DISPUTE RESOLUTION

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 5 | 28 April 2020

CDH
CLIFFE DEKKER HOFMEYR

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Business Rescue, Restructuring & Insolvency

I love how during lockdown some of my friends have developed a sense of humour.

People come up with the funniest memes and social media posts. It must be all the free time on their hands or the pressure to remain positive. The wittiest social media post I recently saw was by writer, Tom Eaton. He said, "*I suspect most of us are going to spend June trying to figure out permutations of our loadshedding/COVID schedule....OK, so its Stage 4 loadshedding, and we're at Stage 2 for COVID, so that means I *can* buy supper but I *can't* cook it...*" (sic) What an interesting world we live in.

Since our last newsletter, we presented the first session in our series of webinars on how to navigate though Business Rescue, Restructuring & Insolvency during COVID-19. The first session was recorded and a copy can be downloaded here. Close to 400 people logged on and listened to our team. Thank you to those who joined. I must say, a virtual presentation will take some time to get used to. It just feels so strange to "*suit up*", just to end up, talking to your computer screen.

The second webinar will be live on Thursday, 30 April 2020 at 14h00. Please refer to the enclosed invite for more information. In the second session, we will discuss directors' liability, legislative amendments and regulations which have been put in place as well as an update on recent noteworthy judgments. We are excited to announce that Sifiso Skenjana, the Chief Economist and Thought Leadership Executive at IQ Business will be joining us on Thursday. You might be familiar with his articles on Fin24 and Business Day.

In an attempt to get some human interaction, during each webinar we conduct a Q&A session and listeners are encouraged to participate and post questions on the online portal. During the first session, we received a number of questions relating to the termination of employment contracts during business rescue and liquidation proceedings. Keep an eye out for our next newsletter where we will discuss the interplay between insolvency and employment arrangements.

I leave you with a link to an interesting article that I recently saw in the *Harvard Business Review* – "We Need Imagination Now More Than Ever". It is suggested that in recession and downturns, 14% of companies outperform both historically and competitively, because they invest in new growth areas. Did you know that Apple released its first iPod in 2001 — the same year the U.S. economy experienced a recession that contributed to a 33% drop in the company's total revenue? I look forward to seeing similar innovative ideas on home ground.

Until next week, I am off to update my load shedding/COVID-19 app, check on my pineapple beer, fit my face mask and goggles and most importantly, to sort out my running gear. I can't wait to hit the road again.

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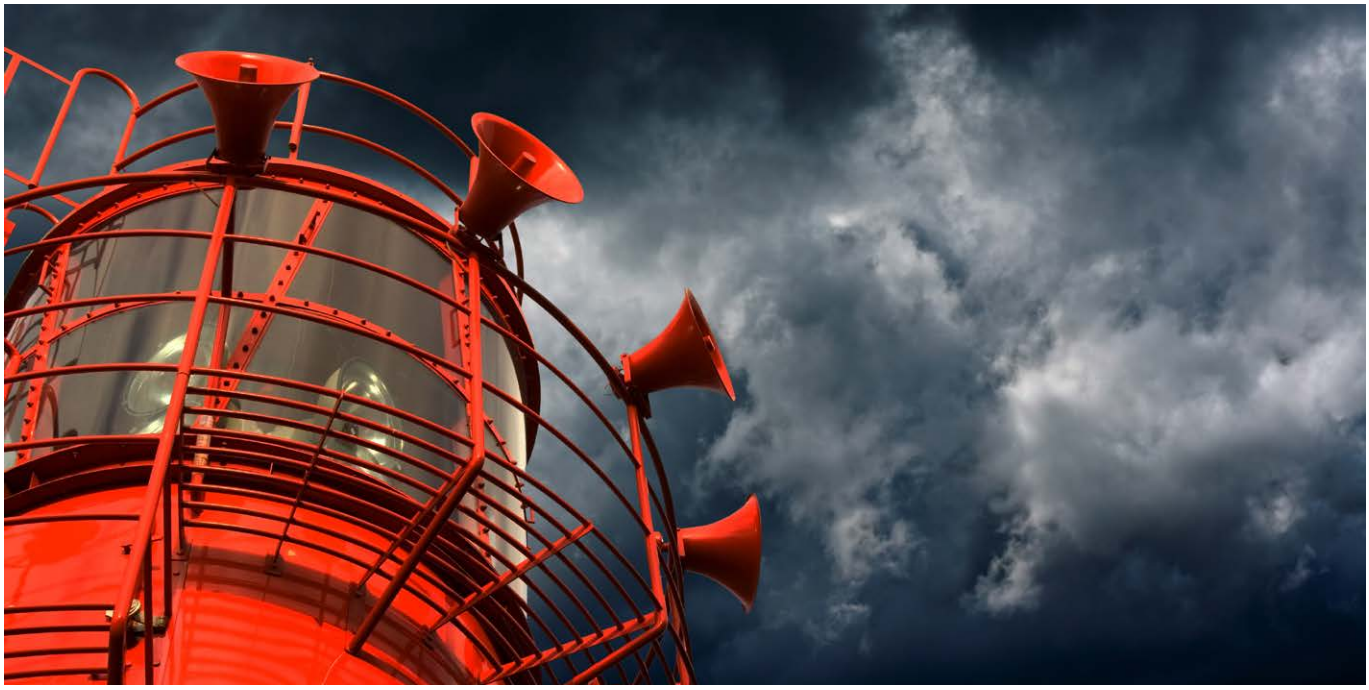
Business rescue proceedings during the lockdown period

On 24 March 2020, the Companies and Intellectual Property Commission (CIPC) published a document titled "*Notice to Customers – Company Close, Corporation and Co-operative Services during Government Lockdown in South Africa*" (CIPC Notice), which was later amended by a further notice from the CIPC, dated 15 April 2020.



The CIPC Notice, as amended, deals mainly with the measures put in place by the CIPC in response to the total lockdown that was announced by the President of South Africa, which was initially scheduled to run from 26 March 2020 to 16 April 2020 but was later extended to 30 April 2020.

This CIPC Notice was also discussed during the recent Webinar which the Business Rescue, Restructuring & Insolvency team of CDH presented on 23 April 2020. Various questions were posted by the attendees during the webinar and will be responded to in this article.

The CIPC Notice, as amended, states that:

> "*For purposes of business rescue, a general extension is provided for business rescue proceedings which commenced, but which did not complete the procedure as stated within section 129 of the Companies Act, 2008 (the Act), until two weeks after the lockdown period, or CIPC communicates otherwise. Furthermore, for proceedings that have not yet commenced in terms of section 129 of the Act, dies non will apply until national lockdown ceases, or CIPC communicates otherwise.*" (Our emphasis)

From a first reading of the CIPC Notice, it appears as if:

(i) New business rescue proceedings, in terms of section 129 of the Companies Act 71 of 2008 (Companies Act), cannot commence until the lockdown ceases or the CIPC communicates otherwise (as a result of *dies non*); and

(ii) Companies already under business rescue, where a business rescue practitioner has not yet been appointed as required in terms of section 129(3) of the Companies Act, will receive an extension to comply with all of the time periods set out in section 129 of the Companies Act, until two weeks after the lockdown period.

The CIPC Notice raises a couple of questions, which we will deal with in this article. In addition to dealing with these questions, we will also briefly discuss bringing urgent business rescue applications during the lockdown period, and the essential aspects to consider before launching such an application.

Can and should companies file for business rescue during the lockdown period?

As mentioned above, it appears as if the CIPC envisaged that the CIPC Notice would prevent companies from filing for business rescue during the lockdown period, since

Business rescue proceedings during the lockdown period...*continued*

the CIPC declared the period between 26 March 2020 – until the lockdown ceases, as *dies non* (days on which court or legal procedures are not permitted, or days not counted for purposes of calculating legal time periods), and since the CIPC didn't make provision for the filing of section 129 resolutions as part of its continuing automated services, as per the CIPC Notice.

The question that now arises is whether the CIPC has the authority to declare a certain time period as *dies non*. The reason why this question is important, is because if the CIPC does not have this authority, directors of financially distressed companies could potentially still be held personally liable for breaching their fiduciary duties set out in the Companies Act, by failing to timeously take adequate steps, even if they are acting in terms of the information contained in the CIPC Notice.

As a departure point, it is important to take note that the CIPC is a creature of statute and was established in terms of section 185 of the Companies Act. Since the CIPC is a creature of statute, its powers and duties are set out in the act in terms of which it was established, namely, the Companies Act (read together with the regulations published under the Companies Act). The CIPC cannot take any steps outside the confines of its powers as set out in the Companies Act.

Section 185 of the Companies Act states the following in relation to the CIPC:

(i) It has jurisdiction throughout South Africa;

(ii) It is independent, and subject only to:

- The Constitution and the law; and
- Any policy statement, directive, or request issued to it by the Minister of Trade and Industry, in terms of the Companies Act.

(iii) It must exercise the functions assigned to it in terms of the Companies Act or any other law, or by the Minister of Trade and Industry, in the most cost-efficient and effective manner, and in accordance with the values and principles mentioned in section 195 of the Constitution.

Regulation 4 of the Companies Regulations, 2011 (Companies Regulations), which is directly applicable to the CIPC, states that the commissioner of the CIPC may:

(i) issue a Guideline at any time by publishing a notice of the Guideline to the general public in the Gazette, any generally circulated newspaper, on the regulatory agency's website, or by any similar means of providing information to the public generally; or

(ii) issue a Practice Note at any time by publishing it in the Gazette and may amend or withdraw any such Practice Note at any time by subsequent notice in the Gazette.

"*Guideline*" is defined in Regulation 4, as a document issued by a regulatory agency (such as the CIPC) with respect to a matter within its authority, which sets out recommended procedures, standards or forms reflecting that regulatory agency's advice as to what constitutes best practice on a matter.

Furthermore, "*Practice Note*" is defined in Regulation 4, as a document issued by a regulatory agency (such as the CIPC) with respect to a matter within its authority, which sets out:

(i) a procedure that will be followed by that regulatory agency; or

(ii) a procedure to be followed when dealing with that regulatory agency; or

(iii) that regulatory agency's interpretation of, or intended manner of applying, a provision of the Act or these regulations.

However, very importantly, Regulation 4 further states that a Guideline or Practice Note must be consistent with the Companies Act and the Companies Regulations, and a provision of the Companies Act or the Companies Regulations prevails if there is any inconsistency between that provision and any such Guideline or Practice Note.

Furthermore, the Companies Act does not provide the Minister of Trade and Industry with the authority to suspend or amend the time periods set out in section 129 of the Companies Act, and therefore, even if the Minister of Trade and Industry, by notice in the Government Gazette, issued a directive that the lockdown period is declared a *dies non* period for purposes of commencing business rescue proceedings, such a notice would be unlawful.

Considering the above, and the fact that there is no provision in the Companies Act or the Companies Regulations, authorising the CIPC to declare a period as *dies non*, and since the Minister of Trade and Industry is also unable to declare a period as *dies non*, it is clear that under normal circumstances, the CIPC does not have the authority to declare a certain period as *dies non*, since this will create inconsistency between the Guideline/ Practice Notice published by the CIPC and, *inter alia*, section 129 of the Companies Act, which will result in section 129 of the Companies Act (and the time periods set out therein) prevailing.

The question now arises whether the lockdown period and the provisions of the Disaster Management Act 57 of 2002 (Disaster Management Act) (and the regulations published thereunder), changes the abovementioned position.

In short, the answer is no, it doesn't change the position. The reasons for this are the following:

(i) Firstly, the Disaster Management Act (and the regulations published thereunder), does not provide the CIPC with any authority to declare a certain period as *dies non*.

(ii) Secondly, although the Minister of Cooperative Governance and Traditional Affairs, in terms of section 27(2) of the Disaster Management Act, read together with Regulation 10(6) of the Regulations issued in terms of section 27(2) of the Disaster Management Act, granted the Minister of Trade and Industry authority to, *inter alia*, issue directions to address, prevent and combat the spread of COVID-19, the Minister of Trade and Industry has to date not issued any such directions.

Business rescue proceedings during the lockdown period...*continued*

(iii) Thirdly, even if the Minister of Trade and Industry issued directions in terms of his authority under Regulation 10(6) of the Regulations issued in terms of section 27(2) of the Disaster Management Act, it could still potentially be argued that a declaration that a certain period is *dies non* for purposes of the calculation of time periods set out in the Companies Act, would be unlawful, since it would be in conflict with the provisions of the Companies Act. The reason for this is that section 5 of the Companies Act, which deals with the interpretation of the Companies Act, states that if there is an inconsistency between any provision of the Companies Act, and any provision of any other national legislation, the provision of the Companies Act would prevail if it is impossible to apply the provisions of both acts concurrently. This is subject to section 5(4)(b)(i) of the Companies Act, which lists certain Acts that would prevail if there is an inconsistency between them and the Companies Act. However, it is important to take note that the Disaster Management Act is not one of the Acts listed in section 5(4)(b)(i) of the Companies Act.

In light of the above, we believe that should a company be under financial distress during the lockdown period, the board of directors of the company must remain cognisant of their fiduciary duties, specifically as set out in section 129(7) to either place the company under business rescue or deliver a notice to each affected person setting out, *inter alia*, the reasons for not placing the company under business rescue.

How can companies voluntarily commence business rescue proceedings during the lockdown period?

Section 129(2)(b) of the Companies Act states that a resolution by a board of directors to voluntarily place a company under business rescue "*has no force or effect until it has been filed*".

The word "*file*" is defined in section 1 of the Companies Act as "*when used as a verb, means to deliver a document to the commission (CIPC) in the manner and form, if any, prescribed for that document*".

Regulation 7 of the Companies Regulations, which deals with the delivery of documents in terms of the Companies Act, states that a notice or document to be delivered for any purpose contemplated in the Companies Act or the Companies Regulations, may be delivered in any manner – (i) contemplated in section 6(10) or (11); or (ii) set out in Table CR3.

Table CR3, which is attached to the Companies Regulations as Annexure 3, states that if a document is to be delivered to the CIPC, it can be done by "*transmitting the document as a separate file attached to an electronic mail message addressed to the CIPC*". The date and time of the deemed delivery, and therefore the deemed filing, will be on the date and time recorded by the CIPC's computer system, unless, within one business day after that date, the CIPC advises the sender that the file is unreadable.

Therefore, companies will be able to file for business rescue by following the process above, and if the company sends the email to the CIPC, by using the correct email address of the CIPC, with the section 129 resolution attached to the email, and it does not receive a failed delivery report from its email server, it could assume that it successfully "*filed*" the resolution with the CIPC and that the company is under business rescue.

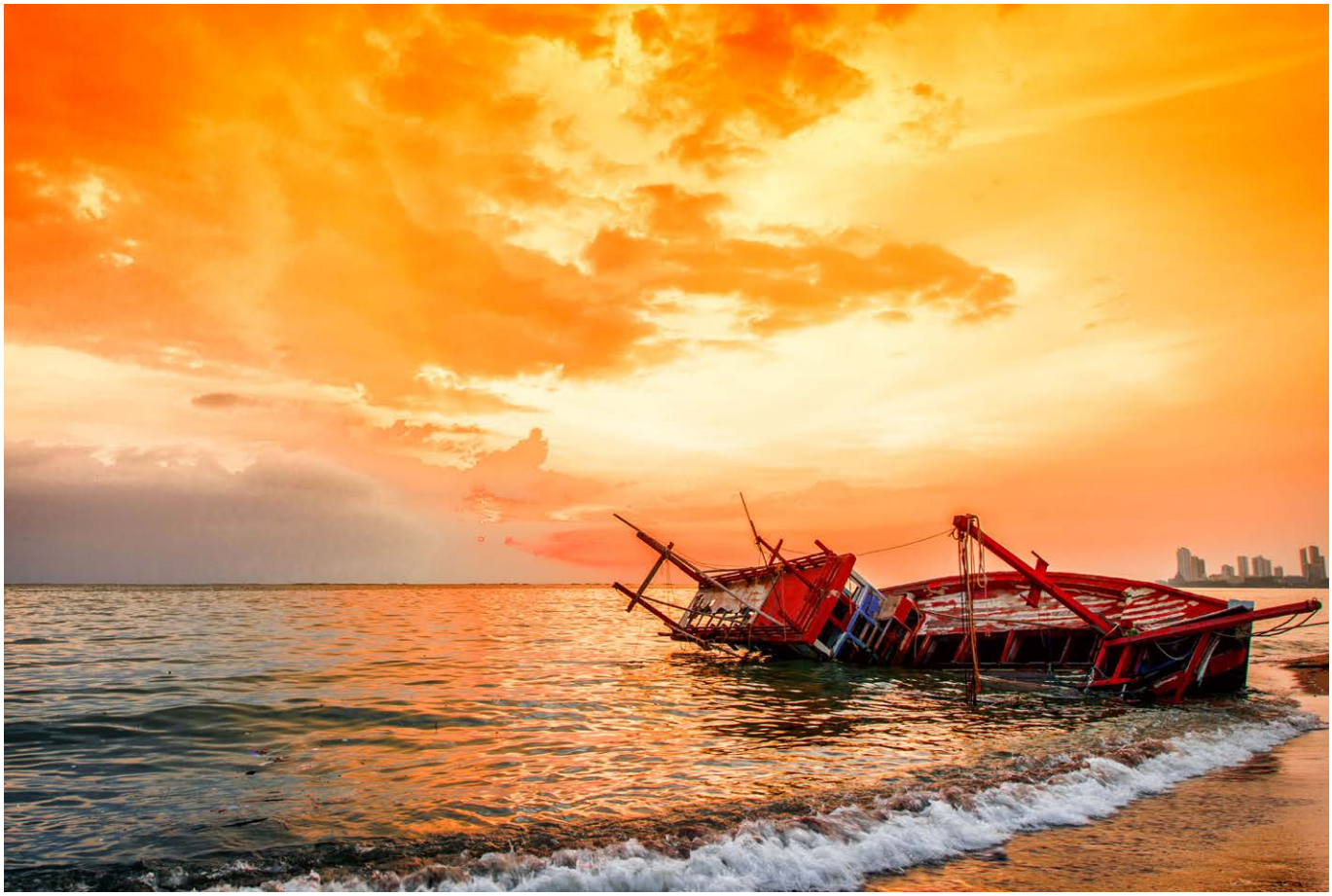
What about the appointment of the business rescue practitioner after the company is placed under voluntary business rescue during the lockdown period?

We are of the view that as soon as the company filed for business rescue by sending the email to the CIPC with the resolution in terms of section 129 attached as a separate file, the company must within 5 days thereafter publish the notice of the resolution to every affected person and appoint a business rescue practitioner, even if this takes place during the lockdown period.

After the business rescue practitioner has been appointed by the company, the company must within two business days thereafter send another email to the CIPC, with the notice of appointment of the business rescue practitioner attached as a separate file and publish a copy of the notice of appointment to each affected person within five days after the notice was filed with the CIPC.

If the company fails to take the steps mentioned above, its resolution to begin business rescue and place the company under supervision will lapse and will be a nullity. The company will then also be unable to file a further resolution to place the company under voluntary business rescue for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte basis, approves the filing of a further resolution by the company.

Business rescue proceedings during the lockdown period...*continued*



What about business rescue proceedings that commenced before the lockdown period started, where the procedure set out in section 129 of the Companies Act has not been completed?

Regulation 166 of the Companies Regulations state that the senior officer of a regulatory agency (such as the CIPC) may generally extend any particular time limit set out in the Companies Act or the Companies Regulations for filing any document with that agency, to the extent necessary or desirable having regard to the public demand for access to the agency's services, the administrative capacity of the agency to meet that demand, and the interests of efficiency and equality of access.

In light of the above, it appears as if the CIPC does have the authority to extend the time limits set out in section 129 of the Companies Act, for the filing of documents with the CIPC. However, the CIPC does not have the authority to extend other time periods set out in section 129 of the Companies Act, which does not relate to the filing of documents with the CIPC (e.g. the time period prescribed in terms of the Companies Act for the publishing of the notice of the resolution to commence the voluntary business rescue proceedings, to every affected person).

Therefore, it appears as if the CIPC might have acted *ultra vires* when it stated that there is a general extension for business rescue proceedings which commenced before the lockdown period, but which did not complete the procedure as stated within section 129 of the Companies Act.

If a company was placed under business rescue before the commencement of the lockdown period, and it did not comply with the time periods set out in section 129(3) and (4) of the Companies Act, its resolution to begin business rescue and place the company under supervision would lapse.

We would advise companies who find themselves in this situation, to contact Cliffe Dekker Hofmeyr Inc. immediately, in order for our Business Rescue, Restructuring & Insolvency Team to assist with bringing an ex parte application to obtain approval from the court for the company to file a new resolution in terms of section 129 of the Companies Act.

Business rescue proceedings during the lockdown period...*continued*

What to consider when contemplating whether to bring an urgent business rescue application during the lockdown period or not

As all legal practitioners know, bringing an urgent application to court under normal circumstances is very difficult, if not nearly impossible, and it is therefore normally used by parties as a last resort.

In light of the above, litigants should be very wary to bring urgent applications during the lockdown period, since it is very likely that during the lockdown period, it will be even more difficult to succeed with an urgent application.

However, if an affected person is contemplating whether or not to bring an urgent business rescue application in terms of section 131 of the Companies Act during the lockdown period, here are a few factors which it should consider:

(i) On 31 March 2020, the Minister of Justice and Correctional Services issued directions to address, prevent and combat the spread of COVID-19, in terms of Regulation 10(6) of the Regulations issued in terms of section 27(2) of the Disaster Management Act. In these directions, it is stated that "*entry into the courts and court precincts may only be allowed in respect of urgent and essential matters*". Although the directions do not clarify whether all matters which would be urgent under normal circumstances, would still be urgent, it does list examples of urgent and essential matters in which the sheriff will be allowed to serve pleadings and execute writs of execution, namely:

- Service and execution of court orders relating to COVID-19;
- Service of domestic violence protection orders;
- Service of protection from harassment orders;
- Service of process relating to claims which are prescribing;

Business rescue proceedings during the lockdown period...*continued*

- Service of urgent court process relating to court hearings scheduled during the lockdown period; and
- Service of urgent court process in family law matters as determined in the directions.

Although a court or judge may, if it is an urgent application, dispense with the forms and service provided for in the Uniform Rules of Court and may dispose of an urgent application at such time and place and in such manner and in accordance with such procedure (which should comply as far as possible with the Rules set out in the Uniform Rules of Court) as it deems fit, the abovementioned list can be seen as an indication of matters which will most likely be considered as urgent or essential by a court. Since urgent business rescue applications will most likely in some manner relate to COVID-19 and the national lockdown, we are of the view that under certain exceptional circumstances, it will be justified to bring an urgent business rescue application during the lockdown period. Each case will, however, have to be considered on its own facts, before a final decision is reached on whether or not to proceed with the urgent application.

(ii) If the company under financial distress renders an essential service, it could be argued that the company's services will assist with the fight against COVID-19 during the lockdown period, and it is therefore important that a business rescue practitioner takes control of the company as soon as possible;

(iii) If the company under distress does not render an essential service, and the issue is raised that the business rescue practitioner will in any event only be able to take effective control of the company after the lockdown period, and as such the application is not urgent, it could be argued that the business rescue practitioner needs to be appointed as soon as possible in order for him/her to take control of the bank accounts of the company, in order to prevent the current board of directors from using the money in the company's bank account during the lockdown period.

Conclusion

As the COVID-19 pandemic wreaks economic havoc across the board, companies should carefully consider their financial positions and undertake the necessary assessments and seek guidance where necessary.

Making the right decisions during the lockdown period is very important for the board of directors of companies, since the fiduciary duties of directors are not suspended during this period. We would therefore advise companies who are in financial distress, to reach out to the Business Rescue, Restructuring & Insolvency Team at Cliffe Dekker Hofmeyr Inc, who will be able to assist and guide them through these difficult times and unfamiliar waters.

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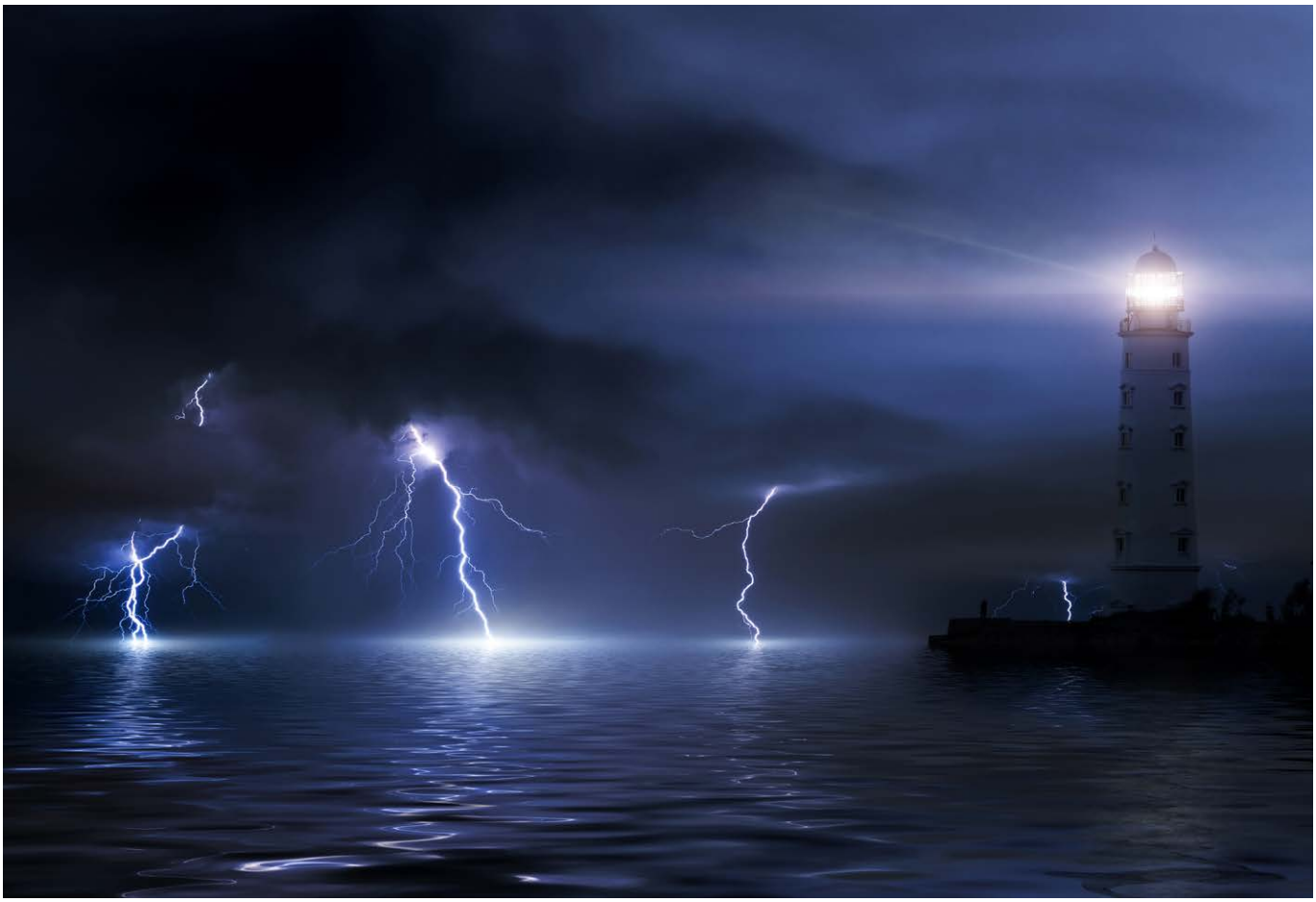
Navigating a new beginning: Liquidation guidelines for insolvent companies



The COVID-19 (Coronavirus) pandemic has forced society to reimagine how it operates. Amid efforts to mitigate the health effects of the Coronavirus, a further concern is the detrimental impact the pandemic has and will continue to have on businesses and the economy. It is therefore pertinent for directors and stakeholders to be aware of the commercial legal processes and consequences applicable to distressed business enterprises. In previous editions of this newsletter, we have addressed directors' liability in financially distressed times as well as the business rescue mechanism that was introduced under the Companies Act 71 of 2008 (new Companies Act).

Let us assume that the directors and management of a company have now considered (a) the essential key points for businesses in financial distress, (b) the risk of directors' liability in financial distressed times and (c) whether the company should be placed in business rescue. It then turns out that the situation is so dire that the only option left is to liquidate the company in order to prevent any further damage.

The purpose of liquidation proceedings

Where a company's financial position is so dire to the extent that it is no longer able to continue trading, the appropriate course of action is a liquidation process. The purpose of liquidation is to wind up the company's affairs by selling the company's assets either

Navigating a new beginning: Liquidation guidelines for insolvent companies*...continued*

by way of private treaty or public auction in order to pay the costs of its winding up as well as its creditors. Any residue thereafter is divided amongst the company's former shareholders in line with their rights and interests in the company.

The test for insolvency

A company is said to be insolvent if its liabilities exceed its assets (this is known as factual insolvency), or if it cannot pay its debts as and when they fall due (this is known as commercial insolvency). The latter is the more appropriate test for insolvency as companies are often factually solvent whilst unable to pay their debts due to cash-flow issues. When such insolvent circumstances result in a company no longer being able to trade, its assets are liquidated.

In South Africa, insolvent companies are liquidated in terms of Chapter 14 of the Companies Act 61 of 1973 (old Companies Act), while solvent companies are liquidated in terms of the new Companies Act. For purposes of this article we will only focus on the processes relating to insolvent companies.

Modes of commencement of liquidation proceedings

An insolvent company may be wound up voluntarily or by the court. A voluntary winding up process/proceeding can be either by members' voluntary winding up or creditors' voluntary winding up.

Voluntary winding up

A company may be liquidated voluntarily if the company passes a special resolution resolving that it be so liquidated. The special resolution must thereafter be filed with the Companies and Intellectual Properties Commission (CIPC) together with several other prescribed forms and documents.

The commencement date of voluntary liquidation will accordingly be the date that the special resolution is filed. The Registrar of Companies shall then forthwith after the registration by him of the special resolution transmit a copy thereof to the Master of the High Court (Master).

Advantages and disadvantages of voluntary winding up

Some of the advantages of a voluntary winding up are that it is quick, simple, inexpensive and expedient.

However, some of the disadvantages are that insolvency enquiries cannot be conducted and often creditors' rights are frustrated because they will not immediately know that the company has passed a resolution to be liquidated.

Winding up by court order

A company may be liquidated by court order on various grounds set out in the old Companies Act. Some of the more common grounds that are used frequently in practice are in instances where the company is unable to pay its debts as described in section 345 of the old Companies Act, or if it appears to the court that it would be just and equitable that the company should be liquidated.

An application to court may, subject to certain provisions, be made by a creditor, the company itself or any of the shareholders.

The liquidation of a company by court order shall be deemed to commence at the time the liquidation application is presented to the court.

Advantages and disadvantages of winding up by court

One of the advantages of a winding up by court is the availability of the mechanism of an insolvency enquiry. In certain instances, the appointment of a liquidator by the Master may happen quicker once an order for liquidation has been granted by the court.

However, some of the disadvantages are that this process is expensive because it requires the preparation and issuing of a formal application to the High Court. If the application is opposed, it may take months to finalise.

Navigating a new beginning: Liquidation guidelines for insolvent companies*...continued*

Appointment of a liquidator

The appointment of a liquidator is made by the Master. The creditors or members will nominate a liquidator of their choice by submitting their nominations to the Master. Once the liquidator has been appointed, he/she will attend to the administration of the estate, which includes liquidating the assets of the company and thereafter distributing the proceeds to the relevant stakeholders.

In a voluntary winding up, the liquidator may without the sanction of the court exercise all powers by the old Companies Act given to the liquidator in a winding up by the court, subject to such directions as may be given by the company (in the case of a members' voluntary winding up) or the creditors (in the case of a creditors' voluntary winding up) in general meeting.

Legal consequences of liquidation proceedings

Once the directors and management of the company have managed to navigate their way through the various processes of commencing liquidation proceedings and taken steps to appoint a liquidator of their choice, it is important to note that the placing of a company in liquidation gives rise to various legal consequences.

Some of the primary consequences to take note of are the following:

General moratorium on civil legal proceedings

All civil proceedings instituted by or against the company are automatically suspended until the appointment of a liquidator. Additionally, any attachment or execution put in force against the estate or assets of the company after the commencement of liquidation shall be void.

Every person who, having instituted legal proceedings against the company which were suspended by the liquidation, intends to continue same (and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the liquidation) shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings. If notice is not so given, the proceedings shall be considered to be abandoned unless the court directs otherwise.

Custody of and vesting of company property

In practice, we often find that there may be a delay in appointing a liquidator following the placing of the company in liquidation, either voluntarily or by the court. It is therefore important to note that at all times while the office of the liquidator is vacant or the liquidator is unable to perform his/her duties, the property of the company shall be deemed to be in the custody and under the control of the Master until the appointment of the liquidator has been made.

Effect of liquidation on uncompleted contracts

In general terms, the liquidation of a company does not automatically suspend or put an end to the contracts concluded by the company prior to being placed in liquidation. However, the liquidator steps into the shoes of the company and must, within a reasonable period, decide whether he/she intends to perform in terms of the contract or not. If the liquidator fails to decide within a reasonable time, it will be assumed that he/she has no intention of performing in terms of the contract.

The liquidator cannot be compelled by the other contracting party to render specific performance in terms of the contract; however, the other contracting party remains vested with its normal common law contractual rights to cancel the contract after liquidation. Where the liquidator elects to not abide by the contract, the other contracting party will have a concurrent claim for any damages suffered as a result of the breach of contract.

Effect on leases

Where the company is a lessee of assets (movable or immovable) in terms of a lease agreement at the time of being placed in liquidation, the lease is not immediately terminated by the liquidation. The liquidator must within a period of three months of his/her appointment make an election on whether he/she wishes to cancel or continue with the lease and must notify the lessor of his/her intentions by giving the lessor written notice to that effect. If the liquidator does not notify the lessor of his/her intentions within that period, the liquidator will be deemed to have cancelled the lease at the end of the three-month period.

Until such time as the liquidator has made an election, the lease remains in operation and any rental amounts which become due after liquidation must be paid by the liquidator. Any rentals that became due from the date of liquidation to the date of cancellation of the lease will be treated as preferent claims and paid out of the administration costs. Any other claims that the lessor has as a result of the breach of the lease will be treated as a concurrent claim.

It must, however, be noted that notwithstanding the election available to the liquidator in relation to the continuance of the lease, the lessor retains its usual common law contractual rights, including the right to cancel the lease after the liquidation of the company, where the company was already in breach of the lease prior to being placed in liquidation.

Effect on employment contracts

The proposition that liquidation does not suspend the company's uncompleted contracts is, however, qualified to some extent. In this instance, the liquidation of a company will suspend the employment contracts between the company and its employees with immediate effect. During the period of suspension, the employees are not obliged to render any services to

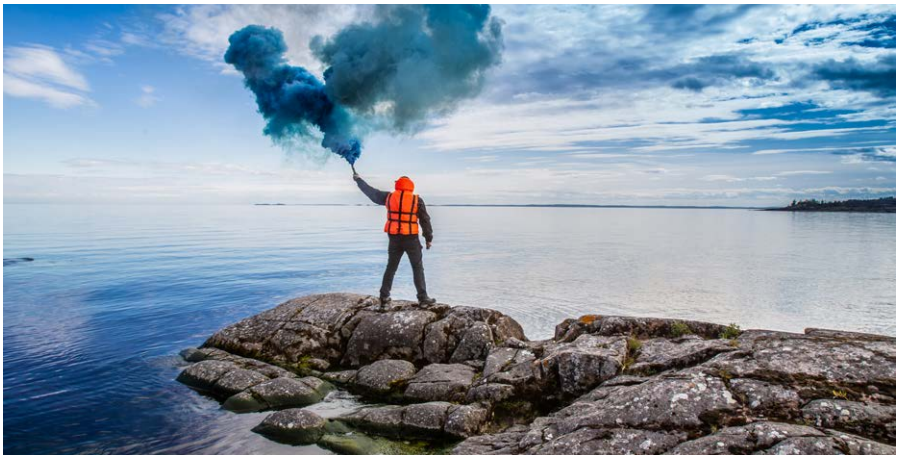
Navigating a new beginning: Liquidation guidelines for insolvent companies...*continued*

the company and are also not entitled to receive their salaries or wages, nor do any of their employment benefits accrue to them. The employees may however be entitled to receive unemployment benefits from the date of suspension of their employment contracts.

The liquidator may elect to terminate the employment contracts but only after he/she has consulted with the employees and/or any of the employees' representatives in an effort to reach consensus on appropriate measures to rescue the whole or part of the company and consequently avoid retrenchments.

All suspended employment contracts, not already terminated by the liquidator, will automatically terminate 45 days after the date of the final appointment of the liquidator.

Employees will have a limited preferent claim for a portion of their salary and wages due but unpaid at the date of liquidation, as well as for any contributions which were to be made by the company on the employees' behalf. Any amounts which remain due to the employees over and above their preferent claim, will be treated as a concurrent claim.



Conclusion

Navigating a new commercial beginning can at times be a daunting process, especially in light of the current international economic strain and uncertainty surrounding the COVID-19 pandemic. The Business Rescue, Restructuring and Insolvency team at Cliffe Dekker Hofmeyr possesses the specialist knowledge, skill and experience to guide you through the process of closing one chapter in the entrepreneurial journey with the potential to start anew, which is the overarching purpose of the liquidation mechanism. Directors and stakeholders should take note of the procedures outlined above when trying to mitigate the fallout of the current economic climate, and when deciding which course of action is most appropriate in the circumstances. We are willing and able to assist in these unprecedented times.

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