. although the claim settlement of the creditors is no longer the core reason for rescue (Alberts, 2004, Braadtveld, 2010 and Bradstreet, 2011:354). Rose (2011) agrees that creditors are no longer deprived of their rights and in actual fact are influencing the process indirectly by their eventual vote in support or not.

Though the literature on rescue practices is limited, it does show the importance of being knowledgeable about the new legislation. All business rescue costs are shared among the shareholders, creditors and the employees indirectly. Business rescue is a costly procedure. Lamprecht (2010) points out that this new legislation is not the answer to South Africa's unemployment and liquidation problems, but that it has the potential to be a successful mechanism for economically viable businesses in financial distress. This is true only if all affected parties are knowledgeable about the complexities associated with business rescue.

RESEARCH METHODOLOGY

As at February 2013, the Companies Act no 71 of 2008 has only been in effect for about 22 months. There is limited information available, and sparse though growing case law to interpret and analyse. There is also insufficient feedback regarding business rescues, and at the same time limited formal data on successful business rescues. Over 800 business rescue filings have occurred, and many of those companies have at least one entrepreneur/small business as a creditor. Given this fact, the research question driving this study originated from the scenarios predicted for the industry, where creditor knowledge was identified as a key factor (Pretorius, 2013). It will be of crucial importance to understand just how much entrepreneurs know of their rights, roles, liabilities and consequences regarding their place in the process of business rescue.

Table 2: Research design components

Component	Description
Research question or problem	How aware are entrepreneurs (creditors) of their rights, roles and liabilities regarding business rescue with regard to the new Companies Act legislation?
Context	Business rescue legislation after the business rescue becomes effective
Propositions*	1: Entrepreneurs are not aware of Chapter 6 in the Companies Act no. 71 of 2008. 2: Entrepreneurs are not aware of the relevant creditor issues regarding Chapter 6 of the Companies Act no. 71 of 2008. 3: Entrepreneurs and small business owners who are potential creditors of a company in business rescue are not aware of their liabilities regarding business rescue. 4: Entrepreneurs and small business owners who are potential creditors of a company in business rescue are not aware of their fiduciary duties with regard to business rescue.
Unit of Investigation	Knowledge and awareness about business rescue
Unit of analysis	Entrepreneurs who are potential creditors to a business rescue or a future business rescue
Logic linking the data to the propositions	Respondents were asked about their awareness and knowledge of issues which the Act entails, as well as processes and procedures around the implementation thereof. Their responses should give a meaningful indication of their knowledge status.

Component	Description
Criteria for interpreting the findings	Agreement with statements evaluating their self-evaluated knowledge and understanding
* = Propositions are set to structure the research process in support of the research question. Research questions are converted to proposition statements, for which support (or otherwise) is sought	

Source: Based on the design description of Yin (2003, p. 21)

Methodology

This study was exploratory in nature in that it was seeking to understand the status quo. A literature search was done and databases such as EBSCOHost, Emerald, Sabinet and ProQuest were searched. The search terms used were 'effects on creditors', business rescue consequences', 'creditors' benefits of business rescue', 'creditors' rights', 'advice for creditors in business rescue', 'creditors' knowledge of Companies Act'. Google Scholar was also used to find popular articles in an attempt to discover these effects on creditors, and not only management.

Due to the lack of academic research in the first year of the new legislation, the following inclusion criteria for 'non-academic' works sourced were used:'

- The work reported on the content of the new legislation.
- The work reported on the advice for creditors involved in business rescue.
- The work reported on the process of business rescue.
- The work reported on the creditors' rights with regard to business rescue.
- The work reported on the benefits/consequences affecting creditors.
- The work reported on the comparative analysis of the new legislation against the old Companies Act and international legislation.

Research design

A convenience sample of 76 SMMEs (small, medium and micro enterprises) in various business sectors was identified and surveyed. The aim of the research was to explore their knowledge and awareness of the Companies Act and also to explain the issues relevant to this exploratory study. Responses to survey questionnaires were collected by both telephonic interviews and personal interviews, focusing on the unit of investigation, which was the awareness and knowledge of creditors. The unit of analysis was entrepreneurs and small-business owners. Many business owners were asked to complete the questionnaire but were not available for either telephonic or personal interviews. Questionnaires were sent via email to the respondents and sent back after completion to the interviewer. Both closed and open-ended questions were used. A four-point Likert scale to measure entrepreneurs' knowledge and awareness of different aspects of the new legislation was used in order to 'force' a decision away from the 'unsure' option, as it was expected that an option for 'unsure' would realise no information.

FINDINGS

The Sample

Of the purposive sample of 76 businesses surveyed for exploratory purposes, 94% were entrepreneurs or small business owners and 15% acted as directors within their companies. The respondents interviewed were placed within various business sectors, namely: *Services*

sector: 35%*; Retail and e-commerce (online retail):* 27%*; Construction and manufacturing:* 14%*; Arts and Crafts:* 3% *and Unspecified:* 21%. Of the businesses that respondents represented, 70% reported having creditors, and 62% reported themselves as being debtors to other businesses/suppliers.

The respondents' experience within their relevant businesses ranged from six months to 35 years. Forty percent of the respondents had less than four years' experience within their stated positions. The ages ranged from 19 to 66 years of age and the gender classification was 60% male and 40% female. Of the respondents, 49% had a matric qualification or less, whereas 51% held post-secondary qualifications including diplomas, certificates, degrees and postgraduate degrees.

Linking this demographic information to the awareness and knowledge about the Companies Act, fewer than 3% of the respondents had been involved in a 'formal' rescue within their own businesses. However, 16% of respondents reported that they had been involved in an 'informal' turnaround within their own businesses.

Table 3 shows the respondents' awareness of the Act. With regard to the awareness of the Companies Act, nearly 60% of the respondents reported very low knowledge and were not very aware of this legislation; that being said, not even 6% of the respondents had extensive knowledge about the Act. Of the respondents, 37% reported they had some knowledge about the Act.

Table 3: Respondents' awareness of the Act

Awareness of Companies Act - Chapter 6				
	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Know nothing about it	11	14.47	11	14.47
Have heard about it	24	31.58	35	46.05
Have read about it	9	11.84	44	57.89
Have some knowledge	28	36.84	72	94.74
Extensive knowledge	4	5.26	76	100.00

Table 4 shows that 93% of the respondents had not attended any information session on business rescue where the Act was discussed, and 96% of the respondents had not attended a seminar on business rescue lasting a day or longer.

Table 4: Attendance of information and training sessions on rescue by respondents

I have attended an information session on business rescue.				
	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Yes	5	6.58	5	6.58
No	71	93.42	76	100.00
I attended a seminar on business rescue lasting a day or more.				
	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Yes	3	4.00	3	4.00
No	72	96.00	75*	100.00

* Missing value

Table 5 shows the awareness of respondents about who may initiate a rescue.

Table 5: Awareness about creditor initiation of business rescue

I am aware that a creditor can file for business rescue in my business without my consent.				
	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Yes	24	32.00	24	32.00
No	51	68.00	75	100.00

Sixty-eight percent of the respondents were not aware that creditors could file for business rescue without their consent. Very few were aware of rescues going on in their working environment (see Table 6).

Table 6: Awareness of current rescues in other businesses

I am aware of current rescues in other businesses.				
	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Yes	31	40.79	31	40.79
No	45	59.21	76	100.00

Table 6 shows that almost 60% of the respondents were not aware of current rescues in other businesses. In addition, 97% of the respondents had not been involved in a formal rescue and only 16% had been involved in an informal rescue in their own businesses.

Most of the respondents had no specific formal knowledge when referred to the Act and Chapter 6. To investigate awareness of core issues that might influence them directly as potential creditors, specific elements were explored.

Table 7: Knowledge about relevant elements in the Companies Act no 71 of 2008

Knowledge component	None at all	Low	Medium	High
	Cumulative %			
The fact that the Act allows for voluntary rescue	42.11% (42.11%)	22.37% (64.47%)	17.11% (81.58%)	18.42% (100%)
From the responses above we can state that 64% of the respondents had little or no knowledge of the fact that one may file for voluntary rescue.				
The fact that someone else can ask the court to file for rescue in your business	43.42% (43.42%)	21.05% (64.47%)	14.47% (78.95%)	21.05% (100%)
64% of the respondents had little or no knowledge of the fact that someone else may ask the court to file for rescue in your business.				
That there is a prescribed filing process	56.58% (56.58%)	19.74% (76.32%)	10.53% (86.84%)	13.16% (100%)
76% of the respondents had little or no knowledge about the exact prescribed filing process.				
What the moratorium means in the business rescue	59.21% (59.21%)	21.05% (80.26%)	11.84% (92.11%)	7.89% (100%)
80% of the respondents had little or no knowledge about the meaning of the moratorium in business rescue.				
Facts about the exact timing guidelines prescribed	65.79% (65.79%)	23.89% (89.47%)	5.26% (94.74%)	5.26% (100%)
Almost 90% of the respondents had little or no knowledge of the exact timing guidelines prescribed in the business rescue process.				
The role that creditors play in the vote on the plan	55.26% (55.26%)	21.05% (76.32%)	15.79% (92.11%)	7.89% (100%)
76% of the respondents had little or no knowledge of the creditor's role in voting for or against the business rescue plan when it comes to the business rescue process.				
The fact that the Business Rescue Practitioner takes over total supervision and decision making of the business	50% (50%)	15.79 (65.79%)	13.16% (78.95%)	21.05% (100%)
65% of the respondents had little or no knowledge of the fact that the business rescue practitioner takes over full supervision and decision making of the business undergoing rescue.				
The required skills that a Business Rescue Practitioner must have	56.58% (56.58%)	26.32% (82.89%)	10.53% (93.42%)	6.58% (100%)
82% of the respondents had little or no knowledge of the skills and expertise that a business rescue practitioner is required to possess.				
The ranking system with regard to creditors' claims	59.21% (59.21%)	17.11% (76.32%	14.47% (90.79%)	9.21% (100%)
76% of the respondents had little or no knowledge with regard to the ranking system of creditors' claims				
The unsecured creditors before the filing become concurrent creditors during the rescue	63.16% (63.16%)	19.74% (82.89%)	9.21% (92.11%)	7.89% (100%)
82% of the respondents had little or no knowledge of the fact that unsecured creditors before the filing process become concurrent creditors during the rescue.				
What professionals need to be used as advisors during business rescue (lawyer, accountant)	52.63% (52.63%)	23.68% (76.32%)	11.84% (88.16%)	11.84% (100%)
76% of the respondents had little or no knowledge about which professionals should be used as advisors during business rescue.				

Of all the responses shown in the Table 7, between 42 and 65% had no knowledge of Chapter 6 of the Companies Act. Moreover, 76% reported little or no knowledge about the Companies Act as a whole. A key observation is that the terminology used in legal documents could be a factor. A full 49% of the respondents had a Matric or less, meaning they had not been exposed to this language register. As the skills that are required of a business rescue practitioner are not stated clearly in the Companies Act, it is not surprising that only 18% of the respondents had any knowledge on this subject. Only 10% of the respondents had any knowledge regarding the exact time process involved in the business rescue process, which is crucial for creditors to know and make informed decisions on.

Table 8 Respondents' main concerns about the business rescue legislation

My main concerns about the business rescue legislation include:				
	Frequency	**Percent**	**Cumulative Frequency**	**Cumulative Percent**
The rescue process	15	23.08	15	23.08
Clarity of 'distress' definition	3	4.62	18	27.69
Lack of knowledge	38	58.46	56	86.15
Business rescue practitioner	6	9.23	62	95.38
No concern	2	3.08	64	98.46
Cost, payments and fees involved	1	1.54	65	100.00

Table 8 shows that 58% of the respondents stated their major concern as being that as entrepreneurs they had limited or even no knowledge about the legislation. In addition, 23% of the respondents stated that they were most concerned about the business rescue process.

Table 9: Most important action to be taken in a business rescue

I think the most important action in business rescue is:				
	Frequency	**Percent**	**Cumulative Frequency**	**Cumulative Percent**
Process must be followed	21	32.81	21	32.81
Fairness	10	15.63	31	48.44
To rescue the business	5	7.81	36	56.25
Not applicable due to lack of knowledge	9	14.06	45	70.31
Everything	7	10.94	52	81.25
Have sufficient information	12	18.75	64	100.00

Thirty-two percent of the respondents answered that the most important part of business rescue was that the correct process needed to be followed; 18% felt that the most important part of business rescue was that all stakeholders should be well informed, and 15% believed that the process needed to be fair above everything else.

DISCUSSION OF FINDINGS

According to these findings, it appears that respondents have no to very little knowledge of business rescue and the related issues, or how it can potentially affect their business.

The Companies Act includes creditors in the 'affected parties' category. These creditors have the option to file for business rescue on behalf of a financially distressed company (to protect their own interests) without its consent and knowledge; 68% of the respondents were not aware of this possibility. The knowledge could be of benefit to them if a business rescue awards the creditors a higher return than liquidation would.

As an example, 1time Airlines (Pty) Ltd (Only the holding company is/was listed) went into provisional liquidation on 7 November 2012, after an attempted rescue. The business rescue process was in the public eye and therefore gained much public attention. Holtzhauzen (2012) stated that the majority of the creditors were institutional creditors. Despite being 'large' creditors, even they stated that the business rescue process was totally unfamiliar to them. This is in line with this study's research findings. Table 5 confirms that 59% of the respondents were not aware of current rescues in other businesses, which supports the finding that there is little knowledge about the existence and workings of the Companies Act.

There is therefore sufficient information to support Proposition 1, that entrepreneurs are not aware of the Companies Act no. 71 of 2008 and Chapter 6 in particular. Finally, Table 7 supports this, concluding that from all of the responses to all of the questions, 76% of the respondents had no knowledge about the Companies Act as a whole.

When investigating the variables associated with the rescue process, the study revealed that 90% of the respondents had little or no knowledge with regard to the exact timing guidelines that are prescribed in the legislation, which could have significant consequences for their own businesses. Linked to this is the fact that only 24% of the respondents knew the prescribed filing process for business rescue, so the over 90% statistic is not surprising. Knowledgeable creditors can use the process to their advantage, as they may set aside the results of these votes by applying to the court (Delport, 2011).

The study also showed that 64% of the respondents did not know that one can file for voluntary rescue, which shows that they are not aware that the new legislation has moved to a more debtor-friendly environment, taking into consideration the creditors' input and involvement to do just that: rescue the business. Placing the creditors in the debtor's shoes, 64% of the respondents had little or no knowledge that someone else may ask the court to file for rescue in their businesses without their consent.

Keeping in mind the demographic classification of the respondents' education, it is not surprising that 80% had little or no knowledge of the meaning of the moratorium in business rescue. The terminology used in the Act could be a barrier for many entrepreneurs; 49% of the sample would probably not have been exposed to the level of linguistics used in the legal fraternity. This is supported by Loubser (2010c:689), who states that the meaning of *moratorium* in the Companies Act can be quite confusing, and some businesses in the SMME sector may find even the title of the legislation misleading.

Logically following from Proposition 1, further support was also found for Proposition 2, that entrepreneurs are not aware of the creditor-related issues associated with the Act.

In the case of a business requiring a rescue itself, 76% of the respondents had little or no knowledge of which profession needs to be approached for assistance with the rescue process, whether it be an accountant, lawyer or business professional. These professions can play a role in the creditors' decisions at the voting meetings. By their not understanding the consequences of rescue in their own or debtor businesses, it can be deduced from the information above that sufficient support was found for Proposition 3, namely that entrepreneurs are not aware of their liabilities with regard to the business rescue process.

What would happen if a business itself needed a practitioner to start the process and file for rescue? According to the answers of respondents, 82% of them had little or no knowledge regarding the skills and expertise of the business rescue practitioner they would need. This is a critical decision in rescue, and 65% of the respondents did not know (or understand) the impact when the appointed business rescue practitioner takes over, as he or she takes on full supervision and decision making of the business undergoing rescue. Not knowing this negates the powers of the businesses involved, as they have the right to vote for the appointment of the business rescue practitioner.

The ranking order of creditors' claims changes between the period before filing for business rescue and that during the rescue. The Act states that unsecured creditors before the filing process become concurrent creditors during the rescue; 82% of the respondents were not aware of this change. A concurrent creditor may now be ranked last and any claims will be processed only after those of all other creditors. As not many small businesses/entrepreneurs demand security for the products they sell or services they render, they will fall into this category, not having a secured claim. Regarding the ranking order of the creditors' claims, 76% of the respondents had little or no knowledge of the fact that a ranking system even existed, and they were not aware that the ranking order was the instruction in which the creditors' claims are processed. Bradstreet (2010:203) adds that it is mandatory for creditors to respond to the court, which could be unfair, as they should not be forced to spend more on legal fees when they are only protecting their own interests. The costs of a legal process are shared among the shareholders and creditors; this again may have grave consequences. There is thus sufficient support for Proposition 4, that entrepreneurs are not aware of their fiduciary duties with regard to the business rescue procedures.

Considering the responses, it is important to note that self-serving bias should be considered when evaluating such results. Self-serving bias is defined as the tendency of individuals to make attributions (either of their ability or effort) to positive events that are more internal, but attribute negative outcomes to external factors (Mezulis, Abramson, Hyde & Hankin, 2004:712). Fournier (2009) supports this statement by noting that it is human nature to deny responsibility for mistakes or problems. It could therefore be expected that respondents would overestimate their knowledge and ratings as a result of self-serving bias. It is courageous of entrepreneurs to state that they do not know the answers to the questions. Libby and Rennekamp (2011:222) mention that positive past performance may lead to overconfident managers overestimating their attributes to explain their knowledge. Where respondents blatantly state their lack of knowledge of the Companies Act, or one suspects that the respondents have overestimated their knowledge, the results paint an even worse picture for the industry.

Completing the questionnaire assisted the respondents to realise their knowledge status and therefore raised certain concerns of relevance to the researchers. The major concern was the fact that creditors do not know the Act, they do not know about it and have not been

informed about it; in fact 58% of the respondents replied that their major concern was their own lack of knowledge. Respondents knew very little about the process, guidelines, procedures and timelines. However, only 23% stated that the business rescue process as a whole was a concern, suggesting that faith in the process does exist. Further research to explore this outcome is needed.

Table 9 shows that even though the respondents do not know the process of business rescue, it is important to them that the process be followed correctly. The importance of being informed and displaying transparency throughout the whole process was an important issue to 18% of the respondents, and 15% believed that the process should be fair and equal for all stakeholders involved. From this information, and linking to the literature study regarding the issues relevant to the Companies Act and Chapter 6 in particular, further support was found for Proposition 2, that entrepreneurs are not aware of the issues pertaining to Chapter 6 of the Companies Act.

CONCLUSIONS AND IMPLICATIONS

There is no doubt that creditors are crucial participants in the process of business rescue. This research exposed the low level of knowledge and awareness of entrepreneurs and small business owners who are creditors to other companies. They are mostly unaware of the legislation's existence. Their level of knowledge about the Act is also low. The research verified that the extent of the problem of lack of knowledge was significant, as speculated in an article by Pretorius (2013).

Creditors have many rights and liabilities with regard to the business rescue process. They have rights in the voting processes of the whole rescue procedure, and have certain liabilities, such as the fees and costs involved. Their decisions are also binding on all stakeholders. However, this study identified many discrepancies in creditors' knowledge of the legislation with regard to the appointment of the business rescue practitioner, what his skills and expertise should consist of and how legislation aims to rescue the debtor. The study also confirmed that the unsecured creditors (most probably small businesses and entrepreneurs) become concurrent creditors during the rescue, moving them to the bottom of the claim priority.

This study has relevance for the industry, its reputation, the regulator (CIPC), business rescue practitioners, management of many businesses, and educators. The lack of knowledge surrounding business rescue will not improve by itself and may aggravate the negativities associated with rescue.

The key implication of this study is of the utmost relevance to industry and can be summarised in a single question: How can creditors use their powers if they are not even aware that they have any? The Act gives creditors certain powers during rescue, but if they are not aware of them, how can they act upon them?

From the study it is clear that, first and foremost, the majority of creditors require training and access to proper business expertise about the Companies Act in order to act in their own best interests. Rescue practitioners have an explicitly educational obligation to inform creditors of their roles, powers and liabilities at the first and second creditor meetings.

LIMITATIONS AND FUTURE RESEARCH

As regards the literature search, the newness of the topic means that limited research has been done; it was therefore necessary to include popular press material such as web pages and websites. Attorneys' web pages are not always a reliable source of information,

representing a personal or corporate view, speculation, or even a marketing tool. The same applies to rescue practitioners' web pages.

This study was mainly exploratory in nature, and as such the findings cannot be generalised, despite confirming many suspicions in the industry. Nevertheless, the strong evidence from the literature and the primary research demonstrates the need for dissemination of information on the subject and how relevant this is to the business domain.

The sample size can be seen as a limitation; however, even the small sample of respondents showed that the great majority of them knew very little about the Act. There is no reason to expect that a larger sample would sketch a different picture. The contribution of this article is of great importance to the SMME sector on an issue that needs urgent attention.

Future research should look into how entrepreneurs can protect themselves against the unforeseen liabilities they may face when rescue 'happens to them'. The role of credit guarantee and insurance firms might play a part in protecting entrepreneurs.

Future research should also look at possible sources of information or ways to educate small business regarding their rights.

REFERENCES

Alberts, M.N. 2004. *Business Rescue in South Africa: A Critical View of the Regulatory Environment*, Unpublished MBA. University of Pretoria

Bonnet, A. 2011. *Old vs New Companies Act*, DeVries Attorneys, June News [online]. Available at http://www.devries.co.za [Accessed: 15 May 2012]

Braadtveld, K. 2010. Chapter 6 of the South African Companies Act 71 of 208 id Reviewed, *Eversheds South Africa*, August, [online]. Available at http://www.eversheds.com [Accessed: 24 April 2012]

Bradstreet, R. 2010. The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy, *South African Mercantile Law Journal* 195-213 [online] Available at http://www.companylaw.uct.ac.za [Accessed: 18 November 2012]

Bradstreet, R. 2011. The New Business Rescue: Will Creditors Sink or Swim? *The South African Law Journal* 352-380 [online] Available at http://www.sabinet.co.za [Accessed: 10 September 2012]

Coertser, N. 2012. Business Rescue, The Companies Act and the Impact on the Construction Industry, *Legal Brief*, March [online]. Available at http://www.polity.org.za [Accessed: 15 May 2012]

Companies Act no 71, 2008. Chapter 6. Cape Town: Government Gazette.

Companies and Intellectual Properties Commission, 2011. Pretoria: South Africa [online] Available at http://www.cipc.co.za [Accessed: 18 June 2012]

Cooper, D.R. & Schindler, P.S. 2008. *Business Research Methods*. 10th edition. New York: McGraw-Hill

CRS Business Rescue, 2011. South Africa [online] Available at http://www.business-rescue.co.za [Accessed: 15 May 2012]

Davis, D., Cassim, F. & Greach, W. 2011. Eds. *Companies and Other Business Structures in South Africa*, 2nd Edition. Cape Town: Oxford University Press

Delport, P. 2011. *The New Companies Act Manual: including close corporations and partnerships*, 2nd edition. South Africa: Lexis Nexis

Eliot, A. 2012. Administration Costs of and Claims Against a Company in Liquidation Post Business Rescue, *Insolvency and Business Rescue News*, March [online]. Available at http://www.eversheds.co.za [Accessed: 13 March 2012]

Fournier, G. 2009. Self-Serving Bias [online] Available at http://www.psychcentral.com [Accessed: 16 November 2012]

Holtzhauzen, G. 2012. Business Rescue Plan for 1Time Airlines Pty (Ltd) [online] Available at http://www.sturns.co.za [Accessed 16 November 2012]

Holtzhauzen, G. 2013. Interview with Business Rescue Practitioner for 1Time Airlines
Jacobs, L. 2012. Post-commencefinancing and creditors; a South African perspective. The Company Lawyer. Issue 3.

Lamprecht, C. 2010. The Case for Business Rescue, ASA, June [online] 26-28. Available at http://www.accountancysa.co.za [Accessed: 19 April 2012]

Levenstein, E, 2011. Business Rescue: A Guide for the South African Banking Sector, *Legal Brief*, March [online]. Available at http://www.werksmans.com [Accessed: 15 May 2012]

Levenstein, E. 2012. Getting Clever with Business Rescue, *Legal Brief*, August [online]. Available at http://werksmans.co.za [Accessed: 26 August 2012]

Libby, R. & Rennekamp, K. 2011. Self-Serving Attribution Bias, Overconfidence and the Issuance of Management Forecasts, *Journal of Accounting Research*, Vol: 50(1):197-231

Loubser, A. 2010a. *Some Comparative Aspects of Corporate Rescue in South African Company Law*. Unpublished Doctor of Laws dissertation. University of South Africa

Loubser, A. 2010b. The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (part 1), *Tydskrif vir die Suid-Afrikaanse Reg*, Issue 3:501-514[online]. Available at http://www.sabinet.co.za [Accessed: 18 November 2012]

Loubser, A. 2010c. The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (part 2), *Tydskrif vir die Suid-Afrikaanse Reg*, Issue 4:689-701[online]. Available at http://www.sabinet.co.za [Accessed: 18 November 2012]

Makholwa, A. 2011. Business Rescue. *Finweek*, 27 October 2011[online]. Available at http://www.finweek.co.za [Accessed: 19 April 2012]

McKenzie Skene, D. 2011. The Composition of the Debtor's Estate on Insolvency: A Comparative Study of Exemptions, *INSOL International Insolvency Review,* Vol 20:29-55

Mezulis, A.H., Abramson, L.Y., Hyde, J.S. & Hankin, B.L. 2004. Is there a Universal Positivity Bias in Attributions? A Meta-Analytic Review of Individual, Developmental and

Cultural Differences in the Self-Serving Attribution Bias, *Psychological Bulletin*, Vol: 130(5):711-747

Moosa, R. 2009. Business Rescue: The Challenges, October [online]. Available at http://www.nortonrose.com [Accessed: 22 March 2012]
Pelser, H. 2012. SA's Business Rescue Track Record. *The Citizen,* September 5, [online] Available at http://www.citizen.co.za [Accessed: 12 September 2012]

Pretorius, M. 2013. Second-generation Scenarios for Business Rescue in South Africa. [online] Available at http://www.brportal.co.za/forum [Accessed: 16 April 2013]

Pretorius, M. & Holtzhauzen, G.T.D. 2008. Critical Variables of Venture Turnarounds: A Liabilities Approach, *Southern African Business Review*, 12(2):87-107

Rajak, H. 2011. Determining the Insolvent Estate- A Comparative Analysis *International Insolvency Review*, Vol 20: 1-28

Rose, A. 2011. Avoiding Insolvency, February [online]. Available at http://www,taxtalkblog.com [Accessed: 15 May 2012]

SAPA, 2009. SA Macro-Economic Environment will not change – Zuma, June 9 [online] Available at http://www.polity.org.za [Accessed: 22 April 2012]

Statistics South Africa. 2012. *Statistics of Liquidations and Insolvencies (Preliminary)* Pretoria: Government Printer

Visser, A. 2012. Business Rescue 'A Boat Without a Paddle', November 5, *Business Day* [online] Available at http://www.bd.co.za [Accessed: 18 November 2012]

Yin, R.K. 2003. *Case Study Research: Design and Methods.* 3rd edition. California: Sage.