

The Status of Business Rescue in South Africa – October 2022

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2022 started off with positive sentiment all round. Covid numbers had drastically reduced, masks were coming off in South Africa and we were all hoping for business as usual. As the threat of Covid-19 gradually receded, economies looked to be recovering once again. With reduced curbs on the movement of goods and people, it was expected that a return to pre-Covid economic activity was assured.

However, the global economy has since run into headwinds in 2022, with many countries experiencing significant levels of inflation, interest rate hikes, supply chain constraints, fuel price hikes and unemployment. Socio-political events have contributed to this picture, with the ongoing conflict in the Ukraine – passed through to the global consumer. The cost of power supply in Europe and the UK becoming of increasing concern.

As part of an interconnected global economy, South Africa has not been spared these challenges, and has also suffered unique difficulties such as loadshedding and runaway consumer price inflation. In sum, while we are a long way from the panicky economic times of 2020, business and consumers in South Africa still face serious difficulties.

The recently published report – *Status of Business Rescue Proceedings in South Africa* published by the [Companies and Intellectual Property Commission \(CIPC\)](#), analyses the state of play in business rescues, up to 30 June 2022.

The purpose of the CIPC report is to provide a statistical overview and data comparisons of business rescue filings in South Africa, from the inception of business rescue proceedings (on 1 May 2011) up to 30 June 2022. This publication is aimed at providing a useful snapshot of business rescue in South Africa, having regard to the latest statistics.

Business rescue – what it is, how it works, and what it is meant to do

Business rescue is a form of corporate rescue created by the [Companies Act 71 of 2008](#), which came into force in 2011. Business rescue entails the temporary supervision of a company facing financial distress, aimed at facilitating the rehabilitation of the company in order for it to trade out of financial distress on a solvent basis.

If this cannot be achieved, business rescue is aimed at delivering a better pay out to creditors than would have been the case had the company been placed into liquidation. The company is supervised by a business rescue practitioner, who manages the company's affairs, business and property during the restructuring of the company in the rescue process.

A key duty of the business rescue practitioner is 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.

Business rescue proceedings also entails a moratorium (stay) on the rights of claimants against the company in business rescue, in order to allow it breathing space to recover. The process has as its primary objective – the public policy goal of saving companies – and jobs – instead of simply consigning distressed companies to the scrap heap of liquidation.

In order to enter into business rescue proceedings, a company must satisfy the financial distress test set out in section 128(1)(f) of the Companies Act. The statute defines the test as follows –

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- June 2022

From the inception of business rescue in 2011, and according to CIPC'S status report, there are currently 1649 active business rescue proceedings. Approximately 4370 companies have entered business rescue, with 19% reaching substantial implementation. From the inception of business rescue, only 546 business rescues have ended in liquidation.

During the course of this year, 63 companies entered the business rescue process. Overwhelmingly, the companies that enter into business rescue are private companies (80%) followed by close corporations at 15%. So far, despite ailing balance sheets and diminished financial support from [National Treasury](#) (particularly since Covid loan support has come to an end), no state-owned company have entered into business rescue proceedings this year.

Furthermore, there have been 15 notices of substantial implementation of the adopted business rescue plan filed this year, indicating that business rescue remains a viable option for financially distressed companies.

Even though 2022 is far from over, there are significantly fewer new business rescue proceedings this year, when compared to last year. This represents a further decline in the number of business rescue proceedings since 2019-2021.

While the slowing of the number of business rescue proceedings could indicate improving business conditions, a glance at the Statistics South Africa Liquidations Report for August 2022 (StatsSA Report) indicates that this is far from the truth. When comparing the period, August 2022 and August 2021, the number of liquidations has soared by 44.8%.

This indicates that companies may be assessing their financial position too late, with the conclusion that there is no reasonable prospect of a successful rescue. These companies had little alternative, but to file for liquidation.

Additionally, far more companies are liquidated than enter business rescue. This is not an anomaly, and has been a consistent trend since 2019. In August 2022 alone, more than triple the number of companies were liquidated, than were placed in rescue.

Reasons for the termination of business rescue

The majority (54%) of termination notices filed in business rescue proceedings are due to the entity no longer being financially distressed. Further, business rescues are terminated 30% of the time by the business rescue practitioners in order for the company to commence liquidation proceedings. This would indicate a business rescue process that has not worked and where the business rescue process had to be converted into liquidation.

Industries/Sectors

Clearly, business rescue proceedings are sector agnostic, and a filing may take place in any industry or sector. As appears from CIPC's status report, for the period 1 January 2022 to 30 June 2022, there have been a large number of construction entities that have commenced business rescue proceedings. Business rescues have mostly impacted companies in the wholesale and retail trade, and in the manufacturing sectors.

Sectors that were expected to be casualties of financial fallout caused by the ongoing effect of lockdowns, such as entertainment and recreation, accommodation and food services (hospitality), have seen low numbers of business rescue proceedings this year. This is reflective of an industry that stood fast, treaded water and survived the financial impact of the pandemic, notwithstanding diminished revenue in that sector. With increased tourism expected in the busy holiday season in the months ahead, hospitality might very well see a significant bounce back.

In the period 2019/2021/2022 we have seen major business rescue filings in company's such as Edcon, SAA, Comair and Ster-Kinekor. Clearly, we would have expected to see more business rescue filings in the period. This did not happen. Edcon (sale of its businesses to TFG and Retailability), SAA (going through its sales process with the Takatso Consortium) and Ster-Kinekor have exited from their business rescue proceedings.

There have been further filings in Andusilite Resources Mine, Optimum Coal Mine, Black Chrome Mine, Rebosis (listed property sector) and Mango Airlines. Comair and SA Express went into rescue and ended up in liquidation. The jury is out as to whether we will see ongoing pressure in the last few months of 2022 and into 2023. Energy issues, water and infrastructure pressures in South Africa might push companies over the edge, and as the economy contracts, with further pressure brought on by a very strong Dollar and a weakening rand. Time will tell.

Conclusion

Considering the CIPC report, it is evident that business rescue remains alive and well in South Africa. Although the number of filings has decreased when compared to a year or two ago, it is evident that business rescue is still a viable option for financially distressed companies.

As the global economy continues to experience high global fuel prices and inflation, it remains to be seen whether continued global economic fallout spreads to South Africa. If it does, it is likely to increase the number of companies filing for business rescue, and with a further uptick in liquidations. Boards of South African companies would do well to get themselves up to speed with insolvency and rescue legislation, as continued financial distress places pressure on boards and the need for company directors to take informed and correct decisions in the South African corporate world.



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