Business Rescue, Restructuring & Insolvency

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SOUTH AFRICA

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What's wrong with business rescue?

According to recent Statistics South Africa (Stats SA) data, there has been a rise in company closures, with liquidations increasing by 14,3% in April 2024, when compared to April 2023. Further, according to the Fitch Ratings forecast of real gross domestic product growth, we will see an increase of only 0,9% in 2024 and at best 1,3% in 2025. Against this backdrop, and given our social, economic and political landscape, organisations in South Africa face real challenges, and business distress can be expected.

Business rescue is a legal process aimed at rehabilitating financially distressed companies. Even so, for all its initial sparkle and progress, some assert that it is in fact "*value destructive*" as certain challenges have arisen during its short history.

For example, although the tariff of fees which business rescue practitioners may charge is legislated, as the adage goes – you get what you pay for. And, those practitioners who may (fingers crossed) possess the skills to actually rescue a financially distressed company will ask for increased fees – and rightfully so, as the tariff is outdated by more than a decade. Significantly, delays in business rescue proceedings can hinder efficient recovery and the longer the business rescue process drags on, the greater the unforeseen costs and the likelihood of unintended consequences arising, which can strain distressed companies further. Some business rescue proceedings have been ongoing for almost a decade with no clear end in sight!

The success of business rescue also hinges on the financially distressed company being supervised by competent practitioners who can formulate and implement a cogent business (rescue) plan. The right practitioner should be able to take control and manage the immediate crisis, rebuild stakeholder support, fix the business and resolve future funding. However, where practitioners lack the necessary experience and qualifications, the rescue process may suffer.

What's wrong with business rescue?

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Despite these challenges, business rescue remains a valuable option for distressed companies, aiming to prevent liquidation and job losses.

It can be a useful tool through which, for example, a struggling company that holds viable businesses can attract investors with its liabilities being significantly limited. It can also be a useful tool though which a distressed company can attain a capital injection though an equity raise while renegotiating its onerous contracts, and it is especially useful when a company needs breathing space from paying its pre-business rescue debts. Most striking is that a business rescue plan can be forced on dissenting creditors, no matter their class. How business rescue is used as a restructuring tool really depends on the practitioners and their advisors' insight and creativity.

So, what is wrong with business rescue? Well, nothing really. Its current challenges can all be overcome by early intervention. That is, the sooner along the distress curve (or, put differently, further away from the company's commercial insolvency) a board of a distressed company or its affected persons act to restructure the company's finances and operations to avoid a formal process, or formally place the company in business rescue, the less messy the process, the more inclined 'good' practitioners will be to take on the mandate, the cheaper it is, and the more certain the prospect of rescue becomes.

Typical signs which affected persons (who do not ordinarily have access to the company's financial affairs like boards do) should look out for in order to act fast include, but are certainly not limited to:

- Late payment of supplier invoices, and often the withdrawal of credit lines (i.e. cash-on-delivery).
- Factoring customer invoices, meaning the "*sale*" by the company of some or all of its outstanding invoices to a third party as a way of improving its cash flow and revenue stability.
- Lack of leadership and of urgency.
- Declining customer service and low staff morale.
- "*Right sizing*" the company through retrenchments.

Nothing is wrong with business rescue, save that it is almost always initiated too late.

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