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Dedication

To my brother Pati Johannes Moraka.

Your support and unselfish approach towards life is dearly missed. These two powerful attributes that defined who you were made me think twice about who I am. While mourning you, life became worthless and offered me no joy. To fill the void that you left in my heart – the journey was born. This is dedicated to you and what you could not finish. The journey continues. It is too soon since your passing to stick to all the promises and dreams that we shared; however, I am resolute in my intention to complete the mission as discussed, and sooner rather than later.

It is the thought that counts, many would say. However, you went beyond this basic rhetoric. You executed without hesitation.

“Robala ka Kgotso Mmina Pula”

I have learned so much from you. This one too is for you.

Job Moraka, February 2018

TITLE

Business Rescue Overview
Second Edition

Acknowledgements

To all past, current and future employees of Nameplate Centre Signs. I acknowledge the past employees for rebuilding this iconic brand after a 20-year period of dormancy. I salute the current employees of Nameplate Centre Signs for their determination to save and grow the company despite the trying economic circumstances. Hopefully we will overcome this, and we will still be standing in 2018 and beyond.

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Introduction

The writing of the second edition of Business Rescue Overview was much easier than the first. For starters, it has been almost six years since the promulgation of business rescue legislation and the accompanying regulations. This means that the South African courts have finally had the opportunity to test some of the provisions of this important legislation. There is also some clarity concerning the interpretation of the tested provisions of the business rescue legislation by the courts of this country. The development of the South African business rescue jurisprudence is becoming clearer by the day. The first edition of this book was written at a time when I was part of a soft turnaround of a medium-sized manufacturing business which was about to go into liquidation. There were many frustrations as the business rescue legislation was still hanging and the judicial management procedures at that time offered no real solutions.

The business had liquidity issues and faced potential liquidation because of its inability to meet the creditors' payment demands. I was very fortunate ten years ago because my involvement with various business turnaround initiatives was secondary in nature, as I was more of a follower than a leader. I reported to experts who knew what they were doing. I was consequently not in the creditors' firing line. During that time, none of the creditors who demanded their overdue payments called me directly. Neither did I receive letters from various attorneys addressed to me personally as the Managing Director of the entity we were attempting to fix. I was not a shareholder in any of the businesses referred to

above and I obviously had no special sentiments or attachments other than to implement the turnaround strategies.

As a result, I did not worry about raising capital to avoid the liquidation of the business. When the first edition of this book was written, business rescue legislation was new, and many questions were still left answered at the time. There was no clarity concerning the implementation and interpretation of the provisions of the Companies Act, particularly Chapter 6 of the Act which specifically deals with business rescue procedures.

In 2011, theory and commentary dominated the business rescue agenda, and nobody had practically implemented the procedures or tested the various provisions of the Act through the courts. The first edition was therefore a combination of theory and some practice confined to the business turnaround sphere, which was not legislated then other than the provisions of the judicial management procedures.

The main difference between the first and second edition of this book is that the second edition is almost entirely based on practical experience in both the technical and legal skills associated with business rescue proceedings. When a company board of directors resolves to adopt the implementation of business rescue procedures, one may be tempted to say that the end is almost near for the company in question. There are two reasons why the end may indeed be near.

Firstly, a business must really be in trouble to contemplate business rescue, as it unfortunately carries negative connotations which may be interpreted differently by the various key stakeholders such as creditors and employees.

The creditors and suppliers would understandably be unhappy if the business failed to settle its debts. In practical terms, the companies that I have witnessed going through the process were not saved and ultimately liquidated. There are nevertheless many companies that have been saved through this process, as suggested by Stats SA.

Secondly, the courts are generally not known for their urgency. Business turnaround, workout or business rescue are all urgent procedures that must be attended to immediately.

The business I owned together with four other shareholders started to experience cash flow problems towards the middle of 2016. These problems persistent until the end of 2016 and for most of the 2017 financial year. The business funders were unhappy with the financial documents they were provided with and asked that we look deeper into the affairs of the company. The funders felt that the business was technically on the brink of liquidation and that unless something drastic happened very soon, it was just a matter of time before the liquidation reality set in. We as the shareholders were given a simple choice to make. We were asked to choose between business rescue or a workout. The business funder wanted to know whether we as the business owners believed that the business could still trade itself out of trouble.

As the business owners and shareholders, we had to inspire confidence in the company employees that all would be alright. We had to make them believe that things would be okay even though hope had long deserted us. We had to put up a show to inspire the team that I personally respected so much. We told the funder that the business was worth saving and we never looked back. We navigated

our way through the rough seas infested with sharks and other obstacles and came through to the other side battered but still standing.

The Nameplate Centre Signs' team are worth gold. They subscribed to the turn-around vision of the company and delivered in unison.

The management team was not alone in navigating the company through troubled waters. There was a team behind management who also believed in the vision and wholeheartedly executed the mandate with precision. We all knew that failure was not on the cards. Nobody had another job to go to.

Our resolution was to work nonstop with a "whatever it takes" attitude. As a result, we missed community events, we missed church services, and we all sadly missed the parents' meetings of our children's schools. Our families and children understood that working hard to save the company was a small price to pay compared to witnessing spouses and parents sitting at home with nothing to do other than to frequent the unemployment queue. Everybody within the company matured quickly and adapted to the prevailing circumstances on the ground as and when they happened, blow by blow.

My colleagues and I were governed by the following motto: "It is possible".

I salute all the Nameplate Centre Signs' employees both past and present. You all contributed towards the development of this company. Your footprints are evident in many mining shafts and in almost the entire road network system of South Africa. This one is for you.

In 2016, I walked into the finance manager's office of the company of which I was a founding member. I then asked her why the company was battling to pay the suppliers and why suddenly, the creditors were calling me directly, even though I was not in operations or finance. I asked why the creditors were not calling her as the finance manager. I added that the company was charging reasonable margins and should not be struggling to pay the suppliers.

Our conversation lasted an hour. During that one hour, I heard strange stories and witnessed uncontrollable tears pouring down her cheeks. I reminded her that all shareholders are allowed by law to inspect the financial books of the company that they own shares in. As a shareholder and following this basic principle of company law, I requested her to present some financial records and a handful of invoices and customer statements. She could not produce any of the invoices I had requested and informed me that the documents I requested were not available because they did not exist. Initially, I misunderstood what she was saying and simply thought she was being insubordinate and did not want to give me what I asked for. What happened next was unprecedented and took me by complete surprise. She told me that the requested invoices were non-existent or fictitious, and yet money had been paid on presentation of these fictitious or non-existent invoices. I knew instinctively that this was the beginning of a nightmare. Money had been paid to fictitious recipients and the company was almost R800,000 in debt.

As the lawyers' letters piled up on behalf of creditors demanding their money, things took a turn for the worse. The business funders gave me two options: they

either had to put the business under workout, or straight into business rescue. There were no other options.

The workout option entailed no financial bailout but a three-month moratorium on the loan repayments. The business rescue option in my mind was a precursor to liquidation. Consultants or business rescue practitioners may or may not fight for the survival of the business. I am therefore grateful that my team and I decided to dig the company out of the mud that we had found ourselves in. It was painful, but we finally got it right.

Effecting a business turnaround or workout is like a soft coup, where the army generals involved are only willing to go as far as parking the tanks outside your yard, and then chatting and having some tea with you despite the seriousness of the matter at hand. The real coup happens when the generals start firing the tanks indiscriminately in full knowledge that the target is defenceless.

Business failure happens to the best business minds in the world. They too cannot let go of their businesses even when they are in bad shape as they believe that a positive change would come about if the tanks and missiles were halted for a day or two. The lender in my case gave us a long rope with which to hang ourselves. The lender agreed to a workout plan that had to be strictly adhered to. Although the funders gave the business a bit of a reprieve, there is no doubt that their fingers remained permanently attached to the trigger and that they only allowed the business to run where it could be seen, in front of the moving tank. We could not falter because the funder was either going to pull the trigger and end it all quickly, or the tanks were in any event going to run us over. It was

just a matter of choosing the most humane way of dying, and sadly taking 40 employees with.

In most cases of business financial distress, poor management and lack of timely execution of responsibilities are the primary problems. It was no different with the company discussed above.

Chapter 1

Progress and Changes

Internet usage is gaining momentum among many South Africans. The South African public is acknowledging the power of this medium and its ability to reach millions of people instantly through social networks like Twitter, WhatsApp and Facebook. The South African citizens have taken this powerful medium further by using the various platforms it provides to vent their anger and raise their frustrations. Individuals, corporate and government are all potential targets of stinging cyber-attacks for anything seen as mischief by the users, whether real or imagined.

The rollout of these important mediums is sluggish and can be fast-tracked. Nevertheless, it is comforting to see the trenches being dug and cables being laid everywhere in South Africa, particularly in large cities. This increased activity is giving South Africans hope that the days of expensive internet may soon be over.

Many rural villages in South Africa are still behind when it comes to internet access. South Africa is mostly rural and millions of legitimate voices that could contribute towards the building of a prosperous South Africa are missing. There is no internet access for them.

Websites are being created for many reasons. Some exist for the ease with which to operate business, while others are created for educational purposes and to promote communication that is fast, easy and borderless. The websites touch on everything that is of concern to the South African public.

Some websites even question the performance of municipalities and corporate South Africa. For the most part, issues relating to poor service delivery are raised.ⁱ Other matters mentioned on these platforms relate to dishonesty, incorrect billing and invasion of privacy by certain state agencies.

In general, businesses are also questioned about poor customer service or the lack of any service by the identified delinquent corporations. Patriotism aside, there are many good companies in South Africa that deliver excellent service and equally listen to their customers.ⁱⁱ Companies falling under the latter category are always willing to rectify their mistakes and to seriously do something about the complaints raised against them.

In 2010, South Africa resembled a mixed bag. The country delivered the best World Cup ever against all odds and experienced a spate of civil disobedience from many communities across the nation. Most of the protests were directed towards municipalities or local government structures. In Gauteng Province, the anger was directed at the City of Johannesburg, which seemed to be unable to address challenges relating to incorrect billing, electricity cut-offs, and a scourge of potholes that were mushrooming everywhere in the city. In 2011, many opposition political parties made comments which suggested that the Johannesburg Municipality was on the verge of collapse due its inability to collect rates.

Six years later, things seem to be the same; however, there are significant changes that have taken place since 2011. The biggest change is that the two large metros in Gauteng, City of Johannesburg and Tshwane Municipality are now governed by the Democratic Party-led coalition. It is early days to judge how

the coalition will fare over time, but it is nevertheless pleasing to note that the level of service delivery protests has decreased, albeit only marginally so. The residents of the major metros in Gauteng lost hope in 2010 and desired that a different political party should take over the municipalities in the hope that service delivery would improve. The residents' wishes were granted in the 2016 local government elections. The two cities are now run by different political parties, and yet the non-service delivery perceptions of the residents remain.

The DA-led administration in the Gauteng metros is not finding it easy to make significant inroads as rapidly as the public expects it to. Opinions differ whether the coalition is performing better than the previous administrations. There are residents who acknowledge that time is needed to fix the municipalities, which were broken and riddled with corruption according to the DA-led alliance. On the other hand, there are people who feel that life was much better under the African National Congress-led administration in the cities of Johannesburg and Tshwane.

It certainly looks like the DA-led coalition has learned something about the mutual gains approach, which has allowed them to solve their coalition differences. The coalition is still standing in 2018, contrary to predictions which suggested that it will not last. The mutual gains approach in this instance has saved the day. South Africa may have just entered the world of political coalitions, and perhaps no political party is fit to govern on its own anymore. These coalition governments are possibly the preferred way to govern to ensure that the political and economic checks and balances are adhered to. The mutual gains approach is based on the premise that all parties involved in any given relationship

are equal, provided they have common goals. The following are the six principles of the mutual gains approach:ⁱⁱⁱ

1. Acknowledge the concerns of others in a dispute;
2. Encourage joint fact-finding;
3. Offer to compensate for known impacts;
4. Accept responsibility, admit mistakes, and share power;
5. Act trustworthy always; and
6. Focus on building long-term relationships.

The above principles are very powerful tools if carried through in good faith. The trick is to ensure that all past promises and commitments are carried through, as this will avoid a situation where the promises themselves become subjects of disputes.

The opinion on which administration is better in governing will continue regardless of who is running the municipalities. The communities will rise if service delivery issues are not addressed. Acceleration of service delivery will therefore stand the DA-led coalition in good stead and help to keep it intact.

Rigidity in terms of how the world is being governed seems to be on the decline. Change is around us and is happening at lightning speed. The new voters want to see change in their lifetime. At the time of writing this book, Zimbabwean citizens finally took a stance. They too wanted to see change after 37 years of Mugabe rule.

To keep up with change is hard for everybody. Circumstances and scenarios are unpredictable. It has become an uncontested responsibility of management to keep up with the pace to ensure that their organisations stay relevant in today's business world. It is also paramount that those leading these organisations understand and recognise the changing needs, trends and sophistication of the consumers that they are serving, whether political or otherwise.

Similarly, in business there are organisations which are trapped in the past and continue to bask in former glories. They have committed themselves that they will change for no one. How long can these organisations tread water under the current prevailing economic conditions? Junk status label has been officially conferred on South Africa by two rating agencies.

The economic downturn is at the forefront in the process of restructuring the world economy.^{iv} Organisations which are failing to adapt to the prevailing recessionary economic conditions are shutting their doors daily.

Failing organisations usually take a significant number of crucial jobs with them. Sadly, loss of jobs is a major problem in the South African context. This is a country with a very high rate of unemployment, estimated at 27%, with others putting it as high as 33%. It is up to the directors, management and employees of the various organisations to instil a culture of team work and co-operation within their organisations. Team work and cooperation are critical attributes for the smooth-running of organisations that do not aspire to be business rescue candidates.

Companies are meant to evolve and often out-live their founders. The lifespan of many companies was unfortunately cut short after 2008 for numerous reasons, one of which was the recession that entrenched itself towards the end of 2008. The 2008 recession affected companies of all sizes and across all sectors indiscriminately around the world.

Many companies have reviewed their business strategies post the 2008/09 world recession to accommodate the new reality of adapt or die. Companies that were resilient enough to adapt and embrace the economic crisis have been shown to be on the right path towards recovery.^v

History has shown repeatedly that resilient organisations are run by managers who are consciously aware of the changes that are taking place and adapting accordingly. They are always on the lookout for indicators that are central to their survival. As a result, they deploy strategies in advance to minimise losses that may arise because of the recessionary environment. These companies appreciate the power of planning, focus and execution. They understand and implement vital plans to counter the severity of any downturn, and by so doing enhance their chances of survival.

These companies excel in setting appropriate goals intended to transform them. They achieve this level of resiliency through the active involvement of their employees. However, employees do not always perceive management's good intentions during the change process. It is therefore important that employees form an active part of any change initiatives, as their exclusion is bound to frustrate the change process, or even lead to its complete failure.

There is no doubt that the world of business post the 2008/2009 recession has been a complex one, as reflected in the IBM study.^{vi} This study was conducted among 1,500 CEOs from 63 countries.^{vii} These chief executive officers were asked what their thoughts were regarding the ever-increasing economic complexities. According to the report, 79% of the CEOs who took part in the study anticipated more complexities in the future, which they might be unable to manage. The conclusions to be drawn from this report are that unless better methods of managing the business are invented, companies which are managed well by today's standards may be at risk in the future.

Much has happened since the study was conducted. The world economy has struggled to get into second gear. Some countries like South Africa and Brazil have sadly struggled to maintain their credit ratings, both of which have been downgraded to junk status. South Africa was a surprise package for a credit downgrade. The country's banking system was hailed as one of the critical factors that minimised the impact of the 2008/2009 recession on the country's economy. While the rest of the world experienced economic problems during the 2008/2009 recession, South Africa was among the least-affected economies. It is not clear what has caused the sudden economic decline of the South African economy.

Indeed, the country's decline to junk status was rapid and there are no signs that the onslaught by the rating agencies will end soon, at least not until all of them have rated the country below the sub-investment grade. It is difficult to understand what could have gone wrong with the South African economy between

2008 and 2017. The various twelve-point plans drafted by key government personnel are perhaps an indication of how lost the country has been economically for a decade.

The rating has raised many concerns regarding the reasons that resulted in the downgrade. As usual, the same issues were raised by the rating agencies. These issues included global business sentiments, the cabinet reshuffle by President Zuma, rigid labour laws and lack of investor confidence due to policy uncertainty. Recently, economic fundamentals have been cited as one of the reasons why the economy is not growing.

The South African public is of late demanding more accountability concerning the way corporates are run. The recent corporate governance issues at Transnet, South African Airways and Eskom are some of the issues many people were not happy about. Allegations of state capture by the erstwhile Public Protector Thuli Madonsela remain untested and troublesome to those who are implicated.

Governments around the world were bailing out their ailing companies during the 2008/9 recession. General Motors is the perfect example of a beneficiary of such assistance. The South African government also set up a special fund worth six billion rand to minimise job losses resulting from distressed companies.^{viii} The South African Industrial Development Corporation (IDC) was tasked to administer the fund to ensure that businesses with a potential for survival are given a chance to do so. The initiatives by the IDC were aimed at ensuring that jobs were saved particularly in the manufacturing sector, which was hard hit by the recession. The number of distressed companies which ultimately end up in liquidation seem to have increased in South Africa between the years 2008 and 2013.

Statistics South Africa (Stats SA) reports that since the last quarter of 2008, 6,000 companies were liquidated for a variety of reasons.^{ix} Although the figure includes voluntary terminations, a significant number of companies failed because of direct liquidation. Liquidations are disruptive to the economy in general because, when employees lose jobs, spending power is impacted, fewer taxes are collected, and a burden is placed on the government to provide social security. The Stats SA June 2017 figure on liquidations stands at 154 companies.

There are many reasons why companies fail. Poor management and external factors rank among the main reasons. It is critical that the companies instil managerial discipline as part of business initiatives aimed at minimising business failure.

Business rescue procedures are not entirely new to South African business. The judicial management procedures, which were the precursor to the Business Rescue dispensation have been around for a while, although their efficiencies during their existence were questioned by business in general. Business did not perceive their value, particularly when it came to the ease of their application and their success rate over the years. They were a complete failure because business liquidations dominated the era of their existence. Very few businesses were saved under judicial management procedures.

The change brought about by the new company legislation which introduced the concept of business rescue has been widely welcomed by business. Business rescue procedures do provide hope to a distressed business, because if they are properly applied they can suspend the initiation of business liquidation by creditors until there is certainty on whether the business will survive or fail. There is

no doubt that business rescue processes are undesirable and very difficult to contend with by all company stakeholders, whether shareholders or employees. Business rescue entails the appointment of an external person – the business rescue practitioner, to run the affairs of a business in distress.

An external appointment may not be a bad idea, provided the company has not yet reached a critical stage of distress. In that regard, a turnaround coach may be brought in to work with the management of the organisation. However, where the company is on the verge of collapse and is unceremoniously urged by its creditors through court proceedings to improve or be liquidated, an external person may not be desirable to run the affairs of the company, as the company may already have reached a point of no return. On the other hand, it could be argued that this is necessary as the internal management has failed.

In South Africa, turnaround coaches are known as business rescue practitioners. Their role is to return the company to profitability as soon as possible. They do not have any allegiance to the troubled organisation and are not interested in the organisational petty politics. Their job is to look at the prevailing situation with a fresh pair of eyes. They use the prevailing organisational history to plot its future. As expected, they are not hired to nurse the egos of management. In most cases, they dismiss employees who are not cooperative and those whose intention is to frustrate the rescue process. They are racing against time to restore customers and creditors' confidence in the organisations and are hence often seen as ruthless and heartless when dealing with the crisis.

The rescue proceedings are also challenging as they require a management approach that is unique and distinctly different to managing a stable or growing

company. The business rescue legislation as contemplated in the new Companies Act is welcomed. It may well be the cure for the undesirable liquidations which, at times, were the only option taken by creditors for a distressed company.

Chapter 2

Legacy: Judicial Management

The South African business community has been vaguely aware over the years of the concept of judicial management, which was first promulgated in the 1926 Companies Act. The judicial management procedures were an attempt by the government to assist companies in distress but were largely ineffective.

Subsequently, judicial management procedures were incorporated into the Companies Act 61 of 1973.^x A company could be placed under judicial management under the 1973 act if it was found that the following circumstances were prevalent:^{xi}

(1) *When any company, because of mismanagement or for any other cause, –*

*(a) is unable to pay its debts or will unlikely be able to meet its obligations,
and*

*(b) has not become or is prevented from becoming a successful concern,
and there is reasonable probability that, if it is placed under judicial
management, it will be able to pay its debts or to meet its obligations
and become a successful concern, the court may, if it appears just and
equitable, grant a judicial management order in respect of that com-
pany.*

The success of judicial management procedures seemed to have been limited over the years. There is very little evidence that suggests that the rate at which companies were saved under the provisions of this legislation exceeded the

number of liquidations which arose out of the same transactions. Many companies preferred to go quietly and found the procedures to be self-defeating and very unkind to the distressed businesses they were intended to help.

There is no doubt that liquidation was the procedure preferred by creditors to recover the debts owed by the distressed company. Although the 1973 Companies Act made provision for compromises in terms of relationships between the creditors and the other role players associated with the distressed company, often the contrary prevailed. Creditors panicked and preferred to salvage what was left of the ailing company for themselves. Frequently this was done with disastrous results as shareholders lost their investments; equally distressing, workers lost their jobs and the government lost continuous tax revenue because of the company's liquidation. The judicial management processes have been incorporated into the business-rescue procedures contained in the new companies' legislation.^{xii}

Stats SA reports that liquidations increased by 25.9% in the first nine months of 2009. The report shows that in 2008, approximately 2,365 liquidations were recorded compared to 2,977 in 2009. The 25.9% increase reflects both compulsory and voluntary liquidations.^{xiii}

According to this report, the mentioned statistics exclude insolvencies arising from business partnerships and sole proprietorships. In the first quarter of 2010, a total of 358 liquidations were recorded. An additional 360 insolvencies were reported, mostly affecting sole proprietors and business partnerships. The same negative sentiments were depicted by the other economic and business bodies, for instance the South African Chamber of Commerce and Industries.^{xiv}

Of the 13 sub-indices that the chamber identified in the index, nine were positive and four were negative. Liquidations were once again shown to be the preferred method of quickly disposing of a distressed company. The result is that little preference was given to judicial management.

It is reported that 959,000 jobs were shed by the South African economy between 2008 and 2009.^{xv} Similarly, funding organisations affirmed the huge job losses in 2009.^{xvi} Serious job losses were also experienced within labour-intensive enterprises. The retrenchments have continued unabated since then to 2018.

While employees are said to be the greatest assets of organisations, they may equally be the greatest liability when difficult times manifest. Severance payment is an expensive exercise for a business barely surviving on a day-to-day basis.

Employees lost their jobs in the past partly due to judicial management procedures. These procedures were rigid and intensely administrative in nature. Their design was not intended to change the fortunes of ailing companies. They were very long and cumbersome, yet companies that are in a distressed situation require speed to survive. Unfortunately, judicial management procedures were the exact opposite of speed.

Chapter 3

Business Rescue

The Companies Act makes provision for two types of companies that may be formed under its jurisdiction. These are for-profit companies and non-profit companies.

The new Act further promotes the development of the South African economy through the following activities, as depicted below:^{xvii}

(Section 7) The purposes of this Act are to –

(a) Promote the development of the South African economy by-

- (i) Encouraging entrepreneurship and enterprise efficiency,
- (ii) Creating flexibility and simplicity in the formation and maintenance of companies, and
- (iii) Encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

(b) Promote innovation and investment in South African markets;

(c) Reaffirm the concept of the company as a means of achieving economic and social benefits;

(d) Continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy.

Section 7 further encourages the efficient and responsible management of companies.

Lastly, the section provides for the efficient rescue and recovery of financially distressed companies.

The Act also requires the development and implementation of a plan to rescue the company by restructuring its affairs. This means that the company's business, property, debt liabilities and equity must be managed in such a manner that the company will continue to exist.

The objective of business-rescue proceedings is to explore all possible business-rescue solutions before liquidation proceedings can be invoked. The business-rescue plan is developed and managed by a business-rescue practitioner, who will be appointed by the business shareholders.

The Act provides that the business rescue plan must be divided into the listed key areas below:^{xviii}

It must contain the necessary background information, which will highlight the assets of the company and identify all stakeholders forming part of the entity in distress.

It should highlight the proposals put forward by the business-rescue practitioner. These proposals must include: the intended duration of the rescue plan; the benefits of adopting the business-rescue plan by the creditors; the property of the company to be made available to pay the creditors in terms of the business

plan; and the plan of adopting the business as opposed to the benefits that the creditors would have had if the company was liquidated.

Lastly, the business rescue plan must include assumptions and conditions to be implemented in respect of existing employees and the status of the company financials, for example the balance sheet. It must also show what the new financial projections would be to convince the creditors that the company is worth saving.

Business rescue is defined as follows.^{xix}

(a) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;*
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
- (iii) the development and implementation, if approved of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.*

Other procedural matters relating to business rescue

The period between the resolution to place the company under business rescue and the adoption of the business rescue plan as drafted by the business rescue practitioner is critical for those who are opposed to the proposed business rescue proceedings.^{xx} They can lodge their objections during this period on any of the grounds listed below:

- ✓ That no reasonable basis exists other than the company being in financial distress;
- ✓ That the prospects for rescuing the company are minimal;
- ✓ Or where the company has failed to comply with procedures after the resolution was taken to place the company under business rescue.

The court in all the above cited scenarios will interrogate the facts and make a fair and just decision after considering the application or objections raised.

Chapter 4

The procedure for placing a company under business rescue

A company's board of directors is the highest body in the organisation which can pass a resolution to the effect that the company must be placed under business rescue.^{xxi} In this instance, the company is voluntarily placing itself under supervision as a result of a reasonable belief that the company is financially distressed and that reasonable prospects of rescuing it exist.^{xxii}

The resolution taken by the board of directors cannot be enforced provided the liquidation proceedings have already commenced against the company or the resolution itself has been filed at the courts.^{xxiii} The company must, within five days after filing the resolution, vote to adopt business rescue proceedings and ensure that a notice of the resolution is published to enable all the affected persons to take note of the decision.^{xxiv} In addition to publishing the business rescue proceedings resolution, the company must also appoint a business rescue practitioner who is qualified according to the provisions of the Act and has expressed a willingness to accept the appointment in writing.^{xxv}

The company must file a notice of the appointment of the practitioner within two business days after making such an appointment and publish a copy of the appointment within five business days after filing the notice.^{xxvi} The court has the final say on good cause shown as to whether there is sufficient evidence suggesting that the company is in distress. Where the court is convinced that the grounds advanced in an application intended to place the company under business rescue is not convincing, the court can set aside the application and

make any other decision that it deems fit under the prevailing circumstances.^{xxvii}
The effect of the court's decision is extended to the company property and employees' contracts.

Chapter 5

Qualifications of the business rescue practitioner

There are various issues relating to functions and qualifications of a business rescue practitioner that must be ascertained before the appointment can be finalised.^{xxviii} The recommended qualifications are listed below:

- ✓ The person must be a member in good standing;
- ✓ Must not be subject to an order of probation;
- ✓ Must qualify to act as a director;
- ✓ Must not have any relationship with the company under supervision;
- ✓ Must not be related to anybody associated with the company under supervision.

Regulations: Business Rescue

The business rescue regulations were published in 2011. Part A of the regulations deals with business rescue proceedings, specifically the notices of commencement of business rescue proceedings. The regulations in Part B cover the accreditation and licensing of business rescue practitioners. Business rescue practitioners must either have an accounting, legal or business background.

Removal and replacement of the practitioner

The practitioner can be removed through a court order if it has been proved that any of the following grounds exist:^{xxix}

- (i) Incompetence or failure to perform duties;
- (ii) Failure to exercise the proper degree of care in the performance of the practitioner's functions;
- (iii) Engaging in illegal acts or conduct;
- (iv) If the practitioner no longer satisfies the requirements of section 138(1);
- (v) Conflict of interest or lack of independence;
- (vi) Incapacitation.

Powers of the practitioner

- ✓ Full management control;
- ✓ Delegation of powers;
- ✓ May remove anybody from the company;
- ✓ Must develop a business rescue plan.
- ✓ Development of a business plan

The practitioner is expected to prepare a business rescue plan after consulting with all the affected parties.^{xxx} These affected parties include the management and creditors of the company. The business rescue plan is expected to contain a variety of information which must include the following:

- ✓ A list of material assets of the company;

- ✓ A complete list of the creditors of the company prior to the beginning of the business rescue plan;
- ✓ The possible dividend if the company was placed under liquidation;
- ✓ A copy of the agreement depicting the agreed salary for the business rescue practitioner;
- ✓ Statement indicating whether the business rescue proposal was formally given to the creditors;
- ✓ The nature and duration of any moratorium for which the business rescue plan makes provision;
- ✓ The extent to which the company is to be released from the payment of debt, and the extent to which debts can be converted to equity;
- ✓ The stance of the company on any existing agreements;
- ✓ The property available to pay creditors' claims within the terms of the business rescue plan adopted;
- ✓ The order of preference in which the proceeds of the property will be applied to pay creditors in terms of the business plan;
- ✓ The benefits of adopting the business rescue plan as opposed to liquidation;
- ✓ The effect that the business rescue plan will have on the holders of each class of the company's issued shares;

- ✓ An indication of what the effect will be on employees and their terms of employment;
- ✓ Circumstances in which the business rescue will end; and
- ✓ Projected financial statements of the company.

The business rescue plan must be published within 25 business days after the date on which the practitioner was appointed.

The above list is not exhaustive, as circumstances may differ on a case-by-case basis. In addition to the business plan, critical factors that are specific to the survival of the business itself must be attended to. A company attempting to give itself a second chance of survival cannot run as it used to. The business rescue plan must demonstrate that the issues which brought the company to the distressed situation are corrected. The company applying for business rescue cannot demonstrate the same traits that caused it problems in the first place. There must be changes indicating that the company will trade itself out of trouble as soon as possible, and that the creditors will benefit from the efforts. Below are some of the business areas that may have to be highlighted in the business plan to indicate what will be done regarding the business areas that need to be fixed. The business in distress may not necessarily require attention in all the areas listed. However, if the business has serious cash flow problems, a complete cost cutting exercise may be necessary to minimise the costs during the development of the business rescue plan phase.

Contents of the Business Rescue Plan

The business rescue plan will, among others, reflect or incorporate some of the following suggested activities:

- ✓ Summary of what is at stake
- ✓ Detailed background study
- ✓ Objectives of the business rescue proceedings
- ✓ Existing business strategy
- ✓ Operations plan
- ✓ Competitive positioning for the future under rescue plan
- ✓ Sales forecast and sales strategy under business rescue regime
- ✓ Organisational changes
- ✓ Intended cost-cutting strategy
- ✓ Human Resources strategy
- ✓ Funding and balance sheet strategy

In conclusion, small to medium-sized businesses (SMMEs) are assumed to have the basic general management functional ability. These businesses are run by various kinds of entrepreneurs, some of whom are very technical and largely unconcerned about management of the company cash or issues pertaining to employees.

It is unreasonable to expect a lone technical entrepreneur with 20 employees working for him who does not care about the general management of the business to pay attention to all the pertinent prevalent issues in this regard. The neglect of any of the general management areas may cause the business harm. For instance, if the business fails to market its services to the customers, the consequences will be dire as there will be no source of income. The various basic management skills are discussed below.

Chapter 6

General Management

The business rescue practitioner is expected to be an all-rounder who understands all the business-related disciplines that may be encountered during the business rescue proceedings. Some of the anticipated challenges are discussed below and entail skills in general management.

The creation of a new business venture is dependent on market focus, financial planning, sales, operations, human resources, marketing and sound management.^{xxxii} General management therefore embraces all areas of managing comprehensively. A general manager oversees many critical business areas; hence issues of leadership, corporate governance and continuous business innovation must be high on their agenda.

Successful businesses are driven by a systematic policy of innovation. As such, management is a critical element for business survival. However, sound management alone cannot guarantee results. There must also be a powerful vision driving the management initiatives. Management is vital for a smooth-running business, without which there would be no planning and coordination.

General management embraces all areas of managing. It requires the managing team to be competent to manage the business in all its spheres. General management is about leadership and organisational compliance as well.

In addition, top managers should have faith regarding reaching their organisation's set goals. They should also motivate to build organisational strength.

These points suggest that general management is more involved than merely the management of a specific portfolio. The integration of the various business units is based on the specific business's strategy. The business strategy is the road map that a company uses to distinguish itself from others, and to navigate it through the business world.

Analysis of the various general management components

Strategy

Strategy may be defined as a plan that guides a business through various interventions to make a profit.^{xxxii} It involves the careful consideration of choosing the markets, products and business activities to be involved in. The aforesaid initiatives must be accompanied by a sound plan of execution.^{xxxiii} Ultimately, strategy must be the choice that the organisation makes to remain in business and outperform competitors with the sole intention or purpose of making profit.

A high-performing organisation's strategy incorporates being a provider of choice, employer of choice and investment of choice. The strategy document must reflect historical patterns of the organisation that are aimed at improving the future of the company.^{xxxiv}

All businesses are created out of ideas which are then completed by a strategy document or a business plan. The strategy document is created to give the business direction in terms of how it will generate profit.

A company must be able to determine what has worked or not in the past, and to plan better for the future. It should not only focus on the introduction of new concepts, which have not been tested in the market. Often the success of many companies relies on taking existing business ideas and performing better than the competitors. Forward thinking must be included in organisational strategies. Well-thought-out strategies are good tools to determine future trends, and to enable a company to plan for anticipated trends.^{xxxv}

Organisational strategies are reliant upon the capabilities or core competencies of an organisation. Organisational competencies are unique to the individual organisation and cannot be replicated with ease by other organisations.^{xxxvi} There are many examples to demonstrate businesses that have stayed true to their competencies over the years. The American franchise groups of Kentucky Fried Chicken and MacDonald have remained loyal to their original competencies to date.

When developing strategies, organisations should factor in variables that may impact their business either negatively or positively. Among others, these factors include: economic, political and social issues, market conditions, customers, competitors, talent availability and technology.

Leadership

Holding a leadership role involves leading and interacting with others to achieve the company's set objectives.^{xxxvii} Leadership depicts at least two major players:

the leader and the person being led. In an organisational sense, a leader conceptualises the vision which becomes a blueprint, according to which the followers can operate and achieve organisational goals. The vision by itself is not sufficient to achieve organisational results.

The leader must also be able to inspire the followers to internalise the vision and execute it. Good leaders are always concerned about the wellbeing of their followers. Leaders who measure their success through the development of their followers are held in high esteem by many.

There are fundamental differences between leading and managing. Leaders are in the firing line and cannot blame others for any errors in judgment or hide behind details to justify their mistakes.^{xxxviii} Managers have the luxury of hiding behind details for their lack of foresight where things go horribly wrong. Leaders are not as fortunate, as the buck is expected to stop with them. The difference between leadership and management is clearly defined by the owning up attribute.

A person's leadership ability determines the individual's level of effectiveness. The ability to lead opens many doors. A winning vision is a catalyst of organisational success. A leader's vision must be depicted by the end results. Leadership is dynamic and must exist at all levels of the organisation.^{xxxix} This approach is beneficial to the organisation, as employees are systematically empowered to make decisions at the grass-roots level. Leadership is not only about leading others, but also about managing inner conflicts that the leader may have, fear for example. In fact, leaders are said to fear success as much as they fear failure.^{xl}

Leaders must continually develop themselves to ensure they remain competent and at the top of their game. The character of a leader is often measured by how he or she leads under pressure.^{xli} Leaders must be able to demonstrate their tolerance for dissent where followers ask hard uncomfortable questions. In other words, they must demonstrate a high level of emotional-intelligence awareness. Leaders with a high level of emotional intelligence do their best to remain objective even when the odds are against them. Leaders are not into the habit of holding grudges against those that they are leading.

It is often difficult for certain leaders to lead empowered and intelligent people.^{xlii} Leaders who do not dig deep into their emotional-intelligence capability battle to lead clever employees. Good leaders know the uniqueness of each person they are leading, and often find ways to recognise individual capability for the good of the collective.^{xliii} A great leader always creates a nucleus of leaders who think independently from one another.

Pick n Pay, under the exceptional leadership of Sean Summers, demonstrated this leadership quality in 2003 during the “so-called” poison scare. The South African retail giant was seriously under siege after a disgruntled employee made threats of sabotage by indicating that some of the retail merchandise had been poisoned. Because of the threats, Pick n Pay customers panicked as nobody knew which of the merchandise were affected. Pick n Pay handled the situation exceptionally well, and none of the managers shied away from their responsibility.

They were all accountable to customers and reassured the customers on a continuous basis that they were handling the situation and that everything was under control. They achieved a great measure of success in steering the consumer confidence back to the levels they were prior to the poison scare. Sean availed himself to the media and answered every conceivable question to the best of his ability with limited information. This is a good example of decentralised leadership, and the benefits it brings during the hard times. Sean could not have done this on his own.

He had a good team of independent managers, who individually led their various areas of responsibility under his guidance and vision. The vision was to restore consumer confidence in the brand again.

They succeeded with flying colours. Their success cannot be compared with the way Blackberry handled the world-wide three-day operation system black-out. Blackberry users around the world were left unattended and endured an unproductive three days of no functionality. The Blackberry management only started sharing information with its users when they were hounded by the media. The information sharing was impersonal, via video recording.

Operations

Operations management involves the design of the workflow system, the control process, and ultimately the tangible results experienced by customers through services and products.^{xliv} The operations of any company forms the nucleus around which revenue is generated. In other words, a business's operations are closely linked with the core product or service that the organisation has been

created for. It is therefore important that all the departments within the organisation support the core business.

Organisations can compete operationally using the value chain. The value chain is important for the competitiveness of the organisation, as it improves products or services for the customers' benefit. Every activity in the process of rendering a service or manufacturing a product should be continuously improved.^{xlv} This will ensure customer satisfaction in terms of quality and the safety of the products manufactured or services rendered.

It is important for managers to run most of their daily activities, because internalised daily activities run as projects tend to elevate the level of productivity among employees. This is because any activity converted to a project is more reliable in many ways. By applying project plan principles, a determination can be made at an early stage whether the activity should be continued or not. Secondly, clear goals that must be achieved through the application of the project will be depicted.

This will ensure that the activities have at least been scientifically assessed. Organisations which prefer project-based activities equip their employees with cost-saving methods, which also enhances the quality of their products or services. For instance, six sigma methodology and lean principles (if applied correctly) are essential for cost-management, timely delivery and the efficiency of the overall workings of the organisation. Similarly, Just in Time management, which is a spin-off of lean principles, enhances the management of an organi-

sation's inventory levels. It ensures that the raw materials required for production are sourced at the right time and delivered just before the commencement of the production schedule.

Toyota has perfected the implementation of lean principles across the organisation. Toyota's operational excellence has been a subject of great admiration amongst its competitors. Lean principles ensure that organisations which embrace them can eliminate wastage and are also able to produce quality goods on time at minimum production costs. Operations are part of general management within the broader sense of the organisational strategy.

In South Africa, there will be a radical shift in the way companies run their operations. The Consumer Protection Act has far-reaching consequences with respect to the manufacturing, procuring and supply or distribution of goods and services.^{xlvi} In terms of the Act, all suppliers of goods and services must be identified. The law states that a person must not conduct business, advertise, promote, offer to supply or supply any goods or services, or enter into any transaction or agreement with the consumer under any name except the business's full name.

The South African manager and entrepreneur will be expected to do things differently and to put a greater emphasis on quality and the timely delivery of goods. This will pose a big challenge to delinquent organisations, which still believe that their relevance is guaranteed. These are organisations which often assume they know what the customer wants, and without the necessary interaction with the customer make products that the customer must accept according to them, regardless of whether they are satisfied with the products or not.

Human Resources

Human resources professionals must be versatile and should understand the business in its entirety to be taken seriously as business partners.^{xlvii} Human resources practitioners must not only be familiar with the required performance management procedures but must also encourage their employees. They must be able to make employees understand that their contribution is important for the organisation to meet its business objectives. Employers of choice are in the forefront in terms of employee development and career advancement. Human resources practitioners must use their influence and skill as business partners to ensure that the business shares the same principles. The human resources practitioners must, as the first point of protocol, instil a culture of compliance with the local labour laws within the organisation.

There are many South African companies that are deliberately resisting compliance with the prevailing laws. Employees are often injured at the workplace, as the employer disregards safety standards and legislation by forcing them to work more than the stipulated overtime limit, according to the basic conditions of employment legislation. There are also other labour laws that employers choose to ignore for as long as they are not confronted by the relevant authorities.

Human resources practitioners must stand up to non-compliance issues within their respective organisations, and thereby demonstrate the justification of their status as a business partner. Many organisations still see the human resources department as a support department which is not critical for the survival of the organisation. Some operations departments are under the illusion

that human resources practitioners must be called upon to rubber stamp their decision, no matter how unreasonable they may appear to be. It is a myth to assume that human resources is a support department. Human resources departments are business units and can generate income for the company. In South Africa, companies claim a skills levy and tax benefit associated with skills and training through human resources departments. For big organisations, the skills levy amount claimed may be substantial.

All company operations are mostly driven, whether directly or indirectly by human resource principles. The hiring of employees, performance management, dispute resolution, training and development, and the cultivation of the organisational culture are some of the interventions that human resources departments around the world are responsible for. These are critical interventions that will carry any organisation which believes that its employees are its biggest assets.

Organisational culture is practiced by its employees. Organisational culture plays a critical role as it defines the way the organisation does its business. Positive organisational culture can be entrenched through regular communication between senior management and employees. Organisations are run or controlled by people and not machines. People interact with one another to create a unique culture distinct to the organisation in question, hence the role of human resources personnel cannot be underestimated.

There is no doubt that the role of the human resources profession has changed massively in recent times. It has evolved from the early days of personnel man-

agement to business support, and of late to business partner. The human resources practitioners are now seen by dynamic organisations as strategic partners within the enterprise. This move is long overdue, considering that most organisations view employees as their greatest assets. The profession is now seen in a critical light regarding the various aspects of the business, which includes the search for, and retention of top talent.

Top talent is generally viewed as one of the most important strategic imperatives for companies. A war is currently being waged by organisations for top talent globally, the search and retention of which has become a worldwide priority overnight. The emergence of the BRICS nations (Brazil, Russia, India, China and South Africa) creates another headache for the global business community in terms of the “top-talent” war. It is the organisations that care about their employees and truly reflect the attributes of an employer of choice which will win the war for top talent.

The modern human resources professional is different in comparison to the erstwhile personnel manager. A modern human resources professional is a change agent who must, apart from being a business partner, also manage the ever-present conflict between management and employees.

Financial Management

Business must operate ethically in all economic spheres.^{xlviii} The lack of will-power among the strongest nations of the world to regulate financial institutions and global markets sufficiently led to a massive global recession towards the end of 2008. The non-regulation of the financial institutions and global markets threatened the global economy and the world’s financial systems. The world’s

financial woes were long predicted by insightful minds many years ago.^{xlix} Recently, financial commentators and analysts both in the print media and broadcasting have also predicted a double dip recession, which started in earnest towards the end of 2010. They are forecasting that the recession will be with us for a considerable duration until the United States' economy is back on its feet, and the problems currently experienced by some Euro Zone countries have been fixed.

The world of finance has been complicated over the years by experts, particularly in the field of corporate finance.^l The key documents in the world of finance—for instance balance sheets, profit-and-loss statements and income statements—reflect an unrealistic financial position in many organisations. These documents are intended to give an accurate financial perspective of organisations at any given time. The balance sheet depicts the current assets and liabilities that the organisation has. On the other hand, the profit-and-loss statement quantifies the gains or losses experienced by the organisation over a specific time-frame. The profit-and-loss statement is linked to the balance sheet in the sense that it encompasses the status of the previous balance sheet. Managers are involved daily with a wide range of business activities that contribute significantly towards the compilation of these documents. Every business activity involving finances must be accounted for properly.

Financial management is the key component of general management as it reflects whether the organisation is making a profit or not, which in turn will either enable or not enable it to meet its obligations towards shareholders and creditors.

Marketing

The Consumer Protection Act of 2008 has been in place since 2011 to regulate a variety of issues which affect the consumer.^{li} The purpose of the Act has been depicted as follows:

- ✓ *To promote and advance the social and economic welfare of consumers in South Africa.*
- ✓ *To promote and protect the economic interests of consumers.*
- ✓ *To establish a legal framework to achieve and maintain a consumer market (including the regulation of unfair or deceptive practices and the control of unfairness in contracts).*
- ✓ *To enhance consumer choice and confidence.*
- ✓ *To provide a system of consensual resolution of disputes arising from consumer transactions and a system of redress for consumers.*
- ✓ *To promote consumer education.*

The Act further highlights the shape of the marketing activities which will occur in South Africa. In terms of Section 8, the following provisions will apply:

Supplier of goods or services must not unfairly-

- ✓ *exclude any person or category of persons from accessing any goods or services offered by the supplier;*

- ✓ *grant any person or category of persons exclusive access to any goods or services offered by the supplier;*
- ✓ *assign priority of supply of any goods or services offered by the supplier to any person or category of persons;*
- ✓ *supply a different quality of goods or services to any person or category of persons;*
- ✓ *charge different prices for any goods or services to any persons or category of persons;*
- ✓ *target a community, districts, populations or market segments for exclusive, priority or preferential supply of any goods or services; or*
- ✓ *exclude a community, district, population, or market segment from the supply of any goods or services offered by the supplier.^{lii}*

The above provisions indicate the extent to which marketing activities are impacted upon. The Act prohibits the suppliers of goods and services from supplying their services or products exclusively to selected businesses. The Act promotes transparency in all aspects of business dealings with the public. The business models of various organisations that were run on an exclusive basis may have to change to accommodate the public or interested parties in the exclusivity arrangements. Marketing managers must make it their business to get used to the new way of doing things. It is incomprehensible that six years after the promulgation of this important legislation, the competition commission is launching one investigation after another into the very same activities that the

legislation is intended to stop. It is more frustrating that the violations or companies investigated are often large companies with resilient boards who should know better.

Transformation is taking place daily regarding the way business is being conducted locally and globally. Consumers are moving towards the centre stage in terms of deciding which products and services are suitable for them. They are dictating how products should be manufactured, distributed and sold. These changes are taking place everywhere within organisations, and are impacting everybody at industry, organisational and even personal levels.^{liii} The world has entered a knowledge-based economy that favours those who are able to gather and apply information. It therefore means that manufacturers, suppliers, distributors and even employees must be well acquainted with the changes that are taking place around them and must be willing to adapt to new circumstances to ensure the survival of their organisations.

Organisations without marketing initiatives may find it hard to navigate their way through the world of commerce. To sell services or goods, the public or the market that the business is targeting must know about such goods to enable business transactions to take place. Without a market to sell goods and services to, no cash can be generated. Management must ensure that the marketing strategy details the unique selling point/s of their organisation. The responsibility to market products should not only rest with those who have a marketing responsibility within the organisation but should include the entire organisation. It is not uncommon for senior management to be blank about the products that

their organisations are selling, and others have demonstrated during random interviews that they do not know the customer service number of their very own organisations.

These are the same managers who flatly refuse to contact customers when a customer query has been raised and would rather hide behind the notion of a tight schedule than face a customer. Some organisations maintain that customer queries should be handled by the customer service department, which is often manned by junior employees. At times these employees are simply out of their depth to resolve certain customer complaints satisfactorily.

The marketing strategy and initiatives are insufficient on their own. Organisations must focus on the customer wholeheartedly if they wish for a customer retention strategy second to none. The retention of existing customers provides an organisation a base upon which future customers can be attracted. Businesses are made by customers and destroyed mostly by bad reputation, either in the form of bad service, or failure to heed the warning signs that are often raised by the customers themselves. An organisation without customers is destined for a short lifespan.

Marketing is an integral part of any business's survival. The generic four P's of marketing depict product, price, place and promotion. Organisations must consistently pay attention to the four P's to ensure that their products are to some extent still relevant in the market place.

General management is quite simply the art of managing. The general management concepts must be grasped by those who are running organisations. They

must be able to distinguish between gross profit and net profit after tax. Many small to medium-sized businesses have failed due to the operators' failure to respect this simple distinction. Failure to adhere to this basic distinction often results in business cash flow problems and ultimately failure. They must equally understand the business that their organisation is in, which can be demonstrated by the power of focus. Organisations that focus and differentiate themselves from the rest often have better chances of survival. One can consider Apple computers and their revolutionary smart phones as a classic example here. The world goes mad every time Apple announces a new model or even a cosmetic upgrade of the previous model. It is a common practice for most of the new technology lovers to queue for hours to lay their hands on that piece of equipment. The rush and the madness can best be described as an incurable addiction. Sadly, Steve Jobs is no more, yet I am convinced that the tradition will continue for as long as Apple exists, and for as long as they continue to produce revolutionary smart phones and other gadgets.

Management and employees must know their organisational corporate strategy to enable themselves to steer the organisation in the right direction. They must equally have a good sense of the organisation's human resource issues. They must be in the position to hire the right people who will take the organisation to another level. It is ideal for all senior managers to be competent in all areas of general management.

Managers must be developed beyond the basic traditional principles of management, which emphasise leading, planning, organising and controlling. Although the newer methods of management, innovation management for example, do not

replace the traditional management theories, they do equip managers with the current way of thinking in business circles. Newer methods of management are unique and cater for the shortfall of the traditional management principles, which do not cater for a different business environment; for instance, where companies are in distress. It is therefore important for managers to be equipped with the necessary knowledge to be able to identify unusual business trends. Companies fall short mostly due to management inefficiencies, particularly when management fails to recognise the danger signs and continues to conduct business as usual.

Valuable lessons

Running an organisation is not as straightforward as it may appear. There are times when things do get out of hand, either due to poor management or because of factors beyond management's control. These factors beyond management's control are often attributed to nature. In April 2011, for example, Japan was hit by a devastating earthquake. Japan has been hit by quakes before and lived to tell the tale, and there is no doubt that Japan will rebuild itself again. It will continue to be as successful as it was previously. Massive infrastructure must be constructed in Japan in the coming years to restore what has been lost. If Japan can rise from the ashes as it has done before, surely any nation anywhere can do the same. Or can they? Perhaps there are fundamental differences in the way that Japan does business as compared to the rest of the world. A strong work ethic and long-term planning are part of Japan's most notable attributes.

News reports suggested that many Japanese companies including Toyota had to halt production due to safety reasons during the nuclear catastrophe. We saw forward thinking and planning from the Japanese from the time that the earthquake struck. Companies like Toyota moved some of their manufacturing operations to areas that were less affected. The government also pumped more than a hundred trillion yen into the Japanese stock market to restore its liquidity. These actions were taken speedily and decisively. Careful planning ensured that the eyes remained on the task ahead. After all, for the Japanese it is not only about this generation, but also the future generations to come.

One must examine the Japanese culture of saving to understand why they could rebuild their economy as quickly as they did after such a huge calamity. Compare their decisiveness to the long and drawn-out discussions of the Euro Zone countries in their attempt save Greece. As if that was not enough, knowing that it had very few options other than to accept the financial aid package offered by European countries, Greece decided to hold a referendum. The intention with the referendum, according to reports was to decide whether the financial aid package must be accepted or not. The holding of a referendum falls squarely within the powers of the executive branch but is a time-wasting exercise which did not help the prevailing situation.

Decisiveness and speed are some of the attributes associated with rescuing a business. Speed is of the essence as there may be customers who rely on the product for the survival of their businesses, shareholders who are likely to lose their investment, and competitors who are waiting in the wings to take over. Organisations in distress can learn a great deal from Japan.

Chapter 7

Causes of Business Failure: Poor Management

The extent to which poor management has been cited as the number one factor which contributes towards business failure cannot be overemphasised. One must look at the statement made by the finance minister during the collapse of Saambou Bank. He attributed the bank's failure to poor management.

Managerial incompetence is said to be accounting for 40% of business failure, lack of leadership 30%, lack of managerial experience 20%, and no industry experience 10%.^{liv} Businesses may fail due to social impact, economic failure, legal failure and, most importantly, managerial failure. Where management is experienced, at least the generic management turnaround strategies are deployable.

Poor management problems

It goes without saying that management is often exposed to many challenges. These challenges are mostly general management issues, and it is therefore imperative that managers be continuously innovative in running their businesses. Companies that fail to innovate will be left behind in today's fast-paced and fast-changing business environment.

A company that relies on old technology may find itself irrelevant in the current prevailing business conditions. Innovation must always be coupled with a sound business model for it to be successful. A business model refers to the rationale of how an organisation creates, delivers and captures value.^{lv} The generation of a business model often denotes the new path that the organisation wants to

adopt. The South African Breweries is a perfect example of how old products are continuously rebranded with maximum impact on consumers. Innovative management is critical between the declining phase of an organisation and the need for business turnaround.

Innovative management can be presented or depicted in various forms. Product development is central to the process of innovation, and innovative management is characterised by consistent organisational renewal. Organisations that do not transform themselves are often surpassed by competitors and become irrelevant in the long run.

The concept of innovation can best be highlighted through the PADI Logistics model.^{lvi} The concept identifies the following organisational behaviour patterns:

- ✓ *Pragmatism Logic: a force or need for speed, energy and getting things done.*
- ✓ *Administration: a force or need for stability, control and continuity.*
- ✓ *Divergence: a force or need for high levels of difference and innovation.*
- ✓ *Integration: a force or need for cooperation and harmony.*
- ✓ *The model highlights the difference between innovation management on the one side and traditional and turnaround management on the other.*
- ✓ *Traditional management is predominantly centred on administration. Organisations that operate at the administration level pursue business stability and continuity. Such organisations fail to see the need for*

change depending on the nature of the business that they are involved in.

- ✓ On the other hand, turnaround-centred organisations are focused on business survival. Their goal is to rescue the organisation through speed and focus. Other organisations are leaders in innovation and may be described as trendsetters. These organisations are not entirely safe as the market can reject their innovation attempts, which could lead to serious consequences.
- ✓ Innovation has taken centre stage in the developing markets, where consumers are forever experimenting with new products. Companies failing to innovate may be left behind in these markets and must be able to determine when a new business model is required; for example, where the traditional customer base is no longer able to satisfy the aspirations of the organisational sales target. Performing managers can determine these needs long before they can paralyse the organisation.

Chapter 8

Other Factors Contributing Towards Business Failure

Economic growth

The Minister of Finance said in his 2013 mid-term budget speech that the economy would grow by 3.5% in 2016.^{lvii} Job losses, according to him, were the major concerns that the non-growing economy is subjected to. Because of these losses, and the drive to create sustainable jobs, the government focused on ways to encourage and stimulate job creation initiatives. These ideas are listed below:

- ✓ Public infrastructure spending;
- ✓ Business investment must be supported through competitive packages and protect workers and enterprises affected by current economic conditions;
- ✓ Address inefficiency, extravagance and waste in public administration;
- ✓ Programmes to be implemented in support of job creation initiatives;
- ✓ Tax incentives for industrial investment;
- ✓ Investment in energy, water and transport as well as communication and infrastructure;
- ✓ Improved incentives for investment in industrial development;
- ✓ Development of small businesses;

- ✓ Support for black business development through preferential procurement;
- ✓ Support for job creation, training and community works projects;
- ✓ Regional integration within Sub-Saharan Africa;
- ✓ Alignment of trade, investment and energy policies.

It is very disconcerting that the economy of South Africa sadly never reached a 3.1% growth rate. The current 2018 forecast is sitting below 1%.

Credit Availability

The 2008/09 recession has created a massive resistance from the financial lenders to make credit available for businesses. Many small to medium-sized businesses fail because of cash-flow problems. The South African business-lending fraternity is dominated by the banks as well as agencies established by the government to stimulate small businesses. In 2017, the same reasons for funding exclusion were used against small business owners and the youth. Small businesses in distress are often owned by people who do not have the necessary large collateral demanded by the funders. The results are often disastrous as these businesses, although promising, end up closing doors due to insufficient funds, while at the same time destroying desperately needed jobs.

Mergers and Acquisitions

Foreign direct investments are not always beneficial to the country. The acquisition of Massmart by the American multinational Walmart created many problems for the South African government, with the ministers of Trade and Industry, Agriculture and Economic Affairs being vehemently against it.

Central to the dispute was the demand by the South African government and some trade unions that certain guarantees be given by Walmart. For instance, that jobs were not to be shed and that a certain percentage of their products was to be procured in South Africa. Walmart is known worldwide for its massive buying power that could easily destroy local industries including farming and manufacturing of certain products which Walmart could readily source from overseas. The question of job losses is a reality in any merger situation. The acquisition of the two major South African Banks, Absa and Standard Bank resulted in job losses. The recent acquisition of South African Breweries equally resulted in the shedding of jobs.

Cultural Social Change

In recent times, there has been a proliferation of Pakistani, Somali and Egyptian nationals into several South African areas which were predominantly black. There was also a massive assault in the previous black traditional businesses, both in urban and rural areas, many of which have shut down in townships and rural areas because they could not compete with the superior business acumen

possessed by the foreign nationals. It is a moot point whether any jobs are created through this business model. Certainly, the local people are not employed by foreign nationals doing business in rural areas and townships because the establishments are often one-man shows.

Workers' Rights

The workers' rights are enshrined in the constitution of the Republic of South Africa as well as the international labour organisation instruments. Workers have the right to strike in pursuit of their salary demands. Some strikes, such as the AMCU strike in Rustenburg, last for six months. During this time very little mining activities took place in Rustenburg, resulting in a near shutdown of the South African platinum mining sector.

The truth is that long and protracted strikes contribute towards business failures, while the exploitation of workers by some employers is a moral issue that cannot be tolerated by societies which value fairness. Lonmin Mine seemed to have struggled with cash in 2017. The company therefore announced a massive cut back on social spending that the mine had undertaken. Shortly after announcing the cutback in social spending the mine became a subject of an acquisition by Sibanye-Stillwater. An offer of R5.17bn has been tabled by Sibanye-Stillwater to buy Lonmin Mine on an all share deal. The South African Public Investment Cooperation, the biggest investor in Lonmin Mine, is expected to give its consent for the merger during 2018. This could very well be the result of the six-month strike which crippled many businesses in Rustenburg in 2012.

Distressed Fund

The government of South Africa established a distressed fund because of the economic downturn experienced in the last couple of years. This was also because the traditional funding options provided by the banks dried up due to tight controls. The Industrial Development Corporation was mandated by the government to establish a fund worth six billion rand to assist companies negatively affected by the recession. The fund has saved more than 8,800 jobs to date.^{lviii} It is however not pleasing that organisations which desperately need the cash injection to survive cannot access it because of the rigorous screening of funding applicants. Many businesses that could have been saved failed because of a lack of much-needed cash flow.

Consumer Protection Act 68 of 2008

The Consumer Protection Act affords a consumer in South Africa the right to make decisions that were non-existent in the past. The Act is applicable to every conceivable business transaction in South Africa, except for the exclusions which have been identified in the Act. The purpose of the Act is depicted as follows:^{lix}

The purposes of this Act are to promote and (a) establish a framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers in general.

It can no longer be business as usual for the suppliers, distributors and manufacturers of products, as the Act forces them to account to the consumer for goods and services that the consumer is prepared to pay for. The Act will have a negative impact on businesses producing sub-standard goods and providing

sub-standard services. In the past, such companies used to get away with the poor service or inferior products because the law was cumbersome in addressing consumer dissatisfaction. The Act not only provides a quick, efficient and cheap resolution of complaints, but also ensures that the consumer's voice is heard. There are on-going problems that are consistently experienced by customers relating to poor service and defective goods.^{ix} In addition, fines imposed by the Consumer Commission will force some companies to shut down.

Growth prospects

The slow growth in the world economy is expected to impact negatively on emerging markets. According to the World Bank, the global economy was expected to grow by 2.7% in 2017, increasing slightly in 2018 to 2.9%. Sadly, South Africa can only dream about the modest 2.8% economic growth. It is safe to say that the South African economy will grow less than 1% as the figure is continually revised downward. Any economy that grows at only 1% cannot be expected to create jobs. The South African situation has been worsened by the technical recession that the country currently finds itself in. It therefore follows that a prolonged recession will result in many business failures.

Monetary and fiscal policy

To cater for the disastrous 2008/09 recession, the world's major central banks adopted quantitative easing measures. While the South African Reserve Bank has maintained a steady interest rate, it is disturbing to contemplate what an increase in interest rate will do to the already over-stretched South African consumers. South Africa's inflation targeting monetary policy has come under the

spotlight recently, with the current Public Protector overstepping her jurisdiction by suggesting that inflation targeting must be done away with.

Chapter 9

Nature of Business Turnarounds

Business rescue principles in the new South African company law context are not different from the common business turnaround strategies which have been in use across the globe for many years. These business turnaround strategies adopted world-wide found their way into the South African business environment, the only point of differentiation being that the South African legislative environment concerning business turnaround was not “business friendly”.

As indicated elsewhere in the book, the judicial management procedures were not an ideal tool to assist businesses in distress, and they did not provide adequate protection in terms of providing the necessary funds promptly and when they were needed. It certainly did not do much in terms of keeping creditors of distressed companies at bay until the outcome (either positive or negative) of judicial management procedures.

The worst-case scenario at the disposal of creditors is the liquidation of a company. The problem is that liquidation does not guarantee that creditors will recover their investments or loans advanced to the company, as possibilities exist that such creditors may be unable to salvage all their loans. In short, there is no real protection afforded to the distressed organisation unless some formal process backed by the court has been realized.

However, for the creditors to acknowledge that a business is in distress, according to the new legislation, a court order must be in place. The business rescue procedures are applied where there is evidence that the company affected is

unable to pay its debts. The rescue procedures can be initiated by a creditor or the company shareholders. The normal business turnaround strategies can be applied by management at any given time under the usual business operations to improve on any poor-performing areas. The legislation related to business rescue is new in South Africa, hence strategies and best-case studies are still lacking. It is on these bases that business rescue and turnaround strategies will be used interchangeably.

The current business world moves at a fast pace in the sense that what is relevant today may be irrelevant tomorrow. Changes are not immune from failure. I have been privileged over the years to work for some of the best companies in the world: **3M**, **KFC** and **Hyatt International**. Innovation was a top priority at 3M. Innovation brings change into the organisation and raises the levels of expectation among all stakeholders. The changes that the companies implemented were managed closely; therefore, they continue to flourish even in the recent recession. There are other companies that have failed repeatedly over the years to implement change without any measure of success.

The South African Post Office, which I was privileged to work for in the early years of my career, is one of those companies that implemented many change initiatives over the years which were unsuccessful. It must be said that the South African Post Office seems to have hit the right note of late. The company has recovered and is destined for great things if it keeps on repeating the newfound winning formula. A turnaround is a change initiative, which may be subjected to the same harsh business realities.

A company that goes through a turnaround plan is completely different from a managed business in a stable or growth phase. A turnaround situation disregards many proven management principles applicable where a business is in a different phase, for example the growth phase.^{lxi} Turnaround decisions are made without sufficient data or information.^{lxii} Speed occupies the centre stage in a turnaround situation. Often in such circumstances, a company is racing against time to return to profitability, or to avoid liquidation which may have devastating effects on shareholders, employees and creditors alike. Excessive change may result in unintended consequences, and it is advisable for the turnaround team to be mindful of the core business and strategies around it.^{lxiii}

It is a myth that business turnarounds are only about cost cutting. They are also about the enhancement of the business imperatives, such as striving towards sound business strategies, operational excellence and attracting top talent. A business, if managed properly during a turnaround phase, can grow into a profitable organisation, easily increasing its market share overnight. The results at Cell C are there for everybody to see. The cell network operator has shown some serious signs of recovery, which could spell bad news for seasoned players like MTN and Vodacom. The Cell C business is now being developed into the next phase after turnaround, which could be the stabilisation or growth phase. A turnaround situation has all the ingredients of standard general management principles; however, it differs a great deal about the attitude and the timing of implementing turnaround management.

Turnaround management also addresses all the common general management aspects of the business, for example finances, human resources and corporate

strategy. The emphasis in turnaround management is placed on speed and change-management initiatives, which are crucial for the survival of the business. As highlighted elsewhere in this book, the turnaround management initiatives impact the entire organisation, as well as external stakeholders such as customers and suppliers.

Organisations that lose direction in most cases lose their competitive advantage and ultimately end up in distress. The business environment and management play a critical role in turnaround strategies.

Strategic Turnaround

Strategic turnaround entails the efforts of a troubled company to pursue a return-to-growth strategy, and involves initiatives aimed at refocusing the company strategy to deliver an improvement on its products and services.^{lxiv} Companies drastically change their business strategy in turnaround situations to create niche markets which are in line with their turnaround plan. In a strategic turnaround, the organisation is assessed comprehensively.

This means that every existing activity that the company was involved in prior to the implementation of the turnaround plan is assessed to see whether it fits into the bigger turnaround vision. For instance, an organisation that uses labour brokers may take a long-term view of retaining such employees permanently. The organisation can make this decision since labour brokers often have a high labour turnover based on the temporary nature of the activities involved. Employees under the labour broker's employ are generally known to be constantly looking for new jobs that can provide some degree of certainty.

The strategic turnaround may be applied to both a company that needs emergency turnaround and a company that has strong operations and cash flow.^{lxv} In most cases, companies opting for a strategic turnaround normally take a long-term view when it comes to implementing the turnaround strategy.^{lxvi} As the business is reviewed completely during strategic turnaround, a decision may be taken by the organisation to exit non-core business operations which effectively affect their focus. This was evident with the divestiture of the 3M Imation Group from the rest of the company. An organisation that is going through financial distress must always reinvent itself to accommodate the unusual business environment. Prescriptive management methods must relate at all times to the organisation in distress. Questions asked must be specific and unique to each organisation rather than applying prescriptive management models in general. The turnaround strategy of an organisation may involve taking a different direction which was not part of the original core activity of the business. A manufacturing company may, for instance, abandon manufacturing activities to become a market-focused company by sourcing products instead of manufacturing them.

Businesses have many challenges to overcome. Enterprises must design and develop business models that will make the organisation ready to compete and deal with future challenges. Business performance must be consistently measured to determine progress to make the right decisions on time.

People Management Turnaround

In a turnaround situation, the organisation is not only confronted with a scarcity of cash flow and/or resources. There is also a danger of capable employees leaving the organisation because of their specific skills or options, an issue which may arise due to the change initiatives contemplated. Employees must be looked after during the turnaround process – good employees do not like uncertainty. Reassurance of continuous employment is important in ensuring that those good employees feel that they are valued. Non-performing employees usually worry about their chances of survival with a potential new employer due to poor performance; therefore, the chances of them leaving the organisation are minimal. The irony is that these are the people who must leave the organisation, no matter the circumstances, especially when the company is undergoing the huge change-management initiatives which a turnaround is known to bring.

Any change-management situation prevailing or contemplated must be driven by a management plan that will effectively highlight any demise of present employees. The organisation may take a view that could result in job losses through retrenchments and employee rationalisation. There is a regular war for top talent among organisations, hence the plan must clearly identify the employees who are going to be retained based on their skills, and those who will be transferred to other areas of business if their original positions have become redundant.

When 3M South Africa decided to close its manufacturing plant in 2001 under the leadership of Ian Hardgrove, then Managing Director of the South African operations, everything possible was done to accommodate the employees who

were directly involved and those who were supporting the manufacturing operations. He knew that the company was entering unfamiliar territory of importing some products that were previously manufactured locally. The local 3M management team made sure that people who fitted in to the new company vision were retained, even though some were directly affected by the intended changes. They applied their minds to the capability and expertise of each employee before a decision was taken to terminate their services. As a result, top talent was retained.

It is imperative for organisations to retain top talent at all costs if possible under such circumstances because it could be a costly exercise to replace those people at a later stage. Over and above the costs of recruitment, which have gone up radically, other associated costs are in play. Some recruitment companies charge up to 25% of the total cost to company for the employee to be placed, which means that for every million rand, an employer must pay the agency a fee of two hundred and fifty thousand rand. Then there are costs associated with the induction of an employee in instances where local support is not sufficient.

For instance, a company could invest in an overseas trip to enable employees to learn about its core products, if the organisation is a multinational corporation and the new employees recruited are either in sales or marketing. Key people need to be told in advance that there is a role for them to play in the changing organisation. The retention of key people may also be facilitated by extra benefits for such people and through the signing of confidentiality agreements with talented employees.^{lxvii} Failure to sign confidentiality and restraint of trade agreements can result in former employees setting up their own operations,

which then frequently compete with the erstwhile employer. These are often the employees who understand the business operations of the former employer, and at times have access to the former employer's trade secrets. It is important for the employer to create an environment of certainty with this group of employees to ensure that there is continuity after the dust has settled.

It is a fact that change initiatives attempted by organisations often result in job losses. Such losses are not pleasant for anybody, and it is even harder on managers if not correctly sensitised on how they should communicate changes that result in job losses of people who report to them.

Simple and effective communication is of the essence in today's business world. Communication, cooperation and coordination play a critical role in the turnaround of an organisation.

The norms, values and belief of the organisation help to create a common vision. Employees who operate within the boundaries of a defined organisational culture are crucial for the survival of the business in any turnaround. This is so because employees who share a common organisational culture tend to do things as a collective and in a systematic manner. Where a system exists, employees adapt and implement the system to the best of their ability and avoid working outside of a structure or system which has been proven over time to be effective.

Employees who do not subscribe to a vision often resist change. The trade unions in South Africa are frequently at loggerheads with the respective employers who try to effect change one way or the other, particularly where job losses are

on the cards. In most cases, this happens because there is no common vision. The unions' core business is people and the membership subscriptions which they collect monthly. Organisations, on the other hand, are in the business of making profit, and will cut jobs if need be to reach that objective.

Culture emanates from a well-orchestrated vision within any community, including the business community. Managers must not only manage culture within the organisation but must also be able to navigate the cultural differences and diversity of the broader community.^{lxviii} Culture plays a significant role in organisations. It is central to the way people classify one another, whether this is based on origin or background.^{lxix} With the emergence of multinational organisations, culture based on origin took a back seat to be replaced by organisational culture.^{lxx}

Organisational culture plays a critical role in the ultimate performance of the organisation. Successful companies are generally inclined to treat employees as their most important assets. In a turnaround situation, people may not like how the organisational culture may be affected or changed, or even completely challenged. This is so because it is also extremely difficult to instil a turnaround culture in employees who have been exposed to a certain way of working their whole lives. It is even harder for employees who have been used to a culture of jobs for life to embrace a turnaround. In a turnaround situation, employees who cannot embrace the organisation's new order tend to leave. In most cases, resistance emanates from the entrenchment of the old corporate culture in most of the employees, which may then conflict with the new culture. It is therefore very important for management to ensure that all employees interpret the new

corporate intentions correctly during the transition period. Misunderstandings about corporate intentions lead to inaction, which results in failure to implement change.^{lxxi}

The culture in turnaround management is that of urgency, and some employees may find it difficult to cope with, let alone comprehend it. Employees should be continuously monitored in a turnaround and be assured on an ongoing basis, particularly the top performers. They should have the necessary abilities to handle it. The organisation will be doing itself a disservice by appointing people, in management, to lead a turnaround without the necessary capabilities. In a turnaround situation, the thinking must be different as the organisation normally goes through a stressful situation, with the potential to destroy many dreams including jobs and investment opportunities.

Management Turnaround

Good companies do “go bad” at times and good managers can remake them.^{lxxii} In a turnaround situation, it is essential for a leader to have a strategy or vision backed by capable management.

In most cases, the turnaround attempts that are unsuccessful have ill-equipped managers who do not have the necessary turnaround skills.^{lxxiii} South Africa has faced business leadership challenges post the 1994 elections. Prior to 1994, the government was very much in control of most parastatals and very little activity was going on in terms of entrepreneurship. There has been a spike in entrepreneurial activities since 1994, fuelled mainly by democracy and Black Economic Empowerment. Business opportunities and investments increased after the lift-

ing of sanctions and through the broad involvement of the private sector. It remains to be seen what the depth of these opportunities and investments is and, equally important, how effective the corporate executives and entrepreneurs in general will be in terms of handling business rescue legislation as provided for in the new Companies Act.

Many businesses have existed only during times of growth and certainty. Most managers are therefore ill-prepared for global business, stiff competition and uncertainty. The lawmakers fail to take managerial issues into account when enacting insolvency laws. Small businesses, for instance, do not have the same resources as big corporations. It thus becomes impossible to save small companies faced with problems due to a lack of resources; for example, the payment for a turnaround practitioner.

A turnaround situation is abnormal in a business cycle and the management style therefore cannot remain the same. It is advisable for management in a turnaround situation to seek advice consistently from external people, as they will be able to view the problem objectively. Top management must make a habit of going to the source directly and avoid focusing only on filtered reports. Such reports may be biased in favour of the compiler, solely because an employee who compiles a report, for instance an accountant may want to project a positive outlook in the financial documents by withholding critical information. It is therefore important for top management to ask for supporting documents which were used to compile the report. Documents such as purchasing orders and customer invoices contain critical information which goes into financial reports, and yet management at times neglect to check the validity or even the

existence of these documents. This oversight borders on negligence or at best poor management.

Research has shown that 80% of a business's decline or failure can be attributed to internal mismanagement or poor management. A turnaround may be especially difficult in a family-run business due to family allegiances. A culture of non-accountability may set in where, for instance, in the spirit of avoiding the transfer of arguments from the workplace to the household, a husband or a wife may pay lip service to poor management attributable to one of them.

The turnaround manager should have different characteristics to managers in other phases of a business. Turnaround managers must also be carefully hand-picked. Business goes through different phases in its cycle, and every cycle must therefore be matched with a manager or managers with different characteristics relevant to that stage. Management can be grouped into three categories:

1. *The entrepreneurial manager* is focused on growing the business and hiring people to do the job.
2. *The traditional manager* does not like change and focuses more on shareholder value.
3. *The turnaround manager's* main aim, on the other hand, is to save the organisation.

Decisiveness, strong leadership and good communication are some of the characteristics of a turnaround manager. A turnaround manager will need to exercise tight controls and must also show signs of being hands-on, as this will ensure that he or she stays on top of things. A change of CEO brings a different

perspective in a turnaround situation. The change achieves three main things, which are:

1. A fresh perspective on the business's challenges;
2. An infusion of additional or more appropriate managerial competencies; and
3. A signal to concerned business stakeholders that the situation is about to improve.

Leadership Turnaround

Change-management initiatives require a leader whose number one priority is to transform the organisation for better prospects. The turnaround leadership process must involve the entire organisation and simultaneously bring the best out of the organisation in terms of performance and the attainment of the set goals.

Positive thoughts are key to any change-management issues.^{lxxiv} It is the duty of directors in a troubled company to decide whether the operations of the organisation in distress should be terminated or continued.^{lxxv} At times the organisational leadership may feel that the situation is hopeless, and nothing can save the company from collapsing. When the organisation reaches such a stage of hopelessness, it is important for directors to make the right choice with respect to who is favoured to continue running the operations, should they decide to give the organisation a second chance. There must be a yardstick that they can use to determine whether the transformational leaders they appoint are up to

the challenge. Transformation or even a turnaround cannot be done by any manager who is not up to the challenge in terms of skills and being able to tolerate pressure.

Turnaround leadership must always be put into perspective and be aligned with the adopted company's strategies.^{lxxvi} Turnaround practitioners should not be ruthless individuals who are engaged in the process for the sole purpose of cutting costs.^{lxxvii} Leadership should be at its best during a turnaround situation. A turnaround leader wants to see things done and is always ready to manage any crisis which may arise.

Any turnaround leader should be in the position to at least meet this minimum requirement of managing a crisis. The results of failing to manage crises appropriately can be negative, whether immediately or in the future. A turnaround leader must also instil a belief in the organisation which projects everybody as a leader because, in managing a crisis, no person can be at all places at once. The turnaround process must therefore be centralised.

In conclusion, a turnaround leader differs vastly from managers because he or she can recognise the changing needs of the business in a turnaround and are able to adjust accordingly to give direction to the organisation. It is therefore expected of such a leader to be decisive and to respect the team. In the end, it is the responsibility of the board to assess consistently the performance of the turnaround leader every year to determine his or her relevance to the changing business patterns and needs.

Financial Turnaround

Companies are usually audited on an annual basis to determine their financial status and to check irregularities that may occur within the company. These irregularities may be prevalent because of a deliberate intention to defraud the organisation or, at times, because of a genuine management mistake. The nature of the auditors' work is reactionary. They can only be in the position to discover the true status of the organisation's financial position after the completion of the audit. Auditors often take time to make pronouncements on the company's financial position months after the completion of the audit itself. This means that any irregularities uncovered during the audit period are attended to after the audit report has been tabled. Because of the delays in finalising the audit process, the latent signs of business distress may not be identified immediately. In listed companies the true value of the investments may be obscure, as value would have already been lost.

Some companies in distress during the 2001 US recession were not flagged as such by their auditors in their auditing report, and this led to some of the investing public losing their investments.^{lxxviii} Information contained in company annual reports may therefore be useful to affect a successful turnaround. Financial ratios are key to the process of identifying corporate decline.

Financial innovation, globalisation and deregulation of financial instruments have all added pressure to corporate liquidity, in some instances leading to organisational distress.^{lxxix}

Entities that are doomed to fail sell their inventory and struggle to replace it.^{lxxx} They also have a poor record with their creditors, as there is insufficient cash flow to enable the company to meet its creditors' obligations.^{lxxxi}

It is important, however, to look at the organisation's financial decline in context with all the other organisational variables. For instance, when an organisation is in distress, it is critical for management to value the company's assets correctly.^{lxxxii} Valuing of assets is important when it comes to satisfying investors where money is needed to fund or finance some of the organisational operations.^{lxxxiii}

It is also dependent upon management to ensure that ethical behaviour prevails among the members of the auditing firm engaged to audit the company's financial documents.^{lxxxiv} Tampering with financial statements is bound to create problems.^{lxxxv} More than 1,000 trillion yen of the Japanese GDP was lost in the beginning of 1990 due to an exercise by corporate Japan to clean their balance sheets.^{lxxxvi} Additional cash-flow burdens may be placed on the company's payroll through compensation. For instance, a CEO who is replacing the outgoing CEO in a turnaround situation may demand more money in the form of stock options.^{lxxxvii}

Cash-flow problems place a company in a very difficult position. In the first instance, such a company will not be able to pay cash. Credit purchases are an option; however, the suppliers and creditors may be unwilling to extend the existing credit or grant a new line for that matter.

Organisations that find themselves in financial distress generally go into liquidation or are rescued through turnaround processes. The turnaround plan initiated must be approved by all the stakeholders. There must be a financial restructuring and analysis to meet the objectives of the turnaround process. There are many financial tools that can be used to analyse the business. In a turnaround situation, those in charge may focus on key financial areas which most impact the business. The balance sheet, operating profit, cash flow and the business cash-generating methods are all critical to affect a successful turnaround.^{lxxxviii} An analysis must also be conducted to determine whether the business can finance its own turnaround.

In a turnaround situation there must be short-term measures in place to manage cash, and every activity involving cash outflow should be questioned.^{lxxxix} Banks at times contribute towards business failures because of their reliance on collateral at the initiation of the business loan agreement.^{xc} It is important for an organisation in distress to shop around quietly for another lender, in cases where the existing lender is rigid in that regard. Companies have saved themselves by changing lenders when it mattered.^{xcii}

Financial restructuring is key because it enables companies to exploit new opportunities and contribute towards the organisation's financial stability.^{xcii} It is very important for organisations to adopt business conduct policies which do not compromise their corporate standards guidelines. Corporations must equally fulfil their corporate social responsibility roles. The board's input is critical in ensuring that the organisation's finances are looked after.

All major financial risk falls squarely under the board's jurisdiction.

Operations Turnaround

Operational turnarounds are not easy to accomplish. They require perseverance, which is something not everybody is gifted with. There is a belief by management that operational restructuring improves costs and efficiency, yet operational restructuring in certain instances can cause disruptions and upset customers, and employees can lose their jobs unnecessarily. Restructuring is a sign of incurable underlying problems, which normally happens in the traditional mass-manufacturing environment. Organisations that have adopted lean principles perform better, as lean manufacturing involves key fundamentals which provide the organisation advantage and focus. Companies that have adopted lean principles are safety conscious. The factory floor is strikingly clean and perfectly packed and stacked, so the chances of employees injuring themselves are therefore minimal. These organisations set very high safety standards for themselves, which are in turn adhered to by the employees as well as the suppliers and customers. It is unheard of for these organisations to record any loss time due to injury. They clearly demarcate the factory site with the necessary safety and signage aimed at keeping both employees and visitors safe. These companies embrace the safety philosophy wholeheartedly and are willing to ban or dismiss anybody who breaches safety regulations within their premises. The second thing that lean-oriented companies do is to implement the “just-in-time” system, which is aimed at bringing the raw materials in just in time to be utilised. The importance of this system is the reduction of inventory as goods are not manufactured in line with the forecast but according to customer demands and orders. The pull scheduling techniques are used to perfect the system. It is important in a turnaround situation for an organisation not to lose face with the

customers who are still loyal to it. The other important feature of lean organisations is their no-compromise approach to quality. Through the six sigma methodologies, the standards of quality are set at very high levels. The defects are detected quickly and fixed. The reduction of waste is another critical feature of lean organisations. This waste is not only limited to money. Processes involving unnecessary activities that can be done away with and are not core to the production of the product are time-consuming and should be eliminated without any delays. Lean principles are also about communication. The teams communicate with one another always to ensure that there is consistency in running the operations of the organisation. The teams are empowered to make decisions within their production lines. There is no top-bottom approach, which is the order of the day in a mass-manufacturing environment, where managers are called to assess every manufacturing activity.

The above principles are key in any operations turnaround plan. They address all the main areas of an organisation in distress, the most important being savings, quality, safety of employees and team work, which then creates a single vision to nurse the ailing organisation back to health.

An operations turnaround leader must be a visionary who approaches change differently.^{xciii} In a turnaround situation, normal company operations must be reviewed on an ongoing basis to determine their relevance to the changing business environment. Operational restructuring involves making decisions about a wide range of activities including, but not limited to, the workforce, the plant capacity and the possible relocation of the operational plant to a suitable location.^{xciv}

Firms or companies need to develop their own value-generation capabilities in a turnaround situation.^{xcv} Operational inefficiencies are a symptom of poor management.^{xcvi} Poor management is a significant contributing factor to organisational decline. Poor management manifests itself in the basics of management being ignored. Productivity must be high on the agenda for a successful turnaround plan to be effective. A proper plant layout encourages orderliness within the manufacturing site and forms the basis for successful operations which are often accompanied by sound safety measures.

It is not sufficient for the production team to produce quality goods on time, as the goods must also be able to reach the customer on time. It is therefore imperative that the sales team be accountable for the territories to which they have been assigned. Territory plans should be high on the agenda of any sales person. Time allocated by the sales team must reflect their returns in terms of concluded deals.

It is equally important that adequate budgets must exist for advertising and promotional material, as the organisation must always make itself visible to potential customers. Successful companies have a strong distribution and after-sales service.

Operational turnaround may involve the diversification of assets. A company may decide to do away with its non-core business operations which are not adding any financial value to the organisation. Poor business operating performance, stock returns, financial distress and economic recession are some of the reasons which may lead to the need to restructure the operations of the organisation.

Quick wins are essential in operational turnaround and have an impact on costs and the quality of the products that the company is producing.^{xcvii} Managers must conduct operational review constantly to determine operational challenges, which can then in turn be dealt with as speedily as possible. The operations review must fall in line with the strategic intent of the turnaround process.

Marketing Turnaround

Marketing initiatives must differ during a turnaround situation and must be structured.^{xcviii} The marketing strategy must identify a selected class of customers who are likely to consider the value proposition of the product offering.^{xcix} At times, the turnaround of a small company may be possible because of the focus that goes with it. The strategic marketing relationship must embrace the whole value chain. The turnaround manager must look at customers, suppliers, distributors and other relevant stakeholders to affect the marketing turnaround.

Market planning and intelligence play a critical role in a turnaround situation, as information will be filtered through to the organisation in distress. New products, an appealing environment to customers and improved service to both the customers and the new employees are some of the initiatives that can lead to a successful marketing turnaround.

In a turnaround, the traditional way of managing the business changes. Traditional marketing segmentation may not work in an environment where there is product proliferation. Lateral marketing may be key in situations where real change is needed. Those in control of marketing activities need to take stock of the changing management activities to affect a successful marketing turnaround. The purpose of any commercial interest is to sell as many products or as

many of the services as possible. Marketing is vital to ensure that the organisation has a product or services to sell to stay in business.

In summary, the aim in any turnaround situation is survival. The aim with traditional business management may be growth, maintenance or even stabilisation. The process followed in both instances indicated above is different. Pressure is more prevalent in a distressed business than in a growth-oriented business. Management in a turnaround business must possess the necessary skills to run a business that is on the verge of failure.

Chapter 10

Recent Case Law Development

The business rescue proceedings have been tested by the courts in several cases since the legislation was promulgated. The courts have been grappling with procedures in most of the recent decided cases.^c In the case of *Absa Bank v Newcity Group*, the main thrust of this case was centred on the blurred line between the provisional winding up order that leads to liquidation and the initiation of business rescue proceedings. In this case, Absa Bank had already initiated proceedings to liquidate the Newcity Group, and the court had to decide whether the application for business rescue interrupted the granting of the final provisional order. In this case, the court stayed the granting of the final provisional order. The courts will always look at business rescue proceedings favourably provided the intended business plan is for the benefit of all creditors and that employment will be saved.

The courts have looked at the compliance process as far as business rescue legislation is concerned. The resolution to place a company under business rescue proceedings under normal circumstances is taken by the board of directors. In some cases, interested parties such as creditors may initiate the process of placing the company under business rescue. Most cases decided by the courts recently focused on the rationality of the decision to place the business under business rescue by the board of directors. The courts have tested the rationality of the decision itself through the business rescue plan tabled and compliance in terms of timing. The courts always look at whether business rescue proceedings

are not initiated simply to frustrate the creditors.^{ci} There must be reasonable prospects of success for the rescue plan to succeed.

At present, case law is being developed through the courts which tests the provisions of the business rescue legislation. There are calls from several interested groups who assert that special courts must be created for this procedure. The normal courts do not resolve matters quickly in general. As a result, the normal courts may not necessarily conform to the urgency that a struggling business requires to stay afloat, particularly when the business is under attack from the creditors who want to liquidate it to recover money owed.

In conclusion, business rescue initiatives are more than important in the South African context of the current technical recession that the country is going through. Many companies are distressed and require a breather from the creditors who can afford to wait for payment. Small companies that have rendered a service or sold products to a company under business rescue may not survive themselves. It may well be a question of giving with the right hand and taking with the left. It is too early to judge the success rate of these proceedings. It is also expensive for small companies to even contemplate business rescue proceedings. The average fees charged by business rescue practitioners range between R1,200 to R15,000 a day. I am sure that the legislature did not intend to overburden a company which is already on knees.

Chapter 11

Twenty-Two Practical Tips to Avoid Business Rescue

Tip #1 - Business idea

It helps to be certain about the kind of business that one wants to go into. It is critical to conduct a thorough due diligence before buying any business. Emotions and excitement should be set aside. When conducting business due diligence, look at what the papers before you are not saying before putting pen to paper.

Tip #2 - Business Environment- micro elements

Companies must do their best to understand the economics at their level of influence, as companies can then detect early signs of market sentiments. They can also determine the size of market share at micro level.

Tip #3 - Business climate- macro elements

Macro elements are focused on the broader economic issues. They focus on how the country is performing economically, and on the impact of the world economy on the local economy. It helps to be aware of the new trends and how to respond to them, particularly those that may impact the business negatively.

Tip #4 - Customers

Keep the customers whose loyalty to the business remains intact. They are the business ambassadors. Always cater for their needs despite the strategic direction that the business may take. If the strategic change is too big to retain the status quo, invest in this customer base and make them see change through your concerted efforts.

Tip #5 - Suppliers

Similarly, make sure that suppliers do not wander too far from the winning idea. Avoid overhauling of packaging material and quantities without some sort of an explanation. Coca Cola recently changed their 500ml coke bottles to 450ml without saying a word. The customers are unhappy because of this, which could potentially cause a lot of damage to the brand.

Tip #6 - Avoid complications

Focus on what you do best. Grow organically if scope permits.

Tip #7 - Partners

The right partners in the business are a must. Otherwise go solo and realise your vision.

Tip #8 - Fraud

Fraud is the biggest killer of any business. Be honest in the business and understand your business. Knowing what the business is all about will go a long way in detecting issues at an early stage.

Tip #9 - Ethics

Ethics are hard to come by of late. Try employing likeminded people in critical areas of the business. This may be the only area where dissent is not tolerated. Rigidity and compliance will go a long way towards the survival of the business.

Tip #10 - Big business

Big business always has an agenda, and their agenda may not always be good. Not all big businesses have good intentions, such as driving the development of small and medium-sized businesses. These days, there are big businesses competing with small business, as demonstrated by the recent Competition Tribunal hearings regarding uncompetitive behaviour of some of the big retail companies in South Africa.

Tip #11 - Dinosaurs

Avoid working with dinosaurs – chuck them out. They embrace nothing new, as their objective is to keep the status quo because it is more predictable.

Tip #12 - Corruption

Avoid paying the ultimate high price. Rather be at peace with your maker than give in to the urge to accumulate worldly things at all costs. There is also the law to consider.

Tip #13 - Stats SA

This organisation has so much to offer and should be on every business owners' speed dial. Their information is near perfect. All the indicators that they provide are spot on and may go a long way in saving many businesses.

Tip #14 - Funders

You need funders and must be at peace with them despite any bullying. They are only bullying you to protect their financial interests.

Tip #15 - Plan properly

Planning for everything is important. Over planning is a bonus because it means less risk and no business rescue invitation.

Tip #16 - Poor management

This is the single biggest factor for business failure. Be in the business with your heart and soul and strive never to drop the ball while you're at it.

Tip #17 - Lack of focus

Do not be side-tracked. Warrant Buffet was not side-tracked during the Dotcom era. He is still standing, while the dotcoms are nowhere to be seen.

Tip #18 - Inventory

Buy what you need or can sell. It's as simple as that.

Tip #19 - Failure to separate personal and business funds

Short-term accomplishments may be the biggest obstacles towards building an asset which may be sold by the owner at a later stage.

Tip #20 - Non-profitable business

All businesses are operating to make profit. Businesses are not worth pursuing if they burden the owners financially in their personal capacity.

Tip #21 - The courts

Avoid the courts as far as you are able. They are often run by men and women who are very rigid. There are no grey areas for them; certainly, business grey areas do not feature in their vocabulary. Bureaucrats and technocrats are robotic and repetitive. They know nothing else other than structure.

Tip #22 - Recession and credit downgrade

Aim for ground zero and grow organically. Quick business growth may be disastrous for any business as growth must be funded, and cash flow issues may then arise which lead to business failure.

In conclusion, the avoidance of the pitfalls listed above will significantly enhance the chances of business survival. Business rescue is not ideal and must be avoided at all costs where possible. Where the company has no choice other than business rescue, emphasis should be placed on the interests of all stakeholders.

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