

## **GENERAL MEMORANDUM ON BUSINESS RESCUE PROCEEDINGS**

### **Introduction**

1. Business rescue is governed by Chapter 6 of the Companies Act, 71 of 2008, as amended (“Companies Act”).
2. Business rescue proceedings has a dual purpose:
  - 2.1. Part A:
    - 2.1.1. Restructuring the affairs, business, property, debt and other liabilities and equity of the company in a manner which allows the company to continue in existence on a solvent basis; or
  - 2.2. Part B:
    - 2.2.1. If it is not possible for the company to continue on a solvent basis, results in a better return for the company’s creditors or shareholders than would result in the immediate liquidation of the company.
3. Business rescue proceedings can be commenced by way of a board resolution or by court order.

### **Board Resolution**

4. The board of a company may resolve to begin business rescue proceedings if the board has reasonable grounds to believe that:
  - 4.1. The company is financially distressed; and
  - 4.2. There appears to be a reasonable prospect of rescuing the company.
5. “Financially distressed” is defined in the Companies Act as follows:
  - 5.1. It appears to be reasonably unlikely that the company will be able to pay all its debts as they become due and payable within the immediate ensuing 6 months; or
  - 5.2. It appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 months.
6. When passing a resolution for business rescue the board (or an authorised director) is required to depose to a sworn statement which sets out the facts relevant to the grounds on which the board resolution was founded.
7. Business rescue commences once the resolution and the sworn statements are filed with the

Companies and Intellectual Properties Commission (“CIPC”).

8. Briefly the following procedures have to be followed once the resolution has been filed:
  - 8.1. Within 5 business days of the filing of the resolution the company is required to send a notice of the resolution together with the sworn statement to every affected person. Affected persons comprise of the creditors, shareholders and employees of the company: therefore each creditor, shareholder, employee and trade union is immediately notified of the commencement of the business rescue proceedings;
  - 8.2. Within 5 business days of having filed the resolution the company must appoint a business rescue practitioner (“practitioner”) who has consented in writing to accept the appointment;
  - 8.3. After appointing the practitioner the company must file a notice of his appointment with the Commission within 2 business days after making the appointment and within 5 business days must send a copy of the notice of the appointment of the practitioner to each affected person.

#### **Court Order**

9. In terms of section 131 of the Companies Act, any affected person may apply to Court for an order placing the company in business rescue and based on the following grounds:
  - 9.1. The company is financially distressed;
  - 9.2. The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters; or
  - 9.3. It is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company.

#### **Consequences of Business Rescue**

10. A practitioner is appointed and assumes management control of the company. The board and current management remain in place but become subject to the authority of the practitioner.
11. A moratorium is imposed on any legal proceedings being instituted or continued against the company unless the practitioner or the Court consents thereto.
12. The moratorium does not preclude parties from exercising contractual rights and remedies (provided it does not involve a legal process). Therefore, counterparties are entitled to cancel contracts after the company has gone into business rescue.
13. The practitioner is entitled to suspend any obligations of the company which arise in terms of an agreement which was concluded prior to the commencement of business rescue. For example,

interest payments (interest continues to accrue) or capital payments on debt. Importantly, the practitioner cannot suspend any contractual rights of the counterparty.

14. The practitioner can apply to court to cancel any obligation referred to in paragraph 13 - the counterparty will be left with a claim for damages.
15. A practitioner cannot suspend any obligations due to an employee. All employees continue to be employed on the same conditions which existed at the date of the commencement of the business rescue proceedings and are entitled to their full benefits. Accordingly, the only basis upon which a practitioner may terminate the employment contract of an employee would be by following the normal labour law procedures.

### **Practitioner – Powers and Duties**

16. The general powers and duties of the business rescue practitioner include:
  - 16.1. The practitioner has full management control of the company in substitution for its board and pre-existing management. Please note however the board of directors continue to exercise their functions subject to the authority of the practitioner and have a duty to the company to exercise any management function in accordance with the express instructions and directions of the practitioner (to the extent that it is reasonable to do so);
  - 16.2. The practitioner may delegate any power or function to a board member or pre-existing member of management of the company;
  - 16.3. The practitioner must investigate the company's affairs, business, property and financial situation and after having done so must consider whether there is any reasonable prospect of the company being rescued;
  - 16.4. If at any time during the business rescue proceedings the practitioner concludes that:
    - 16.4.1. there is no reasonable prospect for the company to be rescued then the practitioner must inform the Court, the company and all affected persons of this conclusion and must apply to Court for an order discontinuing the business rescue proceedings and placing the company into liquidation;
    - 16.4.2. there are no longer any reasonable grounds to believe that the company is financially distressed then the practitioner must inform the Court, the company and all affected persons and, in the case of a company placed in business rescue by way of a resolution, file a notice of termination of the business rescue proceedings;
    - 16.4.3. there is evidence, in the dealings of the company before the business rescue

proceedings began, of voidable transactions or failure by the company or any director to perform any material obligations relating to the company, reckless trading, fraud or other contravention of any law relating to the company, the practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps.

- 16.5. Within 10 business days after having been appointed the practitioner must convene and preside over a first meeting of creditors and a separate first meeting of employees. The main purpose of this meeting is for the practitioner to report back to creditors as to whether he believes that there is a reasonable prospect of rescuing the company, either in terms of Part A or Part B.

### **Creditor's Committee**

17. The creditors can form a creditors' committee. The creditors' committee serves an important role in the business rescue process and constitutes the forum in which the practitioner can consult creditors on the progress of the business rescue as well as on the development of a business rescue plan. In larger business rescue matters, the practitioner normally forms more than one creditors' committee representing different creditor groups. For example, a lenders' committee, a trade creditors' committee and an employees' committee etc.

### **Rights of Creditors in a Business Rescue**

18. In terms of the Companies Act, each creditor is entitled to:
- 18.1. Notice of each Court proceeding, decision, meeting of other relevant event concerning the business rescue;
  - 18.2. Participate in Court proceedings;
  - 18.3. Formally participate in the proceedings as provided for in the Companies Act; and
  - 18.4. Informally participate by making proposals to the practitioner.
19. Business rescue is a creditor driven process and ultimately it is the creditors who need to approve the business rescue plan.
20. Voting interests of creditors are determined by the value of their claims. In other words, R1 = 1 vote. The Companies Act also distinguishes between independent and non-independent creditors. Independent creditors are creditors who are not related to the company, a director or the practitioner.

### **Directors**

21. The directors of the company are not removed and remain in their position as directors during the business rescue proceedings, subject to the authority of the practitioner.

22. Each director of the company:
  - 22.1. Must continue to exercise the functions of a director, subject to the authority of the practitioner;  
and
  - 22.2. Has a duty to exercise any management function within the company in accordance with the expressed instructions or direction of the practitioner, to the extent that it is reasonable to do so.
23. If any director 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 it is approved by the practitioner.
24. The directors of the company have a general duty to co-operate with, assist and attend to the request of the practitioner at all times during business rescue and to provide the practitioner with any information about the company's affairs as may be reasonably required.

### **Post Commencement Finance**

25. Post-commencement finance is finance provided to the company once business rescue proceedings have commenced.
26. Section 135 (1) of the Companies Act also provides that any remuneration, reimbursement for expenses or other amount of money relating to employment that becomes due and payable by a company to an employee during business rescue, is also considered to be post-commencement finance.
27. During business rescue proceedings, a company may obtain financing (commonly known) as post commencement finance ("PCF").
28. PCF may be secured by utilising any asset of the company to the extent that it is not already encumbered.
29. Pre-commencement secured creditors' claims are not affected by the business rescue and do not slide down the ranking behind PCF (secured or otherwise). A secured creditor's rights are protected by section 134 of the Companies Act – if a company wants to dispose of property which is subject to another person's security or title interest, that indebtedness must be paid in full before the property can be disposed of in business rescue.
30. Section 135 of the Companies Act ranks the claims in business rescue as follows:
  - 30.1. Practitioner's remuneration and expenses;
  - 30.2. Claims arising out of costs of the business rescue (for example rental, utilities);
  - 30.3. Employee's claims arising in the business rescue;

- 30.4. Secured PCF claims in respect of the secured assets;
- 30.5. Unsecured PCF claims in the order in which they were incurred;
- 30.6. Pre-commencement employee claims; and
- 30.7. Pre-commencement unsecured claims.

## **Plan**

- 31. The practitioner is required to consult with creditors, other affected persons and the management of the company in preparing the business rescue plan.
- 32. The business rescue plan must contain all information reasonably required to enable affected persons to decide whether or not to accept or reject the plan.
- 33. The practitioner is required to publish the plan within 25 business days after the date on which the practitioner was appointed. The practitioner may, however, extend the period on application to Court or with the consent of the holders of majority of the creditors' voting interests.
- 34. Within 10 business days after publishing a business rescue plan the practitioner must convene and preside over a meeting of creditors called for the purpose of considering the business rescue plan.
- 35. The plan is approved on a preliminary basis if:
  - 35.1. it is supported by the holders of more than 75% of the creditors' voting interests that were voted; and
  - 35.2. those votes included at least 50% of the independent creditors' voting interests, if any, that were voted.
- 36. If the proposed business rescue plan has been approved by creditors on a preliminary basis and it does not alter the rights of the holders of any class of the company's securities, then the plan will be finally adopted.
- 37. "Securities" is defined in section 1 of the Companies Act to mean "any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company".
- 38. When a business rescue plan has been adopted it is binding on the company and on each of the creditors irrespective whether or not such creditor was present at the meeting, voted in favour of adopting the plan or has proved a claim against the company.
- 39. A company under the direction of a practitioner must take all necessary steps to satisfy any conditions on which the business rescue plan is contingent and implement the plan as adopted.

40. When the business rescue plan has been substantially implemented the practitioner must file a notice of substantial implementation of the business rescue plan. This would signify the end of the business rescue proceedings.
41. If the business rescue has not been adopted the practitioner can take the following steps:
  - 41.1. Seek a vote of approval to prepare and publish a revised plan;
  - 41.2. Apply to court and set aside any votes against the adoption of the plan on the grounds that such rejection was inappropriate.
42. If the plan is rejected, any affected person may, if the practitioner does not take any of the steps set out in paragraph 41, may take such steps.
43. If no persons take any actions as contemplated above then the practitioner must file a notice of termination of the business rescue proceedings.

#### **Termination of Business Rescue Proceedings**

44. Termination of business rescue proceedings: business rescue proceedings end when:
  - 44.1. The court sets aside the resolution placing the company in business rescue or has converted the business rescue proceedings to liquidation proceedings;
  - 44.2. The practitioner has filed with the Commission a notice of termination of business rescue proceedings;
  - 44.3. The business rescue plan had been proposed and rejected, and no persons have acted to extend the proceeding as set out above; and
  - 44.4. The business rescue plan has been adopted and the practitioner files a notice of substantial implementation of the plan.