

Is your business struggling? Liquidation or Business Rescue are not the only options: The Section 155 Compromise

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Introduction

When your business is struggling and creditors are knocking down the door, the primary focus has traditionally been on liquidation and business rescue as the only options for addressing financial distress within companies. However, Section 155 of the Companies Act, 2008 (hereafter referred to as "the Act"), presents a compelling alternative that should not be overlooked. This article presents the nuances of Section 155 and its potential as a viable alternative to liquidation or business rescue in South Africa.

Understanding Section 155

Section 155 of the Act grants the court the authority to issue orders that effectively compromise or alter the rights of creditors and shareholders. This section provides a legal framework for a company to restructure its financial obligations and equity structure outside the confines of formal business rescue proceedings or liquidation. Importantly, it can be employed proactively by a solvent company to implement financial reorganization measures. For a section 155 Compromise proposal to be accepted by a court, all the procedural requirements must be met, otherwise the application may be set aside. In **Commissioner of SARS v Logikal Consulting (Pty) Ltd and others, 2018 ZAGPPHC** para 54, and para 82 as obiter, the court stated that *'all creditors to the compromise must be notified of the application so that they can oppose it even if they voted in favour of the compromise. The failure to notify or serve these creditors puts the sanction compromise and the entire compromise itself at risk of being set aside at a later date'*.

Authority and Legal Foundation

Section 155 of the Companies Act is firmly grounded in the principles of equity and fairness. It recognizes the need for flexibility and adaptability in corporate affairs, especially during times of financial distress. In **DH Brothers Industries (Pty) Ltd v Gribnitz NO and others 2013 JOL 31017 (KZP) at 65** the court stated, unlike Business Rescue, the section 155(9) scheme of arrangement or compromise under that section does not affect the liability of any person who is a surety of the company. In **Trevo Capital Ltd and others v Steinhoff International Holdings (Pty) Ltd and others [2021] ZAWCHC 123 (WCC)** para 6, the court stated *"If any of the creditors that the company has entered into a section 155 compromise or 'scheme of arrangement' with are not a 'class of creditors' as envisaged by section 155 of the Companies Act, an interested party could challenge the section 155 proposal by seeking a declaratory order from the court confirming that the agreement was done between the company and creditors not of the required class."*

Section 155 can be employed to restructure a company's financial obligations in a manner that is just and equitable. The courts have recognized that this provision promotes commercial flexibility while protecting the rights of stakeholders.

The Key Advantages of Section 155

- 1. **Preservation of Going Concern Value:** One of the most significant advantages of Section 155 is its ability to preserve the going concern value of a company. It allows businesses to restructure their debt and equity without the necessity of winding up operations, which is often the result of liquidation.
- 2. **Flexibility in Debt Restructuring:** Section 155 grants the court broad discretion to approve schemes of arrangement that can modify or compromise creditors' claims. This flexibility can be invaluable in crafting innovative solutions tailored to the unique circumstances of each case.
- 3. **Protection of Shareholder Interests:** Unlike liquidation, where shareholders typically lose their stake, Section 155 allows for the preservation of some or all of the shareholders' interests, depending on the specific arrangements approved by the court.
- 4. **Enhanced Creditor Recovery:** Section 155 can lead to higher recoveries for creditors compared to a liquidation scenario where assets may be sold at distressed prices.
- 5. **Reduced Costs:** Business rescue proceedings can be costly and time-consuming. Section 155 may offer a more cost-effective and efficient alternative for companies facing financial difficulties.

Conclusion

In conclusion, Section 155 stands as a potent and underutilized tool in the realm of corporate restructuring and insolvency in South Africa. It empowers companies to proactively address financial distress, safeguard going concern value, and to seek equitable solutions for all stakeholders.

As legal practitioners and corporate advisors, it is incumbent upon us to explore the full spectrum of options available to our clients when navigating financial challenges. Section 155 offers a path that aligns with the principles of fairness and adaptability in the dynamic landscape of corporate affairs. Embracing this alternative can foster the resilience and sustainability of South African businesses, ultimately benefiting both the corporate sector and the broader economy.



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