



## **BUSINESS RESCUE EXPLAINED**

# WHAT IS BUSINESS RESCUE?

## **What is business rescue?**

Business rescue is a procedure aimed to facilitate the rehabilitation of a financially distressed company. The company is placed under the temporary supervision of a business rescue practitioner who manages the affairs of the company. There is a moratorium on the rights of all claimants against the company or in respect of all its property. A business rescue plan is developed to rescue the company by restructuring its affairs. This may include a restructure of the business, its property, debt, other affairs, liabilities and equity.

## **What is the purpose of business rescue?**

Business rescue aims to restructure the affairs in such a way that it allows the company to continue its existence in the future or if it results in a better return to creditors of the company than would ordinarily result from the liquidation of the company.

## **Is business rescue a better alternative than a liquidation?**

If the prospects of saving the company are good then yes. The process is aimed at returning the company to profitability and is an effort to save jobs and allowing the entity to continue trading as an economically contributing entity.

## **What is an affected person?**

An affected person is a person that has various rights throughout the business rescue process. These are directors, shareholders, employees or their representatives and trade unions representing the employees of the company.

## **Who benefits from business rescue?**

All affected parties benefit from this process. Creditors of the company will receive a better return than they would ordinarily receive from the liquidation of the company. The company will continue its existence once the business rescue process is complete, saving jobs and allowing the entity to continue trading as an economically contributing entity.

## **Can any company be placed under business rescue?**

No. Only if the company is financially distressed and there is a reasonable prospect that the business may be rescued can it file for business rescue.

### **Can any business entity be placed under business rescue?**

No, not all businesses can apply for rescue. Only companies may file for business rescue. Businesses operating through trusts and sole proprietors cannot file for business rescue.

### **Can a close corporation be placed under business rescue?**

Yes, under the new Companies Act a close corporation is classified as a company.

### **What is meant by financial distress?**

A company is in financial distress when doubt exists over whether or not a company is able to pay all its debts as and when they become due and payable within the ensuing six months, or it appears that it is unlikely that the company will become solvent within six months.

### **When should a company file for business rescue?**

A company should commence business rescue proceedings at the first signs of being financially distressed. This implies that at the first signs of distress a company should apply for business rescue. Should a company become “more distressed” options other than business rescue become an option such as takeovers or a liquidation.

### **Who may place a business in business rescue?**

Any affected person may apply to the courts to place a company into business rescue or the directors may file for voluntary business rescue provided in each case the company is financially distressed and there is a reasonable prospect that the business may be rescued.

### **What is meant by a reasonable prospect that the business may be rescued?**

The directors need to assess the business and ask questions such as;

- Do we have a business?
- Are clients and products still in tact?
- How terminally ill is the business?
- Decide if the business can be saved?

### **How is a company legally classified in terms of its size?**

A company may be classified as a small, medium or large company based on its public interest score. This also defines the category of business rescue practitioner that qualifies to conduct the business rescue.

### **What is a public interest score?**

A public interest score is a calculation to determine the size of a company at the end of each financial year. Companies with a public interest score of less than 100 are classified as small companies. Companies with a score of between 100 and 500 are classified as medium companies whilst large companies have a score in excess of 500. State owned or public companies with a public interest score of less than 500 are classified as medium sized companies.

### **How is the public interest score calculated?**

A public interest score is calculated at the end of the financial year of a company as follows;

- One point equal to the average employees employed during the year;
- One point for every R 1 million or part thereof of third party liability;
- One point for every R 1 million of turnover or part thereof;
- One point for each shareholder;

The total of all the points is then the calculated public interest score.

# THE PROCESS

## **How does a company go into business rescue?**

There are two ways in which a company can be placed into business rescue. One, where the directors voluntarily commence business rescue proceedings and secondly when an affected party makes a formal application to the court placing the company in business rescue.

## **How does a company go into business rescue voluntarily?**

A company must be financially distressed and the directors must agree to place the company into business rescue. The company must file a form CoR123.1 with the Companies and Intellectual Property Commission. This must be accompanied by a resolution of the board of directors where the board resolve to commence business rescue proceedings as well as an affidavit stating why the company is financially distressed and why the board of directors believe that there is a reasonable prospect of rescuing the company.

## **Are there any other tests to see if a company should be placed into business rescue?**

Yes. Under business rescue the creditors must receive a better return in business rescue than in a liquidation.

## **Who is the CIPC?**

The CIPC is the “Companies and Intellectual Property Commission” and they are the body mandated by the Companies Act to govern most aspects regarding companies as well as licensing of business rescue practitioners.

## **Who may apply to court to cause a company to go into business rescue?**

Directors, shareholders, employees or trade unions acting on behalf of their members may apply to court for a business rescue order.

## **How does a company go into business rescue by approaching the courts?**

The applicant bringing the order must indicate that there is a reasonable prospect that the company can be rescued. Without this information the court is not in a situation and will be unable to consider if the prospects of the company are such that creditors will receive a better return in business rescue than in a liquidation.

Other considerations are;

- The company must be financially distressed;
- The company may have failed to pay over any amount in terms of an obligation in terms of a public regulation or contract;
- It also needs to be equitable to place a company into business rescue for financial reasons;

### **On what grounds can a person object to a company being placed into business rescue?**

An affected party can apply to the court to set aside a business rescue if;

- There are no reasonable prospect of the company being rescued;
- The company does not seem financially distressed;
- The company has not complied with the business rescue procedures as set out in the Act;

### **Can any person object to a company being placed in rescue?**

Only an affected party may apply to the court for an order to object to a company being placed into business rescue. A director of a company that voted in favour of placing the company into business rescue may not apply to have that resolution set aside unless they prove that they acted in good faith at the time of the resolution being passed and the information in making that decision has since been found to be false or misleading.

### **On what grounds can a person object or oppose a business rescue resolution?**

Any time during the business rescue proceedings an affected person may apply to court to object or oppose a business rescue resolution on the following basis;

- There is no reasonable basis for believing that the company is distressed;
- There is no reasonable grounds for rescuing the company;
- The company has failed to comply with the procedures defined in the Act;

### **What are the consequences of a successful objection toward a company in business rescue?**

Should a person be successful in objecting to a business rescue the business rescue process is declared a nullity and the company may not file for business rescue for a period of three months, unless the court approves the new filing.

### **On what grounds will the court grant a rescue?**

The court will grant an order placing the company under supervision and commencing business rescue proceedings if they are satisfied that the company is financially distressed, or the company has failed to pay an amount in terms of an obligation in terms of a public regulation, or it has failed to pay over amounts due in terms of a contract relating to employment matters. The court will also grant this order if it is just and equitable to do so for financial reasons. In each case there must also be a reasonable prospect for rescuing the company or the application will be dismissed and the company placed into liquidation.

Secondly, the court may grant a business rescue order on the basis that the procedures during business rescue were not adhered to and it is just and equitable to place it into business rescue.

### **When does business rescue begin?**

Business rescue begins:

- When the business files a resolution with the CIPC passed by the directors to place company under supervision;
- When the company applies to the court for consent to file a resolution placing the company into business rescue;
- When an affected person applies to the court for an order placing the company into business rescue;
- The court makes an order placing a company into business rescue during liquidation proceedings or proceedings to enforce a security interest;

### **How long does business rescue last?**

Business rescue must last for a period of three months during which period the practitioner must convene meetings with affected parties and develop a business rescue plan and thereafter implement the plan should it be approved. If the proceedings have not been completed after three months the practitioner must prepare a report on the progress of the business rescue proceedings and update affected parties and the CIPC on a monthly basis until the proceedings have ended. If the business rescue proceedings have been subject to a court order, the court needs to receive these monthly reports as well.

### **What are the steps in business rescue?**

Once a company commences business rescue proceedings be it on a voluntary basis or by order of the court the following actions must occur;

- Within five business days after the company has filed for business rescue it must publish a notice of the resolution as well as publish the sworn affidavit of the facts and grounds of the business rescue to every affected person;
- Within five business days after the company has filed for business rescue it must appoint a business rescue practitioner who has consented in writing to accept the appointment;
- Within two business days after appointing the practitioner the company must file a notice of the practitioners appointment with the CIPC;
- After this notice has been filed the company must within five business days send a copy of this notice to every affected person;
- The practitioner must then investigate the affairs of the company and within ten business days after being appointed convene a meeting of creditors and employees and advise the meeting of the prospects of rescuing the company;
- A business rescue plan must be published by the company within twenty five business days after the date on which the business rescue practitioner was appointed;
- Within ten business days after the publication of the business rescue plan the practitioner must convene a meeting of affected persons for the purpose of considering the business

rescue plan and voting thereon;

### **What happens if the time periods prescribed by law are not adhered to?**

Should the company or the practitioner not comply with the prescribed procedures an affected party may approach the court to have the business rescue proceedings declared a nullity and therefore that the proceedings have lapsed. The company may then not file a further resolution placing it into business rescue once again from the date of the lapsed resolution for a period of three months.

The company can however approach a court on an ex parte basis and if good cause is shown the court will approve filing a resolution for business rescue within the three month period.

### **What is a creditors and an employees committee?**

Creditors and employees committees are formed when the number of these persons makes it difficult for the practitioner to deal with all persons. These committees are formed and consult the practitioner.

### **What are the functions of a creditors and employees committee?**

These committees are entitled to consult the Practitioner regarding the development of the business rescue plan and must be afforded sufficient opportunity to review such plan and where necessary submit input into the development of the business rescue plan;

- They can consult the business rescue practitioner but may not direct or instruct him or her;
- They are entitled to receive reports on the progress of the rescue;
- They must report to their bodies;
- They must act independently of the business rescue practitioner;

### **Who may be a member of a creditors committee?**

An independent creditor of the company, or an agent, proxy or attorney or any person acting under general power of attorney may be a member of the creditors committee. A person authorised in writing by an independent creditor may also be a member.

### **Who may be a member of an employees committee?**

An employee of the company, or an agent, proxy or attorney or any person acting under general power of attorney may be a member of the employee's committee. A person authorised in writing by an employee may also be a member.

# RIGHTS

## **What are the rights of creditors?**

The creditors have the right to participate in the business rescue process.

Each creditor is entitled to;

- Notice of each court proceeding, decision, meeting or other relevant event concerning business rescue of the company;
- Participate in any court proceedings arising during business rescue;
- Formally participate in the business rescue proceedings as provided for in the Act;
- Informally participate in the proceedings by making proposals for the business rescue plan to the practitioner;

In addition to this each creditor has the right to vote, to amend, approve or reject a plan, and if the plan is rejected to participate in the development of an alternative plan.

A creditor may present an offer to acquire the interest in any or all of the other creditor's interests if that creditor voted against and opposed the plan at an amount equal to the value had the company been liquidated. Creditors are entitled to form a creditors committee and consult the practitioner during the development of the business rescue plan.

## **How are employees represented?**

Employees who are represented by a registered trade union may exercise their rights collectively through the trade union in accordance with labour law. Employees not represented by a trade union may exercise their rights directly or by proxy through an employee organisation or representative.

## **What are the rights of employees?**

Employees, their trade unions or representatives are entitled to;

- Notice of each court proceeding, decision, meeting or other relevant event concerning business rescue of the company;
- Participate in any court proceedings arising during business rescue;
- Form a committee of employees' representatives;
- Be consulted by the practitioner during the development of the business rescue plan and be afforded enough time to review the plan;
- Employees may address the affected persons at the meeting called to vote on the business rescue plan;
- To the extent that an employee is a creditor they may vote on the business rescue plan;

If a business rescue plan is rejected the employees have the right to;

- Propose the development of an alternative plan;
- Present an offer to acquire the interests of one or more affected persons;

Furthermore, to the extent that any remuneration or amount of money relating to employment before the beginning of business rescue proceedings the employee is a preferred unsecured creditor of the company.

**Do affected parties have the right to inspect the books of account or receive additional financial information about the company?**

No. The fact that a company is in business rescue does not change rights of affected persons to demand or inspect additional financial information. Affected parties are entitled to information allowed by various Acts and to the information disclosed in the business rescue plan. Should an affected party believe that they are entitled to information they may motivate that to a court who will decide the validity of the request.

# CLAIMS

## **What is a claim?**

When a company files for business rescue it owes monies to various affected parties. At business rescue date these parties need to prove to the business rescue practitioner that indeed the money is owed by the company. The practitioner will request that companies owed money prove this is due and will require all affected parties to complete a claim form so that the claim may be evaluated and either accepted or rejected.

## **How are they submitted to the practitioner?**

There is no prescribed format for submitting a claim however guidance is taken from the Liquidation and Insolvency Act so claims need to be submitted in that format. Usually the practitioner will advise all affected parties of the prescribed format.

## **When are claims to be submitted?**

Claims may be submitted at the first creditors and employees meetings and may be submitted during the process until such time that the business rescue plan is approved.

## **What is the order of preference of claims?**

The following classes of claims are relevant in business rescue;

- Secured Creditors
- Preferred Creditors
- Con-current Creditors

## **Can a claim be rejected?**

The practitioner will investigate the nature of the claim and has the right to accept or reject a claim. The onus is on the affected party to prove the claim.

## **What happens if I don't submit a claim?**

If an affected party does not submit a claim or the claim is rejected they do not participate in the business rescue process and as such waive their future rights to any further monies to be received in terms of that claim.

## **Can a creditor sell their claim?**

Yes a claim may be sold or acquired any time during the business rescue process on the basis of a willing seller and a willing buyer.

However if any affected person or combination of persons make a binding offer to purchase the voting interests of one or more persons who have opposed the adoption of the business rescue plan they may do so. This must be done at a fair and reasonable value that is equal to the amount had the company been placed into liquidation, and this value must be determined by an independent expert.

In this instance the practitioner is then required to adjourn the meeting and conduct certain procedures.

**Can I submit a claim for a contingent liability?**

No, claims may only be of a nature that are a direct liability to the company.

However any party that has been subjected to a contract that has been suspended or set aside under business rescue may assert a claim against the company for damages.

**Can the business rescue practitioner dispute a claim?**

Yes, the business rescue practitioner is required to investigate each claim and may dispute a portion of the claim or the entire claim.

# THE EFFECT OF BUSINESS RESCUE

## **Can creditors institute legal action against the company during business rescue?**

No legal proceedings including an enforcement action, against the company or its assets may commence or proceed unless;

- The practitioner has consented to this in writing;
- The court has given leave to this;
- The claim is in terms of a set off made by the company in legal proceedings whether it is before or after the business rescue date;
- The action is a criminal proceeding against the company, its directors or officers;
- The claim is against any property or right over which the company acts as a trustee;
- The proceedings are by a regulatory authority in the execution of its duties and it has notified the practitioner in writing;

## **What is the effect of business rescue on shareholders?**

During business rescue proceedings any change in the classification or status of issued securities of a company other than by way of ordinary course of business is invalid except if the court or the business rescue plan directs otherwise.

## **What are issued securities?**

Securities are shares, debentures, or other instruments irrespective of their form of title, issued or authorised to be issued by a profit company.

## **What is the effect of business rescue on employees?**

During business rescue proceedings employees will continue to be employed under the same terms and conditions that applied prior to business rescue, except when;

- Changes occur in the ordinary course of attrition;
- Employees agree to different terms and conditions in accordance with labour laws;
- Any retrenchments contemplated are done in compliance with labour laws;

A business rescue practitioner may not suspend an employment contract for the duration of the business rescue proceedings.

## **What is the effect of business rescue on medical, pension and other employee schemes?**

Schemes for the benefit of employees, past and present, is an unsecured creditor to the extent that the amounts due are immediately before the beginning of business rescue proceedings, and in the case of a defined benefit fund, the present value of an unfunded liability at the commencement of business rescue proceedings.

**What is the effect of business rescue on directors?**

The directors of the company remain directors of the company but their powers and duties are constricted in that the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management. During this period all directors are still bound by directors fiduciary duties and duties regarding personal financial interests and can incur personal liabilities as determined by the Act.

**What effect does business rescue have on contracts?**

Existing contracts remain in force under business rescue proceedings, but the business rescue practitioner may entirely, partially or conditionally suspend an agreement for the duration of the business rescue proceedings. The practitioner may also apply to court to entirely, partially or conditionally cancel any terms that are just and reasonable in the circumstances. Any party to an agreement that has been suspended or cancelled has a claim against the company for damages only.

**What is the effect of business rescue if I am using assets of the company?**

If any property of the company under business rescue is in the possession of a third party as a result of a contract entered into before business rescue they may retain it.

**What is the effect of business rescue if the company under rescue is using my assets in terms of a contract?**

Any person that wants to exercise any right over property or an asset in the possession of the company can only do so with the written consent of the business rescue practitioner and the practitioner must not unreasonably withhold the requests of that person.

**What is the effect of suretyships and guarantees under business rescue?**

During business rescue proceedings a guarantee or suretyship by a company or person may not be enforced against the company in business rescue, except for with the leave of the court.

**Once a business rescue plan is adopted how does that affect claims and debts?**

A business rescue plan once implemented may provide that a creditor has agreed to the discharge of the whole or a portion of the debt owing and the creditor will then lose the right to enforce the relevant debt or part thereof against the company. Furthermore a creditor is not entitled to enforce any debt owed by the company immediately before business rescue unless it is provided for in the plan.

# THE PRACTITIONER

## **What is a business rescue practitioner?**

A business rescue practitioner is a person appointed to oversee a company during the rescue process.

## **Is a business rescue practitioner licensed?**

Yes, all business rescue practitioners are licensed by the CIPC.

## **How is a business rescue practitioner licensed?**

Practitioners are classified into three groups by the CIPC;

- Senior practitioners must have engaged in turnaround business practice for a combined period of 10 years and may be appointed to small, medium or large businesses as a practitioner;
  - Experienced practitioners must have engaged in turnaround business practice for a combined period of 5 years and may be appointed to small or medium businesses as a practitioner;
  - Junior practitioners may only be appointed to a small business as a practitioner and these are persons that have less than five years or no experience in turnaround business practice;
- The practitioner is initially licensed with the CIPC as a senior, experienced or junior practitioner and thereafter is required to apply for a licence for each business rescue that he or she will be appointed on. The practitioner in each case needs to comply with the qualifications specified in the Act each time they apply for a licence.

## **Can a licence of a business rescue practitioner be withdrawn?**

The CIPC may at any time suspend or withdraw a practitioners licence.

## **Can a company appoint more than one practitioner?**

Yes, joint appointments are allowable.

## **What is the purpose and role of the practitioner?**

The business rescue practitioner once appointed is required to:

- Conduct various procedures and issue notices in terms of the Act;
  - Investigate the affairs of the company, its business , property, financial situation and any other matters and then consider if there is a reasonable prospect to rescue the company;
- During the rescue proceedings the practitioner must notify the court if applicable or the affected persons if;
- There is no reasonable prospect for the company to be rescued and it will be placed into liquidation;

- There is no reasonable grounds to believe that the company is financially distressed;
  - The business rescue plan has been substantially implemented;
- If in the investigations into the affairs of the company show that;
- There have been voidable transactions or the company or a director has failed to perform a material obligation, the practitioner must direct management to rectify that matter;
  - Reckless trading or contravention of the law has occurred the practitioner must forward evidence and report the matter to the appropriate authority for further investigation and possible prosecution.
  - The practitioner must also direct management to rectify the matter as well as recovering misappropriated assets of the company;

The practitioner must publish a business rescue plan.

### **What powers does a business practitioner have?**

The practitioner has full management and control over the company in substitution for its board and pre-existing management. The practitioner may delegate certain functions to a director and to a person who was part of pre-existing management and these persons are required to work under direction of the practitioner.

The practitioner may also remove a person that was part of pre-existing management or appoint an independent person in their stead. The practitioner in certain instances may need to obtain court approval for removal of persons.

During business rescue proceedings a practitioner may entirely or conditionally suspend for the duration of the business rescue proceedings any obligation that the company may have arising from any agreement that the company may have at the commencement of the business rescue proceedings.

The practitioner may also apply to the court to entirely or partially cancel any terms or any contract if it is just and reasonable to do so in the circumstances.

### **What is the investigation into the affairs of the company mean?**

As soon as possible after being appointed the practitioner must investigate the affairs of the company, its business, property and financial situation and consider whether there is a reasonable prospect of the company being rescued.

If at any time during the business rescue proceedings the practitioner concludes that there is no reasonable prospect of the company being rescued the practitioner must inform the court, the affected parties and the company, discontinue business rescue proceedings and place the company into liquidation.

If in the investigations into the affairs of the company show that;

- There have been voidable transactions or the company or a director has failed to perform a material obligation, the practitioner must direct management to rectify that matter;
- Reckless trading or contravention of the law has occurred the practitioner must forward evidence and report the matter to the appropriate authority for further investigation and

possible prosecution.

The practitioner must also direct management to rectify the matter as well as recovering misappropriated assets of the company;

### **Who appoints the business rescue practitioner?**

The practitioner is appointed by the board of directors of the company or by the court if there is an application by an affected person to have a company placed into business rescue.

### **Who qualifies to be a practitioner?**

A person may be appointed as a business rescue practitioner to a company only if;

- That person is a member in good standing of a legal, accounting or business management profession that is accredited by the CIPC;
- That person has an initial licence to practice a business rescue practitioner;
- The person is not disqualified from becoming a director of a company;
- The person is not subject to a probation order;
- The person must not have a relationship with the company that would lead a third party to conclude that the practitioners integrity, impartiality or objectivity would be compromised;
- The person must not be related to a person that has a relationship with the company;

### **How is a practitioner remunerated?**

The basic remuneration of a business practitioner is prescribed with a tariff prescribed by the Act.

It may not exceed the following rates and these are determined by the size of the company that has been determined by its public interest score.

Small sized company

R1 250 inclusive of VAT to a maximum of R15 625 / day.

Medium sized company

R1 500 inclusive of VAT to a maximum of R18 725 / day.

Large sized company

R 2000 inclusive of VAT to a maximum of R25 000 / day.

In addition to these fees a practitioner may conclude a contingency agreement for further remuneration if the business rescue plan is adopted and implemented.

In addition to this remuneration, a practitioner is also entitled to be reimbursed for the actual costs of any disbursements incurred. These disbursements need to be incurred to the extent that they were reasonably necessary to carry out business rescue functions to facilitate the business rescue proceedings.

### **What is contingency agreement?**

A practitioner may in addition to the remuneration by the tariff have an additional agreement for further remuneration if a particular result or combination of results is achieved. This arrangement will only be binding if the holders of the majority creditors voting interests and majority of the voting rights attached to shares approve the agreement. Should a creditor or a shareholder that voted against the agreement not be in agreement with the principal of the contingency agreement they may apply to court within 10 business days for an order setting aside the agreement.

### **When must a business rescue practitioner place a company into liquidation?**

If at any time during the business rescue proceedings the practitioner concludes that there is no reasonable prospect of the company being rescued the practitioner must inform the court, the affected parties and the company, discontinue business rescue proceedings and place the company into liquidation.

### **Who approves the remuneration of the business rescue practitioner?**

A remuneration agreement is final and binding on a company if it is approved by;

- The holders of the majority of the creditors voting interests that are present at a meeting called to vote on the matter;
- The holders of a majority of the voting rights attached to any shares of the company that entitle a shareholder to residual value if the company was wound up. This is based on holders present at a meeting called to vote on the matter;

### **Can an affected party object to the remuneration of the business rescue practitioner?**

Should a creditor or shareholder vote against the remuneration of a practitioner and the remuneration agreement has been approved at a meeting to vote upon it, that party may apply to court within 10 business days to have the agreement set aside on the grounds that;

- The agreement is not just and equitable; or
- The remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company;

### **Can a business rescue practitioner be removed from office?**

Yes, a practitioner may be removed from office on the following basis;

- The practitioner does not meet the requirements specified in the Act;
- The practitioner is not independent of the company or its management;
- The practitioner lacks the skills for the specific business rescue;

Furthermore a practitioner may be required to provide security necessary to secure the interests of the company and any affected person.

### **How is a business rescue practitioner removed from office?**

The business rescue practitioner may only be removed from office by way of a court order.

**Does the business rescue practitioner have any liabilities during the business rescue process?**

During the business rescue proceedings the practitioner;

- Is an officer of the court;
- Has the same responsibilities, duties and liabilities as a director;
- Will not be liable for any act or omission performed in good faith during the business rescue but only if it amounts to gross negligence;

# THE DIRECTORS

## **What is the role of the directors under business rescue?**

The directors of the company remain directors but their powers and duties are limited as the practitioner has full management control over the company in substitution for the board of the company.

The directors of the company;

- Must continue to exercise their functions as directors under the authority of the practitioner;
- Must exercise any management function in accordance with the directions of the practitioner;
- Remain bound by the requirements concerning personal financial interests of the company of directors and related persons;
- The directors may still incur personal liability;

## **What are the responsibilities of the directors under business rescue?**

The directors have a general duty to co-operate with, assist and attend to the requests of the practitioner at all time and to provide the practitioner with any information about the affairs of the company.

After the commencement of business rescue proceedings the directors must deliver all books and records that relate to the company to the practitioner.

The directors must also provide the practitioner with a statement of affairs about the company.

## **Must the directors place a company into business rescue?**

If the directors of a company believe that the company is financial distressed but they do not place the company into business rescue, the board must deliver a written notice to each affected persons stating why the company is not being placed into business rescue.

# THE BUSINESS RESCUE PLAN

## **What is a business plan?**

The business rescue plan is probably the most important output of the business rescue process. This document details the manner in which the business rescue practitioner envisages how the company will be rescued. It is developed with the help of affected persons if necessary and if approved it is implemented by the business rescue practitioner.

## **What are the contents of a business plan?**

The general content of a business rescue plan contains amongst others the following information.

### **The plan**

Details of the business rescue plan to be implemented  
Conditions for the business plan to succeed  
Estimated return to creditors

### **Background**

History of the business  
Corporate structure  
Company details  
Historical financial performance  
Investigation into the affairs of the company  
Reasons for financial distress  
Actions taken by directors  
Actions taken by the practitioner

### **Financial position at business rescue date**

Statement of financial position at business rescue date  
Material assets of the company  
Creditors of the company  
Contingent liabilities of the company  
Liquidation and distribution account  
Practitioner's remuneration

## **When is a business plan published?**

The business rescue plan must be published by the company within twenty five working days after the date on which the business rescue practitioner was appointed or such longer time as may be allowed by;

- The court on application by the company;
- The holders of a majority of the creditors voting rights;

## **Who participates in the drawing up of a business plan?**

Any affected party may participate in the formulation of a business rescue plan but these parties are only consulted by the practitioner and they may not direct or instruct the practitioner.

## **How is a business rescue plan adopted?**

Within ten business days after publishing the business rescue plan the practitioner must call a meeting of creditors and holders of a voting interest to consider the plan. Five business days' notice is required for this notice.

A vote will be called at this meeting and the plan will be approved if;

- It is supported by the holders of more than 75% of the creditors voting interests present;
- And the vote on the plan is supported by at least 50% of the independent creditors voting interests present at the meeting;

If the rescue plan alters the rights of any securities of the company the practitioner must call a meeting of the affected security holders and the plan must be voted upon and adopted if the majority of the holders of securities vote in favour of the plan.

## **What is an independent creditor?**

An independent creditor is a creditor of the company including an employee if they are owed money and is not related to the company, a director of the company or the business rescue practitioner.

## **What happens if a business plan is rejected?**

If a business rescue plan is rejected the practitioner may;

- Seek approval from the holders of the voting interests to publish a revised plan;
- Or if a vote against the plan by a holder or holders of voting interests is inappropriate the practitioner will apply to court to have that vote or votes set aside;

If the practitioner does not take the steps above any affected party at the meeting may;

- Call for a vote requiring the practitioner to prepare and publish a revised plan;
- Apply to the court to set aside the result of a vote by holders of voting interests or shareholders on the grounds that it is inappropriate;
- Affected persons may make a binding offer to acquire the interest of the persons opposed to the plan at liquidation value;

The practitioner in each case has certain time constraints to apply to court to have voting interests set aside and to publish a revised plan.

## **What is the consequence of an adopted business plan?**

When a business rescue plan is voted upon and adopted, the plan automatically becomes a legally binding contract on the company and all the affected parties.

**Can a company dispose of its assets during business rescue?**

Yes, a company can dispose of its assets during business rescue. Where the company wishes to dispose of an asset over which another person has security or title interest, the company must obtain prior consent from that person to sell the asset unless the proceeds are sufficient to fully discharge the interest of that person's interest or title.

# POST COMMENCEMENT FINANCE

## **What is post commencement finance?**

Post commencement finance is finance in whatever form provided to a company once business rescue proceedings have commenced. Any outstanding remuneration, reimbursable expenditure and other costs payable to an employee during business rescue is also considered to be post commencement finance.

## **Who can give post commencement finance to a company?**

Any person may provide post commencement finance to a company in business rescue.

## **Can post commencement financiers participate in the business rescue process?**

Post commencement funders will by their nature be a creditor and is thus an affected party and may participate in the business rescue process to the extent that the Act and the timing allows for this.

## **Can post commencement financiers obtain security for their finance?**

Any finance provided by a post commencement financier may be secured by any asset of the company to the extent that it is not already encumbered.

# LIQUIDATION

## **What is the effect of post commencement finance in a liquidation?**

Post commencement finance in liquidation is preferred above the concurrent creditors at the commencement of business rescue and will have preference in the order that they were incurred.

## **Can a company file for business rescue if liquidation proceedings have commenced against it?**

No, a company may not file for business rescue if liquidation proceedings have commenced against it.

## **Why is business rescue different to a liquidation?**

Business rescue is a process whereby that it allows the company to continue its existence in the future or if it results in a better return to creditors of the company than would ordinarily result from the liquidation of the company. A liquidation is a process where the company is brought to an end and its assets redistributed.

## **Can a liquidator be appointed a business rescue practitioner?**

A liquidator may act as a business rescue practitioner provided that person has the necessary skill set and that the person is independent.

## **Where do the business rescue practitioners fees rank in a liquidation?**

To the extent that the business rescue practitioners remuneration and expenses have not been fully paid, the practitioners claim will rank before all other secured and unsecured creditors.

## **Can a business rescue practitioner be appointed as a liquidator?**

If the company is placed under liquidation, the business rescue practitioner is prohibited from being appointed as the liquidator of the company.

## **Can a company be taken out of liquidation into business rescue?**

Yes, a company can be taken out of liquidation into business rescue. Application to the court may be made and this must be motivated with concrete evidence that to prove that the company has a reasonable prospect of being revived. The conditions and criteria associated with a normal business rescue apply.

# OTHER CONSIDERATIONS

## **When does business rescue end?**

The business rescue process ends when one of the following events occur;

- The business rescue plan has been adopted and substantially implemented and the practitioner has advised the CIPC to this effect;
- The court sets aside the resolution adopted by the directors to go into business rescue;
- The practitioner files a notice or advises the CIPC that there is no longer reasonable grounds for the business to be rescued;
- The court converts business rescue proceedings to liquidation;
- The proposed business rescue plan has been rejected and no affected person has acted to extend the proceedings;

## **What is the effect of any legal proceedings against the company during business rescue?**

During business rescue no legal or arbitration proceedings may be taken against the company, its property, or property that is lawfully in its possession. This is referred to as a moratorium. There are however cases where a person is able to commence or proceed with legal action.

These are;

- Where you have the written consent of the practitioner;
- With leave of the court;
- Criminal proceedings against the company, its directors or officers;
- As a set against any claim made by the company in any legal proceedings whether they started before or after business rescue;
- Proceedings concerning any property or right where the company exercises the powers of a trustee;
- Proceedings by a regulatory authority in the execution of its duties. In this instance the authority needs to notify the practitioner in writing of their actions;

## **What will happen if a company does not start business rescue when it should?**

If a company is financially distressed and the directors do not pass a resolution placing the company into business rescue, the board must deliver a written notice to each affected person setting out the reasons for not adopting a resolution for business rescue. Should directors not issue this notice it may have consequences for them.