

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY NEWSLETTER



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Business Rescue,
Restructuring &
Insolvency

It is hard to face reality, when reality has so many faces

At school and university, achieving 90% was a goal set by many students. It now appears that the tables have turned, and different targets are being set. It is suggested that for the lockdown regulations to be relaxed, the average number of daily infections in South Africa would need to be less than 90 per day. In the last week, we have not seen one day where this goal was achieved as new infections are more likely to rise. The reality is that the exponential spread of the virus cannot be escaped. It's time to face reality. But what is your typical reality?

As a start, lawyers and other business professionals will no longer typically be seen to work solely from their glass high-rises. I constantly catch myself thinking that I would have been behind my desk by now. It is strange to accept that my new reality is that from now on, or at least until the end of the year, I will probably be spending less time at the office.

Perhaps the silver lining from all of this is that businesses are forced to re-think the way in which they operate and do business. Cutting costs by reducing the endless list of fixed expenses like rental, parking, water and electricity and subsidising cafeterias could be a way of recouping some lost income. It is predicted by Harvard disease researchers that people around the world might need to practice some level of social distancing intermittently through to 2022. Are hot desks the way of the future? Maybe South Africa needs to catch a wakeup to how things are done internationally.

Personally, the most newsworthy article, albeit not positive news, in the past week was the announcement that government had closed the taps on any further funding for SAA's Business Rescue proceedings. Unfortunately, this decision resulted in a proposal being issued by the Business Rescue practitioners to trade unions to terminate employment contracts. We need to pay close attention to how the story will unfold, as this could be a pilot case study for so many other businesses which will face financial distress or insolvency as a result of the lockdown.

In this edition, we focus solely on business rescue. We conclude the discussion on the key take away points of Business Rescue proceedings and we provide a list of important factors to consider when deciding to file for Business Rescue.

Over the next two weeks we will be presenting two webinars to assist our clients in navigating Business Rescue, restructuring and insolvency during COVID-19. The first session will take place on **Thursday, 23 April 2020 at 14h00**. An economist will join us at each session to provide practical insights. We are privileged to have Lumkile Mondli, an economist and economics lecturer at WITS, with us on Thursday. You may have recognised Lumkile from his interviews on Carte Blanche. Rene Bekker, the COO of the South African Restructuring and Insolvency Practitioners Association (SARIPA), will also make a guest appearance. Please refer to the enclosed invite for further details of Thursday's webinar. We look forward to seeing you there.

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Business Rescue 101 – An introduction – Part 2

In [Part 1 of Business Rescue 101](#), we covered the basics of Business Rescue. We looked at the definition and objectives of Business Rescue, the modes of commencement and requirements for placing a company under Business Rescue as well as the legal consequences of the proceedings.



Now that we covered the basics, in the words of the American soul music artist of the sixties, Shirley Ellis, *“let’s get right down to the nitty gritty”*.

In this edition, we deal with the appointment of Business Rescue practitioners (BRP’s), the general powers and duties of the BRP, the Business Rescue plan of the company under Business Rescue, post-commencement finance, the ranking of claims against a company in Business Rescue, and the termination of Business Rescue proceedings. It is very important for all role players in the Business Rescue industry, such as BRP’s, creditors, employees, shareholders and directors, to have a good understanding of these topics as it will affect each and every Business Rescue process.

Appointment of the BRP

(i) Voluntary Business Rescue

Within five days after the board of directors of a company filed the resolution placing the company under Business Rescue, the company, through its board of directors, must appoint a BRP.

The appointment of a suitable BRP is critical to the successful rescue of the business.

When appointing a BRP, a company should consider and *“interview”* a few BRP’s. It is important that the appointed BRP has the necessary experience in the given business sector. A mining company will for instance need to ensure that the BRP that it appoints, has the necessary experience and knowledge of the mining industry.

The Business Rescue, Restructuring & Insolvency team at CDH has worked with some of the best BRP’s in the country. These practitioners

Business Rescue 101 – An introduction – Part 2...continued

have attended to Business Rescues across all sectors and industries. Our team is also able to assist affected persons (shareholders or creditors of a company, registered trade unions and all employees who are not represented by a registered trade union) to set aside the appointment of a BRP in terms of section 130(1)(b) of the Companies Act 71 of 2008 (Companies Act), on various grounds, including that the BRP is not independent of the company under rescue and/or lacks the necessary skills, having regard to the company's circumstances.

(ii) Business Rescue by way of a court order

If a company is placed under Business Rescue by way of a court order, the court may appoint an interim BRP who was nominated by the affected person who applied to court. However, the appointment is subject to the ratification by the holders of the majority of the independent creditors' voting interest at the first meeting of creditors.

General powers and duties of BRPs

During Business Rescue, the appointed BRP is granted the following powers and duties:

"Powers"

- The BRP has full management control of the company in substitution for its board and pre-existing management;
- The BRP may delegate any power or function of the BRP, to any person who was part of the board and pre-existing management.

- The BRP may remove from office any person who was part of the board and pre-existing management.
- The BRP may appoint any person as part of the management of a company. However, except with the approval of the court on application by the BRP, a BRP may not appoint a person as part of the management of the company or an advisor to the company or the BRP, or a person related to such person, if that person has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship.

"Duties"

- The BRP is responsible for the development of a Business Rescue plan that must be considered and approved by the affected persons (as defined above).
- The BRP must implement any Business Rescue plan that is approved by affected persons.
- The BRP must inform all relevant regulatory authorities of the Business Rescue and of an appointment.
- During the Business Rescue process, the BRP is an officer of the court and must report to the court in accordance with any rules of, or orders made by, the court.
- During the Business Rescue proceedings, the BRP has the responsibilities, duties and liabilities of a director of the company as set out in section 75 – 77 of the Companies Act.

If a BRP fails to fulfil his/her duties as set out above, an affected person can approach the courts to have the BRP removed as the practitioner in that Business Rescue.

Business Rescue plan

It is the duty of the BRP to prepare a plan for the company, setting out the manner in which it is envisaged that the company will be rescued. The plan must deal with, inter alia, the background of the company, proposals on how the company will be rescued, and assumptions or conditions, if there are any, upon which the plan is based. Section 150(1) of the Companies Act provides that the BRP must consult the creditors and other affected persons, as well as the management of the company, in the process of preparing the plan.

The BRP is required to publish the plan within 25 days of his/her appointment, unless the BRP has been granted permission by the court or the holders of a majority of the creditors' voting interests for the plan to be published outside the prescribed time limit.

A Business Rescue plan that is adopted is binding on the company, the creditors of the company and every holder of the company's securities, whether or not such person was present at the meeting, voted in favour of the adoption of the plan or, in the case of creditors, had proven their claims against the company.

When a Business Rescue plan is adopted, if it makes provision for the company to be released from the payment of its debts to creditors, those creditors are not entitled to claim the balance of their claims against the company, even after the Business Rescue process is terminated and the company is trading as a solvent company again.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 as an up and coming Restructuring/Insolvency lawyer.



Business Rescue 101 – An introduction – Part 2...continued

Post-commencement finance (PCF)

Section 135(2) of the Companies Act provides that during Business Rescue, the company may obtain financing, and any such financing:

- may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
- will be paid in the order of preference set out in section 135(3)(b) of the Companies Act (the order of preference will be dealt with below).

The Companies Act therefore allows a company to obtain financing during Business Rescue and allows the company to use its assets (to the extent that they may be unencumbered) as security to obtain PCF.

The Companies Act further promotes PCF by ensuring that these claims will have preference *"in the order in which they were incurred"* over all unsecured claims against the company.

Ranking of claims against a company in Business Rescue

There are two main categories of creditors in a Business Rescue:

- Pre-Commencement Creditors - Claims that arose before the commencement of the Business Rescue proceedings; and
- Post-Commencement Creditors - (i) Claims that arose after the commencement of the Business Rescue proceedings; and (ii) funding that was made available to a company after the commencement of Business Rescue proceedings for the purpose of enabling the company to continue trading.

The claims of the abovementioned creditors rank in the following order of preference:

- The practitioner, for remuneration and expenses of the Business Rescue proceedings.
- Employees for any remuneration which became due and payable after Business Rescue proceedings began.



- Secured lenders or other creditors for any loan or supply after Business Rescue proceedings began, i.e. secured post-commencement finance.
- Unsecured lenders or other creditors for any loan or supply after Business Rescue proceedings began, i.e. unsecured post-commencement finance.
- Secured lenders or other creditors for any loan or supply made before Business Rescue proceedings began.
- Employees for any remuneration which became due and payable before Business Rescue proceedings began.
- Unsecured lenders or other creditors for any loan or supply before Business Rescue proceedings began.
- a plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the Act; or
- a plan has been adopted and the BRP has subsequently filed a notice of substantial implementation of the plan with the CIPC.

Conclusion

It is not an easy decision for a board of directors to place a company under Business Rescue. However, in these tough financial and uncertain times where companies may face financial distress, difficult decisions will have to be made, especially, and as discussed in [Volume 2 of this Newsletter](#), to avoid personal liability.

The Business Rescue, Restructuring & Insolvency team at CDH has specialist knowledge, skills and experience in all aspects of the Business Rescue process. We are available 24/7 to assist and advise all role players in the Business Rescue sector. We reiterate that we can and want to help you during these trying times.

Tobie Jordaan
Director

Stephan Venter
Associate

Termination of Business Rescue proceedings

Business Rescue proceedings will terminate when:

- the court sets aside the resolution or court order that began the Business Rescue proceedings or when the court converts Business Rescue proceedings into liquidation proceedings;
- the BRP files a notice of termination of the Business Rescue proceedings with the CIPC;

When business rescue works (and when it doesn't)

Because of the financial fallout of COVID-19 and the lockdown, Business Rescue is a hot topic.

Unfortunately, many businesses will be placed in financial distress through circumstances not of their own making. Lockdown will have tipped businesses which were struggling because of the decline in the economy over the financial edge. Businesses in other sectors – especially hospitality and tourism – which were doing well before lockdown, face no income and an uncertain future at least in the short to medium term.

Aid packages have been announced especially for small businesses. Financial institutions and the property sector are being encouraged to be lenient to their customers who are facing income difficulties. These are the first places people should look for assistance to alleviate their short-term cash flow pressures. But this may not be enough. Businesses may have to resort to Business Rescue and even, unfortunately, liquidation.

Business Rescue is very useful if applied in the right circumstances.

Business Rescue can work when:

- It is not left too late. Far too many businesses struggle on for too long and leave nothing to save. Timely intervention is essential – and this is a particularly difficult decision for owners who have invested so much time, effort and money into saving their businesses.
- It enjoys the support of most creditors – and in particular larger creditors such as your bank or major suppliers. If they are not on board, you are wasting your time. Business Rescue is a creditor driven process. In many cases creditors will assist if they sense that the debtor is being open, has constructive proposals and that they have a chance of better recovery if a Business Rescue plan is implemented. From both creditors and debtors' perspectives, early intervention is desirable. Most creditors are, out of self-interest, interested in recovering as much as possible. Creditors who are well secured are less interested in the survival of a business, but they may support rescue plans if their security is not threatened.
- There is a real plan to save the business or at least viable components of that business. Business Rescue is not a *"kick and pray"* exercise in the hope that something better will emerge during the rescue process. The most successful Business Rescues happen when the stakeholders sit down in advance and plan the rescue before initiating the formalities – the so-called *"pre-pack"*. This does not have to be inflexible – the time that rescue buys may lead to better variations of what was pre-planned as possibilities emerge and there is less pressure to deal with them.
- The business must be able to run, even if in reduced form, during Business Rescue. This needs money – either from existing cash flow or reserves, or post commencement finance (which can be difficult to obtain and expensive).
- From creditors' perspective, even if the business cannot be saved, assets may still be realised more optimally, economically and efficiently than would be the case in liquidation – so it is a better route to follow anyway since creditors control it.
- A great advantage of Business Rescue is its flexibility – a plan can be devised to achieve any number of outcomes as long as it is supported by a sufficient majority of creditors. It is also a private and efficient process between stakeholders and the company, since state organs are uninvolved in the process. Courts will only step in if asked to do so, and the Master's office has no role to play.

Business Rescue won't work if the above elements are not present. All it becomes is a costly and stressful waiting room for insolvency.

Richard Marcus
Director

WEBINAR INVITATION

NAVIGATING
BUSINESS RESCUE,
RESTRUCTURING
& INSOLVENCY
DURING COVID-19

Join our team for an insightful webinar which will discuss essential points to be considered by businesses in financial distress, together with when Business Rescue and Liquidation is the most appropriate mechanism.

DATE: THURSDAY, 23 APRIL 2020 TIME: 14H00 – 15H30

REGISTER HERE

OUR TEAM

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