WERKSMANS
ATTORNEYS

INSOLVENCY & BUSINESS RESCUE

Business rescue – not for the fainthearted

2 June 2021 *8 min read*

Business rescue proceedings

Business rescue proceedings almost invariably take place under less than ideal circumstances. To begin with, all candidates for business rescue are financially distressed, and as a natural consequence, you often find that the company's employees have not been paid, aggressive trade creditors are almost certainly knocking on the door and liquidation proceedings are most likely on the horizon. In addition, the existing directors of the company are, often times, uncooperative or may simply abscond from their responsibilities, in view of the company's imminent peril. Certainly from our experience, companies that opt for business rescue are typically on their last legs – in desperate need for a lifeline to stay afloat.

Against this adverse backdrop, business rescue practitioners ("**BRPs**") are faced with the unenviable task of rescuing financially distressed companies, whilst balancing the competing interests of a multitude of stakeholders. This is no easy feat, and frequently, time is of the essence, and decisions have to be made expeditiously, in high-pressure and potentially hostile environments. Recognising the reality of the less than ideal circumstances associated with corporate rescue, the legislature in Chapter 6 of the Companies Act 71 of 2008 (the "**Act**") affords BRPs significant and wide-ranging management powers during the course of business rescue proceedings. However, as the old adage goes, "with great power, comes great responsibility". This is no less true in the context of business rescue proceedings, as a high standard of conduct is expected of BRPs, who may be held personally liable in instances where they fail to act with the required degree of care and skill.

A case before the High Court – Van den Heever N.O and Others v Van Tonder

In *Van den Heever N.O and Others v Van Tonder*,[1] the scope for BRP liability came to the fore and was dealt with on appeal by a full bench of the High Court. In this case, a claim against a BRP in his personal capacity, was instituted by the joint liquidators of an interdependent group of companies, which the BRP had initially been appointed to rescue. The claim was based on an alleged loss suffered by one of the group companies, Baobab Holdings (Pty) Ltd ("**Baobab**"), as a result of the BRP's use of funds received by Baobab from its debtors (which funds were subject to a cession of book debts in favour of Baobab's creditors) to discharge the obligations of the companies in the group (the "**disposal**").

In support of their claim, the joint liquidators alleged that the disposal was effected without compliance with the financial assistance provisions in section 45 of the Act, and without the consent of the holders of security over the book debts, in terms of section 134. On account of this, the joint liquidators argued that the BRP was in breach of his fiduciary duties to Baobab in terms of section 76(3) and was to be held personally liable for Baobab's loss in terms of section 218(2), or alternatively section 77(2)(b)(ii). The BRP denied any liability, but pleaded that should he be found liable, that he had acted in good faith during the course of the exercise of the powers and performance of his functions as a BRP and was excused from liability in terms of section 140(3)(c)(i). The BRP further pleaded that if it were found that he had breached his fiduciary duties, he had acted honestly and reasonably and his liability should be excluded under section 77(9) of the Act.

In the court *a quo*, the claim against the BRP was dismissed on several grounds and the joint liquidators took this finding on appeal. The appeal was similarly dismissed, after the court found *inter alia* that, having regard to the evidence presented, it could not be said that the BRP committed wilful misconduct or acted in wilful breach of trust. The full bench further held that the BRP was reasonable, honest and *bona fide* in his attempts to rescue the group of companies, in accordance with his mandate. Accordingly, the BRP was excused from personal liability in terms of section 77(9) of the Act.

The judgments of both the court *a quo* and the full bench set out a number of key findings in relation to both section 45 and section 134 of the Act. Firstly, the judgments confirm that section 45 of the Act applies equally to companies in business rescue and is not excluded by Chapter 6. Therefore, where a company under business rescue is asked to provide financial assistance to a director or to a related or interrelated company, section 45 must be complied with. Secondly, it was confirmed that a cession of book debts constitutes property for purposes of section 134, and the word "disposal" used therein does not limit the ambit of the section to the physical selling of property, but also includes the transfer of funds to another. Whilst these findings go a long way in clarifying the effect of sections 45 and 134 in the business rescue context, the relevance of the judgments for present purposes is that they clearly outline the scope for BRP liability, as summarised below.

The scope for BRP liability during business rescue proceedings

During the course of business rescue proceedings, BRPs have free reign to adopt any management, oversight and control functions that they deem appropriate. This is because in terms of section 140(1)(a) of the Act, a BRP has full management control of the company, in substitution for its board and pre-existing management, for the duration of the business rescue proceedings. In addition, in terms of section 137(2), the existing directors of a company must continue to exercise their functions, albeit subject to the authority of the BRP, who may give them express instructions or directions as to the exercise of their management functions. Moreover, should the board or one or more directors purport to take any action on behalf of the company that requires the approval of the BRP, such action is void unless approved by the BRP.

However, notwithstanding the wide-ranging powers afforded to BRPs, the scope for BRP liability cannot be overlooked. In terms of section 140(3)(b) of the Act, a BRP has the same responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77 of the Act. In addition, section 140(3)(c)(ii) provides that a BRP may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of a practitioner. Furthermore, in terms of section 139(2), should a BRP fail to exercise the proper degree of care in the performance of his or her functions or fail to perform the duties of a BRP, the court may, upon the request of an affected person or on its own motion, remove such BRP from office.

Act affords BRPs certain protections

With the above in mind, BRPs must ensure that they guard against falling foul of the aforementioned provisions, as failure to do so may result in personal liability. However, having said this, it is worth noting that the Act affords BRPs certain protections or safeguards from being held personally liable. The first form of protection is found in section 77(9) of the Act, which applies to the liabilities that a BRP may incur in terms of section 77. Section 77(9) provides that in any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director from liability, if it appears that the director is or may be liable, but has acted honestly and reasonably, or having regard to all the circumstances of the case, it would be fair to excuse the director. The second form of protection is set out in section 140(3)(c)(i) of the Act, and excuses BRPs from the liability that they may incur in terms of section 140(3)(c)(ii). Section 140(3)(c)(i) provides that a BRP is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of the practitioner. This second form of protection specifically caters for BRPs, and applies where they perform their duties as practitioners, which include convening meetings, developing or implementing the business rescue plan, or reporting to creditors and other affected parties in accordance with the Act.

Read more on The Basics of Business Rescue here

Download our Business Rescue pocket guide

Download our Business Rescue toolkit

by Eric Levenstein, Director and Head of Insolvency, Business Rescue & Restructuring Practice and Malachizodok Mpolokeng, Candidate Attorney

---

[1] *Van den Heever N.O and Others v Van Tonder* (A5076/2018) [2021] ZAGPJHC 7 (20 April 2021).



Eric Levenstein

Head of Insolvency & Business Rescue

View Profile