

Business Rescue Proceedings in South Africa

20 June 2022 14 min read

Business Rescue Proceedings

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1. 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.

Everything you need to know about the [basics of Business Rescue](#).

2. How is a company placed in business rescue?

There are two main ways in which a company can be placed in business rescue, namely:

- When the board of directors of a company resolves that the company voluntarily commence business rescue proceedings and be placed under the supervision of a business rescue practitioner (section 129 of the Act); and
- When an affected person makes a formal application to court for an order placing the company under supervision and commencing business rescue proceedings (section 131 of the Act), provided the company has not already been placed under business rescue in terms of section 129, on the basis that:
 - The company is financially distressed;
 - The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters; or
 - It is otherwise just an equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company.

3. How does a company practically voluntarily commence business rescue proceedings?

The company must file Form CoR123.1 with the Companies and Intellectual Property Commission ("[CIPC](#)") and this must be accompanied by the resolution of the board of directors of the company (in which it resolves to commence business rescue proceedings, and if it has a business rescue practitioner in mind at the time, to appoint a certain person as the practitioner) together with a statement setting out the

facts upon which the resolution was founded. Thereafter, the company must comply with a number of notice and publication requirements prescribed by the Act.

4. What preliminary actions are required of a company that commences voluntary business rescue?

In terms of section 129(3) & (4), once a company has commenced business rescue proceedings, pursuant to the passing of a board resolution in terms of section 129, the company must:

- Within five business days of filing the Form CoR123.1, resolution and statement, with CIPC,
 - Publish notice of the resolution, together with a sworn statement as to the reasons why the company is financially distressed, detailing the prospects of rescuing the company, to all affected persons;
- And appoint a business rescue practitioner; after appointing a business rescue practitioner,
 - file a notice of the appointment of the business rescue practitioner within two business days with CIPC; and
 - Publish a notice of the appointment of the business rescue practitioner within five business days after the notice is filed.

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5. What happens if the time periods in respect of voluntary business rescues are not adhered to?

With regard to voluntary business rescues, in terms of section 129(5)(a), if a company fails to comply with the provisions of sections 129(3) and (4), the resolution lapses and is a nullity and the company may not file a further resolution for a period of three months after the date on which the resolution was adopted, unless a court, on good cause shown, approves of the company filing a further resolution (section 129(5)(b)).

Further, an affected person can make application to court in terms of section 130(1)(a)(iii) to set aside the resolution on the grounds that the company has failed to satisfy the procedural requirements set out in section 129.

6. How can one object or oppose a business rescue resolution?

Section 130 provides that at anytime after the adoption of a business rescue resolution, an affected person may apply to court for an order –

- Setting aside the resolution on the grounds that (i) there is no reasonable basis for believing that the company is financially distressed; (ii) there is no reasonable prospect for rescuing the company; or (iii) the company has failed to satisfy the procedural requirements in section 129;
- Setting aside the appointment of the practitioner on the grounds that the practitioner (i) does not satisfy the requirements 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
- Requiring the practitioner to provide security (in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected person).

A director of a company that votes in favour of a resolution may not apply to court to set aside the resolution or the appointment of the business rescue practitioner unless such person can satisfy the court that he acted in good faith on the basis of information that has since been found to be false or misleading (section 130(2)). Each affected person has a right to participate in a hearing contemplated by this section (section 130(47)).

7. What goes into the papers for an application to court for business rescue?

The decision of the Western Cape High Court, Cape Town, in the case of Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA423 (WCC) was instructive about the nature of the evidence that must be placed before a court in order to ensure that an applicant indicates that there is a reasonable prospect that the company can be rescued and to ensure that an application for business rescue is successful.

Judge Eloff dismissed the application for business rescue. He held that "...it is difficult to conceive of a rescue plan that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable.

A business plan which is unlikely to achieve anything more than to prolong the agony... by substituting one debtor for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice". The court went on to state that the applicant must deal with "concrete and objectively ascertainable details in support of business rescue and which facts are beyond mere speculation". These facts should include:

- "the likely costs of rendering the company able to commence with its intended business or to resume the conduct of its core business";
- The availability of "cash resources" to enable the company to meet its daily expenses and the nature of the funding on which the company will rely;
- "the availability of any other necessary resources, such as raw materials and human capital"; and
- "the reasons why the proposed business rescue plan will have a reasonable prospect of success".

The court went on to state that without such details, a court is not only unable to consider the prospects of the company continuing in existence on a solvent basis but is also unable to consider the alternative aim of securing a better return for the creditors of the company than would arise from a liquidation.

Similar sentiments were expressed by the courts in the case of *Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd & Others* 2012 (2) SA 378 (WCC), *Swart v Beagles Run Investments 25 (Pty) Ltd & Others* (four creditors intervening) 2011 (5) SA 422 (GNP) and *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd & Another* (unreported case no 25051/2011, 22 February 2012).

The extent to which it is reasonably possible to include all the information that the court sets out in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* in all business rescue applications is a matter that will need to be dealt with in time by our courts.

8. How does one oppose a business rescue application to court?

Business rescue proceedings are generally launched on an urgent basis and thus the time periods ordinarily applicable to applications will generally not apply.

Any affected person on whom an application for business rescue has been served, may oppose such application in the manner in which any other application is ordinarily opposed by serving and filing a notice of intention to oppose the application and thereafter serving an answering affidavit on the applicant in accordance with the time periods set out in the notice of motion.

Any affected person opposing a business rescue may either request the court to dismiss the application together with any other appropriate order, including an order placing the company under liquidation.

A business rescue plan that is likely to merely prolong the agony of a company by substituting one debt for another without any glimmer of hope is not likely to suffice.

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

9. How long do business rescue proceedings last?

Section 132 provides that business rescue proceedings should last for a period of three months. It is not clear what the words "business rescue proceedings" intend to cover but it is understood that during the three months, the business rescue practitioner must do his job by convening meetings for affected persons, consulting on the business rescue plan and thereafter implementing the plan if it is approved in accordance with the Act. If business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must –

- prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and

- deliver a report and each update in the prescribed manner to each affected person and to (i) the court (if the proceedings have been the subject of a court order); or (ii) CIPC, in any other case

The reporting requirements that come with extending the time frames are burdensome. These provisions provide business rescue practitioners with an incentive for conducting the process and implementing the plan, in the shortest possible time, but in any event within the three month period.

10. When does business rescue begin?

In terms of section 132 of the Act business rescue proceedings commence when –

- the company (i) files a resolution to place itself under supervision in terms of section 129 of the Act; or (ii) applies to court for consent to file a resolution in terms of section 129(5)(b) (i.e. if a company fails to comply with the provisions of subsections (3) and (4) it must approach the court for leave to file another resolution if it wishes to do so within the three-month restricted period); or
- a person applies to court for an order placing the company under supervision in terms of section 131(1); or
- a court makes an order placing a company under supervision during the course of liquidation proceedings or proceedings to enforce a security interest (section 131(7))

11. How does the business rescue process unfold?

Once a company commences business rescue proceedings either voluntarily (by way of a resolution in terms of section 129) (and in such a case, the preliminary actions have been taken) or by an order of court (on application by an affected person in terms of section 131), the following actions are prescribed by the Act –

- the practitioner must investigate the affairs of the company as soon as possible after the commencement of business rescue (section 141);
- within ten business days after being appointed, the practitioner must convene a meeting of the creditors and a meeting of the employees and advise the meeting, among other things, of the prospects of rescuing the company (section 147 and 148);
- the business rescue plan must be published by the company within twenty-five days after the date on which the business rescue practitioner was appointed (section 150);
- and the business rescue practitioner must convene a meeting of the creditors and any other holders of a voting interest, for the purpose of considering the proposed plan, within ten business days of the publication of the business rescue plan (section 151).

12. When do rescue proceedings end?

In terms of section 132 of the Act business rescue proceedings end when –

- the court sets aside the resolution or order that began the business rescue proceedings or when the court converts business rescue proceedings into liquidation proceedings;
- the business rescue practitioner files a notice (Form CoR125.2) of termination of business rescue proceedings with CIPC; and
- a business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the Act or a business rescue plan has been adopted and the business rescue practitioner has subsequently filed a notice of substantial implementation of the plan (Form CoR125.3).

13. What happens if a company does not commence business rescue proceedings when it should?

If a company is financially distressed within the meaning of the Act but the board of directors of the company has not passed a resolution for the commencement of business rescue proceedings, then the board must deliver a written notice to each affected person setting out the test for financial distress and the extent to which it applies to the company and the reasons why the board has taken a decision not to pass a resolution for the commencement of business rescue proceedings. The notice to affected persons is commonly referred to as the "section 129(7) notice" as it is set out in section 129(7) of the Act and the form used to notify affected person is Form CoR123.2 (Notice of Decision Not to Begin Business Rescue).

A decision to send out a section 129(7) notice must be well-considered and exercised with caution, as such a notice advises the world at large that the company is financially distressed and on the verge of insolvency. This notice may give rise to a number of unintended consequences both in respect of directors and creditors of the company.

14. 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 business 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 questions is in the affirmative, business rescue proceedings are likely to be successful. If not, liquidation may be the preferred alternative.

