

Basics of Business Rescue

14 August 2021 5 min read

What is business rescue?

Business rescue proceedings are proceedings aimed to facilitate the rehabilitation of a company that is financially distressed by providing for – the temporary supervision of the company, and the management of its affairs, business and property, by a business rescue practitioner; a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession; and the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities and equity (section 128(1)(b)).

What is the aim of business rescue?

The aim of business rescue is to restructure the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company (section 128(1)(b)(iii)).

What is a business rescue practitioner?

A BRP is a person appointed, or two or more persons jointly appointed, to oversee a company during business rescue. While the Act defines a BRP as one or more persons, the business rescue provisions of the Act do not necessarily refer to or support joint appointment. Further, the word "person" in the Act includes a juristic person. It is therefore arguable that a company can take appointment as a business rescue practitioner (section 128(1)(d)).

What is an affected person?

Affected persons are important role players in the business rescue process. An affected person is a shareholder, creditor, employee (or their representative) or a registered trade union representing employees of the company. Affected persons have various rights throughout the business rescue process (section 128(1)(a)).

What is the test for business rescue?

The test for whether or not a company should be placed in business rescue is whether or not the company is financially distressed. The Act defines the words "financially distressed" (section 128(1)(f)) to mean that – 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 six months (commercial insolvency); or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (factual insolvency).

When should a company commence business rescue?

A company should commence business rescue proceedings at the first signs of it being financially distressed, within the meaning of the Act. That is, either when it is reasonably unlikely that a company will be able to pay its debts when they fall due for payment in the immediately

ensuing six months or when it is likely that the company will become insolvent in the immediately ensuing six months.

What is post-commencement finance?

Post-commencement finance is finance provided to the company once business rescue proceedings have commenced. Section 135(1) of the 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.

What is a business rescue plan?

A business rescue plan is a plan developed and, if approved, implemented by the business rescue practitioner, which details the manner in which the practitioner envisages that the company will be rescued. The plan is the culmination of the business rescue process.

Read more about the [Business Rescue plan South Africa](#).

Your Business Rescue Proceedings Checklist:

1. When should a company commence BR?
2. How is a company placed in BR?
3. How does a company practically voluntarily commence BR proceedings?
4. What preliminary actions are required of a company that commences voluntary BR?
5. What happens if the time periods in respect of voluntary BR are not adhered to?
6. How can one object or oppose a BR resolution?
7. What goes into the papers for an application to court for BR?
8. How does one oppose a BR application to court?
9. How long do BR proceedings last?
10. When does BR begin?
11. How does the BR process unfold?
12. When do BR proceedings end?
13. What happens if a company does not commence business rescue proceedings when it should?

Read more about the [Business Rescue Proceedings in South Africa](#)

Is business rescue suitable for all companies?

Business rescue proceedings are not necessarily suitable for all companies. The type of company is for the most part determinative as to whether or not a company is a suitable candidate for business rescue. For instance, companies that are involved in retail are more suitable for business rescue than companies that have been set up for property investment purposes, as retail companies have a "business" that can be rescued, while property investment companies may not.

In a recent decision of the South Gauteng High Court, Johannesburg, in the case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 JPR 0239 (GSJ) the court considered the plausibility of business rescue in an instance where liquidation was preferable. In this instance, the court dismissed the application for rescue and held that a liquidation of the company would achieve a similar result to that of a business rescue.

This judgment makes it clear that prior to a company, or an affected person, placing a company in business rescue, consideration should be given to the nature of the company, the extent to which business rescue is the appropriate procedure for that company and the extent to which business rescue would be more beneficial for the company than liquidation.

If the answer to the latter question is yes, rescue proceedings are likely to be successful. If not, liquidation may be the preferred alternative.

