

Post-Commencement Finance – Domiciled Resident or Uneasy Foreign Transplant?

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Abstract

The 2008 Companies Act 71 of 2008 introduced a new business rescue regime into South African company law, bringing it into line with trends in developed countries, particularly the United States. Indeed, it appears that the United States Chapter 11 model was followed in this process, introducing the business rescue concept as a legal transplant. Corporate law is well suited to legislative borrowing, but there are important caveats to bear in mind when doing so. In particular: the context and legal culture of the country of origin may differ from those of the destination country. South Africa's commercial environment is different from that of the United States, problematising a transplant of Chapter 11's concepts. Post-commencement finance will be used as a micro-study of this broader phenomenon, and this topic will be investigated with comparative reference to the position in the United States. It will be argued that an essential difference between the two procedures is the lack of legislatively mandated court oversight in South Africa. This impacts on the interests of creditors, as well as on the availability of fresh finance. This results in problems in the implementation of the post-commencement finance provisions, which threaten the viability of this particular legal transplant.

Keywords

Company law; business rescue; post-commencement finance; secured credit; United States Chapter 11; legal transplants; court oversight.

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1 Introduction

"The law, it seems, is an eager and experienced traveler",¹ and in the case of Chapter 6 of the South African *Companies Act*² ("the Act" or "the South African Act") it would appear that United States bankruptcy law has made its way to our shores. Academics and practitioners are by now familiar with this chapter of the Act, which deals with business rescue.³

Business rescue, or corporate reorganisation, has become a common phenomenon in developed jurisdictions.⁴ It would appear that the benefits of this type of approach seem to be generally viewed as outweighing the drawbacks.⁵ Chapter 6 of the Act sought to update South African company law in line with developments in other countries.⁶ The purpose section of the Act⁷ reiterates aims set out in the 2004 policy paper prepared by the Department of Trade and Industry (DTI) and entitled "South African Company Law for the 21st Century: Guidelines for Corporate Law Reform".⁸ This policy paper emphasised an intention to develop a business rescue regime appropriate to the needs of the current South African economy and

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¹ Markovits 2005 *Cornell Int'l LJ* 95.

² *Companies Act* 71 of 2008 ("the Act").

³ For general discussions of the provisions of ch 6, see Cassim *et al Contemporary Company Law* ch 18; Rushworth 2010 *Acta Juridica* 375-408; Bradstreet 2011 *SALJ* 352-380; Loubser 2013 *SA Merc LJ* 435-457.

⁴ See for example Emmerman 2015 *Am Bankr Inst J* 26-28; Metzger and Bufford 1993 *Cal Bankr J* 153-159; Wessels 2014 *Insolvency Intelligence* 4-9.

⁵ The rationale for this type of approach is that the greater good of the enterprise as a whole should take precedence over an individual creditor's interests. The liquidation of a major corporation will result in job losses, which may have a negative impact on the economic status of a geographical location if a city depends on the resident corporation. Also there will be losses to shareholders. Thus business rescue, if successful, is certainly in the public interest. Even creditors may benefit, since the value of a business's assets is usually greater if it remains a going concern – or even if it is sold as a going concern – than if it is liquidated and its assets sold off piecemeal. For a defence of business rescue as a concept, see McCormack *Corporate Rescue Law* ch 1. For a contrary view, see Loubser 2013 *SA Merc LJ* 435-457, who points out that it should not be accepted without question that liquidation proceedings necessarily produce less favourable outcomes.

⁶ See the discussion in Rajak and Henning 1999 *SALJ* 263-264.

⁷ One of the express purposes of the new *Companies Act* at s 7(k) is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders".

⁸ GN 1183 in GG 26493 of 23 June 2004.

mentions specifically that the United States model found in Chapter 11 of that country's Bankruptcy Code⁹ would be considered.¹⁰

It is also not surprising that the legislature chose to consult United States law and to consider incorporating (at least in part) the Chapter 11 process. As Loubser¹¹ points out, Chapter 11 reorganisation has "reached cult status", with an overwhelming number of jurisdictions in Europe and elsewhere choosing to consider, rely on, and incorporate its processes and provisions. The prevailing school of thought seems to be that the success of this mechanism in the United States endorses its value as a legal transplant.¹²

Given this, and the relative maturity of the United States corporate rescue regime, one would be forgiven for considering this regime a valuable source of insight that our courts might draw on for guidance when interpreting the provisions of Chapter 6 of the Act. However, the Supreme Court of Appeal in *African Banking Corporation of Botswana v Kariba Furniture Manufacturers*¹³ was unwilling to do so for a number of reasons. This article will not analyse the substance of the decision in the *Kariba* case, but instead considers the court's reluctance to look to the United States' Chapter 11 and the jurisprudence thereunder when interpreting the provisions of the South African Act's Chapter 6. The Supreme Court of Appeal did not, however, conclude that as a general rule American jurisprudence should not be considered, but merely that it was inappropriate to do so in the instance before it.¹⁴ We contend that this might well also be the case for several other provisions of Chapter 6. Although the Act expressly provides that courts may look to foreign company law to inform their decisions to the extent that this is appropriate,¹⁵ close analysis shows that they should proceed with caution in the case of Chapter 11 of the United States code. This paper will defend this view by means of a comparative analysis of the United States and South African positions on post-commencement financing.

⁹ Chapter 11 was introduced into US corporate insolvency law by the *Bankruptcy Reform Act, 1978*. The United States federal law on bankruptcy may be found in Title 11 "Bankruptcy" of the *United States Code* (hereafter "the Bankruptcy Code").

¹⁰ GN 1183 in GG 26493 of 23 June 2004 45.

¹¹ Loubser 2013 *SA Merc LJ* 439.

¹² Loubser 2013 *SA Merc LJ* 440. More extensive discussion of legal transplantation follows in part 4.2 below.

¹³ *African Banking Corporation of Botswana v Kariba Furniture Manufacturers* 2015 5 SA 192 (SCA) (hereafter *Kariba*).

¹⁴ *Kariba* para 16.

¹⁵ Section 5(2) of the Act.

This paper will not purport to consider the merits of Chapter 11 as a legal transplant in South Africa, however. A subtle yet pervasive import of the features of this system is a *fait accompli*. Instead, now that Chapter 11 has been incorporated into South African company law, the paper will question whether a similar positive impact of the business rescue concept is possible in South Africa under the existing statutory provisions of Chapter 6 of the Act. Primarily, the paper will caution against a process of statutory interpretation that imports features of United States law without careful consideration of the significant differences between the Act and Chapter 11. In considering the case of post-commencement finance it becomes clear that judges may be confined and restricted by the wording of the Act in a manner that no interpretation can remedy, regardless of how progressive or robust it may be. Indeed, attempts to fill the gaps by importing from United States law could cause as much damage to the reputation of Chapter 6's provision as a conservative, textual approach.¹⁶

Part Two of the article will provide an overview of the relevant provisions of Chapter 11 of the United States Code and describe recent developments in the United States that are relevant to the discussion. Following this, in Part 3, the post-commencement financing provisions of the South African Act will be discussed and analysed in the light of cases that have considered these sections. In Part Four the approach taken by the Supreme Court of Appeal in *Kariba* will serve as a point of departure to comment briefly on the debate surrounding so-called legal transplants and how these manifest in the context of corporate law in general and specifically in the context of insolvency law and post-commencement finance during business rescue proceedings. The comparative analysis illustrates that a greater degree of oversight by the courts, perhaps unexpectedly, renders the United States system flexible and practical, as will be argued in the conclusion in Part Five.

2 Post-petition finance in the United States

2.1 Chapter 11 reorganisation in general

Chapter 11 of the Bankruptcy Code was enacted in 1978; hence the comment by LoPucki and Triantis that it is a "mature" system.¹⁷ Chapter 11

¹⁶ See for example Osode 2015 *Penn State J L Int'l Affairs* 459, where the author argues that "the adoption of an interpretive approach that is conservative, largely textual or literal, and purpose-neutral will significantly undermine the prospect of Chapter Six achieving the public policy goals intended by law and policymakers. Indeed, such an approach may by itself lead to regulatory failure".

¹⁷ LoPucki and Triantis "Systems Approach" 120.

proceedings usually commence with the filing of a petition by the distressed company with the bankruptcy court.¹⁸ Once such proceedings begin, a moratorium ("automatic stay") is placed on litigation and executions against the petitioning company.¹⁹ The company is then able to meet with creditors and shareholders to reorganise debt and restructure the company if necessary.²⁰ Reorganisation proceedings under Chapter 11 are referred to as "debtor in possession" ("DIP"), with the management structures of the company remaining in place, but with the same functions and duties as a trustee in conventional bankruptcy proceedings.²¹ The DIP must then draw up a reorganisation plan, which is to be approved by creditors.²² There is provision for a "cram down" of dissenting creditors, provided a sufficient majority is in favour thereof.²³ A cram down occurs when a court orders that a business rescue plan should be implemented, despite the objection of a dissenting class of creditors.

2.2 Post-petition finance under Chapter 11

One of the administrative powers of the DIP is to obtain post-petition finance to revitalise the debtor corporation.²⁴ The terms on which such finance can be obtained are set out in section 364 of the Bankruptcy Code. This section establishes four progressive tiers of financing, which create greater and greater encumbrances on the assets of the company in favour of the new lender. The idea is that the company attempts to obtain finance at the lowest level of encumbrance possible, so that if finance can be secured on easier terms within the mechanism of say section 364(a) or (b), there is no need to look to the protections which section 364(c) or (d) offer to the creditor. These tiers will be considered one by one.

Section 364(a) authorises the company to obtain unsecured credit in the ordinary course of business without court approval. This finance will enjoy the priority of an administrative expense and will thus rank above unsecured

¹⁸ This would occur in terms of s 301 of the Bankruptcy Code. See McCormack *Corporate Rescue Law* 78-79.

¹⁹ Section 362 of the Bankruptcy Code.

²⁰ Section 341 of the Bankruptcy Code.

²¹ Section 1107(a) of the Bankruptcy Code. See Armour, Cheffins and Skeel 2002 *Vand L Rev* 1699 for a comparative analysis of US and UK law on corporate reorganisations from a corporate governance point of view.

²² Sections 1121-1129 of the Bankruptcy Code.

²³ Section 1129 of the Bankruptcy Code. For more detailed analysis of US-style "cram downs" see Friedman 1992-1993 *Cardozo L Rev*; LoPucki and Triantis "Systems Approach" 160-170; Broude 1983-1984 *Business Lawyer* 441-454.

²⁴ Section 364 read with s 1108 of the Bankruptcy Code.

creditors with a priority claim on the assets of the company.²⁵ This means that the DIP may use funds to pay new creditors during reorganisation, since it is authorised to use the company's assets to meet administrative expenses.²⁶ All pre-petition secured creditors are in the meantime blocked by the automatic stay.²⁷ The "ordinary course of business" requirement is open to some interpretation: Henoch suggests a fairly literal interpretation of what is considered usual in a business's day-to-day operations.²⁸ This would exclude servicing debt or purchasing new capital assets.²⁹

Section 364(b) authorises the obtaining of unsecured credit with administrative expense priority for uses other than in the ordinary course of business, provided there is "notice and a hearing". This requires the existing creditors to be informed of the pending application and for the new finance to be court-approved. This is unlikely to be the favoured option for post-petition creditors, however, since by definition the funds are required for unusual outlays and hence it would be prudent to obtain further security under section 364(c) or (d).³⁰

Post-petition secured credit is obtainable under section 364(c) or (d), following notice and a hearing, with the difference between these sections being that super-priority security can be taken only under section 364(d). There must be no possibility of obtaining finance allowable under section 364(a) or (b) as an administrative expense, however.³¹ Thus section 364(c) creates three options for new creditors:

- a claim ranking as the leading priority expense, before other administrative expenses. This would put the creditor first in line after the existing secured creditors;
- a lien on otherwise unencumbered property of the debtor company. This would create a new security interest in assets which were not affected by pre-petition secured creditor claims;
- a junior lien on already encumbered property.

²⁵ Section 507(a)(1) of the Bankruptcy Code.

²⁶ Section 503 of the Bankruptcy Code.

²⁷ Compare the arguments in Weintraub and Resnick *Bankruptcy Law Manual* 8-45 to 8-46.

²⁸ Henoch 1991 *Bankr Dev J* 586.

²⁹ Henoch 1991 *Bankr Dev J* 586.

³⁰ Compare Henoch 1991 *Bankr Dev J* 586-587.

³¹ Section 364(c) of the Bankruptcy Code.

Henoch notes that most post-petition financing agreements in the USA operate under section 364(c).³² In order for this section to function, however, there must be value in the assets of the company over and above the existing claims of secured creditors. This is referred to as an "equity cushion" in the jurisprudence. It is the size of this equity cushion which is likely to induce a creditor to lend funds under section 364(c) without requiring super-priority.³³ If the newly secured creditor is not first in the queue for payment, it would have to be demonstrated to its satisfaction that it is nevertheless guaranteed payment.

Where there is insufficient equity to satisfy a post-petition creditor or no unencumbered assets to use as security, section 364(d) of the Bankruptcy Code provides that a court may authorise a granting of "super-priority" finance which takes precedence over existing pre-petition secured claims. Section 364(d) reads as follows:

- (d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if –
 - (A) the trustee is unable to obtain such credit otherwise; and
 - (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.
- (2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

As to leg A of section 364(d)(1), the case law suggests that the duty on the debtor to seek other forms of credit does not require it to approach every possible lender; the court must decide on a case-by-case basis whether the test has been met. The US Court of Appeal for the fourth circuit held in *In re Snowshoe Company Inc*³⁴ that it was sufficient for the debtor corporation to have approached financial institutions in the immediate geographical area.³⁵ This approach was echoed in *In re Sky Valley Inc*,³⁶ where the corporation had identified potentially interested debtors as those holding a pre-petition security interest or doing business in the community surrounding the ski

³² Henoch 1991 *Bankr Dev J* 587.

³³ Compare Henoch 1991 *Bankr Dev J* 588.

³⁴ *In re Snowshoe Company Inc* 789 F 2d 1085 (Court of Appeal, Fourth Circuit 1986) (hereafter *Snowshoe*).

³⁵ *Snowshoe* 1088.

³⁶ *In re Sky Valley Inc* 100 BR 107 (Bankruptcy Court, Gainesville Division 1988) (hereafter *Sky Valley*).

resort and golf course business operated by the debtor company.³⁷ All identified lenders had been unsuccessfully approached and this was held to be adequate.³⁸ In *In re Ames Department Stores Inc*³⁹ the size of the loan required to fund the reorganisation of the debtor (\$250 million) was such that only a limited number of potential lenders was available.⁴⁰ A denial of credit by four such lenders otherwise than under section 364(d) was therefore held sufficient to satisfy the requirements of that section.⁴¹

As to leg B, the concept of "adequate protection" is defined in section 361. According to that section, adequate protection may be given by:

- requiring the debtor company to make periodic cash payments to the affected creditor where the automatic stay on enforcement actions against the creditor under section 362 – or the granting of a super-priority security interest under section 364 – has led to a decrease in the creditor's interest in the debtor's property. This would be particularly apt where a security interest is held in a depreciating asset and the automatic stay delays realisation of that interest;
- providing an additional or replacement lien on alternative property;
- providing alternative relief which will provide the creditor with the "indubitable equivalent" of its property. The US Supreme Court held in *United Savings Association of Texas v Timbers of Inwood Forest Associates Ltd*⁴² that "indubitable equivalent" has developed a settled meaning "connoting the right of a secured creditor to receive present value of his security".⁴³

The rationale behind the concept of adequate protection is said to be the protection of property rights in the United States Constitution. It is also for this reason that super-priority is not as drastic a measure as it appears to be at first glance. In *In re Swedeland Development Group Inc*⁴⁴ the Court of Appeal for the Third Circuit stated that the enquiry as to whether protection

³⁷ *Sky Valley* 113.

³⁸ *Sky Valley* 113.

³⁹ *In re Ames Department Stores Inc* 115 BR 34 (Bankruptcy Court, New York Division 1990) (hereafter *Ames*).

⁴⁰ *Ames* 40.

⁴¹ *Ames* 40.

⁴² *United Savings Association of Texas v Timbers of Inwood Forest Associates Ltd* 484 US 365 (US Supreme Court 1988) (hereafter *Timbers of Inwood*).

⁴³ *Timbers of Inwood* 377.

⁴⁴ *In re Swedeland Development Group Inc* 16 F 3d 552 (Court of Appeal, Third Circuit 1994) (hereafter *Swedeland Development Group*).

is adequate "depends directly on how effectively it compensates the secured creditor for loss of value caused by the super-priority given to the post-petition loan".⁴⁵ An analysis of the case law indicates that this is the key determinative issue in a court's decision as to whether or not to grant finance.

One of the enduring tests as to whether there is adequate protection for pre-petition creditors is to determine if there is sufficient equity in the assets of the company to protect existing secured creditors from an issue of fresh super-priority finance.⁴⁶ This is the "equity cushion" test. An example of a case decided on the basis of an equity cushion analysis is *Sky Valley*.⁴⁷ In this case the debtor sought emergency super-priority funding in the amount of \$400 000. The total outstanding debt on a golf course development owned by the debtor company was approximately \$11 million. The value of the property hypothecated by the various security interests was about \$12 million. Thus the equity cushion was narrow. However, the only petitioning creditor (Anchor Bank) held a first priority security interest of about \$3 million of the total debt, which was secured to property totalling \$8,5 million dollars. Since the other creditors had not opposed the application for new section 364(d) credit, the equity cushion of over \$5 million was held alone to be sufficient protection to Anchor Bank, despite the fact that its claim would now be subordinated.⁴⁸

A similar finding was reached in *In re Dunes Casino Hotel*.⁴⁹ Here the debtor sought \$700 000 in super-priority funds to aid in the development of a casino hotel at Atlantic City. The objecting creditor was exposed to the extent of \$17,6 million, a debt secured to property worth \$26 million. Again, the court held that the equity cushion alone was sufficient protection.⁵⁰

In *Snowshoe*⁵¹ the court held that although some creditors viewed the equity cushion as part of the "bargained for consideration", the fact that liabilities of \$13 million were recorded against a ski resort development worth \$20 million provided sufficient cushion for a super-priority loan of a further \$2

⁴⁵ *Swedeland Development Group* 564. This passage was approved in the later cases of *In re Campbell Sod Inc* 378 BR 647 (Bankruptcy Court, Kansas Division 2007) 653 and *In re Fontainebleau Las Vegas Holdings LLC* 434 BR 716 (District Court, Miami Florida Division 2010) (hereafter *Fontainebleau*) 749.

⁴⁶ *Telesca* 1988 *Bankr Dev J* 117-128.

⁴⁷ *In re Sky Valley Inc* 100 BR 107 (Bankruptcy Court, Gainesville Division 1988).

⁴⁸ *Sky Valley* 114.

⁴⁹ *In re Dunes Casino Hotel* 69 BR 784 (Bankruptcy Court, New Jersey Division 1986) (hereafter *Dunes Casino Hotel*).

⁵⁰ *Dunes Casino Hotel* 795.

⁵¹ *In re Snowshoe Company Inc* 789 F 2d 1085 (Court of Appeal, Fourth Circuit 1986).

million. This finding was based in part on the detailed financial projections of the debtor that the loan could be repaid in one ski season.⁵² These two factors together, held the court, amounted to adequate protection for the pre-petition creditor.⁵³

Snowshoe was one of the earlier cases dealing with a section 364(d) application and the finding that more than an equity cushion alone was needed could in part be ascribed to the criticism of the equity cushion analysis in *In re Alyucan Interstate Corp.*⁵⁴ In that case it was held that while the equity cushion analysis was easy to apply, a court needed to be able to take into account the individual facts of a case.⁵⁵ The court thus expressly rejected the concept of an equity cushion as a measure of whether there was adequate protection to creditors.⁵⁶ This finding was based on the view:

- that equity cushion analysis was inconsistent with the concept of adequate protection expressed in section 361, which was to guard against impairment of the lien;
- that the purpose of section 361 was to compensate for lost value due to the automatic stay. (Consider for example the payment of cash compensation to creditors who are barred from enforcing their claims.) The value from other assets might be appropriated to pay such compensation, rather than secure fresh debt;
- that equity should be used to rehabilitate debtors for the benefit of pre-petition creditors, not create new debt.⁵⁷

The finding in *Alyucan* seems to have made waves in the case law and in the secondary sources. The points raised against equity cushion analysis are valid, but seem to present a conservative view in favour of pre-petition secured creditors at the expense of the debtor corporation. This view seems at odds with the rest of the body of case law. In defence of *Alyucan*, Telesca notes that the structuring of ordinary credit agreements takes into account available security and attendant risk and this calculation of risk ultimately determines the bargain struck between the parties.⁵⁸ To uproot security

⁵² *Snowshoe* 1089.

⁵³ *Snowshoe* 1090.

⁵⁴ *In re Alyucan Interstate Corp* 12 Bankr 803 (Bankruptcy Court, Utah Division 1981) (Bankruptcy Court, Utah Division 1981) (hereafter *Alyucan*). *Alyucan* is cited in *Snowshoe* 1090.

⁵⁵ *Alyucan* 810.

⁵⁶ *Alyucan* 810-812.

⁵⁷ *Alyucan* 810-812.

⁵⁸ Telesca 1988 *Bankr Dev J* 129 (paraphrased).

post-petition on the basis of an equity cushion, he argues, is "to change one side of the terms without commensurately changing the other".⁵⁹ Telesca concludes that it would be "beneficial to all parties" if the courts adopted "a cautious and calculated approach to the particulars of each case".⁶⁰

This cautiousness is recognised in the *Snowshoe* judgment as set out above. Further criticism of equity cushion analysis was presented in *In re Aqua Associates*,⁶¹ where the court raised the issue of whether the going concern or liquidated valuation of the property was more appropriate, as well the problems in conflicting valuations from two teams of lawyers and experts.⁶² Furthermore such analysis could either "foolishly let the air out of an equity cushion" or deny permission to a debtor who lacks an equity cushion to enter a transaction which is "demonstrably wise and resourceful".⁶³ The court held that the presence of an equity cushion should merely be a factor in the decision and the inquiry should focus on whether the protection of the secured creditor's interest was adequate (citing *inter alia Alyucan*).⁶⁴ In *Aqua Associates* the equity cushion was modest, but it had a potentially viable business plan involving a lucrative lease of its premises to an upmarket billiards club. The debtor was permitted to access super-priority funding.⁶⁵

Thus the case law reflects a certain amount of ambivalence between debtor and creditor interests, but the overall impression one gets is that reorganisation is viewed favourably by the courts. To this end an application for post-petition finance has a good prospect of success, provided the debtor can show the existence of an equity cushion and something more – such as the potential viability of its future business plans. In some cases an equity cushion alone will be sufficient, but this will depend on the individual facts of a given case.

A final point to consider before leaving the discussion of section 364 is the impact of section 364(e). (Section 364(f) contains certain definitional limits on the concept of "security" for the purposes of the rest of the section which are not relevant to this paper.) Section 364(e) protects the good faith creditor under this section: its loan agreement (including possible super-

⁵⁹ Telesca 1988 *Bankr Dev J* 129.

⁶⁰ Telesca 1988 *Bankr Dev J* 129.

⁶¹ *In re Aqua Associates* 123 BR 192 (Bankruptcy Court, Pennsylvania Division 1991) (hereafter *Aqua Associates*).

⁶² *Aqua Associates* 196.

⁶³ *Aqua Associates* 196.

⁶⁴ *Aqua Associates* 196.

⁶⁵ *Aqua Associates* 199.

priority) cannot be undone by a subsequent appeal of another creditor. This means that once credit has been approved the decision cannot be reversed (unless the final granting of the application had been stayed pending an appeal). For this reason many creditors face the issue of mootness in contesting an award of section 364 funding on appeal.⁶⁶ Thus necessary protection is given to creditors and there is no danger of priority being denied *ex post facto*. This also means that if a creditor intends to appeal a successful section 364 application by the debtor, it must obtain a stay of the order pending appeal.

Section 364 can thus be seen to be a carefully crafted section which balances the competing rights and interests of debtors and creditors and ensures viable access to funding. Debtors are supported by the incentivising of post-petition funding and creditors are protected by the requirement of adequate protection. There is also a very necessary procedural mechanism to avoid reversal of a section 364 order after money has already been lent.

2.3 Cross-collateralisation

One of the challenges facing post-petition financing in the US is what to do about the problem of cross-collateralisation. This is a means by which a pre-petition creditor of the debtor secures its pre- and post-petition loan to the company in Chapter 11 proceedings, using section 364 preference to better its position in the ranking of creditors. The creditor (who is typically unsecured or under-secured with regard to its pre-petition debt) would thus advance further post-petition funds to the debtor company requiring a security interest over all the pre- and post-petition property of that debtor. The catch is that this new security interest would be required to cover the pre-petition debt as well. Thus the fresh finances are secured, typically with super-priority status – and the old finances are given a boost in the ranking of creditors to the same super-priority status.

This type of financing was held to be not authorised by section 364 and to be against the basic priority structure of the code by the Court of Appeal for the Eleventh Circuit in *In re Saybrook Manufacturing Co Inc*.⁶⁷ This finding was in concordance with the earlier ruling of the Court of Appeal for the Second Circuit in *In re Texlon*,⁶⁸ which strongly disapproved of cross-collateralisation, but left open the question as to whether it would be

⁶⁶ Compare for example *Fontainebleau*.

⁶⁷ *In re Saybrook Manufacturing Co Inc* 963 F 2d 1490 (Court of Appeal, Eleventh Circuit 1992) 1496.

⁶⁸ *In re Texlon* 596 F 2d 1092 (Court of Appeal, Second Circuit 1979) 1098.

disqualified in every conceivable circumstance. The arguments against this practice are set out by Tabb:

- section 364 is supposed to set out the exclusive list of permissible means of financing debtors – cross-collateralisation is not one of them;
- the argument that permitting cross-collateralisation induces creditors to lend money should not be allowed to sway courts into allowing this practice since it is contrary to the principle of equal treatment of similarly situated creditors upon bankruptcy;
- without the protection of Chapter 11, the advantage given to pre-petition debt would constitute a voidable preference;
- considerations of equity were against this practice – the fact that it was fairly common put debtors in the difficult position of choosing between cross-collateralisation and liquidation. This would not occur if the practice were outlawed.⁶⁹

Despite the disapproval of two branches of the Court of Appeal, McCormack notes that many courts still approve this type of financing order.⁷⁰ *In re Vanguard Diversified Inc*⁷¹ sets out a four-part test which the debtor must satisfy in order for a court to approve cross-collateralisation:

- the business operations of the debtor will not survive without the proposed financing;
- no alternative finance can be obtained on acceptable terms;
- the proposed lender will not agree to provide finance without cross-collateralisation;
- the proposed financing is in the best interests of the creditor body as a whole.⁷²

In *Vanguard Diversified* cross-collateralisation was permitted by the court.⁷³ Indeed at the time of his writing (1986) Tabb noted that cross-

⁶⁹ Tabb 1986 *S Cal L Rev* 119-175.

⁷⁰ McCormack *Corporate Rescue Law* 191.

⁷¹ *In re Vanguard Diversified Inc* 31 BR 364 (Bankruptcy Court, New York Division 1983) (hereafter *Vanguard Diversified*).

⁷² *Vanguard Diversified* 366.

⁷³ *Vanguard Diversified* 367.

collateralisation was becoming a standard term for sophisticated post-petition lenders.⁷⁴

2.4 The position of employees with regard to post-petition finance

The US is known for the lack of unionisation of many sectors of its labour force and the relatively weak position in which US labour law leaves employees.⁷⁵ The same is largely true of the treatment of employees under the Bankruptcy Code. Hence employee contracts are "executory contracts" for the purposes of section 365, which means that the debtor company is free to terminate these employment contracts at will.⁷⁶ Redundant employees are given a preferential claim against the company under section 507(a)(4)(A) for wages accruing from up to 180 days prior to Chapter 11 proceedings, but this is limited to \$10 000. Thus it is safe to say that reorganisation often occurs at the expense of the company's workforce and that US law does not protect the plight of redundant employees to any great degree.

The position of workers whose services the company wants to retain is different, however. The company typically extends special treatment to this group in an effort to maintain their loyalty – to the extent that there is a name for this practice – the "Key Employee Retention Plan".⁷⁷ The special treatment typically involves bonuses and other pay-to-stay arrangements.⁷⁸ Thus fresh finance is a very necessary part in maintaining the viability of the company through the retention of essential workers. This is indeed one of the key uses of section 364 finance⁷⁹ and the use of this money in this way needs to be authorised as an expense under section 363.⁸⁰ Retained employees are thus one of the key beneficiaries of post-petition finance, but they certainly do not have any sort of claim on this money outside of the company's good will. Post-petition creditors would definitely have the first bite of the pie should the company go into liquidation, and employees would merely have a preferential claim under section 507.

⁷⁴ Tabb 1986 *S Cal L Rev* 168.

⁷⁵ McCormack *Corporate Rescue Law* 210-214.

⁷⁶ Section 365(a) of the Bankruptcy Code.

⁷⁷ Skeel 2004 *Wash U LQ* 1470.

⁷⁸ Skeel 2004 *Wash U LQ* 1473-1476.

⁷⁹ Compare Hensch 1991 *Bankr Dev J* 576; *UNICTRAL Legislative Guide on Insolvency Law* (2004) para 94.

⁸⁰ If salaries are paid "in the ordinary course of business" court approval is not required under s 363(c). Skeel 2004 *Wash U LQ* 1475 states that court approval is required for KERPs, since these are not in the ordinary course of business, and hence s 363(b) pertains.

2.5 Criticism of Chapter 11

This discussion would not be complete without pointing out that Chapter 11 is facing increased scrutiny within the United States itself. As Wessels⁸¹ notes, it is ironic that while many other countries regard Chapter 11 as a "holy grail", this statutory mechanism is not without criticism at home in the United States. In fact one of the main concerns surrounding the provisions of Chapter 11 is the manner in which it deals with the issue of secured credit. Walters summarises the main objection as follows:

The narrative is now well established and oft-repeated. Whereas in the past, firms filing for chapter 11 would come into the bankruptcy process with at least some unencumbered assets, modern firms tend to have capital structures that are entirely consumed by multiple layers of secured debt. And so, according to the prevailing conventional wisdom, chapter 11, in the general run of cases, has become little more than a glorified nationwide foreclosure process through which secured creditors can exit via a quick section 363 sale or an outright liquidation.⁸²

In other words, current experience in the United States points to the fact that secured creditors are diverting bankrupt companies away from the Chapter 11 process entirely.⁸³ This criticism suggests that some view Chapter 11 simply as an additional foreclosure process, or a debtor-centred form of "unsupervised winding up".⁸⁴

3 Post-commencement finance in South Africa

3.1 Sections 134 and 135 of the Companies Act, 2008

Section 135 of the Act appears in part A ("business rescue proceedings") of Chapter 6, which deals *inter alia* with various preliminary matters such as entry into business rescue,⁸⁵ the moratorium on proceedings against a company,⁸⁶ the protection of property interests⁸⁷ and the effect of business

⁸¹ Wessels 2014 *Insolvency Intelligence* 5. See further: Bradley and Rosenzweig 1992 *Yale LJ* 1043; Kirshner 2015 *U Penn J Bus L* 527.

⁸² Walters 2015 *U Ill L Rev* 545. Also see ABI Symposium 2010 *Am Bankr Inst L Rev*; Tabb 2013 *U Ill L Rev* 103; Tabb 2015 *U Ill L Rev* 765.

⁸³ Kirshner 2015 *U Penn J Bus L* 527 points out that "Increasingly, secured creditors divert bankrupt companies from the traditional Chapter 11 process, which has protected the interests of junior creditors, and push them instead into asset sales under Section 363 of the US Bankruptcy Code".

⁸⁴ This phrase is borrowed from Rajak and Henning 1999 *SALJ* 267, who cite the view of Olver *Judicial Management* 9. This quote in the original refers to the system of judicial management under the South African *Companies Act* 46 of 1926. We have appropriated it here for our purposes.

⁸⁵ Sections 129-131 of the Act.

⁸⁶ Section 133 of the Act.

⁸⁷ Section 134 of the Act.

rescue on contracts,⁸⁸ employees,⁸⁹ shareholders and directors.⁹⁰ Part A thus deals with certain immediate consequences of business rescue and the inclusion of post-commencement finance in this preliminary section reflects the fact that an injection of fresh capital is likely to be one of the first requirements of a distressed company.

Before considering the substance of section 135, section 134(3) bears mention, as its provisions impact on the position of the existing secured creditor. The section determines that the distressed company may not, during business rescue proceedings, dispose of any property over which another person has any security or title interest unless certain requirements have been complied with. In short, the company will require the prior consent of the affected person, unless the disposal would be sufficient to discharge the indebtedness protected by the affected person's security or title interest, in which case payment out of sale proceeds should promptly be made.⁹¹

Obtaining fresh finance as such is dealt with in section 135(2):

During its business rescue proceedings, the company may obtain financing ... and *any such financing* may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered⁹²

A plausible literal reading of this provision would suggest that pre-existing security is not subordinated to new secured lenders. Hence the new finance may be secured only with existing equity in the company's assets or with assets not already subject to a security interest. Post-commencement secured creditors will seemingly rank ahead of unsecured creditors in the order in which such claims are incurred. The immediate question which arises is what if there are no equity or unencumbered assets available to the company in question? Particularly if such a company is indeed in financial distress, it is likely that it will already have pursued all available credit options and have no assets left to secure fresh finance.⁹³ The legislation quite simply does not make adequate provision for this scenario. Indeed, the legislative approach taken here stands in stark contrast to that taken by Chapter 11, which, as discussed, offers nuanced mechanisms to

⁸⁸ Section 136 of the Act.

⁸⁹ Section 136 of the Act.

⁹⁰ Section 137 of the Act.

⁹¹ Section 134(3) of the Act..

⁹² Section 135(2) of the Act (emphasis added).

⁹³ That this is the case was confirmed by a recent report prepared on behalf of the CIPC: Pretorius 2015 http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf.

address the likely factual scenario that no equity or unencumbered assets remain available.

The Act also fails to create incentives to attract fresh finance in its ranking of company creditors. This ranking is established by section 135(3) and represents a variation on what would be the conventional liquidation ranking of creditors. The following order of claims is laid down:

- the remuneration of the business rescue practitioner and costs of business rescue proceedings;
- "remuneration, reimbursement for expenses or other amount of money relating to employment" which becomes due and payable by the company to its employees during business rescue;
- secured creditors (including pre-commencement secured creditors), ranked according to the items of property over which the security interest is held and the order in which such security rights were obtained;
- unsecured post-commencement creditors; and
- unsecured pre-commencement creditors.

Section 135(4) holds that this ranking will be maintained if the company should subsequently slide into liquidation (with allowance for the costs of liquidation, of course).

There can hardly be a quibble about prioritising the business rescue practitioner's costs. If there is to be a displacement of a company's management this should be undertaken by a highly competent person and without guarantees of payment this would be difficult to effect. The ranking of employees' claims in second place is ostensibly in line with the Act's general approach, which is more stakeholder friendly. The provisions of section 135(1) seem broad enough to cover wages, reimbursement for expenses, and contributions by the employer to the employees' pension funds. It should be noted, however, that this priority applies only to employment costs incurred during business rescue proceedings. Pre-commencement employee claims are dealt with separately.⁹⁴ This represents a laudable attempt to ensure that employees are protected, and stands in stark contrast to the harsh American position discussed above.

⁹⁴ Section 136 of the Act.

Employees play a pivotal role in ensuring a successful rescue of the business. This stakeholder-inclusive approach also aligns with the increasingly stakeholder friendly perspectives ingrained in the modern approach to corporate governance.⁹⁵

3.2 Overview of recent decisions by the courts

In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd*,⁹⁶ Kgomo J had the opportunity to consider the ranking of creditors under section 135. The court concluded that this section should be interpreted to mean that claims rank in the following order of preference: first, remuneration and expenses of the practitioner and other persons (including legal and other professionals) for the costs of the business rescue proceedings. Secondly, remuneration for employees that became due and payable post-commencement. Thirdly, the claims of secured lenders for loans or supply made after business rescue commenced (so-called "post-commencement creditors"). Fourthly, unsecured post-commencement creditors; with pre-commencement secured creditors ranked fifth. In sixth place are the remuneration claims of employees, which predate the commencement of business rescue proceedings. Lastly, seventh, are unsecured pre-commencement creditors.⁹⁷ Kgomo J reiterated this interpretation in *Redpath Mining South Africa (Pty) Ltd v Marsden*.⁹⁸

It is questionable whether this interpretation of the Act is sound. The judgment does not expressly consider the wording of the provision, nor the impact of the chosen interpretation, and in fact does not cite the legislation directly but instead relies exclusively on a single secondary source.⁹⁹ There might be some contention about whether or not secured post-commencement creditors might outrank pre-commencement secured creditors, but it is highly questionable whether the wording of the Act envisages that unsecured post-commencement creditors should also do so.

⁹⁵ See for example IODSA *King III* 9.

⁹⁶ *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* 2013 ZAGPJHC 109 (10 May 2013) (hereafter *Merchant West*).

⁹⁷ *Merchant West* para 21.

⁹⁸ *Redpath Mining South Africa (Pty) Ltd v Marsden* 2013 ZAGPJHC 148 (14 June 2013) (hereafter *Redpath*) para 54.

⁹⁹ *Merchant West* para 21, where Kgomo J refers to Stein and Everingham *New Companies Act* 420-421.

The constitutional era has seen a break with South Africa's literalist past when it comes to statutory interpretation.¹⁰⁰ The Constitutional Court has often discussed statutory interpretation, stressing a contextual, purposive approach, which interprets a statute through the "prism of the Bill of Rights".¹⁰¹ Even in the dry world of commercial law, the Supreme Court of Appeal has confirmed that the proper approach to statutory (and other textual) interpretation is a purposive one, which examines context from the outset, without needing the open sesame of ambiguity or absurdity.¹⁰² Wallis JA held as follows in *Natal Joint Municipal Pension Fund*:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.¹⁰³

Wallis JA went on to explain that this approach requires an interpreter to consider the language used in a provision in the light of the ordinary rules of grammar and syntax, and to balance this with the apparent purpose of a provision and its context, which includes the material known to those who drafted it.¹⁰⁴ This process is objective, not subjective, requiring an investigation into the meaning of the words actually used.¹⁰⁵ A court should also prefer a meaning which makes business common sense, in line with purposive construction.¹⁰⁶ Finally, judges should be careful not to diverge from interpretation into legislation: any meaning derived from a text must be grounded in the language thereof.¹⁰⁷

It is not clear how Kgomo J's interpretation of the post-commencement finance provisions accords with this approach. In spite of the fact that interpretation is now considered a unitary process,¹⁰⁸ the literal meaning of the words must remain the starting point of any engagement with the text.

¹⁰⁰ Section 39(2) of the *Constitution of the Republic of South Africa*, 1996. See generally *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) (hereafter *Hyundai*) paras 21-26.

¹⁰¹ *Hyundai* para 21.

¹⁰² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter *Natal Joint Municipal Pension Fund*) para 18. See further: *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) (hereafter *Bothma-Batho*) paras 10-12; Wallis 2010 SALJ.

¹⁰³ *Natal Joint Municipal Pension Fund* para 18.

¹⁰⁴ *Natal Joint Municipal Pension Fund* para 18.

¹⁰⁵ *Natal Joint Municipal Pension Fund* para 18.

¹⁰⁶ *Natal Joint Municipal Pension Fund* para 18.

¹⁰⁷ *Natal Joint Municipal Pension Fund* para 18.

¹⁰⁸ *Bothma-Batho* para 12.

Certainly the ideal is a comprehensive approach based on the actual wording of the document, as opposed to one that takes only the context into account. Subsection 135(3) gives post-commencement creditors (whether secured or not) a ranking above that of "all unsecured claims against the company".¹⁰⁹ The express inclusion of unsecured claims surely points by implication to the exclusion of secured claims in this instance.¹¹⁰ Such an interpretation also aligns with section 135(2), in terms of which assets may be utilised for the purposes of security post-commencement only to the extent that they are unencumbered. The interpretation taken by the court effectively undermines or renders obsolete the provisions of this subsection by negating the rights of the pre-commencement secured creditor almost entirely. Therefore the consequences of the interpretation will likely not pass constitutional muster as the argument could convincingly be made that such an interpretation of the legislation will deprive pre-commencement secured creditors of their property rights in an unconstitutional manner.¹¹¹

Delport further argues that the decision taken in *Merchant West* does not seem to be in accordance with section 135(3) because the subsection does not refer to secured claims before business rescue began, as these are regulated by section 134.¹¹² The author points out that although the same ranking was also used in *Redpath Mining* the Court in that instance expressly referred to the rights of "secured" creditors as contained in section 134(3).¹¹³ In the light of this it bears mention that section 134 deals with pre-commencement secured creditors in instances where the company aims to *dispose* of an encumbered asset. It seems not to extend to instances where the company seeks to further encumber such an asset. As such it is submitted that section 135(3)(b) might well apply in addition to section 134 to govern such instances. If so, it is lamentable that the Legislature does not expressly set out how this would affect the ranking. The fact that section 135(2) allows for assets to be further encumbered only to the extent possible, and then determines that such creditors have a preference "in the order in which they were incurred",¹¹⁴ seems to suggest that what was envisaged was a ranking that preferred the secured pre-commencement

¹⁰⁹ Section 135(3)(b) of the Act.

¹¹⁰ This is the so-called *expressio unius est exclusio alterius* rule. For a modern discussion, see *Masetlha v President of the Republic of South Africa* 2008 1 BCLR 1 (CC) para 192.

¹¹¹ A comprehensive discussion of matters related to the constitutionality of the court's approach falls outside of the scope of this paper but would of course be based on the rights contained in s 25 of the *Constitution of the Republic of South Africa*, 1996.

¹¹² Delport "Post-commencement Finance" 480(42).

¹¹³ Delport "Post-commencement Finance" 480(42).

¹¹⁴ Section 135(3)(b) of the Act.

creditor, followed by secured post-commencement creditors in the order in which their claims were incurred. This interpretation has the added benefit of giving meaning to the provisions of subsection 135(2).

Pretorius and Du Preez observe that the rankings as set out in the Act prefer the post-commencement secured creditor, but the authors subsequently support the interpretation of the court in *Merchant West* as "an encouraging development for the distressed investing industry".¹¹⁵ The authors do not engage with the logic of the court and it is not clear how their argument can be justified. To be sure, mechanisms to support the distressed investing industry (to use the authors' term) should be forthcoming and, as argued above, the legislation in its current form seems to be inadequate. However, as will be argued in the conclusion below, the solution does not lie in disregarding the clear wording of the Act in favour of an interpretation that ostensibly addresses the concerns created by the Legislature's apparent omissions. It is especially ill conceived to attempt to incorporate mechanisms which are accompanied by extensive judicial oversight elsewhere without also including the necessary safeguards and scrutiny. In spite of the controversy, it seems as though the observations related to the ranking of creditors in both of Kgomo J's decisions above remain *obiter dicta* and will hence not bind future courts.¹¹⁶

Post-commencement finance was also considered in the matter of *Kritzinger v Standard Bank of South Africa Ltd*.¹¹⁷ In *Kritzinger* the applicant company, which was in the business of providing mining supplies, found itself in financial distress. It had been a client of the respondent bank for the preceding nine years, and held two accounts with it – one an overdraft facility with a R800 000 limit, the other a salary account used to pay employees and for certain other business expenses.¹¹⁸ Nine years before the events in question the applicant company had ceded book debts to the respondent bank.¹¹⁹ After being notified of the initiation of business rescue proceedings, the bank set off funds in the salary account against the deficit in the overdraft facility and demanded that the book debts be paid directly

¹¹⁵ Pretorius and Du Preez 2013 *SA J Entrep & Small Bus Man* 171. This article offers a comprehensive analysis of the state of post-commencement finance in South Africa.

¹¹⁶ Kgomo J's observations regarding the ranking of creditors form part of a general overview of the consequences of business rescue and do not form part of the ultimate decision. See *Merchant West* para 52; *Redpath* paras 29-39.

¹¹⁷ *Kritzinger v Standard Bank of South Africa Ltd* 2013 ZAFSHC 215 (19 September 2013) (hereafter *Kritzinger*).

¹¹⁸ *Kritzinger* para 10.

¹¹⁹ *Kritzinger* para 23.

to it.¹²⁰ Upon receiving this instruction, the business rescue practitioner opened an account with another financial services provider (Investec) and started receiving book debts in the new account.¹²¹ The overdraft agreement with Standard Bank contained a clause that entitled that bank to revoke this facility at any time, should the financial position of the applicant deteriorate.¹²² In the light of this provision, Rampai AJP concluded that the actions of the respondent bank had been justified.¹²³ By notifying the bank of the commencement of business rescue proceedings the company itself admitted financial distress, and the bank as final arbitrator had the sole and final discretion to determine that the financial position of the applicant had deteriorated and to cancel the overdraft agreement.¹²⁴

The court confirmed that the respondent bank had merely exercised its contractual powers in a lawful and acceptable manner in terms of the recognised hierarchy of creditors. In this regard the court made the following noteworthy observation:

The respondent is still a secured creditor post commencement of business rescue proceedings in much the same way as it was prior to the commencement of such proceedings. The commencement of such proceedings did not and could not demote the respondent from its rightful position as a creditor with a secured rank.¹²⁵

These sentiments seem to contradict in strong terms the conclusion reached by the court in the *Merchant West* and *Redpath* decisions and instead align with the protection afforded to secured creditors under section 134 of the Act (as set out above). The court came to the conclusion that the provisions of section 133(1) of the Act (on which the applicant had relied) did not preclude the bank from applying set-off, given the facts of the case. Rampai AJP argued further that even if this were not the case, it would be inequitable to order the respondent bank to reverse the set-off transaction in the light of the facts both that its security had been "drastically diminished if not completely eroded", and that such a reversal would release the affected funds to the parties whose "subversive conduct" had rendered the applicant's security for repayment of the overdraft facilities meaningless.¹²⁶ In the words of the judge, "this the law could not countermine".¹²⁷ In relation

¹²⁰ *Kritzinger* para 17.

¹²¹ *Kritzinger* para 20.

¹²² *Kritzinger* para 32.

¹²³ *Kritzinger* para 47.

¹²⁴ *Kritzinger* para 47.

¹²⁵ *Kritzinger* para 54.

¹²⁶ *Kritzinger* para 77.

¹²⁷ *Kritzinger* para 77.

to the payment of the book debts into the new Investec account, the court found that the first applicant (the business rescue practitioner) had contravened s 134(3), which protects the rights of the secured pre-commencement creditor.¹²⁸

3.3 Cross-collateralisation under section 135?

If there is a lack of incentive for creditors to invest in reorganising companies in South Africa, perhaps some sort of cross-collateralisation goal could motivate a lender to further secure its position with regard to a company's assets. Cross-collateralisation (as stated above) is when post-commencement finance is granted to a debtor on the agreement that this will constitute a secured loan, with the security extending to the pre-commencement debt as well. This could be achieved in South Africa by taking security in all unencumbered property of the debtor to the extent that such property exceeds the value of the post-commencement loan. Would this practice be permitted under the new business rescue laws? The wording of section 135(2) does not condone or disallow this practice, speaking only of security for present financing ("*any such financing* may be secured to the lender" – see the discussion in part 3.1 above). Ultimately, this is a policy-laden question for a court interpreting the provision to determine.

4 Analysis

4.1 The Supreme Court of Appeal decision in *Kariba*

The decision in *Kariba* centered on an interpretation of the term "binding offer" found in section 153(1)(b)(ii) of the Act and thus does not directly pertain to the issue of post-commencement financing.¹²⁹ The court was specifically called on to determine whether a "binding offer" made in terms of the section implied a mandatory acceptance of such an offer by the offeree.¹³⁰ The court *a quo* had concluded that such an offer should indeed be considered binding in this way and based its decision on what was considered a similar procedure contained in Chapter 11.¹³¹ The relevance

¹²⁸ *Kritzinger* para 51.

¹²⁹ Section 153(1)(b)(ii) of the Act provides that (if a business rescue plan has been rejected) "any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed the adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated".

¹³⁰ *Kariba* paras 12-21.

¹³¹ *Kariba* para 8.

of the decision for our present purposes, however, lies in the Supreme Court of Appeal's observations on the appropriateness of using the Chapter 11 procedure as an interpretative guide to the particular section of the Act in question. In this regard, Dambuza AJA points out that:

[C]ertain factors distinguish the process as provided for in our Act from the procedure provided for in the U.S. Bankruptcy Code. First, under the U.S. Bankruptcy Code it is the court that makes the decision as to whether rejection of a business plan by a creditor should be ignored. Obviously that decision would be taken after due consideration of all relevant factors. In *s 1129(a)* of the U.S. Bankruptcy Code the requirements that must be satisfied before a court can confirm a rescue plan are listed. And the provisions of this section are peremptory.¹³²

The accepted meaning of term "offer" as it has developed in South African jurisprudence was also analysed and the court concluded that the Legislature intended for the offer in question to be binding on the offeror (an interpretation which aligns with the position at common law).¹³³ No further mention was made of Chapter 11 or its worth as persuasive authority when interpreting the Act. The SCA did, however, highlight the untenable practical consequences of an interpretation that aligned with Chapter 11 as argued for by counsel for the respondent debtor company.¹³⁴ These practical examples make it abundantly clear that such a construal effectively plucks a provision from United States law in a vacuum – leaving behind the contextual safeguards, such as oversight mechanisms, that anchor and give meaning to its terms. It is thus not only in interpreting legislation, but also in drafting it, that one runs the risk of disregarding such context when transplanting legal provisions from elsewhere.

4.2 Legal transplants¹³⁵

Legal transplantation¹³⁶ is almost as old as the law itself.¹³⁷ However, in a modern and globalised society many countries are subsuming the laws of other jurisdictions at an ever-increasing pace – a trend motivated by

¹³² *Kariba* para 16.

¹³³ *Kariba* paras 17-19.

¹³⁴ *Kariba* paras 22-24.

¹³⁵ There is a vast literature dedicated to the phenomenon of legal transplants. See for example Watson *Legal Transplants*; Kahn-Freund 1974 *MLR*; Legrand 1997 *MJECL*; Berkowitz, Pistor and Richard 2003 *Am J Comp L*; Miller 2003 *Am J Comp L*; Markovits 2005 *Cornell Int'l LJ*; Graziadei 2009 *Theo Inq L*.

¹³⁶ Watson *Legal Transplants* 21 defines legal transplantation as "the moving of a rule or a system of law from one country to another, or from one people to another".

¹³⁷ Miller 2003 *Am J Comp L* 839. Miller gives the (17th century BC) Code of Hammurabi as one of the oldest examples.

necessity, political pressure,¹³⁸ expediency or otherwise.¹³⁹ Miller¹⁴⁰ rightly points out:

Whether it is in order to assimilate or diverge from the value and necessity of legal transplants and the concomitant need to take heed of jurisprudence developed in other jurisdictions when interpreting alien precepts can hardly be called into question.

Most countries will find themselves unable to attract international investment or engage in international trade without at least to some extent aligning their legislation with international norms and best practices.¹⁴¹ Scholars are in two camps where legal transplants are concerned.

On the one hand, proponents of legal transplant theory (for example, and most famously, Watson) argue that there are few social challenges to lifting rules or systems of law from one jurisdiction to the next.¹⁴² This is due to the fact that the law is considered socially neutral and can be divorced from socio-economic, political and historical context.¹⁴³ Of greater significance, it could be argued, would be the legal tradition from which the rule stems and this should be taken into account when considering the likelihood of a successful transplant.¹⁴⁴ The transplant theory was explained and advanced by Cotterrell, and drew distinctions between law that is culturally based and law that is instrumental.¹⁴⁵ As such, areas such as family law and the law of succession are considered culturally based, and will be more susceptible to influences of cultural and social context, whereas corporate law is in general considered instrumental and therefore more neutral and better suited to becoming the subject of a transplant.¹⁴⁶ Corporate law, Cotterrell argues, relies on "economic interests rather than national customs or sentiments" and therefore it is less likely that new rules or systems will be rejected following the transplant.¹⁴⁷

On the other hand, contextualist theory opposes this notion. As Kahn-Freund¹⁴⁸ points out:

¹³⁸ See for example Gillman 2009 *Geo J Int'l L* 263.

¹³⁹ An example is the relatively recent legal transformation that took place on a grand scale in Eastern European countries, see Mistelis 2000 *Int'l Law* 1055.

¹⁴⁰ Miller 2003 *Am J Comp L* 839.

¹⁴¹ Miller 2003 *Am J Comp L* 839.

¹⁴² Watson 1976 *LQR* 79.

¹⁴³ For a summary of the discourse, see Cabrelli and Siems 2015 *Am J Comp L* 124.

¹⁴⁴ Cabrelli and Siems 2015 *Am J Comp L* 124.

¹⁴⁵ Cotterrell *Law, Culture and Society* 118.

¹⁴⁶ Cotterrell *Law, Culture and Society* 118.

¹⁴⁷ Cotterrell *Law, Culture and Society* 126; Cabrelli and Siems 2015 *Am J Comp L* 124.

¹⁴⁸ Kahn-Freund 1974 *MLR* 27. See also and in general Legrand 1997 *MJECL* 114.

[A]ny attempt to use a pattern of law outside the environment of its original country entails a risk of rejection ... [and] its use requires a knowledge not only of the foreign law but also of its social and above all political contexts.

Similarly culturalist theory completely rejects the idea that legal transplants are at all possible. In the words of Legrand, "[i]n any meaningful sense of the term, 'legal transplants'... cannot happen".¹⁴⁹ This is because of the fact that any rule which is assimilated is in fact also culturally appropriated to the extent that it becomes inappropriate to refer to it as a transplant at all.¹⁵⁰

A middle road may exist between these camps: Friedman argues that it is modernity itself that makes it possible for vastly dissimilar systems to assimilate, due to the fact that developing economies will increasingly face the same challenges that developed countries have been grappling with for years, thus prompting a need for legal transplants to occur.¹⁵¹

Further analysis of the phenomenon of legal transplants beyond this brief introduction falls outside of the scope of this paper. Suffice it to say that transplants remain a reality in modern legal discourse and that it is an undeniable fact that jurisdictions the world over, and particularly in the developing world, are increasingly driven to conform their systems of law under international pressure to what is considered best practice.¹⁵² Corporate legislation anecdotally has the most to gain from such alignments and indeed ensuring that our legislation remains in step with international developments was one of the drivers behind the draft 2008 legislative reforms.¹⁵³ In addition to the usual caveats that apply when transplanting law, Loubser points to a number of reasons why, popular as it may be, Chapter 11 could be a Trojan horse as far as the law of insolvency and corporate reorganisation is concerned:¹⁵⁴

An insolvency system should arise out of existing cultural conditions and attitudes, and how debt is viewed in a specific country. Transplanted insolvency laws do not reflect these views and are then expected to change the cultural attitude to debt and debt forgiveness, something they cannot do, and so these imported systems are often ineffective.¹⁵⁵

¹⁴⁹ Legrand "What 'Legal Transplants'?" 57.

¹⁵⁰ Legrand 1997 *MJECL* 117.

¹⁵¹ Markovits 2005 *Cornell Int'l LJ* 96.

¹⁵² Miller 2003 *Am J Comp L* 839.

¹⁵³ GN 1183 in GG 26493 of 23 June 2004 5.

¹⁵⁴ Loubser 2013 *SA Merc LJ* 435-457.

¹⁵⁵ Loubser 2013 *SA Merc LJ* 443. See also Martin 2005 *BC Int'l & Comp L Rev* 1.

There is academic argument to the effect that Americans view insolvency with a spirit of optimism that other countries do not share. Such scholars would hold that being declared insolvent does not bring with it the usual stigma and judgements, and that the rehabilitation of the debtor to his erstwhile state of being a contributing consumer has high priority.¹⁵⁶ As Martin¹⁵⁷ points out:

The United States never adopted the English's unforgiving and highly administrative bankruptcy process... The focus in the United States instead was on balancing the desires of creditor groups and debtor groups, and promoting commerce. To this day, a United States bankruptcy debtor's freedom of choice about whether to liquidate or reorganize remains a key component of United States bankruptcy law... While in most parts of the world business failure causes less stigma than personal financial failure, both forms are viewed far more negatively in England, Australia, and Canada than in the United States.

The fact that this societal norm extends to corporate reorganisation is evidenced by the eager participation of financial service providers incentivised to invest in financially distressed firms. Indeed McCormack goes so far as to describe the United States' DIP financing regime as a "prime candidate" for "banks looking for a low-risk, high yield venture".¹⁵⁸ Chemical Bank, for example, a United States company which established a specialist DIP unit in 1984, claimed after a considerable lapse of time that it had "never lost a penny" in this type of venture.¹⁵⁹ In addition, in the United States a number of debtor-centred features of insolvency and bankruptcy laws "are structured to correct slack and improve managerial decision making" and are in fact thus considered by some to be "last-resort governance mechanisms".¹⁶⁰ This is not the position in South Africa, which has traditionally taken a creditor-friendly stance and where, if anything, a debtor-centred approach is viewed with scepticism.¹⁶¹

4.3 Further observations

The inclusion of a post-commencement financing provision in the new South African *Companies Act* is a necessary step in favour of successful reorganisation. Finance is essential to pay employees, maintain supplies of goods and services, and provide for the miscellaneous overhead costs

¹⁵⁶ Richardson, Gallagher and Szekely 2008 *JIBFL* 457; Rochelle 1996 *TSAR* 316; Martin 2005 *BC Int'l & Comp L Rev* 3, 22. For a comprehensive overview of the history of American insolvency law, see Tabb 1995 *Am Bankr Inst L Rev* 5.

¹⁵⁷ Martin 2003 *Am Bankr Inst L Rev* 367-368.

¹⁵⁸ McCormack *Corporate Rescue Law* 178.

¹⁵⁹ McCormack *Corporate Rescue Law*; Hensch 1991 *Bankr Dev J* 581.

¹⁶⁰ Triantis 1997 *NY Sch J Int'l & Comp L* 196.

¹⁶¹ Burdette 2004 *SA Merc LJ* 244.

necessary for the business to continue as a functioning entity.¹⁶² It is not difficult to establish that there is a demand for post-commencement finance, but what are the incentives for lenders? Clearly it is potentially risky to lend to a corporation which is by definition in financial distress and hence the legislative safeguards which must be put in place to protect new and existing creditors. In the United States incentives for new lending are created by priority over pre-petition unsecured creditors or even by super-priority over pre-petition secured creditors under section 364(d). At the same time, section 364 ensures that pre-petition creditors are adequately protected. While the ranking of creditors might be altered, courts are careful not to undermine the legitimate interests of pre-petition secured creditors. This protection is said to stem from a constitutional protection of property rights.¹⁶³

Similar considerations appear to have moved the South African Legislature, so that security for post-commencement finance may be granted only to the extent that assets "are not otherwise encumbered".¹⁶⁴ Section 135 of the Act is much simpler and far less flexible than its United States counterpart, however. In particular, the failure to allow for any form of super-priority for post-commencement secured creditors suggests that the South African Legislature has omitted the crucial feature of a loan incentive to prospective creditors particularly in instances where a distressed debtor has no unencumbered assets left. The United States requirement of adequate protection and the strict enforcement thereof in the courts shows that super-priority need not spell the end for pre-commencement creditors. The consequences of the decisions in *Redpath* and *Merchant West* is that this interpretation in effect now allows for a super-priority to be afforded to a post-commencement creditor without any of the protection and court oversight that accompanies this procedure in terms of Chapter 11. It also seems to be completely at odds with the provisions of section 134. Indeed, the pre-commencement secured creditor is left in a perilous position. Ironically this might well be a strategy that companies in business rescue could abuse, since this mechanism could be used to leverage a pre-commencement creditor into providing further funds in order to allow that creditor to make use of cross-collateralisation to improve its position or merely to avoid being usurped by another creditor.

¹⁶² For an overview of the significance of post-commencement finance in business rescue, see Pretorius and Du Preez 2013 *SA J Entrep & Small Bus Man*.

¹⁶³ See part 2.2 above.

¹⁶⁴ Section 135(2) of the Act.

Five years have passed since the Act came into operation. It would seem there is already evidence indicating that one of the critical challenges facing companies under business rescue is the fact that post-commencement finance is not forthcoming in South Africa. In a report prepared on behalf of the Companies and Intellectual Property Commission (CIPC), Pretorius highlights concerns that have come to light.¹⁶⁵ Pretorius¹⁶⁶ points out that South Africa appears to have a very small venture capital market. Furthermore, he notes that:

The perceived "low preference" that a PCF investor will hold in case of an eventual liquidation (if rescue fails) also contributes to the adversity to PCF provision. Related to the lack of data integrity, potential PCF providers perceive the risk as too high for the allocated preference.

The report further confirms that, as is the case in the United States, most of an embattled company's assets are already encumbered by the time that the company files for business rescue and it would appear that alternative advanced financing options are under-utilised (the report refers specifically to mechanisms such as debt swaps or buying the bank's debt).¹⁶⁷ In the light of the fact that business rescue practitioners consider it an unwritten rule that a lack of post-commencement finance means that there is little prospect of a successful rescue, a lack of comprehensive legislative regulation may well prove fatal.¹⁶⁸

5 Conclusion

It is abundantly clear that in spite of a purported reliance by the South African Legislature on Chapter 11 of the United States Bankruptcy Code, the distinctions between the Act's business rescue provisions and their American counterpart are stark – at least as far as post-commencement finance is concerned. Perhaps the most noteworthy of these distinctions is the lesser degree of court oversight in the South African process. As the decision in *Kariba* shows, this is the case for many of Chapter 6's provisions. The impact of this must not be underestimated and the courts should

¹⁶⁵ Pretorius 2015 http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf.

¹⁶⁶ Pretorius 2015 http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf 46.

¹⁶⁷ Pretorius 2015 http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf 48.

¹⁶⁸ Pretorius 2015 http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf 46.

proceed with great caution when drawing comparative conclusions from Chapter 11 and related American cases.

This paper's proposed solution is not that the provisions of Chapter 11 should be transplanted in their entirety through an amendment of the Act to align with its United States counterpart. The Chapter 11 procedure is not necessarily the most suitable solution for South Africa and in any event, recent reports would suggest that reorganization is a fallible process in both jurisdictions, and the United States is itself reconsidering various aspects of Chapter 11.¹⁶⁹ One of the core problems that South Africa would face if it tried to more fully replicate the United States' post-commencement financing provisions is that these rely extensively on court oversight. In South Africa, by contrast, court oversight is shunned, due to the perception that undue court involvement will encumber business rescue proceedings, rendering it costly and time consuming.¹⁷⁰

There is some irony in this reasoning if one considers the myriad of factual variations that might present themselves in this type of scenario, as well as the number of stakeholders with conflicting interests and the nuanced manner in which such a matter must surely be managed in the interests of both commercial realities and legal certainty. The fact that the South African Legislature did not provide for a more rigorous and detailed regulatory regime with regard to post-commencement finance might actually represent as big a threat to corporate reorganisation as unwarranted court oversight. The current position might also have the unexpected consequence that court oversight occurs by default, when creditors without statutory recourse to this form of supervision are forced to turn to litigation in a situation where the lacunae in the Act are abused.¹⁷¹

There may, however, be other options for oversight that could prove as effective as the United States' mechanism, while still minimising delay and legal costs. For example, it might be possible to give the Companies Tribunal jurisdiction to oversee applications by creditors for priority in instances where there are no unencumbered assets left, yet adequate protection of the interests of all remaining creditors can be established. For

¹⁶⁹ South Africa: Pretorius 2015 http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf; United States: ABI date unknown <https://abiworld.app.box.com/s/vvircv5xv83aav14dp4h>.

¹⁷⁰ Burdette 2004 *SA Merc LJ* 410; Rajak and Henning 1999 *SALJ* 276.

¹⁷¹ See for example *Kariba* and *Kritzinger* discussed above. See further: *ABSA Bank Limited v Newcity Group (Pty) Ltd* 2013 3 All SA 146 (GSJ), where a final liquidation order was refused and the business rescue provisions upheld instead, in spite of the debtor company's admitting that this was effectively an abuse of process.

factual examples where this might be appropriate, the reader is referred to the American cases discussed above in Part Two. The Act already makes provision for similar forms of extra-judicial oversight in other contexts such as the jurisdiction of the Takeover Regulations Panel to oversee so-called "affected transactions" involving "regulated companies".¹⁷² Similarly, it would be possible to regulate certain types of company more keenly than others. There are, of course, several other examples of this type of differentiation in the Act.¹⁷³ In fact, in the context of Chapter 6 the regulations already make provision for a process of differentiation for the purposes of the appointment of the business rescue practitioner.¹⁷⁴ This could be taken into account to address concerns that smaller entities might be affected more detrimentally by the costs of court oversight than larger ones.

After analysing the existing jurisprudence related to Chapter 6, Osode¹⁷⁵ argues that the South African case law is beginning to demonstrate the "gaps in the framework" of our business rescue provisions, reflecting poor quality drafting. The fact that South African courts are faced with factual scenarios for which the Act makes no provision could lead to a forced interpretation of its provisions. The danger exists that an interpretation such as the one in *Merchant West* is favoured by later courts as a robust pro-business rescue position. This type of reasoning equates more aggressive protection of post-commencement creditors with being pro-business rescue, whereas a more restrained approach is by default seen as being pro-liquidation and more creditor friendly. Theoretically more robust rescue incentives and adequate protection for post-commencement financiers will bolster business rescue efforts. Attempting to achieve this end by reading United States-type mechanisms into the provisions of the existing Act, as was done by the court *a quo* in *Kariba*, as well as in *Merchant West* and *Redpath*, would be misguided, however. In fact, such a trend could, without the necessary and concomitant foreign safeguards, paradoxically threaten the viability of business rescue in South Africa, given the fact that the success of these provisions relies to a great extent on the trust of stakeholders, especially creditors.¹⁷⁶

¹⁷² See ch 5 of the Act.

¹⁷³ For example the "public interest score" introduced by s 30(7), or the definition of "regulated company" in s 117 of the Act.

¹⁷⁴ Regulation 127(2)(b) under the Act differentiates between "large", "medium" and "small" companies.

¹⁷⁵ Osode 2015 *Penn State J L Int'l Affairs* 488.

¹⁷⁶ Rajak and Henning 1999 *SALJ* 287.

Chapter 11 ostensibly favours reorganisation and the skepticism that the process is met with elsewhere is far less of a hindrance in the United States.¹⁷⁷ While the South African Act supports reorganization by making provision for post-commencement financing (this is not true, for example, of the United Kingdom)¹⁷⁸ the balance struck in section 135, the lack of nuance, and the complete lack of court oversight make it impossible to protect pre-commencement secured creditors while at the same time offering viable options to persuade post-commencement creditors to invest in a company in distress. This is certainly one of the areas of the Act that the Legislature should revisit to seek a creative and realistic solution. As this analysis has shown, interpretation by the courts will not be able to save the existing provisions that regulate post-commencement financing.

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¹⁷⁷ See Moss 1997-1998 *Brook J Int'l L* 115 for a comparison of US and UK law in this regard.

¹⁷⁸ McCormack *Corporate Rescue Law* 176.

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http://www.cipc.co.za/files/4714/2866/7900/Report_Number_3_ammended_30032015.pdf_accessed 19 July 2016

List of Abbreviations

| | |
|------------------------------|---|
| ABI | American Bankruptcy Institute |
| Am Bankr Inst J | American Bankruptcy Institute Journal |
| Am Bankr Inst L Rev | American Bankruptcy Institute Law Review |
| Am J Comp L | American Journal of Comparative Law |
| Bankr Dev J | Bankruptcy Developments Journal |
| BC Int'l & Comp L Rev | Boston College International and Comparative Law Review |
| Brook J Int'l L | Brooklyn Journal of International Law |
| JIBFL | Butterworths Journal of International Banking and Financial Law |
| Cal Bankr J | California Bankruptcy Journal |
| Cardozo L Rev | Cardozo Law Review |
| CIPC | Companies and Intellectual Property Commission |
| Cornell Int'l LJ | Cornell International Law Journal |
| DIP | Debtor in possession |
| DTI | Department of Trade and Industry |
| Geo J Int'l L | Georgetown Journal of International Law |
| Int'l Law | International Lawyer |
| IODSA | Institute of Directors of Southern Africa |
| KERP | Key employee retention plan |
| LQR | Law Quarterly Review |
| MJECL | Maastricht Journal of European and Comparative Law |
| MLR | Modern Law Review |
| NY Sch J Int'l & Comp L | New York Law School Journal of International and Comparative Law |
| PCF | Post-commencement finance |
| Penn State J L Int'l Affairs | Penn State Journal of Law and International Affairs |
| SA J Entrep & Small Bus Man | South African Journal of Entrepreneurship and Small Business Management |
| SALJ | South African Law Journal |
| SA Merc LJ | South African Mercantile Law Journal |

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|----------------|--|
| SCA | Supreme Court of Appeal |
| S Cal L Rev | Southern California Law Review |
| Theo Inq L | Theoretical Inquiries in Law |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law |
| U Ill L Rev | University of Illinois Law Review |
| U Penn J Bus L | University of Pennsylvania Journal of Business Law |
| UK | United Kingdom |
| UNCITRAL | United Nations Commission on International Trade Law |
| US | United States |
| Vand L Rev | Vanderbilt Law Review |
| Yale LJ | Yale Law Journal |
| Wash U LQ | Washington University Law Quarterly |