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| Comment | Editor | 1st Reviewer | 2nd Reviewer | Response |
| **Review 1385** |  |  |  |  |
| All comments in text |  | 1 |  | Addressed one by one – very useful to improve the document  |
| The use of agency theory to discuss/debate and explain the unique relationship between affected parties and the business rescue practitioner is to my view incorrect. Why “agency theory”? This article ventilates the “popular” perception (rightly or wrongly) that currently prevails on business rescue practitioners. Currently, rescue practitioners are frequently categorized as “puppets”. Either puppets of the banks or puppets of the shareholders/directors. The main reason for this generalised perception is that practitioners are not regulated as a qualifying profession, as is the case with practicing attorneys and chartered accountants. This unregulated rescue environment leads to the appointment and licensing of “sub-standard” practitioners. Refer PRETORIUS, M. 2014a. ‘A competency framework for the business rescue practitioner profession,'Acta Commerci 12(2), 87–107. |  |  | 2 | 1 Agency is well known theory about relationships and used as the lens to judge only. The aim is not to be a legal test but a practice manifestation. I addressed that as it underlies the referee’s main concern.2 Not regulated is correct – therefore this paper to show how relationships manifest as a result thereof. |
| The author refers to the CIPC as the “Regulator” for business rescue practitioners, which is incorrect. The CIPC’s current function is limited to the licensing of rescue practitioners and have no further regulatory function other than to ensure administrative compliance with the Act. Refer to CIPC Business Rescue Circular 3 and the requirements attached to the CIPC license certificate. There is a dire need to establish a proper regulatory body for business rescue practitioners to ensure discipline, required skills set and education, refer to the article by Bradstreet; “ The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders’ Willingness and the Growth of the Economy. (2010) 22 SA Merc LJpg 195-213.  |  |  | 2 | 1 While the CIPC does not fulfil its functions properly, they are still the Regulator and is now in a process to accredit BRPs. Matter of opinion.2 This is part of the motivation for this study. What is describes is a result of the “non-regulation” effect. |
| Quote from the author's text *“….Agency theory attempts to address two main problems: the conflicting goals of the principals and agents and the difficulty for the principal to verify or authenticate the agent’s actions (Eisenhardt 1989:58)…”* the business rescue practitioner “goals” are dictated by the Companies Act, Act 72 of 2008 (“the Act”) and the agency principal, or incumbent principal’s goals, as explained in this article, are irrelevant. The author goes so far as to suggest that Banks are “incumbent principals” in the business rescue process. The United States’Bankruptcy Code Chapter 11, which have some similarities to the South African Chapter 6 is frequently referred to in South African literature. Unfortunately, due to the lack of South African literature on the subject of business rescue, authors use USA based articles which have strong reference to Chapter11. Under Chapter 11 however, the creditors plays a bigger role in the post-filing administration of the company which is classified as “Property in Possession”. This PIP dictates that the debtor retains “ownership” of the business, thus a potential for creditors to dictate. USA literature thus express the opinion that creditors are “principals” in an agency agreement that follows petitioning of Chapter 11. Refer to Barondes, R., Fairfax, L., Hamermesh, L., &Lawless, R. (2007). Twilight in the Zone of Insolvency: Fiduciary Duty and Creditors of Troubled Companies-History & Background. Journal of Business and Technology Law, 1(2), 229–255.I strongly disagree with the author’s viewpoint that agency theory principals applies in the South African context of business rescue process (Chapter 6). There is no “contract” between the directors (principals), the banks (incumbent principals) and the business rescue practitioner (agent). Applying agency theory in this perspective, which to my view is the mistaken belief of the actual role that a practitioner play in the rescue of a company, is not correct. The Act is quite clear on requirements and regulations of the business rescue practitioner. The most important sections of the Act are firstly Section 7 (k) which reads as follow *“… provide for the efficient rescue and recovery of financially distressed companies, in a manner that* ***balances the rights and interests of all relevant stakeholders;…****”* |  |  | 2 | 1 While this may be true from a legal perspective – what happens in practice is different and therefore supports the aim and contribution of the research.2 This disagreement by the reviewer actually constitutes agreement with the paper contribution. 3 Legally, there is no contract but in practice, there are relationships that manifest between role players and which impact how business rescue is perceived. These are discussed through the theoretical lens of agency theory.4 Despite the act’s clarity on what the BRP must/must not do, this is not how it happens in practice, hence the conflict between parties. |
| Quote from the author's text *“….Agency theory attempts to address two main problems: the conflicting goals of the principals and agents and the difficulty for the principal to verify or authenticate the agent’s actions (Eisenhardt 1989:58)…”* the business rescue practitioner “goals” are dictated by the Companies Act, Act 72 of 2008 (“the Act”) and the agency principal, or incumbent principal’s goals, as explained in this article, are irrelevant. The author goes so far as to suggest that Banks are “incumbent principals” in the business rescue process. The United States’ Bankruptcy Code Chapter 11, which have some similarities to the South African Chapter 6 is frequently referred to in South African literature. Unfortunately, due to the lack of South African literature on the subject of business rescue, authors use USA based articles which have strong reference to Chapter11. Under Chapter 11 however, the creditors plays a bigger role in the post-filing administration of the company which is classified as “Property in Possession”. This PIP dictates that the debtor retains “ownership” of the business, thus a potential for creditors to dictate. USA literature thus express the opinion that creditors are “principals” in an agency agreement that follows petitioning of Chapter 11. Refer to Barondes, R., Fairfax, L., Hamermesh, L., &Lawless, R. (2007). Twilight in the Zone of Insolvency: Fiduciary Duty and Creditors of Troubled Companies-History & Background. Journal of Business and Technology Law, 1(2), 229–255.I strongly disagree with the author’s viewpoint that agency theory principals applies in the South African context of business rescue process (Chapter 6). There is no “contract” between the directors (principals), the banks (incumbent principals) and the business rescue practitioner (agent). Applying agency theory in this perspective, which to my view is the mistaken belief of the actual role that a practitioner play in the rescue of a company, is not correct. The Act is quite clear on requirements and regulations of the business rescue practitioner. The most important sections of the Act are firstly Section 7 (k) which reads as follow *“… provide for the efficient rescue and recovery of financially distressed companies, in a manner that* ***balances the rights and interests of all relevant stakeholders;…****”*These disqualifying criteria in the Act, which the author correctly argue can only be enforced by the Courts, prevails where the CIPC licensed practitioners that do not meet the specified qualification criteria as per the Act. The CIPC will not, or will be reluctant to issue a license to a practitioner that has been removed by the Court. As such another abuse of the Act manifest itself where the practitioner, under these circumstances, “resign” to save face (and ensure re-appointment in future – thus to continue in the same flawed way). Whether a practitioner can merely resign when he/she feels the heat, is still open to debate.  |  |  | 2 | 1 Legally true but practice shows different2 Fiduciary duty is the legal approach. The interest of this article is the practice. While the referee is correct about the directives of the law, this paper describes the relationships as they are observed in practice. This was addressed right through.  |
| Thirdly the Act is clear in the goal setting of the practitioner as an officer of the Court. Section 140 states that*“…During a company’s business rescue proceedings, the practitioner- (a) is an officer of the court, and must* ***report to the court*** *in accordance with any applicable rules of, or orders made by, the court;**(b)has the responsibilities, duties and* ***liabilities of a director*** *of the company, as set out in sections 75 to**77;* ….” |  |  | 2 | Legal vs practice argument repeated |
| Finally for this article review purposes it is prudent to quote Section 140 which states that *“…the creditors of a company are entitled to form a* ***creditors’ committee****, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan*…” this section is followed by section 149 which spells out the role of such a creditors committee.  |  |  | 2 | Legal vs practice argument repeatedCreditor committee has shown in practice to be under utilised |
| I believe that these quotes from the Act clearly dismisses the conception that an Agency theory relationship exist with the business rescue practitioner. Any relationship other that what is described in the Act is not consistent with the purpose of the Act stated in Section 7(k).  |  |  | 2 | Legally yes agreed – practice as shown from this research appear different. |
| I have referred to the use of literature, sourced from the USA on the subject matter used under the Bankruptcy Code’s Chapter 11, which is not applicable in the South African contextof business rescue as prescribed by the Act. The author refers to sources which workare not based on grounded theory, such as Gribnitz, K. &Appelbaum, R. 2014 (spelled Applebaum in the article) and Jacobs EM. 2012, who’s comments and observations are based on their personal un-grounded views and believes. |  |  |  | 1 Research methodology well described for Appelbaum and Gribnitz for descriptive statistics2 Jacobs – legal view |
| In a circuitous way the article, due to the auto-ethnographic foundation, ventilates a lot of the miss- conception about business rescue and is a realistic view of what the rescue industry is perceived to be by a certain portion of the population. Due to the newness of business rescue in South Africa, and with the legacy of the insolvency regime in the background, a lot of the author’s observations from this limited population are valid. The author, however, fails to follow through and substantiate these observations with factual outcome and common law developments in this field. The population which is included in the research should be expanded the get a more balanced result. In researching recent case law on the matter of removal of practitioners based on the lack of independence, it is evident that the rescue environment does not tolerate any form of agency relationship.  |  |  | 2 | Legal argument again – addressed by several clarifications throughout the text in alignment with Reviewer 1. |
| * **Is the research question clear and concise?**

Refer to comment above |  |  |  |  |
| * **Is the research method appropriate to address the research question?**

Refer to comments above and under point 4b. |  |  |  |  |
| * **Essentially, is this article suitable for publication in an ISI accredited journal?**

No. Applying Agency Theory in the context of the South African business rescue system is not plausible at all. |  |  | 2 | Confirms the argument in this paper – the difference between practice and legal correctness |
| * **If so, do you have any suggestions for improvement or shortening? What are those suggestions?**

It is suggested that the author changes the focus of this article to the role that the affected parties can play in ensuring co-operation from the affected parties (incorrectly referred to as principals and incumbent principals in the article), with the practitioner to enable successful rescue of the company. The popular misperceptions on the role of the practitioner, which is broadly ventilated in this article, can form the base for an article on this specific subject which can contribute to the breaking down of these wrong perceptions and beliefs. |  |  |  | The described relationships are exactly those of the affected parties within the relationships created as a result of BR.  |