

BUSINESS RESCUE PROCEEDINGS IN A NUTSHELL

Chapter 6 of the Companies Act, No. 71 of 2008 (The Act) provides for business rescue, which is a mechanism designed to avoid imminent liquidation of financially distressed companies. The main purpose of the regime is to facilitate the rehabilitation and to rescue companies who are experiencing financial difficulty. A company can be placed under business rescue in two ways: either voluntarily by a resolution of the directors of the company, or by a Court Order following an application to court by an affected person (shareholder, employee, trade union or creditor)¹.

Whether or not a company would be placed under business rescue depends on whether the company is “financially distressed”. The term “financially distressed” is defined to mean that within the ensuing 6 months: it appears reasonably likely that the company will be unable to pay all its debts as they become due and payable (commercial insolvency) or it appears reasonably likely that the company will become insolvent (balance sheet insolvency). The aim of business rescue is to restructure the affairs of a company in a manner that maximises the likelihood of a company continuing in existence on a solvent basis or resulting in a better return for the creditors of the company².

The contention that business rescue proceedings should be commenced by a company at first signs of financial distress is re-enforced in the South Gauteng High Court, in the case of *Welman v Marcellle Props*³ the court stated that “*business rescue proceedings are not for terminally ill close corporations. Nor are they for chronically ill. They are for ailing corporations, which given time will be rescued and become solvent*”.

In the case of voluntary business rescue the proceedings begin when the company files a resolution to place itself under supervision or applies to court for consent to file a resolution. It may also begin when an affected person applies to court for an order placing the company under supervision in terms of section 131(1)⁴. These proceedings can last for 3 months.

The business rescue proceedings commence as soon as the practitioner investigates the company’s affairs (business, property and financial situation) and considers whether there is any reasonable prospect of the company being rescued. Within 10 business days after the practitioner has been appointed, the practitioner must convene and preside over a first meeting of creditors and employees representatives. After consulting with the creditors, other affected persons and the management of the company a business rescue plan is prepared for consideration

¹ Chapter 6 of the Act, see also Jakomien Van Staden (De Rebus 2013:15-17)

² Section 128(1)(b)(iii), section 128(1)(f) of the Act

³ Case No.33958/2011 delivered on 24/02/2012

⁴ Section 132, section 132 (1)(a)(i) of the Act

and possible adoption at a meeting. Within 10 business days after publishing a business rescue plan the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest for the purpose of considering the plan⁵.

Section 132(2) of the Act regulates the termination of business rescue proceedings- it creates different options to terminate the proceedings. Firstly, the court can set aside the resolution or order that began those proceedings or it can convert the proceedings to liquidation proceedings. Secondly, the practitioner can file with the commissioner a notice of termination of the business rescue proceedings. Thirdly, if a business rescue plan is proposed and rejected and no affected person has acted to extend the proceedings or adopted and the practitioner has subsequently filed a notice of substantial implantation of that plan⁶.

Conclusion

As business rescue is becoming more common in South Africa, we are seeing increasing interests from foreign investors, venture capitalists and private equity funds in the business rescue space. This process is becoming a mechanism whereby cash flush companies are taking up opportunities by identifying valuable assets in distress, and engage with the business rescue practioner by working towards the acquisition of the company or the assets.

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⁵ Section 132, section 141(1), section 147(1), section 148(1), section 150(1), section 151(a),section 150 of the Act

⁶ Section 132(2)(a),(ii),(b),(c),(i) of the Act