

Business Rescue plan South Africa

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Business Rescue Plan

1. 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.

2. What must a business rescue plan contain?

Section 150 of the Act provides a framework for what the business rescue plan should look like. It provides that a plan must contain sufficient detail to assist affected persons in deciding whether or not they wish to accept or reject the plan. The business rescue plan must contain –

- background (including a list of assets, which assets are secured, list of creditors indicating secured, statutory preferent and concurrent creditors in terms of the laws of insolvency, probable dividend should insolvency ensue, list of all holders of the company's securities, a copy of the written agreement concerning the business rescue practitioner's remuneration and a statement whether the business rescue plan includes a proposal made informally by a creditor of the company);

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- proposals (including the nature and duration of any specific moratorium, extent to which the company is to be released from payment of debts, the extent to which any debt is proposed to be converted to equity in the company or another company, the ongoing role of the company and the treatment of any existing agreements, property of the company available to pay creditors' claims in terms of the plan, the order of preference in which the proceeds of the property will be applied to pay creditors if the business rescue plan is adopted, the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors of the company if the company were to be placed in liquidation and the effect that the business rescue plan will have on the holders of each class of the company's issued securities); and
- assumptions and conditions (including a statement of the conditions that must be satisfied for the business rescue plan to come into operation and be fully implemented, effect on employees and their conditions of employment, the circumstances in which the plan will end and a projected balance sheet for the company and a statement of income and expenses for the ensuing three years).

3. How is a business rescue plan adopted?

A proposed business rescue plan will be approved on a preliminary basis if it is supported by the holders of more than 75% of the creditors' voting interests that were voted and when the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted (section 152(2)).

4. What happens if a business rescue plan is adopted?

A business rescue plan that is adopted is binding on the company, the creditors of the company and every holder of the company's securities whether or not such a person was present at the meeting, voted in favour of the adoption of the plan or, in the case of creditors, had proven their claims against the company (section 152(4)).

Section 154 reiterates the binding effect of an approved plan. It provides that once a business rescue plan is implemented in accordance with its terms, a creditor will lose its right to enforce the relevant debt or a part of it on the basis that it has acceded to the discharge of the debt. The creditor will also be precluded from enforcing a debt that arose prior to business rescue, against the company, unless the business rescue plan provides otherwise.

5. What happens if a business rescue plan is rejected?

Section 153 of the Act deals with the instance in which a plan is rejected. If a business rescue plan is rejected the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan or advise the meeting that the company will apply to court to set aside the result of the vote on the grounds that it was inappropriate. If a practitioner does not take the aforesaid action, an affected person may take such action (section 153(1)(a) and (b)), failing which the practitioner must file a notice of the termination of the business rescue proceedings (Form CoR152.2).

Further, any affected person or combination of affected persons may make a binding offer to purchase the voting interests of one or more persons who opposed the adoption of the plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person or those persons, if the company were to be liquidated (section 153(1)(b)(ii)).

Claims

1. How are claims submitted for proof to the business rescue practitioner?

It is not necessary to prepare a claim in the same format as with liquidation proceedings (ie by deposing to an affidavit) but standard proof of claim forms have been used to submit claims to the business rescue practitioner. It is not necessary to file a formal affidavit. A statement detailing the claim together with supporting certificates of balance and documents would be sufficient proof of the claim.

The Act does not specify a time by when a claim should be submitted. However, section 147(1)(a)(ii) refers to the business rescue practitioner being in a position to "receive proof of claims by creditors" at the first meeting of creditors. The business rescue practitioner would then either accept or reject such claims. All claims that have been accepted by the business rescue practitioner would be included in the plan (section 150(2)(a)(ii)). The only voting which would occur by creditors would be in terms of section 152(2) on the business rescue plan and at a meeting convened for that purpose in terms of section 151.

2. What is the order of preference for the payment of claims during a business rescue?

During business rescue proceedings, the claims of creditors rank in the following order of preference and will accordingly be paid out in this order

- practitioner's remuneration, expenses and claims arising out of the costs of the business rescue proceedings (section 135(1));

- remuneration, reimbursement for expenses or other amounts of money relating to employment, due and payable by the company to an employee during business rescue (post-commencement finance);
- the claims of secured lenders or creditors before business rescue. The Act is not clear about where those creditors should fall in the ranking of claims and this has given rise to some debate;
- secured claims by post-commencement financiers, lenders or creditors in the order in which the claims were incurred (section 135(3)(a)(i));
- claims in respect of the Insolvency Act 24 of 1936; unsecured claims by post commencement financiers, lenders or creditors during business rescue in the order in which they were incurred (section 135(3)(b));
- remuneration of employees which became due and payable before business rescue commenced; and
- unsecured claims of lenders or creditors before business rescue (section 135(3)(a)(ii)).

3. What happens if business rescue proceedings are superseded by liquidation proceedings?

If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation. That is, that the liquidators fees and expenses will rank in priority to that of the business rescue practitioner's fees (section 135(4)).

Interplay Between Business Rescue and Liquidation

1. Are liquidations still an option?

Business rescue is recognised as a valuable part of the Act. Section 7(k) of the Act states that among the objectives of the Act is the aim to "*provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders*".

There has been a move away from a culture of liquidation to a culture of rescue, in that if a company is not able to be restored to a position of solvency, then the next best option is for it to at least achieve a better result for the creditors than would arise from liquidation.

Liquidation is still an option, but it is the last resort

2. What is the interplay between business rescue proceedings and liquidation proceedings?

If liquidation proceedings have already commenced, an application to court for business rescue will suspend the liquidation proceedings until the court has adjudicated on the application or when business rescue proceedings end when the court grants an order applied for (section 131(6)).

Further, the Act provides that a court may grant an order placing a company under business rescue at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company (section 131(7)). This section has given rise to some debate. It seems to suggest that even a company that has been liquidated, may subsequently be placed under business rescue. It has been suggested that compelling reasons would need to be placed before a court before such extreme action is taken.

If business rescue proceedings have commenced by way of an application to court, the company may not adopt a resolution for its liquidation until business rescue proceedings have terminated. The company must notify all affected persons of the order of the court within five business days of the date of the order (section 131(8)).

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

3. How does the test for financial distress differ from the solvency and liquidity test?

Section 4 of the Act sets out the "solvency and liquidity" test. It provides that a company will satisfy the solvency and liquidity test at a particular point in time if considering all reasonably foreseeable financial circumstances –

- the assets of the company, or the aggregate of the assets of the company, fairly valued, equal or exceed the liabilities, or aggregate liabilities of the company, fairly valued (factual insolvency); and
- it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of twelve months after the date on which the test is considered (commercial insolvency)

There has been a move away from a culture of liquidation to a culture of rescue.

The difference between the test for "financial distress" and that of "solvency and liquidity" is that a company will be financially distressed if it is either factually or commercially insolvent while a company will be said to be solvent and liquid if it satisfies both factual and commercial solvency. Further, for financially distressed companies, the question is whether or not the company will be factual or commercially insolvent in the immediately ensuing six months.

4. What is the difference between an insolvency practitioner and a business rescue practitioner?

Insolvency practitioners and business rescue practitioners are not the same. Each is appointed to fulfil different roles, which can be summarised as follows –

- insolvency practitioner – a liquidator in any winding-up shall recover and reduce into their possession all the assets and property of the company, movable and immovable, and shall apply the proceeds so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto (section 391 of the Companies Act 61 of 1973); and
- business rescue practitioner – a business rescue practitioner is responsible for investigating the company's affairs, business, property and financial situation in order to consider whether there is a reasonable prospect of the company being rescued (section 141(1)).

Thus, a different skill set is required for an insolvency practitioner. Prior to the enactment of the Act there was some debate as to whether or not insolvency practitioners could take appointments as business rescue practitioners. Although there are many insolvency practitioners who qualify for appointment as business rescue practitioners, a new profession was created. Only licensed practitioners may be appointed.

5. Can a business rescue practitioner be appointed as a liquidator and vice versa?

Section 140(4) of the Act provides that to the extent that business rescue proceedings are terminated by a court placing the distressed company into liquidation, any person who acted as a business practitioner during the business rescue may not be appointed as a liquidator. This section is unambiguous. A business rescue practitioner may not act as a liquidator.

However, the Act does not suggest that a liquidator may not be appointed as a business rescue practitioner if a company goes into business rescue subsequent to liquidation. It seems as though the liquidator could take appointment as a business rescue practitioner if he satisfies the requirements for qualification under section 138 of the Act.

General Considerations

1. Are companies filing for business rescue or making application to court?

Business rescue is well underway. CIPC, established in terms of section 185 of the Act, is tasked with the administration of voluntary business rescue filings (section 129) and matters related therewith and has to date received many filings for

voluntary business rescue. A number of formal applications have also been made to court (section 131). Although there have been very few instances in which the courts have granted orders for business rescue, the judgments that have emanated from the courts have been informative and instructive in paving the way for the efficient application of business rescue.

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2. Does business rescue interrupt prescription?

If a person has a claim against the company and the enforcement of the claim is subject to a time limit, the time limit prescribed for the enforcement of such a claim will be suspended for the duration of the business rescue proceedings (section 133(3)).

3. Can a close corporation be placed under business rescue?

Section 66 (1A) of the Close Corporations Act 69 of 1984 provides that the business rescue provisions of the Act apply equally to close corporations as they do to companies. Read more on The Basics of Business Rescue [here](#).

Business rescue process

Speed is of the essence in the business rescue process. Very short time periods are set out in the new Companies Act, No. 71 of 2008 (the Act), which introduced business rescue to the South African business landscape, and it is important that all stakeholders have access to competent insolvency, business rescue & restructuring lawyers who can be called upon at short notice. Restructuring of companies in financial distress is on the increase globally. South African companies which are financially distressed or which trade in insolvent circumstances now have an opportunity to reorganise and restructure.

This has far-reaching effects on creditors; financial institutions; shareholders; employees and restructuring specialists. The purpose of business rescue in South Africa is to maximise the likelihood of the company continuing to exist on a solvent basis.

Key to business rescue will be the successful development and implementation, if approved by creditors, of a rescue plan to rescue the company by restructuring its affairs, business, property, debt, other liabilities and equity. Should this not be possible, the implementation of a plan should result in a better return for the company's creditors or shareholders, than would result from an immediate liquidation of the company.

Business Rescue and Insolvency

The members of the Werksmans Business Rescue and Insolvency team have carefully considered the new legislation and the manner in which business rescue proceedings are to be implemented. This includes advising on the manner in which companies should file for business rescue proceedings; the appointment of business rescue practitioners to supervise business rescue proceedings; as well as the duties and liabilities of all parties involved in the business rescue process.

The Purpose of Business Rescue

The purpose of business rescue is to maximise the likelihood of the company continuing in existence on a solvent basis. The key to business rescue will be the successful development and implementation, if approved by creditors, of a business rescue plan to rescue the company by restructuring its affairs, business, property, debt, other liabilities and equity. In the event that this is not possible, the implementation of a business rescue plan should result in a better return for the company's creditors or shareholders than would result from an immediate liquidation of the company.

Basics of Business Rescue

Restructuring of companies in financial distress is on the increase globally. In line with this trend, Chapter 6 of the new Companies Act, No. 71 of 2008 (the Act) introduces business rescue to the South African business landscape. The Werksmans guide to Business Rescue attempts to assist directors and creditors and sets out a broad overview of business rescue proceedings and the sections of the Act which will affect companies in financial distress. We further provide a flow chart of business rescue proceedings with the time periods required by the legislation in the implementation of the process.

We provide a business rescue and insolvency checklist which highlights the importance of when to apply for either business rescue or alternatively liquidation. The impact this decision will have on director's personal liability is also addressed and in particular, the consequences of directors trading a company recklessly, in a position of financial distress or in insolvent circumstances.

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. In a recent decision of the South Gauteng High Court, in the case of *Welman v Marcelle Props* 193 CC JDR 0408 (GST), the court stated that "business rescue proceedings are not for terminally ill close corporations.

Nor are they for chronically ill. They are for ailing corporations, which given time will be rescued and become solvent". This statement supports the contention that at the first signs of financial distress, a company should apply for business rescue. Once a company is more than "financially distressed", options other than business rescue become more attractive for ailing companies, such as liquidations or compromises.

Read more on The Basics of Business Rescue [here](#).

Download our [Business Rescue pocket guide](#).

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