



Business Rescue Procedures and the New Companies Act

Many businesses and their advisors are getting to grips with the terms and condition of the new Companies Act. The act is known as the Companies Act 71 of 2008 despite the fact that it only became effective on 1 May 2011.

One of the more interesting new sections of the Act deals with business rescue. Business rescue means proceedings to facilitate the rehabilitation that is financially distressed by providing for the temporary supervision of the company and the management of its affairs, business and property. It also provides for a temporary moratorium on the rights of claimants against the company or its property.

Business rescue also includes the development and implementation of a plan to rescue the company by restructuring its affairs and business in a manner that maximizes the likelihood that the company will be able to continue in business on a solvent basis or alternatively a plan which results in a better return for the company's creditors in the event of a liquidation. The Act defines "financially distressed" as a situation in which the company within the immediately ensuing 6 months appears to be reasonably unlikely to be able to pay its debts as they become due and payable or it appears to become reasonably likely that the company will become insolvent.

Business rescue proceedings begin once the board of directors resolves voluntarily to begin business rescue proceedings and place the company under supervision. The board must have reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company. The board resolution has no force or effect until it is filed or if liquidation proceedings have been started against the company.

Within five business days after a company has adopted and files a resolution it must publish a notice of the resolution and its effective date to every affected person, including a sworn statement of the facts relevant to the board's decision to adopt the resolution, and it must appoint a business rescue practitioner. The Act provides guidelines as to who may be appointed as a business rescue practitioner and these practitioners are required to be registered with the Companies Commission. Any affected person may also apply to have a company placed in business rescue. This must, however, be done by an application to court. An "affected person" means a shareholder, creditor, trade union representing employee of the company and employees or their representatives of the company.

The Act gives the business rescue practitioner wide authority to run the business. The practitioner essentially takes over management responsibility of the company in place of its board of directors and pre-existing management. The previous board members and management may be used by the

practitioner to attend to matters under his direction but the responsibility for managing the company remains with the practitioner.

Once the business rescue practitioner has taken office, there are a number of duties he must attend to. The primary objective will be to develop a plan to restructure the company with the intention of enabling it to trade into the future on a solvent basis. The practitioner needs to deal with all "affected" persons and in particular with creditors and employees of the company.

It is worth considering placing a company in "business rescue" if there is some hope that the company will survive after a restructure. It will be interesting to see whether we achieve the same levels of success in South Africa with our business rescue procedures as the United States have achieved with Chapter 11. Let's wait and see. If your business is in trouble, you should consider the business rescue provisions of our Companies Act. Maybe the business can be saved.

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