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The Status of Business Rescue in South Africa

8 February 2022 *7 min read*

Business Rescue in South Africa 2022

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With the year 2021 in the rear-view mirror, one reflects on the Covid-19 pandemic, its associated waves, lockdowns, and restrictions, as well as a struggling world economy, which have all contributed to challenging conditions for businesses in South Africa. Notwithstanding these less-than-ideal circumstances, South African businesses have shown resilience, by adapting to and overcoming the pandemic's novel challenges. Despite this, certain companies inevitably experience financial distress and opt to file for business rescue.

In this publication, we take a look at the latest statistics on business rescue in South Africa, as set out in the Business Rescue Proceedings Report, recently issued by the Companies and Intellectual Property Commission ("CIPC"). The purpose of this CIPC report is to provide statistical overviews and data comparisons of business rescue filings in South Africa, from the inception of business rescue proceedings (on 1 May 2011) up to 31 December 2021. This publication is aimed at providing a useful snapshot of business rescue in South Africa, in view of the latest statistics.

1. What is business rescue?

Business rescue proceedings are proceedings aimed to facilitate the rehabilitation of a company that is financially distressed by providing for – the

- temporary supervision of the company, and the management of its affairs, business and property, by a business rescue practitioner;
- a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession;
- and the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities and equity (section 128(1)(b)).

2. What is the aim of business rescue in South Africa?

The aim/purposes of business rescue plan are to restructure the affairs of a company in such a way that either maximizes the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company (section 128(1)(b)(iii)).

3. What is a business rescue practitioner?

A business rescue practitioner is a person appointed, or two or more persons jointly appointed, to oversee a company during business rescue. While the Act defines a business rescue practitioner as one or more persons, the business rescue provisions of the Act do not necessarily refer to or support joint appointment. Further, the word "person" in the Act includes a juristic person. It is therefore arguable that a company can take appointment as a business rescues practitioner (section 128(1)(d)).

4. What is an affected person?

Affected persons are important role players in the business rescue process. An affected person is a shareholder, creditor, employee (or their representative) or a registered trade union representing employees of the company. Affected persons have various rights throughout the business rescue process (section 128(1)(a)).

5. What is the test for business rescue?

The test for whether or not a company should be placed in business rescue is whether or not the company is financially distressed. The Act defines the words "financially distressed" (section 128(1)(f)) to mean that:

- 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).

Active business rescues

Based on the latest statistics from the CIPC, there are 1,658 active business rescue proceedings in the country, which represents 39% of all business rescue proceedings commenced as at 31 December 2021. About 18% of business rescue proceedings have resulted in their respective business rescue plans being substantially implemented, whilst only 511 ended up in liquidation. Most business rescues, however, end by way of the filing of notices of termination by the respective business rescue practitioner.

Types of companies that are placed into rescue

The overwhelming majority of companies that make use of the business rescue mechanism are private companies. As at 31 December 2021, private companies made up 69% of the companies that were placed into business rescue proceedings. Since business rescue's inception, only 97 public companies (2%) and 3 state-owned companies (0.07%) were placed under business rescue supervision. It must be noted, however, that during the 2021-2022 period, only 257 companies were placed into business rescue. This number is significantly less than the 373 business rescues, recorded during both the 2019-2020 and 2020-2021 periods.

Provinces

Majority of business rescue filings occur in Gauteng, followed by the Western Cape and Mpumalanga. Read more on The Basics of Business Rescue.

Reasons for business rescue terminations

The majority (55%) of business rescue terminations occur because the entity in question is not financially distressed. In close second (33%), business rescues are terminated by business rescue practitioners, in order for the entity in question to commence liquidation proceedings. Only in a limited number of circumstances do business rescues terminate on the basis that the relevant business rescue plan is not accepted (4%).

Substantial Implementations and Liquidations

From the inception of business rescue, only about 18% of business rescues end by way of the filing of a notice of substantial implementation of the adopted business rescue plan. On the other hand, only about 12% of business rescues were converted into liquidations by way of court orders.

Volume of Business Rescue Proceedings

During the period 1 April 2021 through 31 December 2021, 257 companies filed for business rescue. In comparison, 280 companies filed for business rescue during the period 1 April 2020 through 31 December 2020. Accordingly, the number of new filings for business rescue has decreased during the abovementioned period of 2021.

Business Rescues vs Liquidations

The statistics indicate that more companies are liquidated than placed into business rescue. This trend is not unique to 2021, as this was also observed in 2020. For the period 1 April 2020 through 31 December 2020, 280 companies were placed into business rescue, whilst 1,657 companies were placed into liquidation. In contrast, for the period 1 April 2021 through 31 December 2021, 256 companies were placed into business rescue, whilst about 1,973 companies were placed into liquidation.

Industries

Business rescue proceedings are utilised by companies engaged in a wide variety of industries. For the period 1 April 2021-31 December 2021, we have seen, in the main, fallout (in descending numbers) in the manufacturing; agriculture, forestry, and fishing; construction, and wholesale industries. It is worth noting, however, that there have been fewer filings for business rescue in the previously "hard-hit" accommodation and food service; arts, entertainment and recreation; real estate, and wholesale industries. The decrease in filings in these industries (in comparison with the numbers from the 2020-2021 period) is most probably due to the easing up of Covid-19 restrictions that previously affected those specific sectors.

Business rescue in South Africa conclusion

In view of the information set out above, it is apparent that business rescue proceedings are still an option for financially distressed companies in South Africa. However, it is evident that there has been a decrease in the number of filings for business rescue, in comparison with the numbers observed over the 2020-2021 period.

This is without a doubt indicative of the resilience of businesses in South Africa, as well as the return to normal business operations. However, having said this, it is important not to view numbers in isolation. Whether we will see an increase in filings for business rescue in 2022, or a further decrease, remains to be seen.

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