

INVESTIGATING THE NATURE, PURPOSE AND EFFECTIVENESS OF BUSINESS RESCUE IN SOUTH AFRICA: CHAPTER 6 OF COMPANIES ACT 71 OF 2008 AS AMENDED

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ABSTRACT

The Companies Act 71 of 2008 was passed by parliament on the 19 November 2008 and assented to by the president on the 8 April 2009. The Act came into force on the 1 May 2011 and it contains provisions of Business Rescue which abolished the provisions of judicial management under the Companies Act 61 of 1973. The Business Rescue has become an important part of South African Business environment since it replaced its predecessor which had a lower success rate. Since Business Rescue is fairly new, our courts are still finding their feet with regards to the provisions of this Act. Due to recent case decision that shows that the provisions cannot be relied upon unconditionally without proper regard to the circumstances of each case, the research provides an insight on how Business Rescue works, whether it serves the purpose it was intended to achieve and how effective it is.

Key Words: Effectiveness, Business Rescue, Companies, Judicial Management, Courts, Effective

Introduction

A company is a fundamental part of the community in which it does business and it has a direct impact on the economic and social welfare of that community through its employees, suppliers and distributors, World Bank (2011:3). Thus, the introduction of modern Business Rescue principles is another step forward in making South Africa competitive and bringing it in line with the modern global economy (Alberts, 2004:10). Before the introduction of business rescue, there was another procedure of rehabilitating these companies called judicial management, which was regulated by Act 61 of 1973 which was criticised because of its nature, it was a glorified liquidation of companies as it was creditor friendly. It has been observed that judicial management or liquidation is an extreme measure as its consequences affects South Africa

economically since jobs will be lost; and a reduction in investor confidence in the country. Therefore, it was necessary to have legislation that is successful in delivering 'escape routes' from such 'commercial deaths' that are aimed at rescuing a financially distressed company from its decline towards liquidation (Bradstreet, 2011:352).

Chapter 6 of the Companies Act 71 of 2008 introduced "business rescue" as a form of rehabilitation in order to preserve our company's jobs, especially in South Africa where there is high rate of unemployment, poverty and population. Therefore, having a successful and effective Business Rescue regime is consequently of great significance to the economic growth and stability of this country (Sheer Lara-Jade, 2013:2). Business Rescue was introduced in 2011 and ever since it was introduced there are achievements and at the same time there are shortcomings as far as Business Rescue Procedure is concerned. The study has been conducted in order to get an insight on how Business Rescue works, whether it serves the purpose it was intended to achieve, or whether Business Rescue is effective and if not, what are the causes for its failure. This study also serves to assess whether Business Rescue has now successfully suited the needs of a modern South African economy as according to the Policy Framework for Company Law Reform.

Aim of the Study

The aim of the research is to explore in depth how Business Rescue works and whether it is beneficial to businesses to opt for this process rather than liquidation of the business. The aim is also to investigate whether it serves the purpose it was intended to and the efficacy of business rescue.

Objectives of the Study

- To assess how Business Rescue works, and whether the requirements considered for applying for the process are eloquent and feasible;
- To assess whether Business Rescue is achieving its purpose,
- To assess whether Business Rescue is effective;
- To determine and evaluate factors that cause the process to fail; and
- To make recommendations on the areas deserving improvement in the Business Rescue procedure.

LITERATURE REVIEW

Definition of Business Rescue

According to Delpont (2011:141) Business Rescue is a proceeding to facilitate the rehabilitation of a company by its management, which is insolvent or may imminently become insolvent. The Companies Act 71 of (2008:230) defines this process as proceeding to facilitate the rehabilitation of a company that is financially distressed.

Initiation of Business Rescue

The Act, under the influence of Chapter 11 of the US Bankruptcy Code introduces a debtor-friendly Business Rescue process even though our insolvency law system is largely creditor friendly (Cassim, Cassim, Cassim, Jooste, Shev, and Yeats, 2012:866). There are two processes of initiating the Business Rescue which are as follows:

Voluntary

Section 129 of the companies act states that the board of a company may resolve that the company voluntarily begin Business Rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that;

- The company is financially distressed; and
- There appears to be a reasonable prospect of rescuing the company.

The company is financially distressed if it appears that to be or reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediate ensuing six months and also if it appears to be reasonable likely that the company will become insolvent within the immediate ensuing six months (Cassim et al., 2012:864).

Procedure to Apply for Voluntary Business Rescue

In terms of Section 129 after the resolution has been reached the company must;

- File the resolution with Companies and Intellectual Property Commission (CIPC);
- Publish a notice within 5 days after the resolution, informing the entire affected persons about the resolution and the grounds on which the board has based their resolution;
- The board must also appoint a Business Rescue practitioner who qualifies to be appointed as in terms of section 138 of the companies act. Then lodge a notice with CIPC within 2 days after the Business Rescue has been appointed. The Business Rescue practitioner has to consent before the notice is lodged; and
- A notice has to be also published to the entire affected person regarding the appointed person.

Application by a Court Order

An application can also be brought by the affected person for an order placing the company under business rescue. The applicant has to lodge a copy about the notice to the company, CIPC and any affected person about the intention of the application (Delpont, 2011:143).

In terms of section 131 the application has to satisfy the court that the company is financially distressed, it has failed to pay its debts in terms of its obligation. Thereafter the court hearing the matter can grant the order. The court is not limited to decide on those grounds only. It can also grant the order if it is just and equitable to do for financial reasons in terms of Section 131(4) (a) (iii).

One of the challenges with Business Rescue is the interpretation of the requirement or the grounds of business rescue. The courts have different views in interpreting this act and the purpose of business rescue. The following are some of court cases that have decided on this issue;

R A Swart v Beagles Run Investments 25(pity) ltd 2011 (5) SA 422(GNP) the company brought an application in court for Business Rescue relying on the fact that the company is unable to pay its debts however there is hope that it will recover given a chance to restructure the company. The application was opposed by creditors based on the fact that the company has been purposely avoiding paying the debts and therefore the application has to be turned down. The court decided

in favour of the creditors. Judge Makgoba held that, where an application for Business Rescue entails weighing up of the interest of creditors and the company, the interest of the creditors should carry the day.

The decision of this court has brought too much criticism as the court in making the findings also relied on the judicial management, which was abolished and replaced by business rescue. The requirement for judicial management was that in order for the order to be granted, the company should produce proof that there is a reasonable probability that the company will rehabilitate or be rescued whereas the Business Rescue states that there must be a reasonable prospect for rescuing the business. Business Rescue seeks to balance the interest of all the interests of stakeholders and judicial management was abolished as it was creditors-friendly. This meant that a creditor with a valid, unpaid claim against a company was entitled to a liquidation order against the company almost as a right (Morgan, 2012:1).

In the case of Southern Palace Investments 265 (pty) ltd v Midnight Storm Investments 386 LTD 2012(2) SA 4239(WCC), Judge Eloff decided that the requirement of a “reasonable prospect” of recovery must mean something less than the recovery should be ‘a reasonable probability’. The judge remarked that the Business Rescue provisions heralded a new era and that the old mind-set of the creditor being almost entitled to a winding up order as a right was over and inappropriate.

These cases were decided within a short period of time after the commencement of this amended act and these cases are one of the first cases that set a precedent however this showed that there is challenge in interpreting the requirements of the Business Rescue process and which maybe one of the causes of failure or challenges faced in this process.

Objection to the Company Resolution

In terms of section 131(1) any affected person may apply to a court for an order setting aside the resolution on the ground that:

- There is no reasonable basis for believing that the company is financially distressed;
- There is no prospect that the company will recover; and
- The company has failed to comply with procedural requirements.

Duration of the Business Rescue Proceeding

Business Rescue starts when a resolution has been filed and also when an application has been brought to court. The Business Rescue ends when the court sets aside the resolution, the court has converted the matter into a liquidation proceeding and when the practitioner files the termination with the CIPC, Section 132 of Companies Act.

Effects of Business Rescue on the Company undergoing the process

Moratorium on Legal Proceedings

Section 133(1)(a) and (b) states that during Business Rescue proceedings, no legal proceeding, including enforcement action, against the company or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

- a) With the written consent practitioner; and

- b) With the leave of the court and in accordance with the terms the court considers suitable.

Legal proceedings are restricted as a general principle, since they may have a detrimental effect on the outcome of the Business Rescue process. However, criminal proceedings against the company or any of its directors or officers do not fall within the scope of S 133(1) Cassim et al (2012: 879). It is designed to provide the company with breathing space while the Business Rescue practitioner attempts to rescue the company by formulating and implementing a Business Rescue plan (Museta, 2011:26).

The Business Rescue Plan

One of the major innovations of the new rescue proceedings is the requirement that a rescue plan must be drawn up to show how the rescue of the company will be achieved (Loubser, 2010:115). Loubser further pointed out that the lack of a requirements that a proper business plan must be prepared and approved has been identified as one of the reasons why judicial management has rarely led to a successful rescue.

Prescribed Contents of a Rescue Plan

Section 150(2) prescribes that a rescue plan must contain the information reasonably required to assist the affected person in deciding whether they should accept or reject the plan. Business plan is divided into three parts:

- 1) Part A- Background

This part has to contain a list of assets belonging to the company and all the assets that were held as security in favour of creditors. The act does not mention the valuation of those assets however it advisable that the assets must be evaluated in order to determine the chances of the company's survival. A list of creditors must be drawn and in accordance to their preferential order and only those creditors who have proved their claim (Section 145).

It should also include the dividend that creditors in each class will probably receive should the company be liquidated and to avoid claims from creditors that they have been misled, practitioners would have to be very careful in their estimates since there may be a number of factors that cannot be predicted with any degree of accuracy and may influence these figures i.e. whether purchasers for all the assets will be found and whether all creditors have proved their claims (Loubser, 2010:116).

A copy of the written agreement concerning the Business Rescue practitioner's remuneration has to be attached to the plan (Loubser, 2010:116). The practitioner is entitled to charge fees and expenses in accordance with a tariff that the minister may prescribe by regulation, Section 143 (1) and (6). The tariff of fees charged depends on the classification of the company, whether it is small, medium or large. For small company the remuneration should not be more than R1250 per hour and limited to R15 625 including vat per day. For medium is R1500 per hour and maximum of R18 750 per day inclusive of vat, and large firms or state owned companies is R 2000 per hour to a maximum of R25 000 a day inclusive vat (Cassim et al., 2012:892).

Last but not least, it should also contain a statement as to whether the plan includes any proposal made informally by a creditor (Museta, 2011:31).

2) Part B- The Proposal

The nature and duration of any proposed debt moratorium, section 150 (2) (b) (i). The suspension of all legal commercial transaction is an extremely important factor as creditors will have to wait to enforce their claims (Museta, 2011:31). Museta further submits that if the period is too long, creditors will face financial strain and therefore a balance struck in rescuing the business and repaying whilst performing is terms of uncompleted contracts at a reasonable time. In the case of Gormleyvs West City Precinct (pty) Ltd & Others, an application was brought by major shareholders and director of a company whilst an intervening affected party brought an application for liquidations.

Amongst grounds for applying for a business rescue, it was clear that the application had as part of its plan a moratorium of 3-5 years during which the assets of West City would dispose of supposedly with the aim of securing a larger dividend to creditors than what would have been the case had the company simply been liquidated. The court decided amongst other grounds that it is not in the best interest of all affected persons that it would grant an application with a long moratorium as the purpose of the act will not be achieved in these circumstances and the application was dismissed and a liquidation order was granted by the court (Opperman, 2012:2).

It is clear that the courts are ensuring that the Business Rescue application is not brought to abuse the system. They are considering all the affected parties in order to strike the balance as per the purpose and the rationale behind the introduction of business rescue. It should also entail the extent to which the company is to be released from the payment of its debts and the extent to which any debt is proposed to be converted to equity in the company or another, section 150 (2) (b) (ii). It should also include the treatment of on-going contracts and how they will be handled as part of the plan and which contracts will be a priority in order to continue conducting the business. The property that is available to pay creditors claims in terms of the plan should also be determined. This is interpreted to mean that the assets that will be used to pay creditors must be listed, rather than assets that are merely available and could possibly be used (Loubser, 2010:120).

The order preference in which creditors will be paid from the proceeds of the company's property if the plan is adopted has to also be disclosed to the affected person (Loubser, 2010:120). This has some loopholes as there is a change in order of preference of creditors as compared to liquidation. Business Rescue has prioritised employees and is dealing with post-commencement finance as opposed to insolvency act which gives employees a limited right as creditors. This could be one of obstacles that hinder the success of Business Rescue (Loubser, 2010:121)

A comparison between the benefits for creditors if the plan is adopted and the benefits they would receive if the company were to be placed in liquidation has be disclosed, Loubser (2010:121). Last section 150 (2) (b) (VI) states that this part of the plan should include the effect.

3) Part C- Assumptions and Conditions

This part of the plan should entail at least the following:-

A statement of the conditions that must be satisfied, if any, for the proposal to (a) come into operation and (b) be fully implemented, sections 150 (2) (c) (i). These will be conditions that are pre-determined by the interest parties to ensure all required mandates are thoroughly executed, before, during and after the entire process of Business Rescue (Museta (2011:33). It also includes an explanation of the plan's effect, if any on the number of employees and their conditions and terms of employment (Loubser, 2010:123). The employment terms and conditions should be in line with labour Relations Act 66 of 1995.

The circumstances in which the Business Rescue plan will end should be stipulated, section 150 (2) (c) (iii). The termination of business plan is essential to the sustenance of the company, Museta (2011:34). A projected balance sheet for the company and statement of income & expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted (Delpont and Vorster, 2012:516). The Business Rescue plan concludes with a certificate by the Business Rescue practitioner in which he states that any actual information provided in the plan appears to be accurate, complete and up to date, and that the projections are estimates made in good faith and based on the factual information and assumptions contained in the statement, section 150 (4) (a) and (b).

Failure to Adopt a Business Rescue Plan

If the Business Rescue plan has not been approved by the majority, then those who voted for it can buy out the voting rights of those who disagreed with the plan. The affected persons also have a right to propose a revised plan and consider alternatives. If none is succeeding then the practitioner can advise the holders, employees and creditors about his intention to apply for a court order setting aside the Business Rescue proceeding. The court can grant that application if it is satisfied that it is reasonable and just to set aside the Business Rescue plan and the court can grant an order for liquidation in the circumstance (Cassim et al., 2012:908)

The Effect of Adoption of the Business Plan Rescue

According to s 154(4) of the Act, a Business Rescue plan that has been adopted is binding on the company, on each creditor and on every holder of securities of the company, whether or not that person was present at the meeting, voted in favour of adoption of the plan or, in the case of creditors, had proven his or her claim against the company. The practitioner must thereafter manage and conduct the affairs of the company in accordance with the Business Rescue plan and must not without consent deviate from the approved Business Rescue (Cassim et al.2012:908). If there is any affected aggrieved by the deviation by the practitioner, an application can be brought to court to challenge him or her.

The company, under the direction of the Business Rescue practitioner, must take all the necessary steps to fulfil any conditions to which implementation of the plan may be subject, and to implement the plan itself (Loubser, 2010: 131). When the Business Rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the Business Rescue plan with the Companies Commission and that brings the Business Rescue proceedings to an end, section 152 (8). The challenge with “substantial implemented” has been loosely used as according to Loubser (2010:132), the Act gives no indication of what would or should be regarded as substantial implementation, and it would therefore be advisable for creditors to stipulate in the plan at what stage it will be regarded as substantially implemented, in order to prevent the Business Rescue practitioner from abandoning the process it is completed or nearly completed.

The Rights and Powers of Affected Persons

In terms of the Companies Act 2008, there are three groups of people that are regarded as affected persons in particular who must be taken into consideration in the Business Rescue proceedings, namely the employees, creditors and the holders of the company’s securities (Cassim et al., 2012:899).

Employees

Employees are in some ways the lost souls of insolvency law (Finch, 2004:778). Employees had a limited right as affected person in terms of the insolvency law. Even with the judicial management which is a predecessor of business rescue, employees had no rights as the process was creditor friendly. One of the primary goals of a good Business Rescue process is the fair and equitable treatment of employees of a financially distressed company (Cassim ET al.2012:884). Cassim further submits that a proper balance must be drawn between the needs of employees and the interest of creditors, which is one of the rationales behind the establishment of business rescue.

The rights of the employees during the Business Rescue proceedings are set out in section 144 of the act. Section 144(3) (a) to (g) employees are entitled to:

- a) Receive notice of each court proceeding, decision, meeting or other relevant event concerning the Business Rescue proceedings;
- b) Participate in any court proceedings arising during the Business Rescue proceedings;
- c) Form a committee of employees’ representatives;
- d) Be consulted by the practitioner during the development of the Business Rescue plan, and to be afforded sufficient opportunity to review any such plan and prepare a submission
- e) Be present and make submission to the meeting of the holders of voting interests before a vote is taken on any proposed business plan;
- f) Vote through a trade union or employee representative with creditors on a motion to approve a proposed business plan; and
- g) If the Business Rescue plan is rejected, to propose the development of an alternative plan and present an offer to acquire the interests of one or more affected person.

Creditors

The underpinning approach of the statutory provision relating to creditors of the company during the Business Rescue proceedings is essentially that as a result of the moratorium which freezes the rights of creditors, they should in return be formally given, as a quid pro quo, a right to influence the manner in which the affairs of the company are regulated and a right to vote on the approval or rejection of the Business Rescue plan (Cassim et al.2012: 902). The creditors have the same rights and powers as employees however the only difference is creditors form a committee of creditors whereas the employees are represented by a trade union. When it comes to their voting interests, they are determined by the value of the amount owed by the company. Secured and unsecured creditors have a voting right which is equivalent to the amount owed by the company to the creditor. A subordinated creditor, who would have subordinated in a liquidation, has a voting interest, as praised and valued by the practitioner, equal to the amount, if any, that the subordinated creditor could reasonably expect to receive in such a liquidation of the company (Delpont, 2011:146).

The Holders of the Company's Securities

Shareholders have the same rights as creditors and employees except that they do not have the right to be consulted by the practitioner during the Business Rescue proceedings or form a committee as they are regarded as being subordinate to the interests of creditors and employees. Cassim et al. (2012:904) further states that shareholders must be aware that if the company is liquidated their shares or investment in the company will be worthless, but if the company is successfully reorganised or restored to profitability, shareholders will benefit from an increase in the value of their shares.

This study has covered the nature of Business Rescue within South African context since other studies focused on the nature of Business Rescue Internationally without relating to what impact and influence it has in business environment and economy in South Africa.

The Purpose of Business Rescue

As stated above, Business Rescue was introduced to abolish judicial management which was rarely successfully because of its nature and also it was creditor friendly, which gave more powers to creditors only. In discussing the purpose of the business rescue, a comparison between Business Rescue as per chapter 6 and its processor, judicial management will be made in order to find out why there was a need to establish another way of rescuing companies.

According to the Companies Act 1973 which regulated judicial management, the company itself or the creditor may apply to court for an application for the company to be placed under judicial management if the company is unable to pay its debts or is probably unable to meet its commitment; has not become or prevented from becoming a successful concern; and there is a probability that if is placed under judicial management it will be able to pay its debts and become a successful company, section 427(1). This differs when compared to Business Rescue as it gives all affected person to take an initiative of rescuing the business and that can be easily made by resolution in a board meeting or alternatively by court order of which resolution by board is less expensive.

The judicial management made a provision to start the application by court order and that was criticised because of its onerous and made it unsuitable for small business to bring that application as it would be expensive. Further the extent to which it is indebted to creditors is not clarified whereas with Business Rescue clearly stating that if the company is unable to pay its debts for the past 6 months or will not be a solvent business within the next six months. The failure to clarify that aspect by judicial management was one of the shortcomings preventing the process to succeed as companies would still apply for procedure whereas it has already insolvent (Loubser, 2010:145).

It was also noted that the judicial management made use of “reasonable probability” which means that it is not merely a speculation that the company will be rehabilitated; it has to be proven beyond that, there is a heavy burden of proof on the part of applicant. Other views are that this threshold was designed to restrict the rights of creditors whom in any way would not obtain their claims under the insolvency law when the company is liquidated which is contrary to Business Rescue which strike the balance between all the affected persons (Sher, 2013:11).

The moratorium in judicial management is not automatically granted as the company has to apply for it. Moratorium is one of the major advantage or benefit of Business Rescue as the company is given a chance to rehabilitate of which the predecessor did not fully grant that. It is also not clear whether the judicial management makes provision for moratorium in civil or criminal cases whereas Business Rescue a stay is for civil cases against the company (Loubser, 2010:64).

In terms of the companies Act of 2008, the minister may impose reasonable conditions upon a person or association designated by the minister in terms of the Act as regards the execution of their functions and prescribe minimum qualifications such as being a person that is a member in good standing of a legal, accounting or business management profession for the admission of a person to the practice of a Business Rescue practitioner, S138 (1). This is contrary to judicial management as the minister has not stipulated who meets the standard qualification to be a judicial manager. This saw many people who are not legitimately qualified practising and ultimately proving the process of judicial management to be unsuccessful as shown by the use of liquidators as judicial managers (Burdette, 2002:350).

The judicial manager upon appointment would assume the management of the company recover and come into possession of all the assets of the company, section 430 (a) Companies Act of 1973. Secondly all the property are placed under the custody of the judicial manager, section 428 of Act of 1973. The judicial manager has discretion and free reign to implement what he or she saw best without input from the board of directors or creditors (Museta, 2011:37). The companies Act of 2008 has rectified that as the legislators saw a need for directors of the company to continue working under the supervision of the Business Rescue practitioner with the aim of rescuing the company.

Comparison between the Companies Act 1973 and 2008

Table 2.1: Comparison of Act 1973 and 2008.

1973	2008
• Under-regulated -Insolvency practice in South Africa was under-regulated	• Improved regulation -Better regulation is in place, with a Business Rescue procedure in position -Business Rescue Practitioners (BRS) are also regulated
• Open to abuse -Business Rescue was under-controlled	• Tighter controls -more effective controls have been put forward
• Adequate Business Rescue procedures were not in place -this was one of the contributing factors to ineffective business rescues for business which were in fact viable	• The new Business Rescue procedure has been legislated -a temporary supervisor or BRS administers the procedure
• Wide variances in qualifications of insolvency practitioners, judicial managers and liquidators -This also contributed to ineffective Business Rescue for viable businesses	• Acknowledgement that BRPs need to be suitably trained & sufficiently qualified -Moreover, those judiciary & other officials participating in the process must be adequately informed about the procedure
• An impractical judicial management procedure in place -A company registrar was in place as a regulator	• A Business Rescue mechanism in place -The judicial management procedure is repealed by the new Companies Act - The commission is in place & is the regulator of BRP

Source: CGF Research Institute (PTY) LTD (2011:6).

The above table makes a comparison between the two Acts in order to explain further why there was a need for review of the previous Act. It further explains why the Amended Act had to introduce a new purpose which differs from its predecessor and that was the rationale for establishing Business Rescue.

The study has also focused on whether rationale behind introduction of Business Rescue has been achieved and what are the causes of its failure. Other studies have not covered in detail

about the purpose and effectiveness of the Business Rescue process but have given an insight of what BR.

Post-Commencement Finance in Business Rescue

When businesses become over-leveraged or financially distressed, for reasons within or beyond their control, access to finance becomes increasingly difficult; if not virtually impossible (Pretorius and Du Preez, 2013:169). Marius and Du Preez (2013:169) further state that the difficulty of accessing post-commencement financing forces distressed businesses to operate on a cash basis or confront the possibility of liquidation or forced sale of their assets. This has been evidenced in the recent financial crisis, where the raising of post-commencement finance/post-petition finance (PCF) has become a major obstacle for businesses that require rescue or reorganisation (Vriesendorp and Gramatikov, 2010: 209-237).

PCF is one of the important elements that determine the success of the rescue plan. One of the key requirements that need to be expanded on in the rescue plan is the magnitude and nature of the financing required to rescue the business (Du Preez, 2012:13). The definition of PCF is explained in the Companies Act 71 of 2008, section 135 expresses as follows:

- (1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's Business Rescue proceedings, but is not paid to the employee-
 - (a) The money is regarded to be post-commencement financing; and
- (2) During its Business Rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing-
 - a. May be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
 - b. Will be paid in the order of preference set (3) (b)
- (3) After payment of the practitioner's remuneration and costs and other claims arising out of the costs of the Business Rescue proceedings, all claims contemplated-
 - a. In subsection (1) will be treated equally, but will have preference over-
 - i. All claims contemplated in subsection (2), irrespective whether or not they are secured; and
 - ii. All unsecured claims against the company; or
 - (a) In subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

Rescue Financing: Stages, Importance and Benefits

Stages of Rescue Plan

In deciding on the appropriate type of financing required for a successful turnaround, it is important to understand the stage of decline that the organisation is in, and match this to be corresponding finance needs (Du Preez, 2012:18). Pretorius (2008:19-28) offered a model that describes the phases that a company experiences during the turnaround process. These 4 stages are as follows:

Table 2.2: Stages during the turnaround process in the company.

STAGES	CHARACTERISTICS	FINANCE REQUIRED
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1. Performing well	Operating normal	Normal financing requirements, bridging for overtrading
2. Under performance	Scarce resources and weak internal operations	Venture is cash strapped and requires restructuring financing
3. Distress	Abundant resources but declining sales and loss of competitive advantage	Requires additional funding but more risky
4. Crisis	Scarce resources and pressure on cash	Request creditors for “debt-forgiveness”

Source: Corporate Renewal Solutions (2011:1).

As the above table depicted, due to the nature and speed of the stages described, it is therefore critical that the Business Rescue specialist should be engaged with promptly, before the company is on the brink of liquidation, in order to be able to recognise the warning signs and act appropriately, Du Preez (2012:19).

Importance of Rescue Finance

Creditors, banks and financiers would obviously be reluctant to finance a company that is under Business Rescue proceedings, yet additional new finance after the commencement of Business Rescue proceedings is often critical to the survival and the turnaround of the company’s business(Cassim et al.2012:882). Recent research suggests that the lack of PCF is one of the five reasons why business rescues in South Africa have failed (Pretorius, 2012:2).

Obtaining turnaround finance and returning the business to liquidity presents a challenge for financially distressed organisations, and therefore the first port of call is normally internal funds which are mostly non-existent (Pretorius and Du Preez, 2013:170). Cassim et al. (2012:882) reaffirmed that not many companies that are placed under supervision have cash or assets that can easily be converted to cash to fund their business activities. It is apparent that it is increasingly important for a business to receive turnaround finance at the beginning of the process of financial distress, as this is directly linked to the magnitude of success of the turnaround.

Benefits Business Rescue to the lenders/financiers

It is well known that the valuation of a business as a “going concern” is almost always greater than it were to be liquidated or sold off piece meal; and this means that it preserves higher economic value for the company and therefore the claims that the creditor or lender will institute will realise a higher recovery rate (Du Preez, 2012:20).

Benefits of Business Rescue to the company

- The company is temporarily supervised by the practitioner.
- The company is given a temporal moratorium (stay) on the rights of the claimants against the company or any legal proceedings against the company until the proceedings are terminated in respect of the property in its possession, section 133 of Companies Act.

This means that the company gets vital breathing space while a Business Rescue plan is implemented (Cassim et al. 2012:18).

- The development and implementation, if approved of a plan to rescue the company by restructuring its affairs, business, property, debts and other liabilities and equity in the manner that maximises the likelihood of the company continuing in existence on a solvent basis or that if not possible, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company, section 128(1) (b).

In support of the above benefits the court confirmed the protection of companies during the Business Rescue proceedings, in the case of *Investec Bank v A Bruyns* 19449/11(WCC). In this matter the applicant (surety of the company) brought an application in court against the bank to enforce his surety ship obligations. The Acting Judge held that section 133(3) is not to be interpreted as releasing persons who stood as surety for the company in business rescue-its plain meaning was explicit: if the lawmaker had intended to prohibit creditors from enforcing their claims against sureties of companies in Business Rescue it would have said so in clear language as such a prohibition would be a drastic interference with the rights of creditors.

The case confirmed that the creditor may proceed against the surety in enforcing its rights where the principal debtor is under Business Rescue as the act only makes provision to stay all proceeding against the company under supervision.

Du Preez (2014:2) submitted that the challenges facing the relatively young rescue industry in South Africa include:

- The insolvency mind-set within South Africa, which still prevails over the consideration of business rescue;
- The perception by respondents that creditors unnecessarily hamper the process by advancing their position through court proceedings. Charles (2014:1) further confirmed that there is a perception that creditors who have traditionally become accustomed to resorting to destroying businesses by way of liquidation in pursuit of some recovery of what is owed to them; and
- Board of directors are waiting too long to file or sometimes filing for the wrong reasons.

RESEARCH METHODOLOGY

Target Population

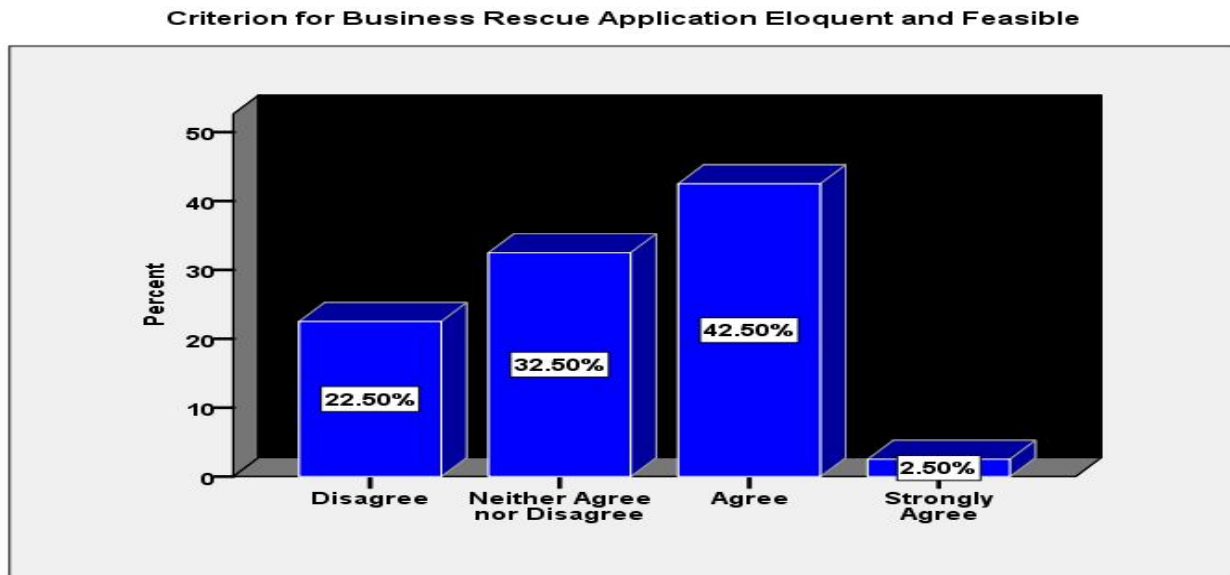
Population is a group of elements or cases whether individuals, objects or events that conform to specific criteria to which we intend to generalise the results of the research (McMillan and Schumacher (2006:119). The target population in this study constituted business practitioners, attorneys, liquidators, financial institutions and relevant departments. There is an estimation of more or less than 50 000 attorney, liquidators and BRS in South Africa, approximately less than 500 in Johannesburg, who are dealing with Business Rescue applications. Participants had to be selected according to their availability and experience for the purpose of this study, in order to

achieve the objectives of the study. Therefore participants are selected because they are involved in the Business Rescue and also in liquidation of companies.

RESULTS, DISCUSSION AND INTERPRETATION OF FINDINGS

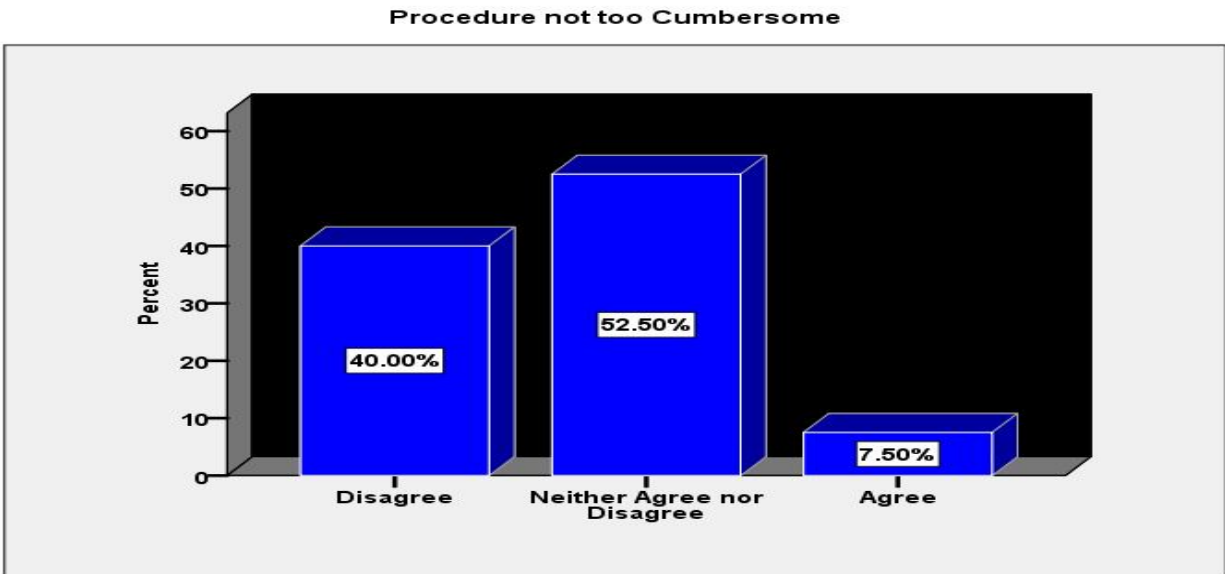
Descriptive Statistics

Figure 4.1: Criterion for business rescue application eloquent and feasible.



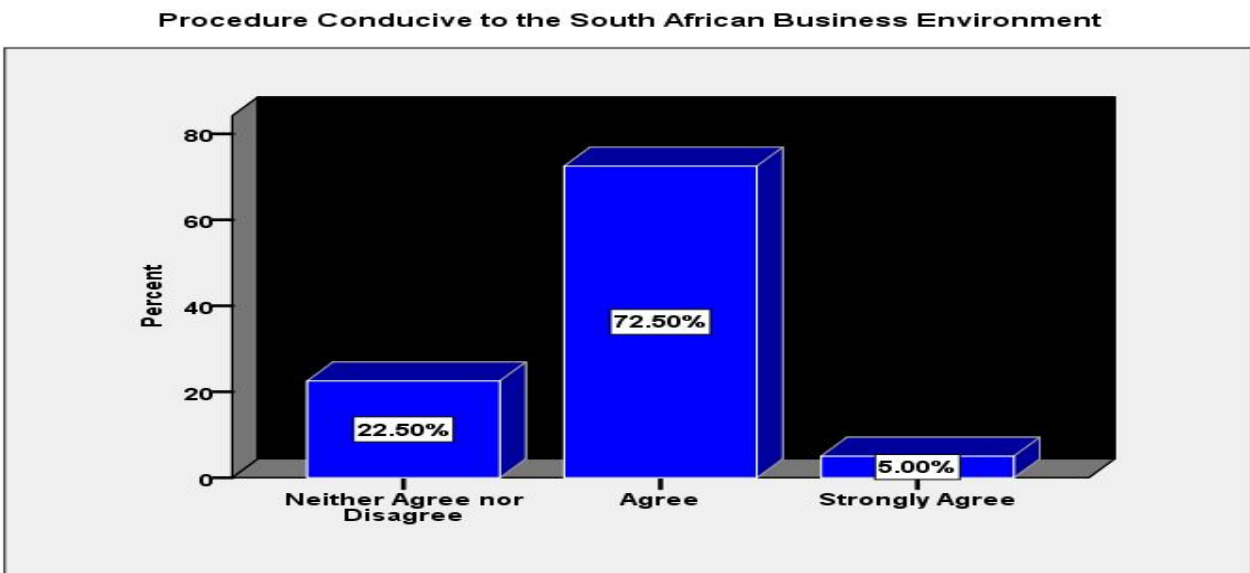
According to Figure 4.1, 42.50% of the participants agreed that the criteria for Business Rescue applications are eloquent and feasible. This suggests that the criteria may be appropriate for successful completion by potential applicants. However, approximately 32.50% neither disagreed nor agreed, indicating perhaps that the application may be cumbersome or enables feasible completion by applicants. Charles (2014:1) stated that Business Rescue being in its infancy stage in South African Law; many of the legislative provisions have not yet been tested by courts and in a number of cases, contradictory judgments have certainly not helped its development in order to clarify ambiguity. This may also depend on the type of business in question and the amount of information required, as some instances may require a more extensive application process than others.

Figure 4.2: Business rescue procedure not too cumbersome.



Based on the results in Figure 4.2, the highest proportion of respondents neither agreed nor disagreed which is 52.50%, providing an indication that the Business Rescue procedure may be moderately cumbersome or that it is cumbersome in some instances and not others. Levenstein (2011:3) stated that the entire Business Rescue procedure is very court driven and therefore may become cumbersome due to the backlog of matters in our courts (no specialised business recovery courts have been proposed at this stage). However, 40% disagreed with the item, suggesting that this proportion of the participants perceive the procedure as, at the very least, somewhat cumbersome to go through. This, again, may be based on the particular situation, as certain Business Rescue applications and procedures may be more cumbersome than others.

Figure 4.3: Business rescue procedure conducive to the south african business environment.



Examining Figure 4.3, 72.50% of the participants (almost three quarters) reported agreeing that the procedure is conducive to the South African business environment. This is a positive indication, as particular policies, procedures, and systems of implementation need to be appropriately contextualised within the environment to which they are applied. This, based on the participants' general response trend, appears to be the case with the Business Rescue procedure. Levenstein (2011:1) stated that Chapter 6 of the Act which deals with Business Rescue effectively replaces the existing judicial management provisions of the old Companies Act 61 of 1973 with a modern Business Rescue regime.

Figure 4.4: Business rescue procedure received positively by South African companies.

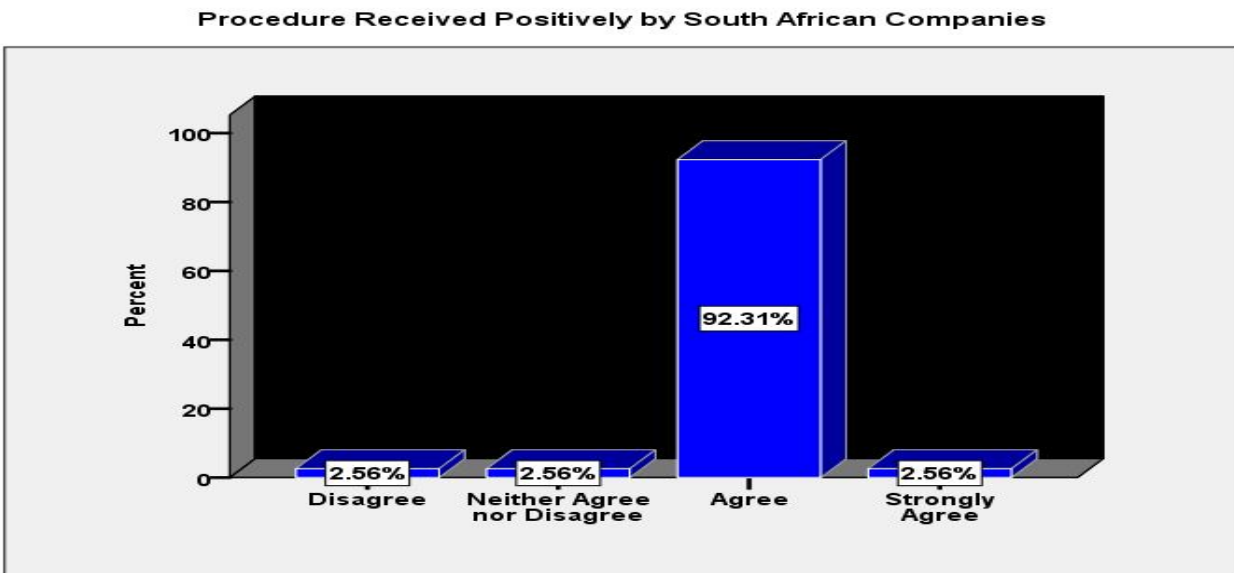
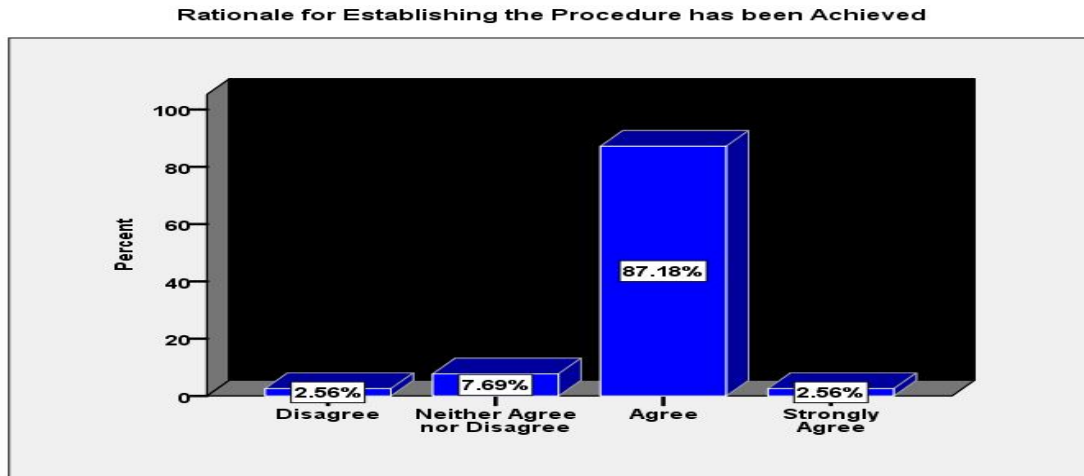


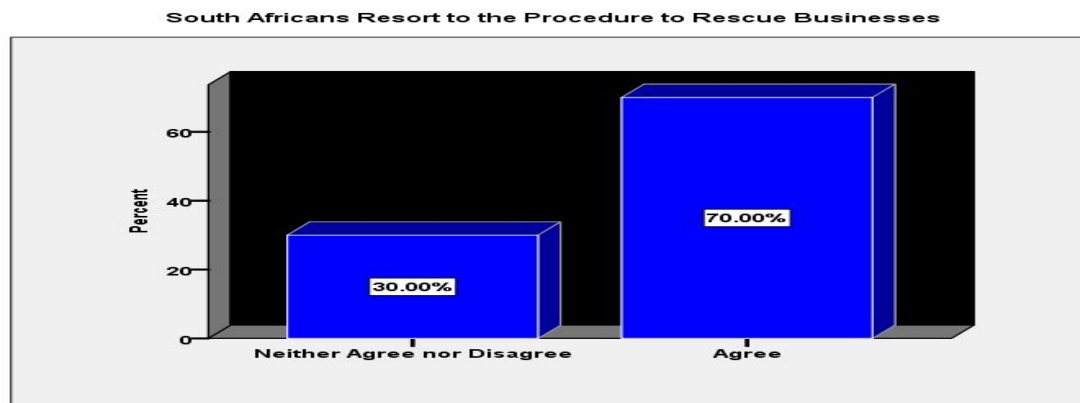
Figure 4.4 examined whether the participants considered the procedure to be positively received by South African companies. 92.31% respondents agreed that the procedure is received positively, which suggests that the procedure is considered to be associated with positive benefits and outcomes. The general indication that the procedure is catered to a South African context (see Figure 4.3) provides some explanation or reason for the positive reception, as the procedure relates to and may have a role to play in the country and provide tangible benefits to those that engage in the procedure. Harris (2012:1) reported that the pace at which company liquidation are decreasing accelerated by 20.2% in August 2012, 28.5% September 2012 and 35.3% in October 2012, this indicated that more companies are benefiting from Business Rescue laws.

Figure 4.5: Rationale for establishing the procedure has been achieved.



According to Figure 4.5, almost 90% of the participants indicated that the rationale for establishing the procedure has been achieved. This is an essential finding, as without achieving the goals and objectives associated with developing such a procedure there would be little use and value in using the procedure. Wassman (2014:1) stated that Business Rescue has been an alternative to liquidation of several well-known entities such as 1time and Top TV. The reason for the success may be based, in part, on the apparent development and implementation with South African factors considered (see Figure 4.3) as well as the positive reception towards the procedure (see Figure 4.4). Nonetheless, the notion that the procedure is accomplishing what it has been established to do is an encouraging indication of positive outcomes for the Business Rescue process.

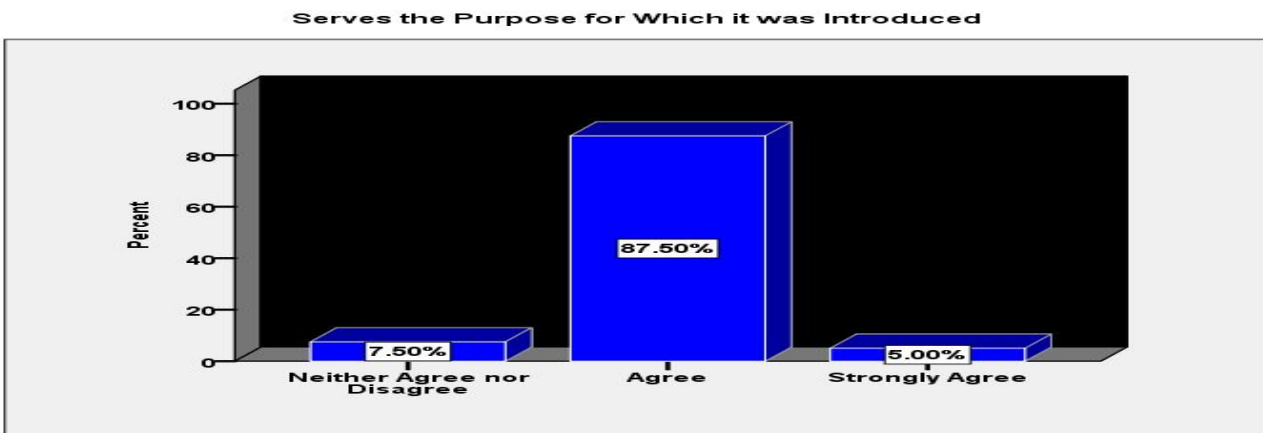
Figure 4.6: South Africans resort to the procedure to rescue businesses.



Examining the response trend in Figure 4.6, 70% of the participants indicated that South African businesses resort to the Business Rescue procedure to rescue their businesses. This suggests that

businesses are aware of the option that is available to them and the sense that businesses are likely to approach this option if experiencing challenges in operating their businesses. The fact that the decrease in the number of liquidation has been driven mainly by voluntary liquidations is indicative that the Business Rescue procedure is taking hold and that there has been an increase in the number of companies seeking assistance, Harris (2012:1). The Business Rescue procedure can only be a success if businesses actually engage and utilise the approach when appropriate, and this appears to be the case in South Africa.

Figure 4.7: Serves the purpose for which it was introduced.



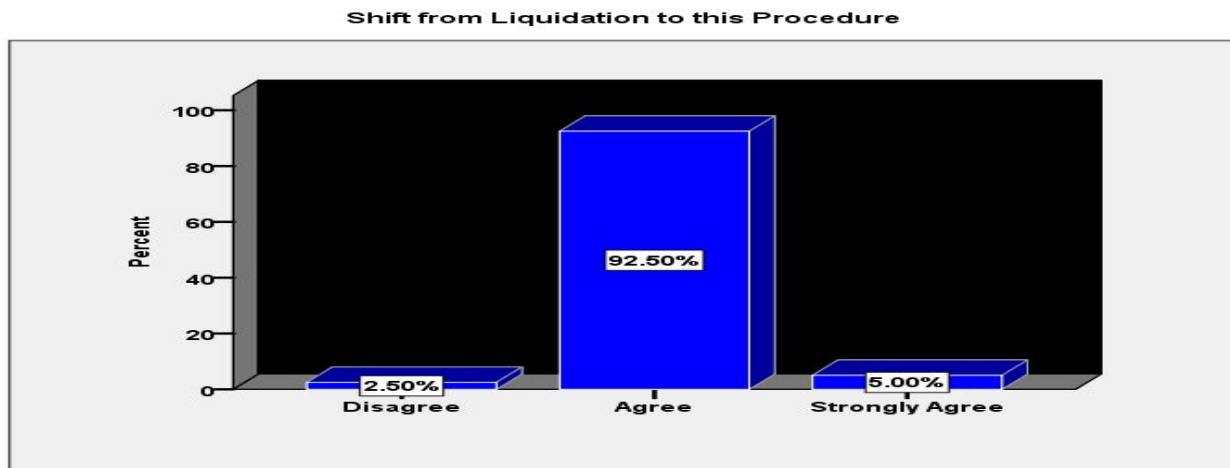
Overwhelmingly, 87.50% of the responses to the item in Figure 4.7 suggest that the procedure serves the primary purpose for which it was introduced. This coincides with Figure 4.5, which examined whether the objective and goal of the Business Rescue procedure has been achieved. This, again, is a critical indicator, as the major aim of any policy, initiative, or procedure needs to be attained in order for such actions to be successful and add value to society, and, in this case, South African businesses. Based on this finding, it would appear that the Business Rescue procedure has provided a number of benefits to businesses that are experiencing challenges and require support.

Figure 4.8: South African businessmen resort to this procedure to rescue their businesses.



In a similar manner to Figure 4.7, 65% of the respondents agreed that South African businesses resort to the Business Rescue procedure in order to rescue and sustain their businesses (Figure 4.8). Thus, it appears as though the Business Rescue approach is an essential component for ensuring that businesses continue to operate and remain in business. It may be one of the primary ways in which businesses seek or attempt to remain in business through the support of the procedure. Therefore, it would appear as though the Business Rescue procedure is important, is utilised extensively when necessary, and may contribute to the economic climate and sustainability of local businesses and South Africa.

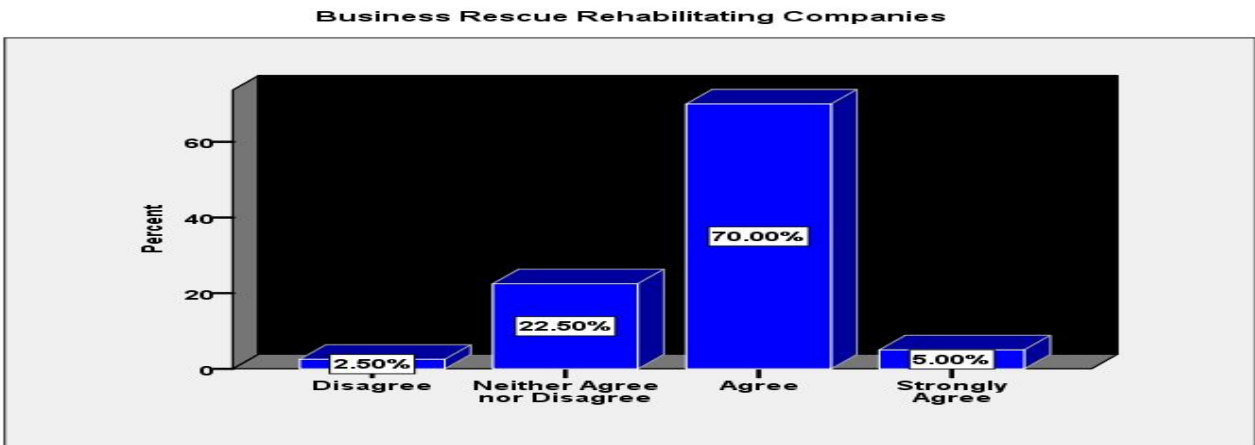
Figure 4.9: Shift from liquidation to this procedure.



Interestingly, the responses in Figure 4.9 indicate that the overwhelming 92.50% of the respondents suggest that there has been a shift among businesses from going through liquidation to utilising the Business Rescue process. This suggests that the purpose of the Business Rescue procedure, to assist in sustaining particular businesses, is being achieved. As a result, more businesses that are experiencing challenges and difficult periods may be more likely to remain in operation, and, perhaps, recover through this procedure. This contrasts the liquidation process in which a business is unlikely to recover, resulting in a range of economic effects, including job loss and unemployment. The Business Rescue alternative appears to be the preferred choice when businesses begin to go through financial problems.

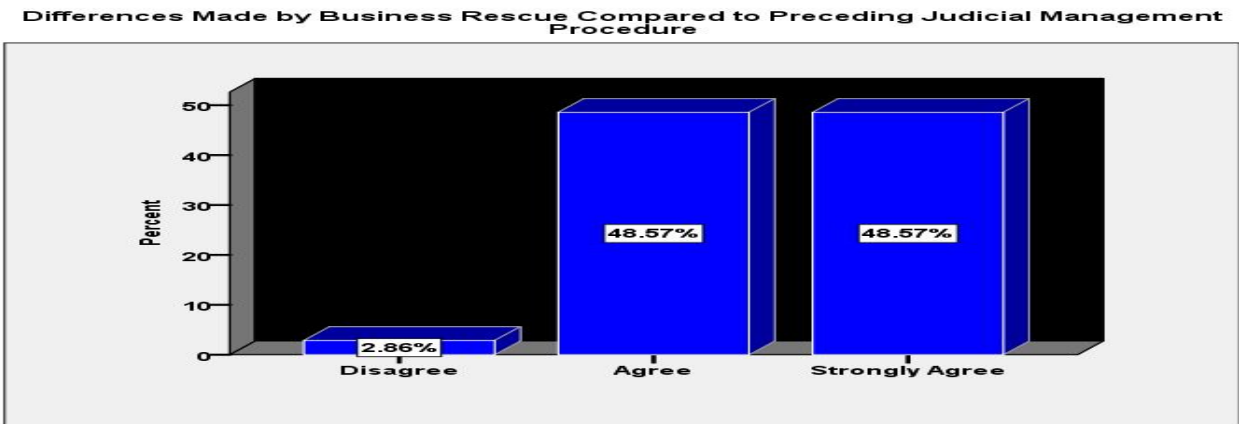
Levenstein (2013:29) stated that there has been a move away from a culture of liquidation to a culture of rescue, in that if a company is not able to be restored to a position of solvency, then the next best options is for it to at achieve best returns.

Figure 4.10: Business rescue rehabilitating companies.



According to Figure 4.10, 70% of the participants consider the Business Rescue approach is rehabilitating companies. Thus, not only are businesses utilising the procedure and attempting to use the necessary channel to remain in business, the Business Rescue approach appears to be successful in that it enables companies to continue operating. This seems to be the fundamental reason behind why the Business Rescue process has been positively received as well as the indications that it has achieved its objectives, as the critical purpose of the Business Rescue process would be to ensure that as many businesses that go through the procedure are rehabilitated and recover. If this was not the case, the procedure would provide little value and the process would largely be an expense of time and financial resources.

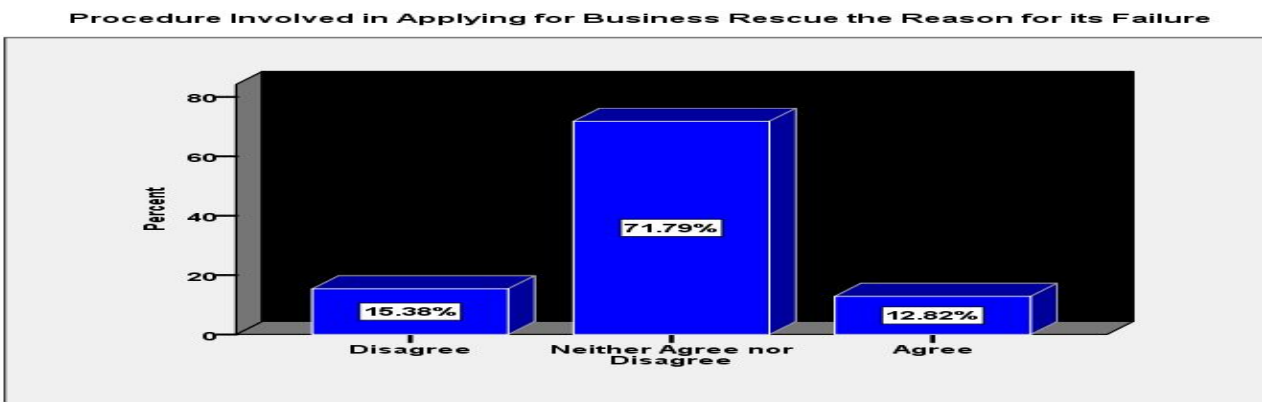
Figure 4.11: Differences made by business rescue compared to preceding judicial management procedure.



Examining Figure 4.11, 48.57% of the participants reported agreeing or strongly agreeing that the introduction and use of the Business Rescue approach has resulted in differences that have been made in comparison to the judicial management procedure that was used previously. This provides additional support for the important use of the procedure in sustaining businesses, and it appears as though the procedure is superior to the prior approach that was used. This superiority may be based, in part, on the suggestion that the Business Rescue procedure has been able to successfully rehabilitate businesses as intended (see Figure 4.10). Bradstreet (2010:197) also

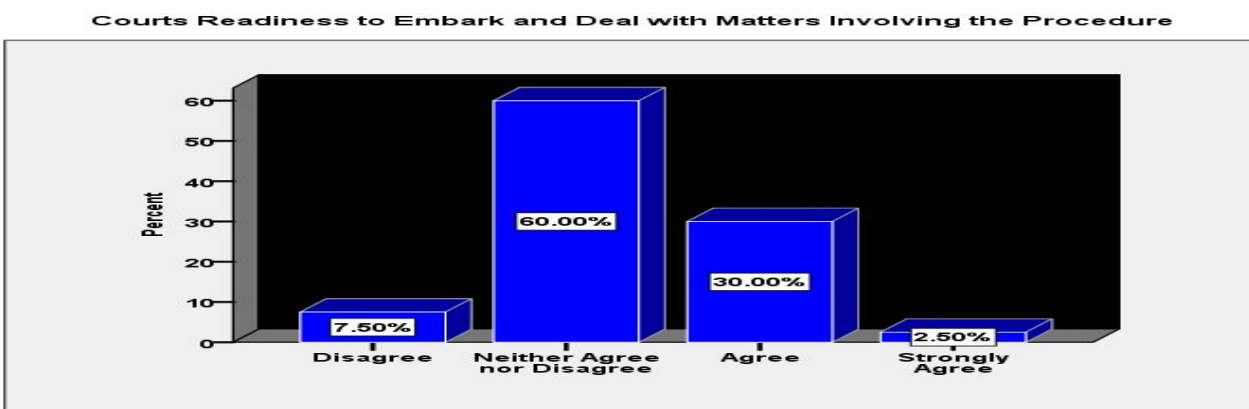
submitted that the provision of Chapter 6 of the Companies Act 2008 have been hailed as a vast improvement on the previous judicial management mechanism.

Figure 4.12: Procedure involved in applying for business rescue the reason for its failure.



The item in Figure 4.12 examined whether the procedure involved in applying for Business Rescue is the reason for some of the failures of the approach. Almost three quarters, 71.79% of the participants neither agreed nor disagreed, possibly suggesting that it may be difficult to pinpoint this as a single area of concern for any failures that have occurred. Although the participants indicated that the process may be cumbersome (see Figure 4.2), a substantial proportion reported that the Business Rescue procedure has been successful in rehabilitating businesses (see Figure 4.10) and the goals of the procedure have been achieved (see Figure 4.5). Perhaps there are other reasons for any failures that have been identified, which may need to be examined in order to ensure that all businesses that go through the process are successfully rehabilitated.

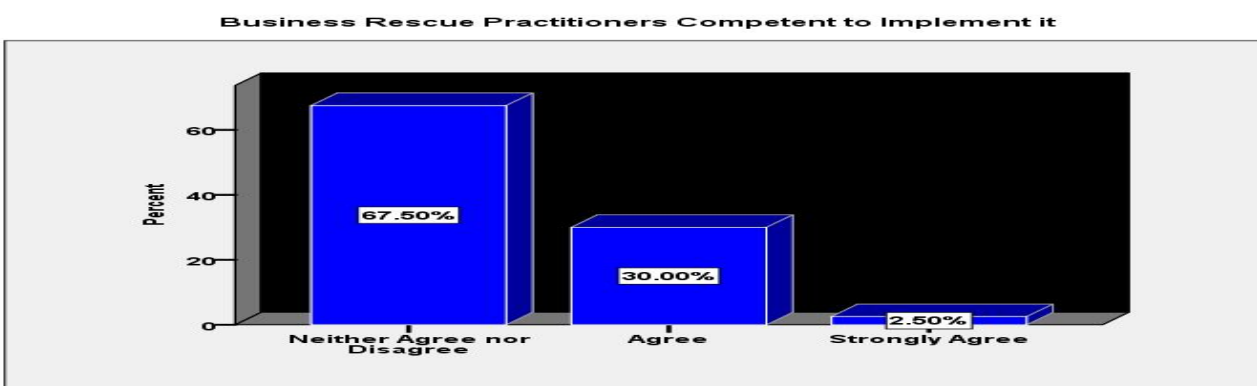
Figure 4.13: Courts readiness to embark and deal with matters involving the procedure.



According to Figure 4.13, 60% of the participants neither agreed nor disagreed that the courts are ready to embark and deal with matters involving this procedure. This may be because many of the participants may not be employed or work within judicial settings, making it difficult to determine readiness or lack thereof. This may also be caused by the fact that Business Rescue is fairly new and as it is used or implemented more often, the judicial will be able to interpret BR more clearly and set precedence for future reference. Pretorius (2014:1) stated that another challenge is that there are no designated and dedicated courts with specialised judges to hear

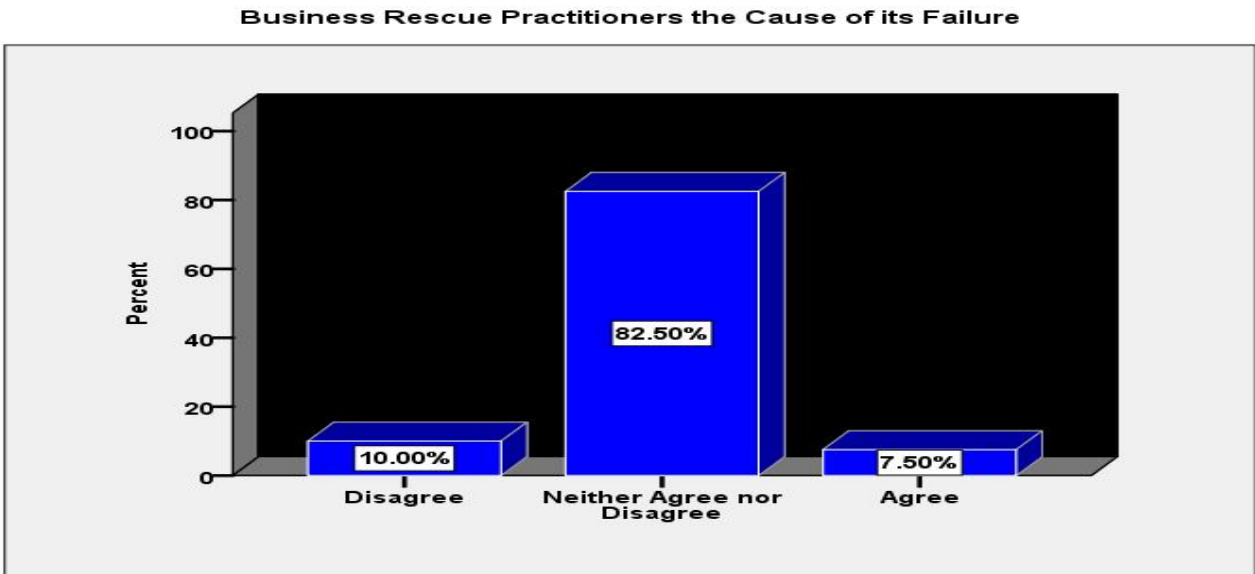
these matters as a result there are challenges in court in making the BR procedure effective. However, 30% of the respondents did agree, indicating that the courts may indeed possess the capacity and knowledge to effectively deal with matters that involve the procedure. It may be necessary to examine, from a judicial perspective, the extent to which courts are appropriately configured for this particular procedure.

Figure 4.14: Business rescue practitioners competent to implement it.



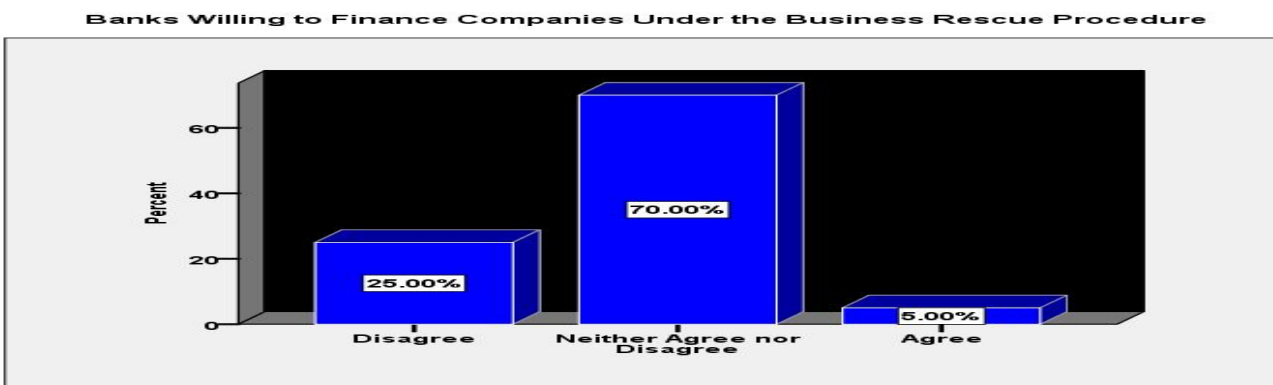
Similarly to Figure 4.14, 67.50% of the participants neither agreed nor disagreed that the Business Rescue practitioners are competent to implement the procedure. This, again, may relate to the level of involvement and experience the BRP, as many may not be directly involved in providing such services or do not have much experience in the field.. On the other hand, perhaps the novelty of the procedure has created some unease and a lack of definitive determination of whether Business Rescue practitioners are competent. According to Pretorius (2012:1) another cause of failure is BRP who are incompetent to handle the Business Rescue process effectively and they have also been accused of dragging the process in order to earn more fees even if there is no prospect of the company being rehabilitated. Levels of competency may need to be assessed over time, or it may also be useful to examine, from a practitioner perspective, the types of skills they consider important for the Business Rescue procedure as well as the extent to which they possess such necessary skills.

Figure 4.15: Business rescue practitioners the cause of its failure.



The general response pattern in Figure 4.15 indicates that the 62.50% of the participants neither agreed nor disagreed that the Business Rescue practitioners are the cause of the failure of the procedure. Similarly to the response pattern to whether the procedure involved in the application process is the reason for the failure of the procedure (see Figure 4.13), it may be difficult to determine the exact reasons for the failures that have arisen. On the other hand, without directly being aware of the competency levels of Business Rescue practitioners to effectively implement the procedure (see Figure 4.15); it would be a challenge to definitively determine whether such practitioners are responsible, in part or full, for the failures that have been evidenced. Cary (2014:1) stated that the stumbling block the Business Rescue process faces is the perception that BR are opportunist and the cause of BR procedure as they are focused more on generating a handsome fee instead of genuinely seeking to rescue the business. This may be an area requiring a more in-depth assessment.

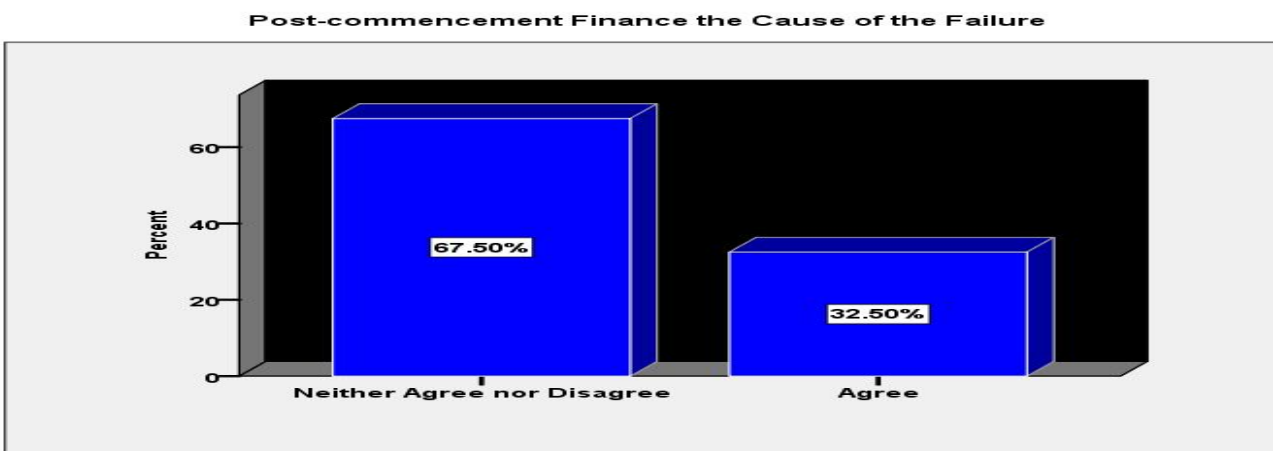
Figure 4.16: Banks willing to finance companies under the business rescue procedure.



Interestingly, Figure 4.16 indicates that 70% of the respondents neither agreed nor disagreed that the banks are willing to finance companies under the Business Rescue procedure. The response pattern may be due to insufficient knowledge of the participants in relation to whether banks are likely to provide financing or it may suggest that some banks provide financing and others not or that they may finance certain situations and not others. However, 25% expressed disagreement, suggesting that, for a number of cases, banks may be unwilling to finance companies that are under the Business Rescue procedure.

Charles (2014:1) submitted that banks have also been cautious about approving Business Rescue proposal for financially distressed businesses and the lack of access to post commencement finance has been one of the biggest hurdles a financially distressed business under Business Rescue faces, making it one of the major causes of many failed rescue attempts.

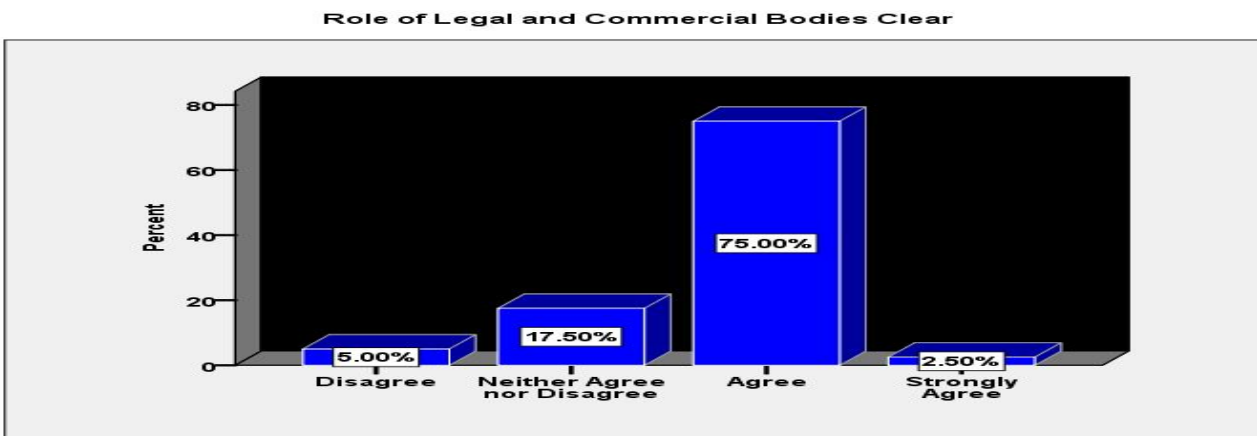
Figure 4.17: Post-commencement finance the cause of the failure.



According to Figure 4.17, 67.50% of the participants neither agreed nor disagreed that the post-commencement finance was the cause of the failures that have been evidenced. This may be due to a lack of direct information about the financial circumstances post-commencement or it may suggest that there are several reasons for the failures that have occurred, with one single factor alone not sufficient for explaining the causes of the failures exhibited. Du Preez (2014:2) is of the opinion that limited sources of funding are a challenge, this contrast strongly to markets like USA where there are firms that specialise in finance for distressed companies. Perhaps, a

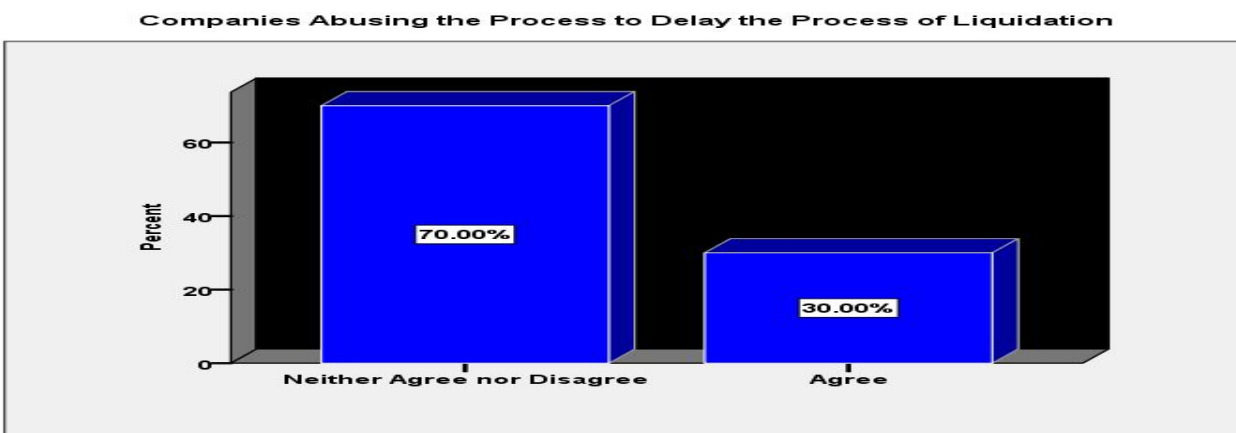
thorough assessment of the causes of the failures is necessary in order to obtain a comprehensive indication of the reason for the failures that have been experienced.

Figure 4.18: Role of legal and commercial bodies clear.



The response pattern in Figure 4.18 denotes that three quarters, 75% of the respondents agree that the role of the legal and commercial bodies is clear. Having clearly designated roles and responsibilities is critical in any commercial and legal exchange or interface, with such clarity likely to contribute to the success of the engagements and outcomes. Thus, this appears to be an important finding for the entire Business Rescue procedure, as legal teams and commercial entities are likely to have clarity about what is expected of them and their role in the process.

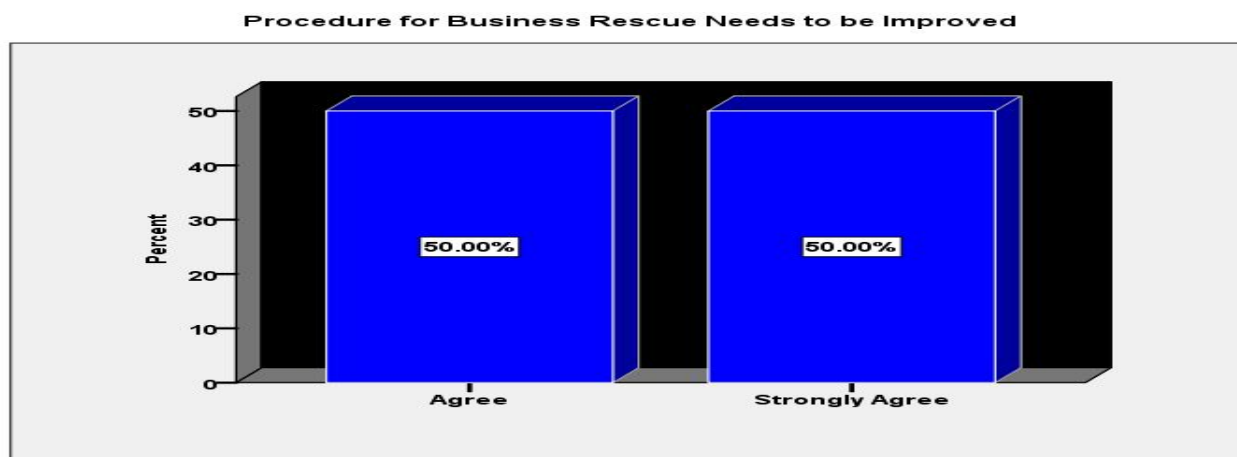
Figure 4.19: Companies abusing the process to delay the process of liquidation.



There are companies who file invalid applications for business rescue, this can also impact to other companies which given a chance would have embarked on the process successfully (Pretorius and Rosslyn-Smith, 2014:18). Based on the result in Figure 4.19, 70% of the respondents neither agreed nor disagreed that companies are abusing the business rescues procedure in order to delay the process of liquidation. It may be difficult to determine in the first place, the underlying reasons for engaging in business rescue, which may be one reason for the general response pattern. However, some businesses may be engaging in the process as a delay to the liquidation process, whereas others may not, which may explain the findings reported in Figure 4.20. With 30% agreeing though, it would appear that on some level, businesses may be engaging in the Business Rescue procedure in order to delay liquidation. With the success of the

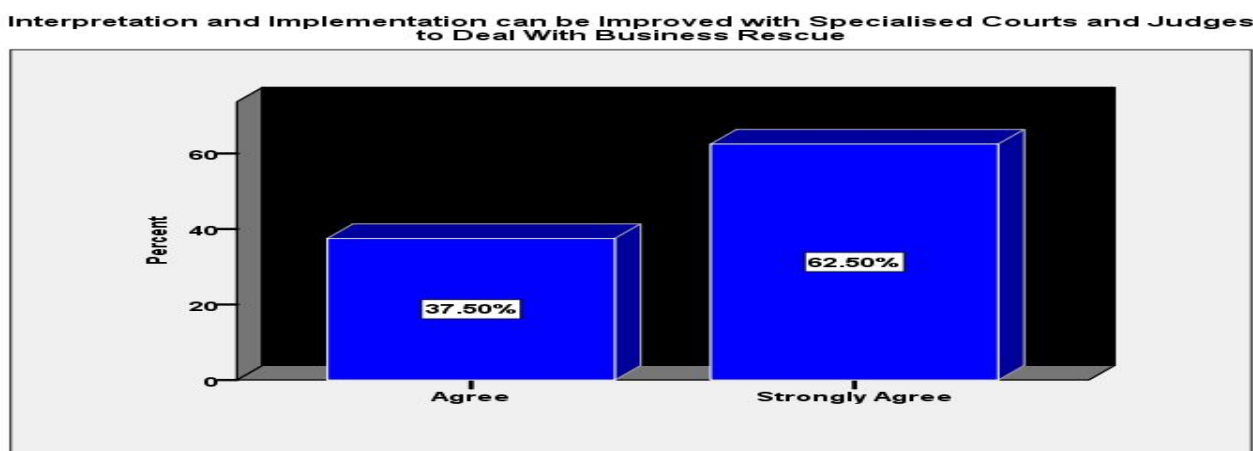
Business Rescue process indicated, however, it may be that some businesses with original intentions to solely delay liquidation may have been successfully rehabilitated.

Figure 4.20: Procedure for business rescue needs to be improved.



In relation to whether the procedure associated with Business Rescue needs to be improved, 50% of participants either agreed or strongly agreed that improvements can be made to the process. Thus, although it appears as though the Business Rescue procedure is achieving its objectives and goals (see Figure 4.5), as what it intends to achieve (see Figure 4.7), and is reportedly successful at rehabilitating businesses (see Figure 4.10), there appear to be areas in which the business procedure may be improved and enhanced. Perhaps, the areas that were examined as potential pitfalls or reasons for various Business Rescue failures (e.g., see Figures 4.16 and 4.18) may be appropriate areas to examine in order to determine whether any prospective improvements may be made.

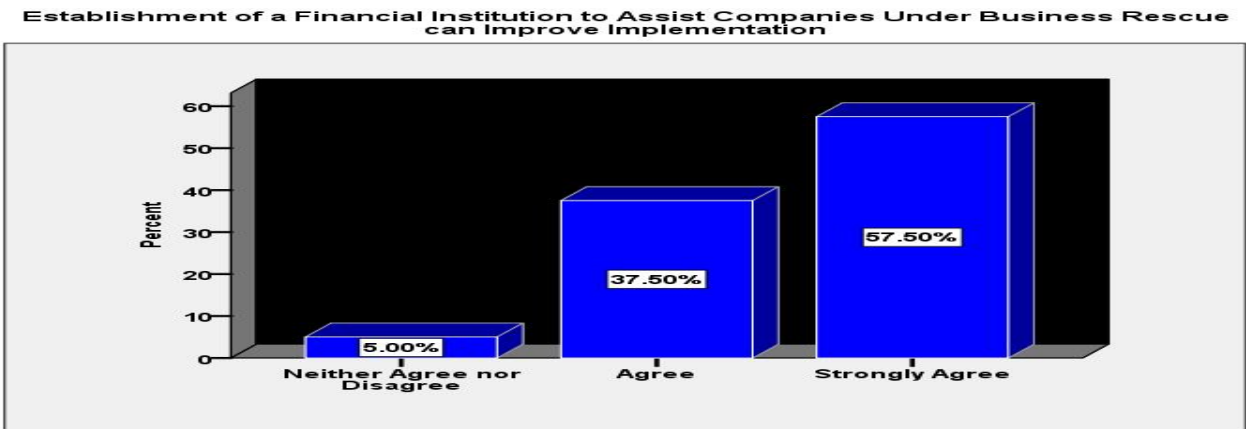
Figure 4.21: Interpretation and implementation can be improved with specialised courts and judges to deal with business rescue.



Due to the indication that the Business Rescue procedure may be improved (see Figure 4.20), Figure 4.21 determined the extent to which the participants, 62.50% felt that improved specialised courts and judges to deal with Business Rescue may enhance the interpretation and implementation of the procedure. Indeed, all of the participants either agreed or strongly agreed. Therefore, at least from the participants' perspectives, this would be an important area to address

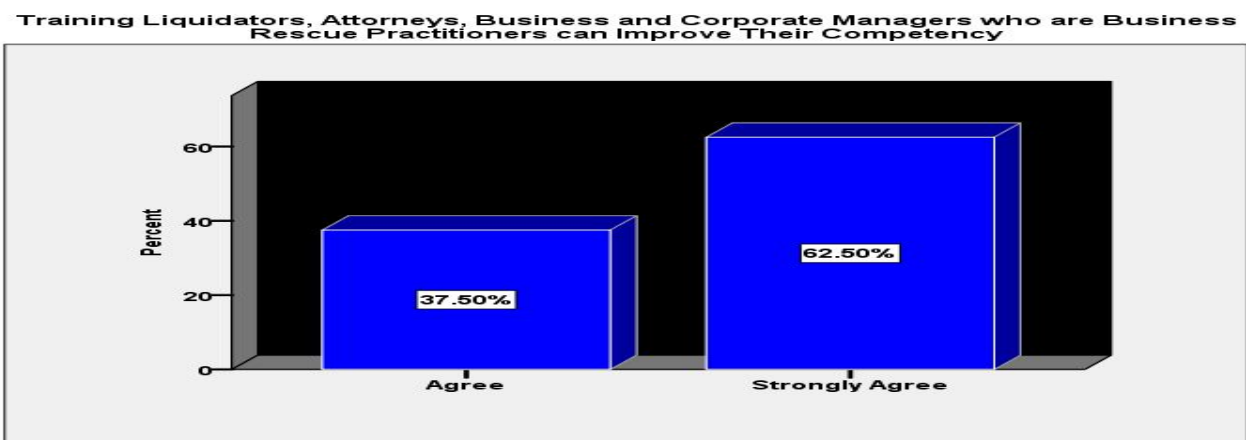
and examine in order to determine whether benefits would be attained for the Business Rescue process and increase the likelihood of positive post-procedure outcomes amongst the businesses that go through the process.

Figure 4.22: Establishment of a financial institution to assist companies under business rescue can improve implementation.



According to Figure 4.22, 57.50% of the respondents either agreed or strongly agreed that establishing a financial institution to assist companies under Business Rescue can improve the implementation of the procedure. Considering many of the respondents neither agreed nor disagreed in relation to whether financial institutions are willing to finance businesses that are going through the process of Business Rescue (see Figure 4.17), it may be necessary to investigate this further, and, as the participants suggest, develop a process through which such businesses are able to obtain financial support while engaging in the Business Rescue process.

Figure 4.23: Training liquidators, attorneys, business, and corporate managers who are business rescue practitioners can improve their competency.



According to Figure 4.23, 62.50% of the respondents either agreed or strongly agreed that training liquidators, attorneys, businesses, and corporate managers who are Business Rescue practitioners can improve their competency. Considering many of the respondents neither nor disagreed in relation to Business Rescue practitioners are the cause of various failures (see

Figure 4.16), it may be necessary to investigate this further, and, as the participants suggest, provide training and developmental platforms for the relevant and important parties to acquire the necessary knowledge and skill in order to contribute to the process and the Business Rescue outcome in a manner that is most conducive to facilitating business rehabilitation. Cary (2014:2) stated that education and creation of awareness in the business fraternity will contribute to developing Business Rescue into a viable solution to creditors and financially distressed businesses.

Reliability

Cronbach's alpha was computed for the outlined 24 items in the questionnaire. The finding indicated acceptable internal consistency and reliability for the questionnaire, $\alpha = .774$. Hence, the questionnaire possessed appropriate reliability for the use of each of the items included in the questionnaire.

4.4 Spearman Correlations

Spearman correlations were performed between each of the items included in the particular and relevant components of the questionnaire. Therefore, the Spearman correlations were computed according to the sections in which the items were included.

4.4.1 Nature and Requirements for Applying and Implementing Business Rescue

The four items included in this particular section of the questionnaire were used to compute Spearman correlations and determine the extent to which each variable related to one another. The descriptive statistics for each item are included in Table 4.1. The Spearman correlations are outlined in Table 4.2.

Table 4.1: Descriptive statistics for nature and requirements for applying and implementing business rescue items.

Variable	<i>N</i>	<i>M</i>	<i>SD</i>
Criterion for Business Rescue Application Eloquent and Feasible	40	3.25	.84
Procedure not too Cumbersome	40	2.68	.62
Procedure Conducive to the South African Business Environment	40	3.83	.50
Procedure Received Positively by South African Companies	39	3.95	.39

Table 4.2: Spearman correlations between nature and requirements for applying and implementing business rescue items.

Item	Procedure not too Cumbersome	Procedure Conducive to the South African Business Environment	Procedure Received Positively by South African Companies
Criterion for Business Rescue Application	-.076	.097	.112

Eloquent and Feasible			
Procedure not too Cumbersome	-	-.385*	-.179
Procedure Conducive to the South African Business Environment	-	-	.328*

Note. * $p < .05$.

Examining Table 4.2, the correlation between Procedure not too Cumbersome and Procedure Conducive to the South African Business Environment was negative and statistically significant ($r = -.385$), indicating higher scores on one variable are associated with lower scores on the other variable. In relation to these variables, the result indicates that when perceptions about the procedure not being cumbersome went down, perceptions of whether the procedure was conducive to the South African business environment increased. The relationship between Procedure Conducive to the South African Business Environment and Procedure Received Positively by South African Companies ($r = .328$) was positive and statistically significant, signifying that higher perceptions of whether the Business Rescue procedure is considered conducive to the South African business environment is associated with greater levels of the procedure being received positively by South African companies. The remaining correlations were not statistically significant, indicating the absence of a relationship between the variables.

Purpose of Business Rescue and Extent to which it has achieved the Purpose

The five items included in this particular section of the questionnaire were used to compute Spearman correlations and determine the extent to which each variable related to one another. The descriptive statistics for each item are included in Table 4.3. The Spearman correlations are outlined in Table 4.4.

Table 4.3: Descriptive statistics for purpose of business rescue and extent to which it has achieved the purpose items.

Variable	N	M	SD
Rationale for Establishing the Procedure has been Achieved	39	3.90	.45
South Africans Resort to the Procedure to Rescue Businesses	40	3.70	.46
Serves the Purpose for Which it was Introduced	40	3.98	.46
South African Businessmen Resort to this Procedure to Rescue their Businesses	40	3.65	.48
Shift from Liquidation to this Procedure	40	4.00	.39

Table 4.4: Spearman correlations between purpose of business rescue and extent to which it has achieved the purpose items.

Item	South Africans Resort to the Procedure to Rescue Businesses	Serves the Purpose for Which it was Introduced	South African Businessmen Resort to this Procedure to Rescue their Businesses	Shift from Liquidation to this Procedure
Rationale for Establishing the Procedure has been Achieved	.319*	.810**	.155	.308
South Africans Resort to the Procedure to Rescue Businesses	-	.263	.320*	-.140
Serves the Purpose for Which it was Introduced	-	-	.249	.524**
South African Businessmen Resort to this Procedure to Rescue their Businesses	-	-	-	.065

Note. * $p < .05$, ** $p < .01$.

Examining Table 4.4, the correlation between Rationale for Establishing the Procedure has been Achieved and South Africans Resort to the Procedure to Rescue Businesses was positive and statistically significant ($r = .319$), indicating higher scores on one variable are associated with higher scores on the other variable. In relation to these variables, greater levels of South African businesses resorting to Business Rescue are associated with greater levels of the achievement of the Business Rescue rationale for implementation. Thus, as more businesses begin to use the procedure as opposed to others, the goals and objectives of the Business Rescue procedure are more likely to be achieved. The relationship between Rationale for Establishing the Procedure has been Achieved and Serves the Purpose for which it was Introduced ($r = .810$) was positive and statistically significant, a finding that compares similarly to the preceding correlation.

Therefore, if the rationale for establishing the procedure had been achieved, then it is more likely that the procedure serves the purpose for which it was introduced or established. In addition, Serves the Purpose for which it was Introduced was positive and significantly correlated with Shift from Liquidation to this Procedure ($r = .524$), denoting that, perhaps, one of the purposes of introducing the Business Rescue procedure was to reduce the number of liquidations. If this is the case, then introducing the procedure for this reason has aided in moving businesses with financial difficulties to rescue procedures as opposed to liquidation.

4.4.3 Effectiveness of Business Rescue

The eleven items included in this particular section of the questionnaire were used to compute Spearman correlations and determine the extent to which each variable related to one another. The descriptive statistics for each item are included in Table 4.5. The Spearman correlations are outlined in Table 4.6.

Table 4.5: Descriptive statistics for effectiveness of business rescue items.

Variable	N	M	SD
Business Rescue Rehabilitating Companies	40	3.78	.58
Shift from Liquidation to this Procedure	40	3.98	.42
Differences Made by Business Rescue Compared to Preceding Judicial Management Procedure	35	4.43	.66
Procedure Involved in Applying for Business Rescue the Reason for its Failure	39	2.97	.54
Courts Readiness to Embark and Deal with Matters Involving the Procedure	40	3.28	.64
Business Rescue Practitioners Competent to Implement it	40	3.35	.53
Business Rescue Practitioners the Cause of its Failure	40	2.98	.42
Banks Willing to Finance Companies Under the Business Rescue Procedure	40	2.80	.52
Post-commencement Finance the Cause of the Failure	40	3.30	.47
Role of Legal and Commercial Bodies Clear	40	3.75	.59
Companies Abusing the Process to Delay the Process of Liquidation	40	3.30	.46

Table 4.6: Spearman correlations between effectiveness of business rescue items.

Item	Q11	Q12	Q13	Q14	Q15	Q16	Q17	Q18	Q19	Q20
Q10	.201	.082	-.051	.045	.024	-.071	.251	-.262	-.410**	-.074
Q11	-	.412*	.454**	-.283	-.168	.197	-.158	-.173	.000	-.177
Q12	-	-	.367*	-.431**	-.149	.371*	-.214	.035	-.045	-.271
Q13	-	-	-	-.407**	-.266	.459**	-.216	.138	.333*	-.077
Q14	-	-	-	-	.567**	-.520**	.334*	-.465**	-.018	-.106

Q15	-	-	-	-	-	-.498**	.192	-.258	.056	-.226
Q16	-	-	-	-	-	-	-.025	.294	.181	.168
Q17	-	-	-	-	-	-	-	-.468**	-.066	-.053
Q18	-	-	-	-	-	-	-	-	.092	.245
Q19	-	-	-	-	-	-	-	-	-	-.162

Note. Item numbering corresponds with questionnaire items. * $P < .05$, ** $p < .01$.

Table 4.6 indicates a number of statistically significant correlations between the Effectiveness of the Business Rescue items. In particular, Shift from Liquidation to this Procedure was significantly and positively correlated with Differences Made by Business Rescue Compared to Preceding Judicial Management Procedure ($r = .412$), indicating that greater perceptions of a shift towards the Business Rescue procedure are related to higher levels of the differences that have been made in moving to the Business Rescue procedure in comparison to the judicial management approach. In addition, Procedure Involved in Applying for Business Rescue the Reason for its Failure was positively and significantly correlated with Business Rescue Practitioners the Cause of its Failure ($r = .459$).

Thus, according to the participants' perceptions, there may be some link between these factors influencing failure experiences in the Business Rescue process such that greater levels of perceived failure along one variable are associated with greater levels of perceived failure along the other variable. Interestingly, Courts Readiness to Embark and Deal with Matters Involving the Procedure was significantly and positively correlated with Business Rescue Practitioners Competent to Implement it ($r = .567$), possibly indicating that practitioners and courts have an interrelated role and relationship with one another.

That is, competency levels are required among these two parties in order to facilitate the process appropriately, and, possibly due to their interactions as part of the Business Rescue process, these two parties interact, learn, develop, and complete the process together, thereby influencing one another and the Business Rescue procedure. Business Rescue Practitioners Competent to Implement it was negatively and significantly correlated with Business Rescue Practitioners the Cause of its Failure ($r = -.498$), denoting that lower levels of Business Rescue practitioner competency levels are associated with higher levels of perceived Business Rescue practitioners responsibility as a factor affecting the failure of Business Rescue experiences.

Recommendations and Improvement of Business Rescue

The four items included in this particular section of the questionnaire were used to compute Spearman correlations and determine the extent to which each variable related to one another. The descriptive statistics for each item are included in Table 4.7. The Spearman correlations are outlined in Table 4.8.

Examining Table 4.8, Procedure for Business Rescue Needs to be Improved was positive and significantly correlated with Interpretation and Implementation can be Improved with Specialised Courts and Judges to Deal With Business Rescue ($r = .671$), Establishment of a

Financial Institution to Assist Companies Under Business Rescue can Improve Implementation ($r = .562$), and Training Liquidators, Attorneys, Business, and Corporate Managers who are Business Rescue Practitioners can Improve Their Competency ($r = .568$). These results suggest that higher levels of the need to improve the Business Rescue process are associated with greater perceptions about whether the proposed areas of improvement are feasible.

In addition, the recommended areas of improvement that were examined for participants perceptions were all positively and significantly correlated with one another ($r = .893, .893, .897$), indicating that improvements in one or more of the areas may result in improvements in one or more of the other recommended areas. Thus, these areas of suggested or recommended improvement may result in benefits to the Business Rescue process.

Table 4.7: Descriptive statistics for recommendations and improvement of business rescue items.

Variable	N	M	SD
Procedure for Business Rescue Needs to be Improved	40	4.50	.51
Interpretation and Implementation can be Improved with Specialized Courts and Judges to Deal With Business Rescue	40	4.63	.49
Establishment of a Financial Institution to Assist Companies Under Business Rescue can Improve Implementation	40	4.53	.60
Training Liquidators, Attorneys, Business, and Corporate Managers who are Business Rescue Practitioners can Improve Their Competency	40	4.63	.49

Table 4.8: Spearman correlations between recommendations and improvement of business rescue items.

Item	Interpretation and Implementation can be Improved with Specialized Courts and Judges to Deal With Business Rescue	Establishment of a Financial Institution to Assist Companies Under Business Rescue can Improve Implementation	Training Liquidators, Attorneys, Business, and Corporate Managers who are Business Rescue Practitioners can Improve Their Competency
Procedure for Business Rescue Needs to be Improved	.671**	.562**	.568**

Interpretation and Implementation can be Improved with Specialized Courts and Judges to Deal With Business Rescue	-	.897**	.893**
Establishment of a Financial Institution to Assist Companies Under Business Rescue can Improve Implementation	-	-	.897**

Note. * $p < .05$, ** $p < .01$.

4.5 Conclusion

The data obtained has answered the research questions this is in order to meet the research objectives of the study by way of questionnaires issued to participants. The data was presented in graphs and interpretation was made in order to explain the views of primary sources about the Nature of Business Rescue, the purpose, and the effectiveness of Business Rescue. The next chapter discusses the outcomes from the research, conclusion and recommendation for the study.

CONCLUSIONS AND RECOMMENDATIONS

Findings from the Study

Findings from the study will be discussed under two headings namely, findings from the literature review and findings from the primary research.

Findings from the Literature Review

Nature and Criteria of Business Rescue Process

An extensive review of relevant literature was gathered to assess how Business Rescue works and whether the process is eloquent and feasible to implement. Authors in the field of business fraternity have shed a light about the process of business rescue. Most have concluded that BR is a concept that has to be accepted as it has effectively replaced judicial management which was known for its failure. However BR has ambiguities and unclear procedures that need to be improved.

Recently, it has become apparent that courts are no longer faced with simplistic applications as envisioned by Section 131 whereby an affected person can, on application to the High Court, apply to have a company placed under BR (Wassman, 2014:1). Wassman (2014:1) further stated that this area of law is still largely uncharted; the courts have been faced with some cases that attempt to narrow the parameters and set the benchmark. Cary (2014:2) agreed with Wassman stating that BR being in its infancy stage in South African law, many legislative provisions in Chapter 6 have not yet been tested by the courts and in a number of cases, contradictory judgments have certainly not helped its development.

One can then conclude that BR process can be achieved successfully as time goes by and that because the legislation is fairly new, companies will be able to accept the concept and have full confidence in resorting to BR. Wassman (2014:1) state that the limited two year timeframe since 2011 has shown that instituting such proceedings is fairly onerous given that the guidelines in Chapter 6 of the Act are not always clear and certain benchmarks are yet to be determined.

Purpose, Extent and Effectiveness of Business Rescue

The study found that the purpose of BR is to maximise the likelihood of the company continuing in existence on a solvent basis or make better returns for creditors. BR was established in order to abolish its predecessor. Cary (2014:1) submitted that BR rescue has been a success even though the percentage of success was between 12-15%, even that percentage is a big achievement as compared to its predecessor.

According to the CIPC, in the first 10 months of 2014, 395 BR proceedings were recorded and the statistics suggests that the BR option is being utilised well but there has not been dramatic increase in figures over the last 3 years (Cary, 2014:2). The study also found that BR is effective and that was confirmed by Bradstreet (2010:197) who submitted that the provision of Chapter 6 of the Companies Act 2008 have been hailed as a vast improvement on the previous judicial management mechanism.

Factors that Cause Business Rescue to Fail

The study found that there are mainly 5 factors that may contribute to the failure of the process;

- Ambiguity in some provisions of the Act;
- Lack of specialised court and judges to clarify uncertainties;
- Abuse of the process by companies;
- Lack of PCF for business undergoing BR; and
- Competency of BRP.

Findings from the Primary Research

Nature and Criteria of Business Rescue

The findings from the primary research regarding the criteria of BR shows that 42.50% of participants agreed that it is eloquent and feasible even though there are shortcoming and pitfalls. 52.50% participants neither agreed nor disagreed that the procedure is cumbersome, and the reason for that was stated on the literature review that in some cases it may be cumbersome. Nonetheless, the procedure has been received positively and 92.31% participants agreed and 72.50% agreed that BR is conducive for South African Business Environment.

Purpose, Extent and Effectiveness of Business Rescue

90% of participants agreed that the rationale of BR has been achieved, 87.50% agreed that it serves the purpose. In responding to the extent in which BR has been used, 70% agreed and 90% agreed that has been a shift from Liquidation to BR. Participants deduced that BR is effective as it has improved compared to Judicial Management, 48.57% agreed, 48.57% strongly agreed and 70% agreed that BR is rehabilitating and therefore effective.

Factors that Cause Business Rescue to Fail

The participants, 71.79% neither agreed nor disagreed that the procedure is the reason for its failure and it can be concluded that it's difficult to pinpoint that the criteria as a single.90% neither agreed nor disagreed that courts are ready to hear the BR matters in court and that is inconclusive whether courts are the only cause reason for failure but in some cases, it has been argued that courts are not ready to embark on the process. 67.50% of the participants neither agreed nor disagreed that BRP are competent and 82.60% participants could not also confirm that BRP's are the cause of BR process to fail however in some extent, they are liable. Participants neither agreed nor disagreed with the fact that companies are abusing the process at the rate of 70% and lastly 70% participants could not agree or disagree that banks are not willing to finance companies under BR.

Recommendations

- It has been deduced that BR has brought a huge change in South African business environment however the criteria and the provisions of the Act have loopholes and that can only be rectified by the interpretation of our courts. It is then difficult to pave the way with current courts as they are not specialist in commercial or business courts that aim at recovering sinking companies. It is recommended that there should be courts and judges that will deal with these application and they will be able to clarify uncertainties;
- BRP have also been accused of contributing to the failure of the process even though they cannot be single pointed, they need to be trained and more stringent requirements need to be put into place if the existing ones are weak. A percentage of 62.50% strongly agreed that BRP need to be trained and 37.60% agreed, and that means there is a need for improvement on their part;
- PCF is another area that needs to be studied. It is recommended that having entities that only specialise in funding companies under BR can improve the process as the Act itself has been developed based on the International laws and funding has been implemented to support the companies. Now that S.A has been placed in an equal footing with modern international BR legislation, funding should also be developed like in other countries; and
- Lastly the companies that abuse the process should be punishable in order to prevent the abuse and prejudicing the stakeholders.

Future Research Areas

The following areas need to be further investigated-

- To what extent does funding plays a role in BR;
- How the banks can be involved in the absence of funding entities, to accept the concept; and
- Review the powers of BRP since they have the ultimate powers in the whole process without anyone to oppose.

Conclusion

The aim of the research was to investigate the BR in order to be able to conclude whether it is a process that has brought about change and benefit in the business fraternity. The research has shown that BR has improved the business environment even though there are still gaps that need to be filled. The research indicates that there is still more work to be done in order to eliminate pitfalls and loopholes in the process. The study has also shed a light that there is hope for companies to give it a try when they are faces with financial difficulties however not abuse the

process. One of the benefits of BR in South African context is that jobs have been preserved by rehabilitating some companies and with the economy that is staggering, BR will save many companies to improve the economy.

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