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Navigating Creditors' Interests in the Context of Business Rescue

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Abstract : The COVID-19 pandemic had a severe impact on the society and companies in South Africa. This raises questions about the position of creditors of companies facing financial distress and the actions that directors should take to cater to the interests of creditors. The extent to which directors owe their duties and consideration to creditors has been the subject of debate. The directors of a solvent company owe their duties to the company in favour of its shareholders. When the company becomes insolvent, creditors are the beneficiaries of the directors' duties. However, the intermittent phase between solvency and insolvency, otherwise referred to as the realm of insolvency, is not accounted for. The purpose of this paper is to determine whether South African company law appropriately addresses the duties that directors owe to creditors and the extent of consideration given to creditors' interests when the company is in the realm of insolvency and has started business rescue proceedings. A comparative study on South Africa, the United States of America, the United Kingdom and international instruments was employed to achieve the purpose statement. In the United States of America and the United Kingdom, the focus shifts from shareholders to the best interests of creditors when business recue proceedings commence. Such an approach is not aligned with the purpose of the Companies Act of 2008 that calls for a balance of interests of all persons affected by a company's financial distress and will not be suitable for the South African context. Business rescue in South Africa is relatively new when compared to the practices of the United States of America and the United Kingdom, and the entrepreneurial landscape in South Africa is still evolving. The interests of creditors are not the only interests at risk when a company is financially distressed. It is recommended that an enlightened creditor value approach is adopted for South Africa, where the interests of creditors, albeit paramount, are balanced with those of other stakeholders. This approach optimises a gradual shift in the duties of directors from shareholders to creditors, without disregarding the interests of shareholders.

Keywords : business rescue, shareholders, creditors, financial distress, balance of interests, alternative remedies, company law

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