COMPANIES ACT, 71 OF 2008
BUSINESS RESCUE AND COMPROMISE WITH CREDITORS

Chapter 6 of the Companies Act of 2008 (the "Act") which deals with business rescue and compromise with creditors, introduces proceedings to rehabilitate companies that are financially distressed. The aim is to maximise the chances of these companies' continued existence.

In terms of section 128 of the Act, "business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company and of the management of its affairs, business and property, as well as a temporary moratorium on the rights of claimants against the company or in respect of property in its possession.

What you should know:
The business rescue plan's objective is to maximise the likelihood of the company continuing in existence on a solvent basis.

In the event that it is not possible to maximise the likelihood of a company continuing in existence on a solvent basis, the implementation of a business rescue plan should result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

The '**affected' person**', in relation to business rescue plans of a company is specified in section 128(1) of the Act and includes:

- a shareholder or creditor of the company;
- any registered trade union representing employees of the company; and
- each employee of the company or their representatives, if any of the employees are not represented by a registered trade union.

The interests of the affected persons are recognised and their participation in the development and approval of a business rescue plan is extensively provided for in the Act.

Business rescue proceedings are largely self administered by the company under the independent supervision of an appointed business rescue practitioner. The entire process is also subject to court intervention by way of application by any affected person.

What you should know:
'Financially distressed', in reference to a particular company at any particular time, means that:

- *it appears to be reasonably unlikely that the company will be able to pay all of its debts as they becom due and payble within the immediately ensuing six months; or*
- *it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.*

How to begin business rescue proceedings

If a **board** has reasonable grounds to believe that a company is financially distressed and there appears to be a reasonable prospect of rescuing the company, the board may in terms of section 129 pass a resolution to voluntarily begin business rescue proceedings.

What you should know:
A resolution to begin business rescue proceedings may not be adopted if liquidation proceedings have been initiated by or against the company and it has no force or effect until it has been filed with the Commission. A company may also not adopt a resolution to begin liquidation proceedings if a resolution to begin business rescue proceedings have been adopted, unless the business rescue proceedings have ended as stipulated in section 132(2).

Within 5 (five) business days after a company has adopted and filed such a resolution, the company must publish a notice of the resolution with its effective date and a sworn statement of the facts relevant to the grounds on which the board resolution was founded and the company must appoint a business rescue practitioner who has consented in writing to accept the appointment. A business rescue practitioner means a person appointed or 2 (two) or more persons appointed jointly to oversee a company during business rescue proceedings.

After the business rescue practitioner has been appointed and accepted the appointment, the company must file a notice of the appointment within 2 (two) business days of such appointment and publish a copy of the notice of appointment to each affected person within 5 (five) business days after the notice was filed.

In the event of a company being financially distressed and the board resolving **not** to proceed with business rescue proceedings, a statement to this effect must be delivered to the affected persons who then have a right to make an application to court to force the company into rescue proceedings as further elaborated on below.

Objections to company resolution

After the adoption of a resolution by the board to implement business rescue proceedings, but before the adoption of a business rescue plan, an affected person may in terms of section 130 apply to a court with the requisite jurisdiction for an order setting aside the resolution; setting aside the appointment of the practitioner; or requiring the practitioner to provide security to secure the interests of the company and any affected persons.

The resolution may be set aside in the event that 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 failed to satisfy the procedural requirements in relation to the adoption of such resolution.

The appointment of a practitioner may be set aside on the following grounds:
- the practitioner is not suitably qualified to hold such a position;
- the practitioner is not independent of the company / management; or
- the practitioner lacks the necessary skills.

Court order to begin business rescue proceedings

In the absence of a resolution by the board of directors to voluntarily begin business rescue proceedings, an affected person may in terms of section 131 (1) apply to a court for an order placing the company under supervision and commencing business rescue proceedings. A copy of an application brought by an affected party must be served on the company and the Commission, and each affected person must be duly notified.

What you should know:
Each affected person has the right in terms of section 131 (3) to participate in the hearing of an application to begin business rescue proceedings.

After considering an application by an affected person, the court may either make an order placing the company under supervision and commencing business rescue proceedings in certain circumstances and if there is a reasonable prospect for rescuing the company or dismiss the application. If the court makes an order placing the company under supervision and commencing business rescue proceedings, the court may also make a further order appointing an interim practitioner, subject to ratification by the holders of a majority of the independent creditors' voting interest at the first meeting of creditors.

What you should know:
If liquidation proceedings have been commenced by or against the company at the time an application is made to place the company under supervision and to commence business rescue proceedings, the application will suspend the liquidation proceedings until the court has either adjudicated upon the application or the business rescue proceedings end.

A company placed under supervision may not in terms of section 131(8) adopt a resolution placing itself in liquidation until the business proceedings have ended and a company must further notify each affected person of the order within 5 (five) business days after the date of the order.

Duration of business rescue proceedings

Business rescue proceedings **begin** in terms of section 132(1) when:

- the company files a resolution for voluntary business rescue proceedings or applies to the court for consent to file a such a resolution; or
- an affected person applies to the court for an order placing the company under supervision and commencing business rescue proceedings and such order is granted; or
- a court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest.

Business rescue proceedings **end** in terms of section 132(2) when:

- the court sets aside the resolution or order that began those proceedings or converted the proceedings to liquidation proceedings;
- the business rescue practitioner has filed a notice of termination of business rescue proceedings with the Commission; or
- a business rescue plan has been either proposed and rejected or adopted.

What you should know:
If a company's business rescue proceedings have not ended within 3 (three) months after the start thereof, the practitioner must prepare a report on the progress of the proceedings with a monthly update until the end of those proceedings which must be delivered to each affected person and the court (if subject to a court order) or the Commission .

General moratorium on legal proceedings against a company

Section 133 prohibits any legal proceedings, including enforcement action, against a company, or in relation to any property belonging to the company, or lawfully in its possession, to commence or be proceeded with during rescue proceedings, subject to the following exceptions:

- with the written consent of the practitioner;
- with the leave of the court;
- as a set-off against any claim made by the company in any legal proceedings;
- criminal proceedings against the company or its directors; or
- proceedings concerning any property or right over which the company exercises the powers of a trustee.

No person may enforce a guarantee or surety by a company in favour of that person during business rescue proceedings unless the court grants such person leave to do so. In terms of any right to commence proceedings or assert a claim against a company, the running of prescription is suspended during the business rescue proceedings.

Protection of property interests

Section 134 stipulates that during business rescue proceedings, notwithstanding any agreement stating otherwise, no person may exercise any right in relation to property lawfully possessed by the company unless the practitioner consents thereto in writing. The practitioner may not unreasonably withhold his consent and must consider the purposes of the business rescue provisions, the circumstances of the company and the nature of the property and the rights claimed in respect of it.

During business rescue proceedings, before a company may dispose of property over which a third party has any security or title interest, such company must obtain such third party's prior consent (unless the proceeds of the disposal will be sufficient to cover the third party's claim). The company must pay as much of the proceeds to that third party as are owed or provide security to the reasonable satisfaction of the third party.

Post-commencement finance

When money becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee, the money is regarded to be post-commencement financing and will be paid in order of preference in terms of section 135 of the Act. Other than obtaining this financing, financing may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered and will also be paid in order of preference.

If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation.

Effect of business rescue on employees and contracts

Employees before the beginning of business rescue proceedings continue to be so employed on the same terms and conditions except to the extent that changes occur in the ordinary course of attrition or to the extent that the employees and the company agree different terms and conditions and any retrenchment of such employees in terms of the company's business rescue plan is subject to certain applicable employment related legislation. The purpose of section 136(2A) of the Act is to avoid the unnecessary suspension of any provision of an employment contract or an agreement where section 35A or 35B of the Insolvency Act applies.

What you should know:
Any party to an agreement that has been suspended or cancelled, or where any provision was suspended or cancelled in terms of section 136(2) may assert a claim against the company only for damages.

Section 136(4) stipulates that if liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company in respect of any outstanding claim for remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.

Effect of business rescue on shareholders and directors

Section 137(1) prohibits an alteration in the classification or status of any issued securities of a company during business rescue proceedings, other than by way of a transfer of securities in the ordinary course of business unless the court directs otherwise or it is contemplated in an approved business rescue plan.

During business rescue proceedings of a company, each director must continue to exercise his functions as director, including the exercise of any management functions, subject to the authority of the practitioner. Section 137(2) also stipulates that the director remains bound by the requirements concerning personal financial interest and if the director adheres to the provisions in section 137(2)(b) and (c), that director will be relieved from duties in respect of the standard of conduct in terms of section 76 and certain liabilities contemplated in section 77.

What you should do:
A director must in terms of sections 137(3) and 137(4) attend to the requests of the practitioner during business rescue proceedings and provide any and all reasonably requested information to the practitioner concerning the company's affairs and not take any action on behalf of the company that requires the practitioner's approval without such approval.

What you should know:
If a director does not act in terms of the provisions of the Act during business rescue proceedings, a practitioner may in terms of section 137(5) apply to court for an order removing such director from office.

Practitioner's functions and terms of appointment

A practitioner may only be appointed as the business rescue practitioner of a company if the person meets the requirements stipulated in section 138 of the Act.

An affected person may on its own or upon request apply to the court to remove a practitioner from office in terms of section 139 if the practitioner:

- fails to perform his duties as a business rescue practitioner or is incompetent;
- fails to exercise the proper degree of care as a practitioner;
- does not qualify to be a practitioner as stipulated in section 138;
- shows lack of independence or conflict of interest arises; or
- is incapacitated and unable to perform the necessary functions and is unlikely to regain that capacity within a reasonable time.

A new practitioner must however be appointed if a practitioner dies, resigns or is removed from office. An affected person will be entitled to bring a fresh application to set aside that new appointment if the grounds arise as set out in section 130(1)(b).

***What you should know*:**
The general powers and duties of practitioners during business rescue proceedings, including the duty to investigate the affairs of a company are set out in sections 140 and 141 of the Act and, amongst others, the practitioner has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77..

What you should do:
In addition to the provisions of sections 137(3) and 137(4), the Act stipulates in section 142 that the directors of a company must co-operate with and assist the practitioner by providing all books and records relating to the affairs of the company.

A practitioner is in terms of section 143 of the Act entitled to remuneration payable by the company in accordance with a tariff. In addition to such remuneration, a practitioner may propose an agreement in terms of which the company pays further remuneration which is calculated based upon various contingencies relating to such practitioner's performance of his duties. The tariff of fees payable to a business practitioner is set out in Regulation 128 of the Regulations to the Act.

An agreement between the company and the practitioner, in terms of which further remuneration is payable to the practitioner, is final and binding on the company following the approval of:

- the holders of a majority of the creditors' voting interests; and
- the holders of a majority of the voting rights attached to any shares that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called to consider the proposed agreement.

Any creditor / shareholder voting against the approval of such an agreement may apply to the court within 10 (ten) business days after the date of voting, for an order setting aside the agreement. The agreement may be set aside if it is not just and equitable or if the remuneration in terms of such agreement is unreasonable, having regard to the financial circumstances of the company.

Any claims that a practitioner may have will rank in priority before the claims of all other secured and unsecured creditors.

Rights of affected persons during business rescue proceedings

The rights of employees during business rescue proceedings of a company are stipulated in section 144 of the Act. For purposes of business rescue proceedings, the employee will, in certain circumstances, be a preferred unsecured creditor of the company.

Each creditor is in terms of section 145 entitled to notice of, and participation in, each court proceeding, decision or meeting. Each creditor also has the right to vote to amend, approve or reject a proposed business rescue plan and if such business rescue plan is rejected, a further right to either propose an alternative business rescue plan or present an offer to acquire the interests of any / all of the other creditors (who voted against the approval of the business rescue plan).

Creditors may form a creditor's committee and are entitled to consult with the practitioner during the preparation of the business rescue plan. Voting by creditors occurs as follows:

- a secured or unsecured creditor has a voting interest equal to the value of the amount owed; and
- a concurrent creditor who would be subordinated in a liquidation has a voting interest equal to the amount that the creditor could reasonably expect to receive (the practitioner will request such amount to be independently and expertly appraised and valued).

In terms of section 146 each shareholder (holder of any issued security) of the company is entitled to receive notice of, and to participate in, each court proceeding, decision or meeting. If a proposed business rescue plan alters the rights of any class of holders of securities in the company, at a meeting of such holders each person is entitled to vote to approve or reject such business rescue plan. If the business rescue plan is rejected, such holders may either propose the preparation of an alternative business rescue plan or present an offer to acquire the interests of any or all of the creditors or other holders, who voted against the approval of the business rescue plan, of the company's securities.

The first meeting of creditors should in terms of section 147 of the Act be convened and presided over by the practitioner within 10 (ten) business days after the practitioner's appointment. At the meeting, the practitioner must inform the creditors whether he or she believes that there is a reasonable prospect of rescuing the company. The creditors may present proof of claims to the practitioner as well as determine whether or not to form a committee of creditors. At any meeting of creditors, other than the meeting to determine the future of a company, a decision is approved if it is supported by the holders of a simple majority of the independent creditors' voting interests.

In terms of section 148 a first meeting of employees' representatives must also be held within 10 (ten) business days after the practitioner's appointment to discuss the reasonable prospect of rescuing the company and to determine whether or not to appoint an employees' committee.

A committee of employees or of creditors may in terms of section 149, respectively consult with the practitioner in relation to any matter relating to the business rescue proceedings, but may not instruct or direct the practitioner. Such committee/s may also receive and consider reports relating to the business rescue proceedings, on behalf of the general body of employees or creditors. It is important that such committees act independently of the practitioner to ensure proper representation of creditors' or employees' interests.

Development and approval of business rescue plan

Section 150 stipulates that after consultation with all creditors, other affected persons and the management, a practitioner must prepare a business rescue plan for consideration and possible adoption. Such business rescue plan must contain all the information which affected persons may need in order to reach a decision regarding its adoption.

The business rescue plan must contain the following 3 (three) parts:

- Background that must contain complete lists of all material assets of the company, creditors, shareholders, the probable dividend received by creditors, copy of the written agreement concerning the practitioner's remuneration and a statement whether the plan includes a proposal made informally by a creditor of the company;
- Proposals that must contain the nature and duration of any moratorium for which the plan makes provision, the extent to which the company is to be released from the payment of its debt, the ongoing role of the company, property available to pay creditors' claims, order of preference to apply proceeds of property to pay creditors, benefits of adopting the plan and the effect that the plan will have on the shareholders; and
- Assumptions and conditions that must contain a statement of the conditions that must be satisfied if the plan come into operation and is fully implemented, impact of the plan on employees, the circumstance in which the plan will end and a projected balance sheet for the company and statement of income and expenses for the ensuing 3 (three) years, on the assumption that the proposed plan is adopted.

The business rescue plan must be published within 25 (twenty five) business days after the date on which the practitioner was appointed or such longer time as may be allowed by the court on application by the company or the holders of a majority of the creditors' voting interests.

Section 151 stipulates that within 10 (ten) business days after the publication of a business rescue plan, a practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest. Such a meeting is convened in order to consider the proposed business rescue plan.

Section 152 of the Act regulates the proceedings at a meeting to determine the future of a company. At a meeting to determine the future of a company, the practitioner must introduce the proposed business plan for consideration by the creditors and shareholders (if applicable) and discuss the practitioner's belief if there is a reasonable prospect of a company being rescued. The practitioner must provide an opportunity for the employees' representative to address the meeting and invite discussion, and entertain and conduct a vote on any motions to amend the plan or to adjourn the meeting to revise the plan for further consideration and call for a vote for preliminary approval of the proposed plan. A vote supported by the holders of more than 75% of the creditors' voting interests as well as at least 50% of the independent creditors' voting interests will indicate a preliminary approval of the proposed business rescue plan.

In the event that a proposed business rescue plan is not approved on a preliminary basis, the plan is rejected and may only be considered further after the practitioner has sought a vote of approval to prepare and publish a revised plan, or has advised the meeting that the company will apply to court to set aside the result of the vote (on the grounds that it was inappropriate).

If a proposed business rescue plan does not alter the rights of the holders of any class of securities in the company, preliminary approval of such business rescue plan as contemplated

above also constitutes the final adoption of that plan (subject to any conditions on which the business rescue plan is contingent).

If a proposed business rescue plan does alter the rights of any class of holders of securities in the company, the practitioner is obliged to immediately hold a meeting of such holders. At such meeting a vote must be called to approve the adoption of the proposed business rescue plan. If a majority of the voting rights are exercised in favour of the business rescue plan, it will be duly adopted. If a majority of the voting rights are exercised in opposition to the adoption of the plan, the plan is rejected and may only be considered further after the practitioner has sought a vote of approval to prepare and publish a revised plan, or has advised the meeting that the company will apply to court to set aside the result of the vote (on the grounds that it was inappropriate).

An adopted business rescue plan is binding on the company, all of its creditors and every holder of securities, even if a person did not actively participate in the adoption of the business rescue plan.

Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder (in terms of section 39) does not apply with respect to an issue of shares by the company in terms of the business rescue plan.

In the event that a business rescue plan is rejected and the practitioner does not seek a vote in respect of a revised plan nor does he or she notify the meeting of his or her intention to apply to the court to set aside the result of the vote, any affected person present at such meeting may in terms of section 153:

- initiate a vote requiring the practitioner to prepare and publish a revised plan;
- apply to court to set aside the result of the vote (on the grounds that it was inappropriate); or
- make a binding offer to purchase the voting interests of the persons who opposed the adoption of such business rescue plan at a fair and reasonable value determinable by an independent expert.

A holder of a voting interest, or a person acquiring such interest in terms of a binding offer, may apply to the court to review, re-appraise and re-value the determination made by an independent expert.

In terms of section 154 a business rescue plan may provide that a creditor who has agreed to the discharge or to the reduction of the debt owing to such creditor, will lose the right to enforce the relevant debt or part of it.

What you should know:

If a business rescue plan is approved and implemented in accordance with the provisions of the Act, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of business rescue process, except to the extent as provided for in the business rescue plan.

Compromise with creditors

Section 155 of the Act applies to a company, irrespective of whether or not it is financially distressed, unless it is engaged in business rescue proceedings.

The board of a company, or the liquidator of a company if it is being wound up, may deliver a proposal regarding an arrangement or compromise of its financial obligations to all of the company's creditors and the Commission. A proposal must also be divided in 3 (three) parts which is in essence similar to the business rescue plan.

A proposal is adopted by the creditors or members of a company if it is supported by a majority in number, representing at least 75% in value of the creditors present and voting at a meeting called to consider the proposal. If a proposal regarding an arrangement or compromise of a company's financial obligations to all of the company's creditors is duly adopted, the company may apply to the court for an order approving the proposal. In terms of such an application, the court may also sanction the compromise as provided in the proposal, if it is just and equitable to do so, after having considered the number of creditors who voted in favour of the proposal, and in the case of a compromise in respect of a company being wound-up, the report of the Master required in terms of Chapter 14 of the old Act.

As of the date on which it is filed, a copy of a court order sanctioning an arrangement or compromise of a company's financial obligations to all of its creditors or members of any class of its creditors is final and binding on all of the creditors or members of the relevant class of creditors.

What you should know:
Any arrangement or compromise contemplated in section 155 does not affect the liability of any person who is a surety of the company.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

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