

COMMENCEMENT BY BOARD RESOLUTION

03



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Presented by

Dr Eric Levenstein

Overview of the entry points into
business rescue proceedings

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Voluntary business rescue proceedings
commenced by board resolution

02

Grounds for the Commencement of
business rescue by the board of directors

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Pre-assessment of affairs, business,
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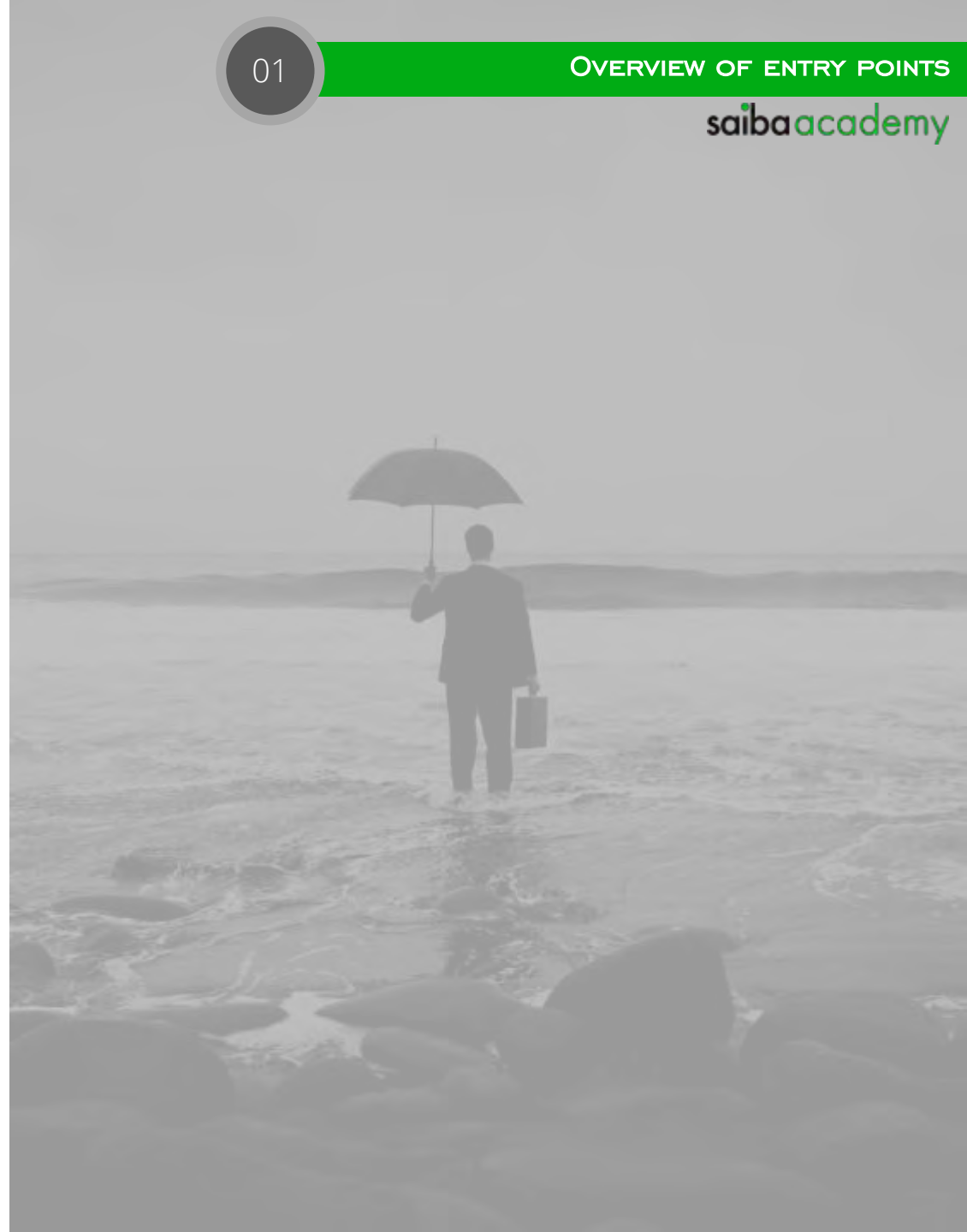
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How does Business Rescue Commence

- The Companies Act contemplates two entry points into business rescue proceedings:
 1. A company resolution
 2. A formal court application
- Once business rescue proceedings have commenced, whether by a company resolution or court application, the commencement process leads to the appointment of the business rescue practitioner
- The business rescue practitioner supervises the company during business rescue proceedings



Entry into Business Rescue

Voluntary Business Rescue

- Board resolution passed by a simple majority
- Business rescue practitioner is nominated in the resolution
- Company is financially distressed (i.e. will not be solvent on its balance sheet or will not be able to pay its debts when they fall due within the next six months)
- Reasonable prospect that the company can be saved
- Cannot adopt a resolution if liquidation proceedings have been initiated

Compulsory Business Rescue

- Affected person (shareholder, creditor or employee) makes application to Court
- Company is financially distressed
- Company has failed to pay over any amount in terms of an obligation under or in terms of public regulation, or contract, with respect to employment related matters
- Just and equitable to do so for financial reasons
- There is a reasonable prospect of rescuing the company

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Voluntary Business Rescue

Voluntary commencement - Section 129 of the Companies Act Resolution placing the company in business rescue

- Board resolution passed by a simple majority for the commencement of business rescue proceedings
- Practitioner is nominated in the resolution
- Reasonable grounds to believe that the Company is financially distressed (i.e. will not be solvent on its balance sheet or will not be able to pay its debts when they fall due within the next six months)
- Reasonable prospect that the company can be rescued.



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Grounds for the Commencement of Business Rescue

Voluntary commencement - Section 129 of the Companies Act Resolution placing the company in business rescue

- Chapter 6 does not give any definitive guidance on what is meant by "reasonable grounds to believe"
- Directors will have to consider the company's specific circumstances at the time of their deliberation
- A subjective element (personal view of the directors)
- An objective element (view of the reasonable director)
- Deliberate over the factual matrix that the company faces at the relevant time
- The definition of business rescue in s128(1)(b) must be kept in mind



Commencement of Business Rescue

- Notice of commencement of business rescue proceedings Affidavit by director – section 129(3)(a) – a sworn statement of facts relevant to the grounds on which the board resolution was founded (financial difficulty, viable concern, prospects of rehab.)
- CoR 123.1 Form – Notice of beginning of business rescue proceedings
- CoR 123.2 Form – Notice of appointment of business rescue practitioner
- The resolution commencing business rescue proceedings must be filed with the Companies and Intellectual Property Commission (CIPC)
- In terms of Notice Number 35 of 2020, as from 15 July 2020, a letter will be issued by the CIPC confirming the processing of CoR 123.1 forms
- The CIPC will no longer issue a stamped copy of the submitted application as confirmation of receipt

Companies and Intellectual Property Commission
Republic of South Africa

Form CoR 123.1

About this Form

- This form is issued in terms of sections 129 and 131 of the Companies Act, 2008, and Regulation 120 of the Companies Regulations, 2011.
- A company commences its business rescue proceedings by or force of effect upon it has been filed with the notice.
- This notice must be submitted to every affected person within 5 business days after:
 - (a) it has been filed, in the case of a resolution; or
 - (b) the date of the court order, in such a case.
- If this Notice is issued following a board resolution:
 - (a) The company must appoint a business rescue practitioner within 7 business days after filing this notice; and
 - (b) Any affected person may apply to a court in terms of section 136 for an order setting aside the resolution.
- The fee for filing this notice is R0.

Contacting the Commission

The Companies and Intellectual Property Commission of South Africa

Postal Address
PO Box 439
Pretoria
0001
Republic of South Africa
Tel: 086 100 1303
www.cipc.co.za

Notice of Beginning of Business Rescue Proceedings

Date: _____

Customer Code: _____

Concerning
(Name and Registration Number of Company)

Name: _____

Registration No: _____

The above named company advises that business rescue proceedings have commenced in terms of Chapter 6 of the Companies Act, as a result of:

The Board of the company having adopted the attached resolution in terms of section 129(a) or _____

A Court having made the attached order in terms of section 127, in _____

In terms of section 129(1)(a), the company's business rescue proceedings commenced on _____, being the date on which:

This notice was filed with the Commission

The court issued the attached order.

(Only in the case of a company resolution)

In support of this Notice, the company has attached a sworn statement of the relevant facts upon which the resolution was founded by a director representing the Board.

Name and Title of person signing on behalf of the Company: _____

Authorized Signature: _____

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Pre-Assessment of Affairs, Business and Prospects of the Company

- Engagements with the nominated Business Rescue Practitioner to ascertain whether the company is a proper candidate for business rescue
- Not allowing a pre-assessment to be conducted constitutes **reckless** conduct by the directors which may result in personal liability for damage or loss caused to the company by the filing of an inappropriate resolution in support of business rescue, without due and responsible consideration
- The pre-assessment involves an investigation into the business, dealings and affairs of the company to determine the prospects of success of a business rescue process
- Ascertaining the extent to which business rescue is the **appropriate** procedure for that company
- Availability of post-commencement finance?



Pre-Assessment of Affairs, Business and Prospects of the Company

African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others 2015 (5) SA 192 (SCA)

- Held – the practitioner must act objectively and impartially in the conduct of business rescue proceedings
- Held – prior consultation with the company is necessary and does not prevent a practitioner who has been engaged to conduct a pre-assessment from being appointed at a later stage as the practitioner of the same company



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Two restrictions on the resolution to commence Business Rescue

- The Board cannot adopt a resolution to commence business rescue when liquidation proceedings have been initiated by or against the company – section 129(2)(a)
 - NB: the meaning of the word "initiated" – the purpose is to prevent the Board from thwarting an application to liquidate the company by adopting a BR resolution
- The Board resolution is of no force or effect until it has been filed with the CIPC – section 129(2)(b)
 - Resolution must be date stamped by the CIPC to have force and effect on the status of the company – BR commences on the date that the resolution is stamped by the CIPC (but see below)
 - Recent notice number 35 of 2020 published by CIPC must provide a letter of confirmation confirming that the form Cor123.1 has been received, processed and the relevant status change has been made on the companies registry.



The meaning of “Initiated by or against the company”

Two approaches to the type of actions that qualify as having initiated liquidation proceedings by or against the company –

(1) Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd (under supervision) and others [2019] JOL 46183 (GJ)

- Facts: applicant issued a liquidation application for the liquidation of the first respondent. This application was not served on the first respondent immediately. It was only served on the first respondent more than a month later. The first respondent (whose board was bona fide ignorant of the liquidation application) filed a resolution to commence business rescue proceedings.
- Question: did the resolution to commence business rescue trump the liquidation application which, though issued before the resolution was filed, was not yet served?
- Held –
 - Having regard to "the inherent policy choice that a litigant remains unaffected in law until made formally aware of the steps being taken against that litigant", liquidation proceedings must be served on the company and not merely issued, in order to meet the requirements of the section.
 - The resolution of the company to commence business rescue trumped the liquidation proceedings brought by the applicant.

The meaning of “Initiated by or against the company”

(2) Mouton v Park 2000 Development 11 (Pty) Ltd and others and a related matter [2019] 4 All SA 133 (WCC)

- Facts: the board of the respondent, at the time that it had resolved to place the company into business rescue, was aware that one of its creditors had decided to issue a liquidation application against it
- the reason that the board of the respondent sought to commence business rescue was to frustrate the attachment and sale of the company's immovable properties by one of its judgment creditors, by relying on the statutory moratorium
- Question: were the business rescue proceedings defective on the basis that they were launched at a time when liquidation proceedings had already been initiated against the company?
- Held: liquidation proceedings against a company are "initiated" when a resolution or decision by a creditor to launch liquidation proceedings against a company is adopted, and not when the application is filed or issued with the court

Conclusion

- The courts will consider the motives of the company's board of directors and whether the board was aware of the impending liquidation proceedings
- ensures that the rights and interests of all relevant stakeholders are taken into consideration and that business rescue proceedings are not abused to the detriment of creditors

Commencement of Business Rescue

- Section 129(3) and (4) read with Regulation 123 set out the publication and notification requirements for the board resolution to commence voluntary business rescue
- If a company fails to comply with any provision of subsection (3) or (4) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity
- **Panamo Properties (Pty) Ltd and another v Nel NO and others 2015 (5) SA 63 (SCA)**
 - non-compliance does not automatically render the proceedings a nullity
 - the business rescue proceedings come to an end only when a court order specifically sets aside the resolution or court order that began those proceedings
- Section 129(6) – a company may not pass a resolution to commence liquidation proceedings once a section 129(1) resolution has been adopted
- Unless: the resolution has lapsed for non-compliance; or until the BR proceedings have ended
- Section 129(7) – publication of notice of financial distress to all affected persons where board opts not to adopt a resolution for BR despite being financially distressed must provide reasons
- Section 129(7) notice – may result in creditor's applying for an urgent winding-up; or could result in the termination of contracts by virtue of being an event of default
- Failure to send out the notice may result in personal liability



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Setting aside the resolution commencing Business Rescue – Section 130

- To prevent abuse of voluntary business rescue affected persons may approach the court to set aside the resolution
- This application must be brought at any time after the adoption of a resolution in terms of section 129 but before the adoption of a business rescue plan
- This prevents the passing of resolutions that are ill-founded and that amount to an abuse of process
- An example of such abuse is where the company cannot realistically be rescued, but where the benefits of the moratorium are sought by the board of directors
- Directors that supported a business rescue resolution when there was clearly no merit in doing so may be punished with a personal costs order

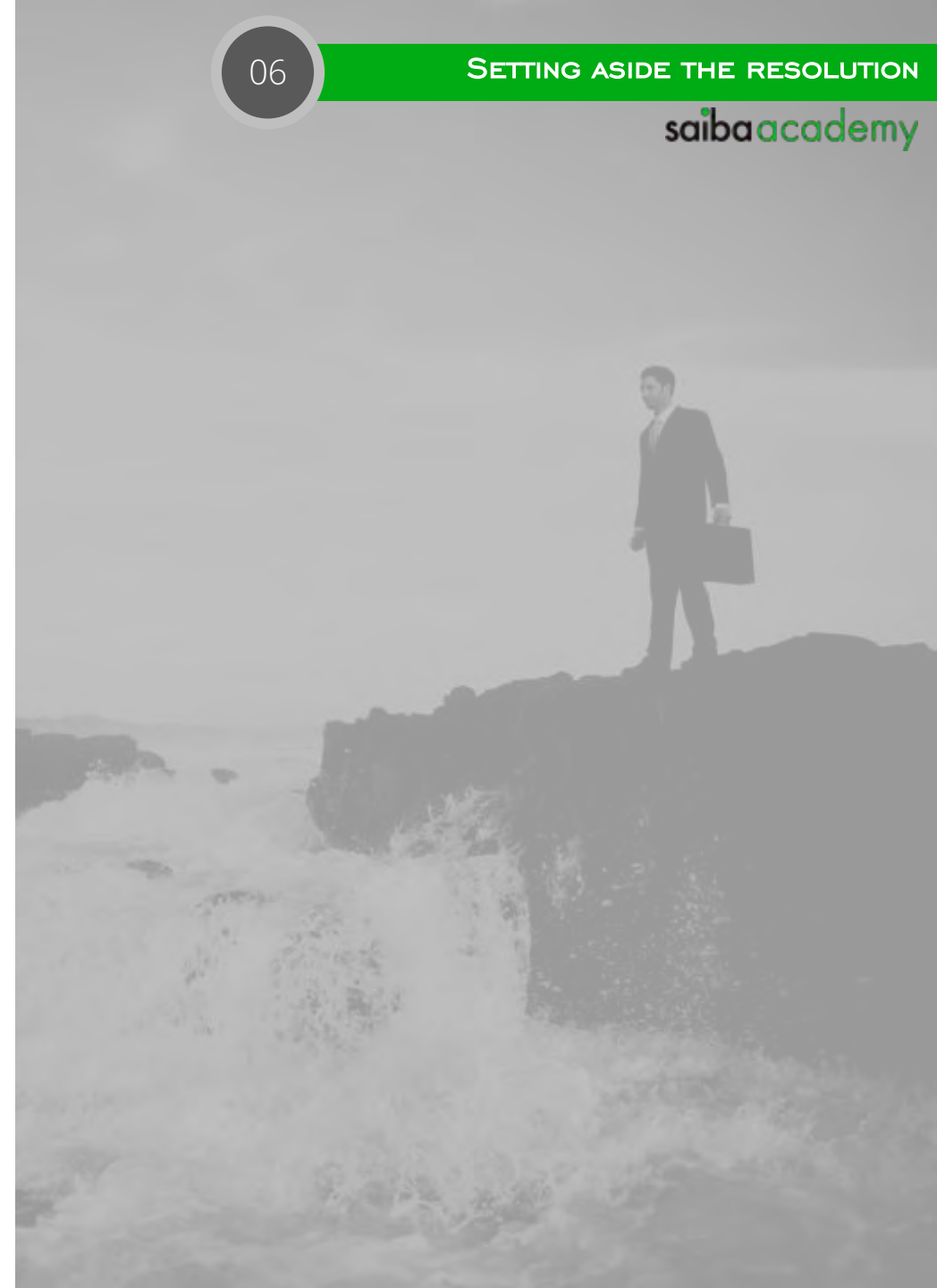


“ CHOOSE YOUR
DECISION WISELY ”

- Deepika Chavan

Setting aside the resolution commencing Business Rescue

- The grounds for setting aside the resolution commencing business rescue – section 130(1)
 1. No reasonable basis for believing that the company is financially distressed
 2. No reasonable prospect for rescuing the company
 3. The company failed to satisfy the procedural requirements set out in section 129
- **DH Brothers Industries (Pty) Ltd v Gribnitz NO and others 2014 (1) SA 103 (KZP)** - these grounds must be evaluated at the time at which the application in terms of section 130 is considered rather than at the time the resolution was taken



Setting aside the resolution commencing Business Rescue

- In terms of section 130(5), the court may when considering an application to set aside the resolution commencing business rescue –
 1. Set aside the resolution on any of the grounds in subsection (1) or if the court considers that it is otherwise just and equitable to do so
 2. Afford the practitioner sufficient time to form an opinion whether or not the company appears to be financially distressed, or whether or not there is a reasonable prospect of rescuing the company
- The court when making an order setting aside the resolution may also make any further necessary and appropriate order including –
 1. an order placing the company into liquidation
 2. an order of costs against any director who voted in favour of the resolution to commence business rescue in circumstances where the court finds that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable



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End of Unit 03

THANK YOU