



INSOLVENCY & BUSINESS RESCUE

Procedural certainty in business rescue: Competing commencement processes

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Business rescue has become a cornerstone of South African corporate insolvency law. Introduced by Chapter 6 of the Companies Act 71 of 2008 ("the Act"), it seeks to rehabilitate financially distressed companies while preserving value for creditors, employees and shareholders. For creditors seeking to place a company under supervision, boards of distressed entities may try to obstruct the process, which runs the risk of undermining the purpose of business rescue proceedings.

A recent judgment of the North West Division of the High Court provides important guidance on two deceptively simple but significant questions: when does voluntary business rescue actually commence, and can a voluntary business rescue be used to thwart a pending compulsory business rescue application? The judgment provides welcome certainty for creditors and reinforce the integrity of South Africa's business rescue framework.

Zizwe Open Cast Mining Proprietary Limited ("**Zizwe**") rendered contract mining services to Lethabo Minerals Proprietary Limited ("**Lethabo**"), a holder of a mining right over a chrome mine near Rustenburg. Following the termination of their commercial relationship, Lethabo acknowledged that there was a substantial debt owing to Zizwe that remained unpaid. Zizwe instituted an urgent compulsory business rescue application under section 131(1) of the Act.

Lethabo filed an answering affidavit that was conspicuously limited in scope. The answering affidavit failed to dispute either the indebtedness or its quantum and produced no financial information demonstrating solvency or a viable path to recovery. Furthermore, Lethabo did not (at that stage) take issue with either the qualifications or the independence of the business rescue practitioner nominated by Zizwe.

Shortly before the hearing, Lethabo informed both Zizwe and the Court that Lethabo's board had adopted a written resolution two days prior to the hearing voluntarily commencing business rescue proceedings. Lethabo stated that the requisite CoR123.1 form had been lodged with the Companies and Intellectual property Commission ("**CIPC**"), thereby commencing business rescue proceedings by operation of law and rendering Zizwe's application moot.

Section 129 of the Act permits a company's board to resolve to commence voluntary business rescue where the company is financially distressed and there is a reasonable prospect of rescuing it. The resolution must, however, be filed with the CIPC, together with the prescribed notices and supporting documentation.

First mover advantage

The first substantive issue before the Court was whether the mere electronic submission of documents to the CIPC constitutes "*filing*" for purposes of section 129 of the Act. At the time of the commencement of the hearing, Lethabo had uploaded the relevant documents electronically, but the CIPC had not yet reviewed, accepted or confirmed the filing. Formal confirmation from the CIPC was only issued during the course of the hearing.

In terms of section 132(1) of the Act, business rescue proceedings commence either when (1) a company files a resolution to place itself under supervision in terms of section 129(3) of the Act or (2) an affected person applies to court for an order placing the company under supervision in terms of section 131(1). In relation to the latter instance, previous court decisions have held that in order for a compulsory business rescue application to be made, the application must be issued by the Registrar, served on the company and CIPC, and that affected persons are notified.

Zizwe's counsel argued that Chapter 6 of the Act prohibits a board from passing a voluntary business rescue resolution as contemplated in terms of section 129 once a compulsory application is made. While the Court did not agree with this contention, it did accept that the Act does not permit parallel business rescue processes. Instead, the commencement date of business rescue proceedings is critical because it informs the date of inception of the moratorium, the practitioner's authority and the rights of creditors.

Section 129(2)(b) of the Act sets out that a board resolution to commence business rescue is of no force and effect until it has been filed with the CIPC. In this regard, CIPC Practice Note 3 of 2021 was issued in terms of regulation 4 of the Regulations to the Act, which confirms that the date of filing of business rescue will be the date that the relevant information is confirmed as correct by a member of the CIPC team. Furthermore, a confirmation letter from the CIPC is required before a voluntary business rescue resolution can be considered filed, within the meaning of section 129(2)(b). In this case, the CIPC certificate of confirmation was only forthcoming during the hearing, and clearly indicated a commencement date subsequent to the date on which Zizwe's compulsory business rescue application was made.

Tactical or abusive?

The Court considered whether the manner in which Lethabo's board acted constituted an abuse of the business rescue procedure. In circumstances where Lethabo's board had been aware of the pending business rescue application for at least two weeks prior to the hearing, and where Lethabo's answering affidavit did not mention any intention to pursue voluntary business rescue or an objection to Zizwe's nominated practitioner, the Court was unsurprisingly critical of Lethabo's conduct.

The Court found this conduct constituted an abuse of process: the resolution was adopted not in genuine pursuit of rehabilitation, but as a tactical manoeuvre to retain control over the identity of the business rescue practitioner and to derail the court-driven proceedings. As such, the Court held that it was just and equitable to set aside the resolution commencing the business rescue proceedings.

Conclusion

The judgment has several practical implications. First, boards of directors creditors should not assume that a board resolution or proof of electronic submission is sufficient to commence business rescue proceedings. They should verify that the CIPC has formally accepted and confirmed the filing. Second, boards seeking to secure a tactical advantage by adopting a resolution to thwart a compulsory business rescue application must understand that this is a high risk and low reward strategy. Third, the judgment confirms that Chapter 6 is not a tactical instrument: directors who invoke it for purposes other than genuine rehabilitation expose themselves to adverse findings.

Ultimately, this decision reinforces the procedural integrity of business rescue, while providing much-needed certainty for creditors, companies and practitioners alike.



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