BKM

ATTORNEYS & NOTARIES

**Business Rescue**

**Don't fall short by not following the procedure**

Business Rescue is gaining traction in South Africa and as more companies use this option as provided for by the Companies Act 71 of 2008 (the "Act")[1], development of the law emerges as courts consider matters concerning business rescue. This article examines the recent case of *DH Brother Industries (Pty) Ltd* v *Gribnitz NO and Others*[2] and considers the procedural requirements under section 129 of the Act and the application of objections to company resolutions under section 130 of the Act.

Briefly, the Applicant is a creditor who brought an application against the First Respondent, the business rescue practitioner, and the Second Respondent that is Dowmont, the company under business rescue proceedings. The Applicant brought an application against the Respondents was to set aside the board of directors' resolution commencing business rescue proceedings. The Applicant did not object to the prospects of the resolution taken to begin business rescue proceedings under section 129(1) of the Act, instead stating that the plan, if it was duly adopted and implemented, would be a basis for concluding that there is a reasonable prospect for rescuing the company. The Applicant brought the application under section

[1] For an introduction to Business Rescue, see *An Introduction to Business Rescue* on our website, www.bkm.co.za.
[2] 2014(1) SA 103 (KZP).

130(a)(iii) stating that an affected person may apply to a court for an order setting aside the resolution on the ground that the company has failed to satisfy the procedural requirements set out in section 129.

At the time of passing the relevant resolutions, the company had two directors. The one director deposed to the replying affidavit and attached the annexures of the resolutions passed. The resolutions intented to place the company in business rescue proceedings and to appoint the First Respondent as the business rescue practitioner. However, only one director signed the resolutions when the Act requires that a majority of directors are required to pass the resolution. On this basis, the Court found that the procedural requirements under section 129 were not followed and as such the resolution was set aside.

Interestingly the Court, on the request of the Applicant, was asked to set aside the resolution on the second ground, the just-and-equitable provision as stated in section 130(5)(ii) of the Act. The Court acceded to this request despite having found that the resolution be set aside under section 130(a)(iii) of the Act. In its reasoning it found an anomaly in the Legislature's drafting of the Act.

In terms of the Act, a court may hear an application to set aside the resolution, as adopted in terms of section 129, if an affected person brings an application on any one of the following three grounds or causes of action in terms of section 130(1)(a):-

- There is no reasonable basis for believing that the company is financially distressed;
- There is no reasonable prospect for rescuing the company; or
- The company has failed to satisfy the procedural requirements set out in section 129.

In terms of section 130(5)(a) of the Act, the Court may set aside the resolution on any grounds set out in section 130(1)(a) of the Act or if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so.

The Court found an anomaly arising out of the wording of the Act and stated that it is no answer to say that, despite the application only being founded on one of the three grounds in section 130(1)(a), the Court can invoke the just-and-equitable ground in granting relief. This is because an application that is brought on any one of the three grounds and fails still runs the prospect of success through the just-and-equitable ground. The result is that a respondent would not have had the opportunity to adequately respond to that ground but may be found to be acting contrary to that ground. Conversely, if the applicant were to deal with the just-and-equitable basis in the application, a respondent would ordinarily be entitled to have that matter struck out as irrelevant. A case of damned if you do, damned if you don't. As a result, the Court sought to remove the absurdity in the drafting error by allowing the just-and-equitable provision to be a fourth ground or cause of action for relief in an application brought under that section.

On the facts, the business rescue practitioner failed to comply with section 150(5)(b) of the Act requiring him to publish a plan within 25 days or 'such longer time as may be allowed by… the holders of a majority of the creditors' voting interests'. The First Respondent sent out emails requesting creditors to extend the 25 day period but "it is common cause that these requests neither invited nor elicited any response". It was argued by the Respondents since nobody responded to those emails, the request was tacitly accepted. The Court identified two issues: (a) the consequence of the allotted time for publication of a plan, whether extended or not, elapsing; and (b) the manner in which the period for publishing a plan can be extended.

The Act does not specify the consequence of failing to publish a plan within the allotted time; section 132(2) lists circumstances which bring business rescue proceedings to an end but failure to publish a plan is not one of them. There are two competing interests here, one, a company in need of rescuing and two, creditors who need to be paid. Business rescue proceedings is the Legislature's attempt to assist an ailing company by temporarily suspending the exercise of creditors' rights

to enforce their claims. It is an intrusion by the Legislature that invades on common law rights and this intrusion must only be allowed where the business rescue proceedings are exercised expeditiously. The failure to draft a business rescue plan tilts the balance to terminate the suspension and on the facts, the Court found that business rescue proceedings ended after the 25 period.

However, the formal process to bring business rescue proceedings to an end is in any one of three ways:

(a) the business rescue practitioner filing a notice of termination in terms of section 132(2)(b);

(b) an affected person bringing an application under section 130(1) on the basis that it would be just and equitable for the resolution to be set aside; or

(c) since one of the bases listed in in section 130(2)(a) for the termination of business rescue proceedings is setting-aside by the court of a resolution or order, an application may perhaps be brought under that subsection.

On the issue of whether there was an extension granted by a majority of creditors, the Court looked at ways in which that vote could be exercised. The Court reasoned that there must be a positive action when requested to vote on an extension. The fact that one failed to respond to an email cannot be construed to allow for an extension of time. This would mean that the business rescue proceedings came to an end after the 25 day period. The Court also said that if this is not the case, this application can and should bring them to an end by setting aside the resolution on the just-and-equitable ground.

As a result, the Court ordered that leave is granted to the applicant to institute this application in terms of section 133(1)(b) of the Act and the resolution purported to have been made by the board of directors of the Second Respondent in terms of

section 129 of the Act is set aside in terms of section 130(1)(a) read with section 130(5)(a) of the Act.

In summary, the crisp points that aid in the development of the procedure of business rescue proceedings are as follows: firstly, the failure to have a majority of directors sign a resolution placing the company in business rescue renders that resolution of no effect; secondly, the just and equitable ground is to be read as a further ground in terms of section 130(1)(a) of the Act and must be specifically brought by an applicant. Finally, failure to publish a business rescue plan timeously places the business rescue proceedings at an end and that there are three ways to officially end those proceedings.

Written and prepared by Kirith P. Haria

**BOUWER KOBELI MORABE**

**Please do not hesitate to contact us on +27 11 788-0083 should you have any further enquiries or email enquiries@bkm.co.za.**

*"BKM Attorneys - Passionate about Law"*