



INSOLVENCY & BUSINESS RESCUE

Troubled waters and looming distress as we enter the second half of 2025

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Much has been written and said about the dangers posed to South Africa's economy, by outside factors and macro-economic influences. These dangers include the soaring costs of international trade, the continued notorious volatility of the local currency, political unpredictability, and a potential slow-down in the global economy.

Closer to home, some of the more eye-catching headlines make for uncomfortable reading. Statistics South Africa recently released new employment figures, reflecting a year-high unemployment rate, with somber numbers: there are 8.4 million unemployed, translating to a jobless rate of over 33%, with government warning that more jobs are at risk. There remains persistent talk of an impending financial crisis and a looming fiscal cliff. Growth and public services remain constrained by what is referred to as unsustainable debt levels, requiring a daily payment of over R1 billion just to finance debt repayments.

Whilst there has been some recent good news for the average South African (for instance, interest rates have been cut, the petrol price has reduced, and withdrawals from the two-pot retirement are often used to reduce debt), it may not be enough. Small businesses are suffering. The Daily Investor reported at the start of August that over half of 1600 small businesses canvassed, feared failure within a year as they stagger under the weight of increased costs, whilst only one in four such businesses reported growth – the rest are presumably treading water, or contracting.

Approximately a month ago, Investec's chief economist, Annabel Bishop, was reported to give the stark position: the drop in real incomes over the previous three months was an indication of the stress that corporates are under, which has in turn impacted staff remuneration, being a further threat to growth. The OECD reported that the percentage of non-performing loans is on the rise, and particularly pronounced for small and medium-sized businesses. Many South African businesses are in trouble, with no realistic reprieve on the horizon.

This is translating to a real, human level. News24 recently reported that 70% of those canvassed feel stressed about their finances, with those in the 45-54 age bracket feeling the pinch the most. Increases to costs of living seem rampant and largely impervious to any factors that might provide relief to businesses and households. Reports are that the 2025 1Life Generational Debt Survey found that those surveyed were using approximately 75% of their income to service debt, but were overwhelmed by debt, with no alternative but to live paycheck to paycheck. Although many are slashing household budgets where possible, this is often not enough, and poses the danger of leading to long-term difficulties, particularly with respect to retirement savings.

Lenders and financial institutions are obviously alive to the present state of affairs, and the potential for fallout and financial distress. Quite often, as soon as there is a default (or even earlier, if signs of financial distress become evident), financial institutions proactively seek to engage with debtor businesses, in the hope that the latter can be shepherded to financially safer waters. However, if this is not a realistic outcome, quite often there is no alternative at that stage, but to exercise security rights under mortgage bonds, notarial bonds, and cession of income and debtors' books, and to call on sureties (often directors and/or shareholders) for payment.

In such cases, liquidation may follow, but that process does not necessarily let directors off the hook: directors of companies in financial strife should be aware that they are under legal obligations to exercise care, skill and diligence, and to act in the best interests of the company. By failing to do so, or by carrying on a company's business recklessly, with gross negligence, or with intent to defraud any person, the prospects of a director being found (by a Court after lengthy and financially-punishing formal processes) to be personally liable for any resulting losses, are high, and often ruinous.

There is a safety line available to directors: if directors of a company believe that the company is 'financially distressed' (in 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, or is likely that that the company will become insolvent in the next six months), they can place the company into business rescue, under the supervision of a business rescue practitioner.

In most cases, the company will benefit from a breathing space from creditors that results from business rescue's moratorium on / suspension of legal proceedings against the company, but with the company permitted to continue its trading activities. The directors retain their positions under business rescue, and the ultimate goal is for a business rescue practitioner (with the support of the directors) to steady the ship, to agree a business rescue plan with creditors to deal with the company's debt, and thereafter to send the company back into the market on a sounder financial footing, under the control of its directors.

Directors of financially distressed companies who fail to consider business rescue proceedings, run the risk of being found to be personally liable for losses, as described above. It is accordingly imperative that such directors remain continuously vigilant of the company's financial position, and take adequate and timeous steps to meet not only their fiduciary duties to the company, but also their statutory obligations. It is not enough for directors to plead ignorance of the law, or to contend that they took no steps because they held out hope that more prosperous days would come: a failure to act will be subject to criticism, but may result in substantial personal liability. The need to take sound legal and financial advice is an imperative, and directors should do so at the earliest possible opportunity, and not wait until it is too late, with the company potentially toppling over into full blown liquidation.



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