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# A Shift in Creditor Protections – The application of Section 34 of the Insolvency Act during Business Rescue Proceedings

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Section 34 of the Insolvency Act 24 of 1936 (the "Insolvency Act") has historically safeguarded creditors' interests in South Africa by mandating public notice when businesses or their assets are sold outside the ordinary course of business. This provision serves to protect creditors by allowing them to assert their claims before any asset transfers occur. However, the introduction of business rescue under Chapter 6 of the Companies Act 71 of 2008 (the "Companies Act"), which deals with business rescue proceedings for financially distressed companies, has prompted debate about the relevance of Section 34 of the Insolvency Act in such proceedings. The recent High Court judgement in *Reiscor Two (Pty) Ltd v Anheuser-Busch InBev Africa (Pty) Ltd* has however provided clarity on this issue.

Section 34 of the Insolvency Act ("Section 34") protects creditors by requiring that a trader (as defined in Section 2 of the Insolvency Act) publish a public notice when transferring, under a contract, any business, its goodwill, or any goods or property forming part of that business, outside the ordinary course of business or for securing the payment of a debt. This notice must be published in the Government Gazette, in 2 (two) issues of an Afrikaans newspaper and 2 (two) issues of an English newspaper, both circulated within the district where the business operates. The purpose is to allow creditors the opportunity to claim their debts before the sale is completed, thus safeguarding them from the risk of asset disposal without the settlement of outstanding liabilities. Failure to publish the notice renders the sale void against creditors for 6 (six) months, allowing them to attach the transferred assets to secure their claims.

Historically, Section 34 has been a powerful tool for creditors, particularly in liquidation scenarios, where asset stripping by debtors could leave creditors with no assets against which to recover. It has been especially critical in traditional trading businesses, where valuable assets such as property, equipment, and inventory may be sold, often leaving little or nothing for unpaid creditors.

The introduction of business rescue under the Companies Act significantly transformed the landscape of financially distressed companies in South Africa. According to Section 128(1)(f) of the Companies Act, a company is considered financially distressed if it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing 6 (six) months (commercial insolvency), or if it appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 (six) months (factual insolvency). Business rescue, as outlined in Section 128(b) of the Companies Act, aims to facilitate the rehabilitation of a financially distressed company by providing for the temporary supervision of the company and the management of its affairs, business, and property by a business rescue practitioner. It also includes a temporary moratorium on claimants' rights against the company or property in its possession, and the development and implementation of a business rescue plan to restructure the company's business, property, debt, affairs, liabilities, and equity. Furthermore, under Section 128(1)(b)(iii) of the Companies Act, business rescue has two objectives: first, to restructure the company's affairs to ensure its continued existence on a solvent basis, and second, if that is not possible, to provide the company's creditors with a better return than they would receive through immediate liquidation of the company.

In business rescue, creditors play an active role in the process. Under Sections 151 and 152 of the Companies Act, creditors have the opportunity to consult and vote on the proposed business rescue plan, which frequently involves decisions about asset sales. This participatory role diminishes the need for Section 34's notice requirements. Unlike liquidation, where creditors are typically passive, business rescue ensures their involvement in key decisions regarding the company's future, including the disposal of assets.

The *Reiscor Two (Pty) Ltd v Anheuser-Busch InBev Africa (Pty) Ltd* ("Reiscor Two") case highlighted the applicability of Section 34 during business rescue. Creditors argued that a sale of assets was void due to non-compliance with Section 34's notice requirements. However, the High Court ruled that Section 34 does not apply in business rescue proceedings. The High Court reasoned that business rescue already involves creditor participation through the exercise of their voting rights. Imposing Section 34 notice requirements would create unnecessary procedural hurdles, obstructing the efficient progression of the rescue process.

The Reiscor Two judgement clarified that Section 34 was primarily designed for situations where creditors typically have less direct involvement in asset sales. In contrast, business rescue ensures that creditors are active participants in decision making, including approving asset disposals. As a result, the protections offered by Section 34 become unnecessary in business rescue, where creditor participation is integral to the process.

The Reiscor Two judgment marks a significant development in South African insolvency law by removing a key procedural hurdle for business rescue practitioners and enabling faster, more efficient execution of asset sales under an approved business rescue plan. The High Court affirmed that Section 34 of the Insolvency Act, which historically protected creditors from asset stripping through public notice requirements, does not apply in business rescue proceedings. In business rescue, creditors play a participatory role in decisions such as asset sales, rendering Section 34's protections redundant. As a result, creditors can no longer rely on Section 34 but must instead take a proactive approach by engaging in the business rescue process, particularly by exercising their voting rights during Section 151 meetings so as to influence outcomes. The ruling also provides greater certainty for buyers of distressed assets, who no longer need to worry that transactions could be voided for non-compliance with Section 34. The Reiscor Two judgment underscores the evolving landscape of creditor protections and highlights the importance of creditor participation in the success of business rescue efforts.




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