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## **An Introduction to Business Rescue**

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Companies are in constant cycles, the highs, the lows and the break-evens. It is part of business and especially smaller businesses tend to be in more lows when starting-up. It is the reality of business to experience these cycles. It is also true that entrepreneurs choose different options to deal with these cycles, some succeed and some do not. When your business seems to be going pear-shaped and the realities of no immediate recovery seems imminent, the Companies Act 71 of 2008 (the “Act”) imposes a statutory obligation on the board of the company to inform each affected person as to why the company has not adopted a resolution to place the company in business rescue.

Business Rescue is a procedure of the Act which allows for either:

- the board of directors to pass a resolution to place the company in business rescue if it believes that the company is financially distressed and that there are reasonable prospects of rescuing the company; or
- an affected person (a shareholder or creditor of the company or employee) applying to court to place the company in business rescue.

It is aimed at maintaining the survival of the company and trying to ensure that the creditors and employees are still paid. As a result, a business rescue practitioner must be appointed to put into effect a business rescue plan to sustain the company and to effectively manage its debts.

In terms of section 140 of the Act, the general powers and duties of the business rescue practitioner *inter alia*:

- may –
  - remove from office any person who forms part of the pre-existing management of the company;
  - appoint a person as part of the management of a company, whether to fill vacancy or not, subject to section 140(2) of the Act;
- have full management control of the company in substitution for its board and pre-existing management;
- and is responsible to –
  - develop a business rescue plan to be considered by the affected persons; and
  - implement any business rescue plan that has been adopted in accordance with Part D of the Act.

The business rescue plan is a plan to rescue the company and has three main components: background, proposals and assumptions and conditions. This plan is presented to the affected persons of the company where a vote is held on the consideration of the business rescue plan. Its focus is company-specific and measures the best way forward for the company.

Indeed, the use of business rescue is invasive. The practitioner has far-reaching powers that may not be agreeable to the board of directors of the company. The affected

persons of the company also have a say on the direction of the company and this may not necessarily be agreeable to the board of directors. Each director of the company may continue to exercise the functions of a director subject to the authority of the practitioner.<sup>1</sup> Furthermore, if during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.<sup>2</sup>

Business rescue is aimed at rescuing the business from insolvency. It is aimed at survival of the business whilst also ensuring that the affected persons of the company participate in the rescuing of the company to benefit from that rescue. It is an attempt by the legislature to give businesses an alternative to the conventional succeed or fail. Sure it is invasive and that invasiveness could end, *inter alia*, by court order setting aside proceedings or when the practitioner files a notice of termination of business rescue proceedings with the Companies and Intellectual Property Commission.

In conclusion, business rescue may take away management and control from the directors' powers. It may also be invasive with a plan that may not be agreeable to the board of directors. However, if the company is in dire straits the only other alternative may be to place the company into liquidation which would not be the best route where the company has prospects of rescue.

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<sup>1</sup> Section 137(2)(a) of the Act

<sup>2</sup> Section 137(4) of the Act

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