WERKSMANS ATTORNEYS

INSOLVENCY & BUSINESS RESCUE

Business Rescue Practitioner in South Africa

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Business Rescue Practitioner

1. What is the role of the business rescue practitioner?

The business rescue practitioner is required, as soon as possible after appointment, to investigate the company's affairs, business, property and financial situation, and thereafter consider whether there is any reasonable prospect of rescuing the company (section 141(2)).

During business rescue proceedings, the practitioner must notify the company, the court and affected persons that there is –

- no reasonable prospect for the company to be rescued; or no longer reasonable grounds to believe that the company is financially distressed; or
- evidence, in the dealings of the company before the commencement of business rescue proceedings, of –
- voidable transactions or a failure by the company or any director to perform any material obligation relating to the company and the practitioner must direct the management of the company to take steps to rectify the problem; or
- reckless trading, fraud or other contravention of any law relating to the company, the practitioner must forward the evidence to the appropriate authority for further investigation and possible prosecution and direct the management to take any necessary steps to rectify the matter (including recovering any misappropriated assets of the company) (section 141(2)).

> *The business rescue practitioner has full management and control over the company. He or she may delegate certain functions to a director on the board of the company or to a person who was part of the pre-existing management of the company*

Read everything about Business Rescue Proceedings in South Africa.

2. What powers does a business rescue practitioner have during business rescue?

In terms of section 140 of the Act the business rescue practitioner has a number of powers. The business rescue practitioner has full management and control over the company. He or she may delegate certain functions to a director on the board of the company or to a person who was part of the pre-existing management of the company. The business rescue practitioner may also remove any person who formed part of the pre-existing management of the company from its office or appoint a person (who does not have any other relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship, or is related to a person who has such a relationship) as part of the management of a company (section 140). In some instances, the practitioner will need to obtain the approval of the court for an appointment.

Can a Business Rescue Practitioner and a Curator Bonis hold hands?

3. How is a business rescue practitioner appointed?

There are a number of ways in which a business rescue practitioner may be appointed –

- a company (ie the board) may, within five business days after the company has adopted and filed the resolution with CIPC (or such longer time as CIPC may allow on application to it), appoint a business rescue practitioner (section 129(3));
- if the court, after considering an application brought by an affected person, sets aside the appointment of a business rescue practitioner, the court must appoint an alternate practitioner recommended by, or acceptable to, the holders of a majority of the independent creditors voting interests who were represented in the hearing before the court (section 130(6));
- if a court, on application to it by an affected person, grants an order placing a company under business rescue the court may make a further order appointing an interim practitioner who satisfies the necessary requirements for appointment and who has been nominated by the affected person who applied to court. However, this appointment will be subject to ratification by the holders of a majority of the independent creditors voting interests at the first meeting of the creditors (section 131(5)); or
- the company, or affected person who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application to object to the appointment and set aside that new appointment (section 139(3)).

4. Does a business rescue practitioner need to have specific qualifications?

Section 138 of the Act regulates the qualifications required for a business rescue practitioner. In order to qualify as a business rescue practitioner, a person must be –

- a member in good standing of a legal, accounting or business management profession accredited by CIPC (section 138(1)(a)); and
- be licensed as such by CIPC (section 138(1)(b)).

From this, it appears that a person must satisfy both the above requirements for appointment. But regulation 126 of the Act states that a person who is part of an accredited profession need not be licensed by CIPC (Regulation 126(2)). CIPC has further indicated that they are not, at least for the meantime, accrediting certain professions for the purposes of business rescue appointments and instead are appointing and licensing business rescue practitioners on an ad hoc basis in accordance with section 138(1)(b).

In addition to the aforesaid, in terms of section 138, a prospective business rescue practitioner –

- must not be subject to an order of probation; must not be disqualified from acting as a director of a company in terms of section 69(8) of the Act;
- must not have any relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by such relationship; and
- must not be related to a person who has a relationship as contemplated above.

5. Are there certain categories of companies for which business rescue practitioners may take appointment?

Regulation 127 of the Act distinguishes between different categories of companies for the appointment of business rescue practitioners. A person will be appointed as a senior practitioner if immediately before being appointed as a practitioner, he or she actively engaged in business turnaround practice before the effective date of the Act or as a business rescue practitioner in terms of the Act, for a combined period of at least ten years. A senior practitioner can take appointment for a medium company (company with a public interest score between 100 and 500) or of a large company (company with a public interest score of 500 or more).

An experienced practitioner is one who immediately before being appointed as a practitioner, actively engaged in business turnaround practice before the effective date of the Act or as a business rescue practitioner in terms of the Act, for a combined period of at least five years. Such a person can take an appointment for a small company (company with a public interest score of less than 100) or for a medium company (company with a public interest score between 100 and 500).

A junior practitioner is one who immediately before being appointed as a practitioner either (i) has not previously engaged in business turnaround before the effective date of the Act or acted as a business rescue practitioner in terms of the Act; or (ii) has actively engaged in business turnaround practice before the effective date of the Act or as a business rescue practitioner in terms of the Act for a combined period of less than five years. Such person can take appointment for only small companies (company with a public interest score of less than 100) or as an assistant to an experienced or senior practitioner.

6. How is the public interest score calculated?

Regulation 26(2) of the Act sets out the manner in which the public interest is calculated. It provides that at the end of each financial year, the public interest score is calculated as the sum of the following –

- a number of points equal to the average number of employees of the company during the financial year;
- one point for every R1 million (or portion thereof) in third party liability of the company, at the financial year end; one point for every R1 million (or portion thereof) in turnover during the financial year; and
- one point for every individual who, at the end of the financial year, is known by the company –
    - in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
    - in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company.

7. Can a business rescue practitioner be removed from office?

In terms of section 139 of the Act, a business rescue practitioner may be removed from office either –

- by order of the court in terms of section 130(1)(b) on the basis of an affected person applying to court to set aside the appointment of a business rescue practitioner who has been appointed in terms of the board resolution on the basis that the business rescue practitioner either (i) does not satisfy the requirements for appointment (in terms of section 138); (ii) is not independent of the company or its management; or (iii) lacks the necessary skills, having regard to the company's circumstances; or
- upon the request of an affected person, by way of an application to court, or of the courts own accord, if the business rescue practitioner is (i) incompetent or fails to perform his duties; (ii) fails to exercise the proper degree of care in the performance of his functions; (iii) engages in illegal acts or conduct; (iv) no longer satisfies the requirements for appointment in section 138; or (v) if the practitioner is incapacitated and unable to perform the function of his office, and is unlikely to regain that capacity within a reasonable period of time (section 139).

8. Can a BRP, who has engaged with the company, creditors or shareholders, prior to the commencement of business rescue, take appointment as a practitioner?

Section 138 of the Act sets out the requirements for qualification as a business rescue practitioner. Section 138(1)(e) provides that "A person may be appointed as the business rescue practitioner of a company only if the person...(e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship". This is supported by section 130(1)(b) and section 139(2)(e) of the Act which make provision for the removal of a business rescue practitioner if he is either not independent of the company or its management or has a conflict of interest or lack of independence, respectively.

The words "independent" and "conflict of interest" are not defined by the Act and the interpretation will need to be elaborated upon by our courts. However, while there is no definition for these words, the Act does define the word "related or inter-related" in section 2. If our courts rely on the definition in section 2 of the Act to ascertain whether or not a practitioner is "independent", then a business rescue practitioner will not, merely by virtue of his prior engagement with creditors or shareholders, be held to lack independence. Something more some "other relationship" will need to exist.

We are of the view that prior consultation with the creditors and shareholders of the company will not necessarily preclude such a person from taking appointment later on as a business rescue practitioner of the company and does not affect the BRP's independence.

A business rescue practitioner should engage with the creditors and shareholders before taking appointment in order to ensure that there is a reasonable prospect that the company can be saved. Without engaging with such stakeholders, it is difficult to see how the practitioner would come to the conclusion that there is a reasonable prospect of rescuing the company if he or she is not certain as to whether or not the creditors or shareholders would support a business rescue plan and thus the rescue of a company

> *In terms of section 139 of the Act, a business rescue practitioner may be removed from office.*

9. How is a business rescue practitioner remunerated?

In terms of section 143 the business rescue practitioner is entitled to charge the company for the remuneration and expenses incurred by the practitioner in accordance with the tariff prescribed by the Act.

The basic remuneration of a BRP is to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, and may not exceed –

- R1,250 per hour (maximum of R15,625 per day) (inclusive of VAT) for a small company;
- R1,500 per hour (maximum of R18,750 per day) (inclusive of VAT) for a medium company; or
- R2,000 per hour (maximum of R25,000 per day) (inclusive of VAT) for a large company or a state-owned company.

In addition to its remuneration as determined by the tariff, the business rescue practitioner may also conclude a contingency agreement with the company for further remuneration if the business rescue plan is adopted or if it is adopted within a certain period of time or if any particular result or combination of results is attained

This contingency agreement will only be binding if it is approved by (i) the holders of a majority of the creditors' voting interests, present and voting at a meeting called to consider the agreement; and (ii) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement. Any creditor who votes against such an agreement may make application to court, within ten business days after the date on which a vote was taken, for an order setting aside the proposed agreement on the basis that the agreement is not just and equitable or not reasonable having regard to the financial circumstances of the company.

In addition to remuneration, a practitioner is also entitled to be reimbursed for the actual costs of any disbursements incurred by the practitioner, or expenses incurred by the practitioner, to the extent reasonably necessary to carry out the practitioner's functions and to facilitate the conduct of the company's business rescue proceedings.

10. What are the liabilities of a BRP during business rescue?

Section 140(3) provides that during business rescue the business rescue practitioner –

- is an officer of the court and is therefore obligated to report to the court in accordance with any applicable rules or orders;
- has the responsibilities, duties and liabilities which are incumbent upon directors, in terms of sections 75, 76 and 77 of the Act; and
- will not be liable for any act or omission performed in good faith in the course of the exercise of the powers and during the performance of his functions as a practitioner but may be held liable in terms of any law for any act or omission that amounts to gross negligence.

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