

Business rescue for external companies? It's all in the definition

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1. Looking back at 2020, it has truly been a year like no other. Indeed, the occurrence of a worldwide pandemic would have been unimaginable only a year ago. It is without a doubt that the cost of the Covid-19 pandemic to both human life and to the global economy has been devastating. In fact, the extent of the economic fallout associated with the pandemic is evident in all facets of the South African economy. One of the results of the tough economic climate has been a marked increase in filings for business rescue.
2. It comes as no surprise that financially distressed companies are increasingly turning to business rescue, especially those that have the potential to successfully trade through their financial difficulties. This is because the business rescue process provides an attractive alternative to liquidation. However, as more and more companies begin to consider business rescue as a route to achieving commercial viability and a return to profitability, an important question is whether business rescue proceedings are in fact available to such companies. This question was especially relevant in the context of foreign or external companies.
3. The question as to whether business rescue proceedings are available to foreign companies, including those registered in South Africa as external companies, was settled by the High Court in *CMC Di Ravenna SC and others v Companies and Intellectual Property Commission and others* 2020 (2) SA 109 (GP) and recently confirmed by the Supreme Court of Appeal ("SCA") in *CMC v CIPC and Others* (1325/2019) [2020] ZASCA 151 (20 November 2020).
4. The facts of this case were briefly as follows: the board of an external company, duly incorporated in terms of the laws of the Italian Republic, resolved to place the company under voluntary business rescue in terms of section 129 of the Companies Act 71 of 2008 ("Act"). However, the Companies and Intellectual Property Commission ("CIPC") then withdrew the business rescue proceedings on the basis that an external company cannot legally commence business rescue proceedings as envisioned under Chapter 6 of the Act, since business rescue is only available to a company as defined in the Act. The company and the appointed business rescue practitioners took an opposing view and sought a declaratory order that the company was validly placed under business rescue.
5. Based on the above, the crisp issue for determination was whether an external company is subject to business rescue proceedings in terms of the Act. To this end, the court had regard to the definition of the term "company" in section 1 of the Act and held that the definition of "company" pertinently excludes an external company. Likewise, section 129 of the Act also does not expressly include an external company. On this basis, the court found that external companies may not be validly placed under voluntary business rescue in South Africa and cannot make use of the business rescue provisions contained in Chapter 6, as external companies are excluded from the definition of a "company". As a result, the court declared that the company was not validly under business rescue.
6. On appeal, the SCA confirmed that a foreign company, even if it is registered as an external company, is expressly excluded from the definition of a "company" and is not incorporated in terms of the Act, as required by the definition of a "company". Accordingly, the court held that the inevitable conclusion is that an external company may not be placed under business rescue proceedings.

7. In view of the above, the findings of both the High Court and the SCA go some way in providing certainty on the options available to external companies in financial distress. It is clear that on the reasoning provided by both the High Court and the SCA, a compromise between a company and its creditors, in terms of section 155 of the Act, will similarly not be available to external companies. As a result, external companies ought to consider alternative mechanisms, such as informal voluntary arrangements and creditor workout procedures, when navigating challenging trading conditions and financial distress. The question as to whether business rescue proceedings and section 155 compromises are to be afforded to external companies is an issue of policy that ought to be properly decided upon by the legislature. However, in the interim, business rescue proceedings continue to be an attractive option for distressed companies, although it remains an exclusive preserve of companies that fall within the definition as set out in section 1 of the Act.



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