

Business Rescue Trends in 2024 and Beyond

29 February 2024 7 min read

Brandon Starr – Candidate Attorney and Caitlin Steytler – Candidate Attorney

With looming elections now scheduled for 29 May 2024, persistent loadshedding, elevated interest rates and recent tax hikes in an already battered economy, businesses in South Africa are now confronted with escalating pressures and uncertainty. As continued financial pressure is brought to bear on corporate South Africa, there is no doubt that we are going to see an escalation in companies having no alternative, but to consider a formal business rescue process, or alternatively liquidation. It is inevitable that companies will continue to grapple with financial distress, necessitating the initiation of either an informal restructuring process or formal business rescue proceedings.

Business rescue proceedings are not limited to any particular sector, and filings can occur across various industries and sectors. According to CIPC's recent status report released in February 2024, there was a significant uptick in manufacturing entities initiating business rescue proceedings in the final quarter of 2023. 17% of the entities that commenced business rescue proceedings between October 2023 and December 2023 were in the manufacturing industry, with the agriculture, forestry and fishing industry following closely with 13.2% of filings.

In the latter quarter of 2023, a pronounced number of entities in the mining sector commenced business rescue proceedings after having determined that they were financially distressed.

Pressure in the mining sector was also highlighted at the recently convened 2024 Mining Indaba in early February, and where attendees were apprised of a grave issue confronting the industry: namely a significant deficiency in skilled labour. This critical shortfall of a pool of workers to service the mining industry, has been identified as a primary impediment hindering the mining sector's operational efficiency into 2024. Opening the Mining Indaba, President Cyril Ramaphosa highlighted several obstacles hampering the mining sector's performance. He recognised that alongside the talent shortage, energy deficits and transportation demands were also of paramount concern. These challenges may explain the concerning trend of mining entities commencing business rescue in 2023.

A prominent player in the global trade credit and potential risk arena, Allianz Trade, has issued a cautionary statement highlighting the substantial barrier to economic growth posed by South Africa's continuous energy crisis. In 2023, the lack of reliable electricity supply emerged as one of the most costly challenges for businesses, a trend expected to persist and potentially worsen in 2024. The debilitating rotational power outages are unlikely to be resolved within the coming 12 months, despite promises from the government to expedite resolution.

For financially distressed companies grappling with these challenges, opting for business rescue remains an attractive alternative as opposed to outright liquidation. Business rescue proceedings were introduced in South Africa by the Companies Act 71 of 2008, which came into force in 2011. The aim of business rescue is to restructure the affairs of a financially distressed company in such a way that maximises the likelihood of the company continuing in existence on a solvent basis. If this cannot be achieved, the secondary objective is to restructure the business to yield better returns for the creditors or shareholders of the company than would ordinarily result from immediate liquidation.

The rehabilitation of a financially distressed company is facilitated through the temporary supervision of the company, and the management of its affairs, business and property by a business rescue practitioner. It is the responsibility of the business

rescue practitioner to develop and implement a business rescue plan. If approved, this plan aims to rescue the company through the restructuring of its business, property, debt, affairs, other liabilities and equity.

A further consequence upon commencement of business rescue proceedings is the temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession. The purpose of the moratorium is to grant companies temporary "immunity" from legal proceedings initiated by creditors for claims that would otherwise have been due and actionable.

The yardstick for determining whether a company should undergo business rescue proceedings is whether or not the company is financially distressed. In terms of section 128(1)(f) of the Companies Act, a company will satisfy the financial distress test if:

- It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (commercial insolvency); or
- It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (factual insolvency).

Section 7(k) of the Companies Act provides 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. So in having introduced business rescue in 2011, South Africa made a marked shift from a liquidation-orientated culture to one of business rescue, with the aim of reintegrating financially distressed companies into the market on a solvent basis.

The recent CIPC status report reveals that of the entities that terminated business rescue proceedings in the final quarter of 2023, 36% were successfully rescued as a result of substantial implementation of the business rescue plan. This is a very positive statistic and one which supports the business rescue process in South Africa. The resulting effect is that these rescued companies are returned into the SA economy on a solvent basis and where these entities would be ready to continue to trade with suppliers and consumers.

30% of financially distressed companies could not continue in existence on a solvent basis, and filed for liquidation in the fourth quarter of 2023. South Africa has witnessed 109 businesses close down in the first month of 2024. According to Stats SA's statistical release on liquidations dated 26 February 2024, there was a 34.6% increase in the total number of liquidations in January 2024, as compared to January 2023. The majority of liquidations were voluntarily commenced, but 11 of the 109 were placed into liquidation by compulsory applications to court. 28.4% of the entities that were liquidated in January this year were in the financing, insurance, real estate and business services sectors, followed by 15.5% in the trade, catering and accommodation sector.

The key to effectively rehabilitating a financially distressed company (and avoiding liquidation) lies in commencing business rescue proceedings at the earliest indication of financial distress, within the meaning of the Companies Act. If the company has progressed too far along the path of financial distress, the only remaining option may very well be liquidation through the sale of assets, subsidiaries, and businesses to external buyers. If entities delay taking action and only pursue business rescue when the company is already deeply entrenched in financial distress, the prospects of successfully implementing an operational/financial restructuring in the business rescue process becomes limited and difficult to achieve.

To maintain and ideally increase the 36% success rate of rescued companies, the crucial factor will always be early intervention. Directors of companies must buy into the notion that appointing a practitioner to oversee the company as early as possible in its distressed phase, will enable proactive measures being taken to achieve a return to solvency through a successful business rescue process. This approach facilitates the rescue of the business, thereby preserving the majority of jobs, which will allow companies to embark on a process of a 'fresh start', and which averts the negative outcome of full-blown liquidation process.



Eric Levenstein

Head of Insolvency & Business Rescue

[View Profile](#)