Business Rescue (Section 129 of the Companies Act) needs buy-in from creditors to be successful

Companies are not using business rescue provisions in the new Companies Act as they were intended and the process is therefore not often successful in turning companies around, says Clinton Pavlovic, Senior Associate at Pietersen Incorporated.

"Obviously business rescue is preferable to liquidation for all stakeholders, especially employees as it provides an opportunity to save the business," Pavlovic says. "But in many cases directors delay implementing business rescue proceedings until it is too late and the company is technically insolvent.

He says business rescue is generally seen more as a delaying tactic to hold off creditors, after which the company goes into liquidation anyway.

Creditors can oppose the action in court if they feel there is no reasonable prospect of rescuing the company.

"Without the buy-in of major creditors, the business rescue process simply won't be successful," he adds.

Under section 129 of the Companies Act, the board of directors can voluntarily place a company into business rescue when it runs into financial distress. However, many boards avoid doing this as it sends out a negative message to creditors and investors.

In addition, while the board of directors continues to exercise their function under business rescue, it is subject to the authority of an appointed turnaround practitioner.

"The boards' hands are tied in many ways, as the turnaround specialist must sign off all decisions," says Pavlovic.

He says creditors have to decide whether they will co-operate and wait to see if the turnaround strategy works or oppose the resolution and file for the company's liquidation instead.