

COMMENCEMENT OF
BUSINESS RESCUE
PROCEEDINGS BY
ORDER OF COURT
AND THE DURATION
OF BUSINESS RESCUE

04





Presented by

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Compulsory commencement – Section
131 of the Companies Act

The "reasonable prospect for
rescuing the company" test

The duration and termination of
business rescue proceedings

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Recap of the entry routes into Business Rescue

Voluntary Business Rescue

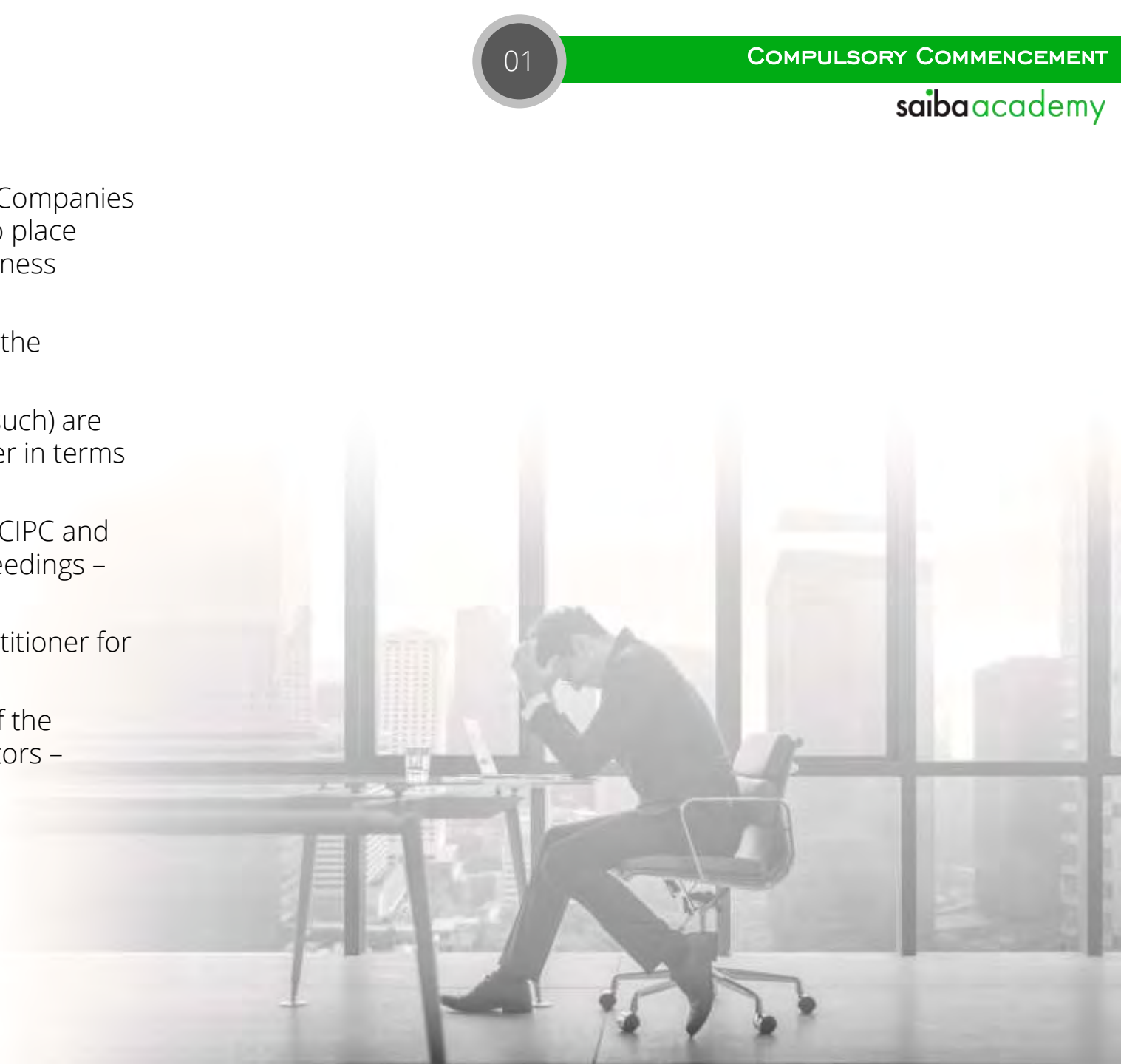
- Board resolution passed by a simple majority
- Business rescue practitioner is nominated in the resolution
- Company is financially distressed (i.e. will not be solvent on its balance sheet or will not be able to pay its debts when they fall due within the next six months)
- Reasonable prospect that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

Compulsory Business Rescue

- Compulsory commencement – Section 131 of the Companies Act – application by affected persons at any time to place company under supervision and commencing business rescue
- Affected person applies to the High Court to place the company into business rescue
- The Company and directors (in their capacities as such) are not authorized to apply for a Business Rescue order in terms of section 131
- Copy of application papers must be served on the CIPC and each affected person must be notified of the proceedings – section 131(2)
- Applicant must nominate the business rescue practitioner for appointment
- This appointment has to be ratified by a majority of the independent creditors at the first meeting of creditors – section 131(5)



Compulsory Business Rescue

- To commence business rescue proceedings in terms of section 131(4)(a) – the applicant who seeks an order placing the company under supervision and commencing Business Rescue proceedings must provide sufficient detail to satisfy the court that:
 1. The company is financially distressed;
 2. The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters; and
 3. It is otherwise just and equitable to do so for financial reasons, **and there is a reasonable prospect for rescuing the company.**
- If no reasonable prospect of rescuing the company exists, the court may dismiss the application and make any other order it deems just including an order to place the company in liquidation – section 131(4)(b)
- If court grants order commencing Business Rescue, the company must notify each affected person – section 131(8)



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“Reasonable Prospect for Rescuing the Company”

- Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA)
- A "reasonable prospect for rescuing the company" refers to a prospect based on reasonable grounds
- A mere speculative suggestion is not enough
- The applicant must establish grounds for the reasonable prospect of either restoring the company to a solvent going concern, or to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process
- This can be achieved by providing a reasonable measure of detail about the proposed plan in the application to court



“Reasonable Prospect for Rescuing the Company”

- To satisfy the "reasonable prospect for rescuing the company" test, the courts require proper motivation of the "reasonable prospect" in the application
- The bar has been set high and it is not enough to simply go through the motions of an unsubstantiated motivation
- Objectively reasonable ground(s) must support the application, and the view that there is a reasonable prospect of rescuing the company
- The courts will also not allow an application for business rescue that amounts to an abuse or manipulation of the process



The “Reasonable Prospect” Test

- Newcity Group (Pty) Ltd v Pellow NO and Others (577/2013) [2014] ZASCA 162 (1 October 2014)
- The SCA was tasked with determining the meaning of "reasonable prospect of rescue as contemplated in section 131(4)(a)
- The SCA dismissed the business rescue and placed the company into final liquidation
- The prospects of rescue must be established on the basis of facts, not speculation – in this regard either of the two objectives of business rescue must be present
- The test for the prospects of rescue should be flexible and the circumstances of each case will determine whether the available facts give rise to a reasonable prospect



Compulsory Business Rescue

- Section 131(5) – the court may grant an order appointing the business rescue practitioner nominated by the applicant (affected person), to act as an interim practitioner, but subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors
- Section 131(6) – if liquidation proceedings have already been commenced by or against the company, at the time an application to commence business rescue proceedings is made, the application to commence business rescue will suspend those liquidation proceedings until the court has adjudicated upon the application; or the business rescue proceedings end
- Thus, liquidation proceedings can be converted into Business Rescue proceedings, but the courts will not allow an application to succeed where it is brought for an ulterior motive



Compulsory Business Rescue

- Section 131(7) – a court may place the company into business rescue at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.
- Section 131(8) – if a company is placed under business rescue, it may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended
- Entry into business rescue by way of a section 131 court application is much more difficult than it is by way of a section 129 resolution
- A section 131 application must be carefully motivated if judges are to be persuaded that a business rescue order is to be granted

“ THE BEST VIEW
COMES AFTER THE
HARDEST CLIMB. ”



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Duration of Business Rescue

- Absa Bank Ltd v Caine NO, In re: Absa Bank Ltd v Caine NO and another (3813/2013, 3915/2013) [2014] ZAFSHC 46 (2 April 2014)
- The business rescue process is not intended to continue indefinitely. The goal is to complete the restructuring of the company within a short time to preserve the business of the debtor company and its relationship with customers, suppliers and creditors



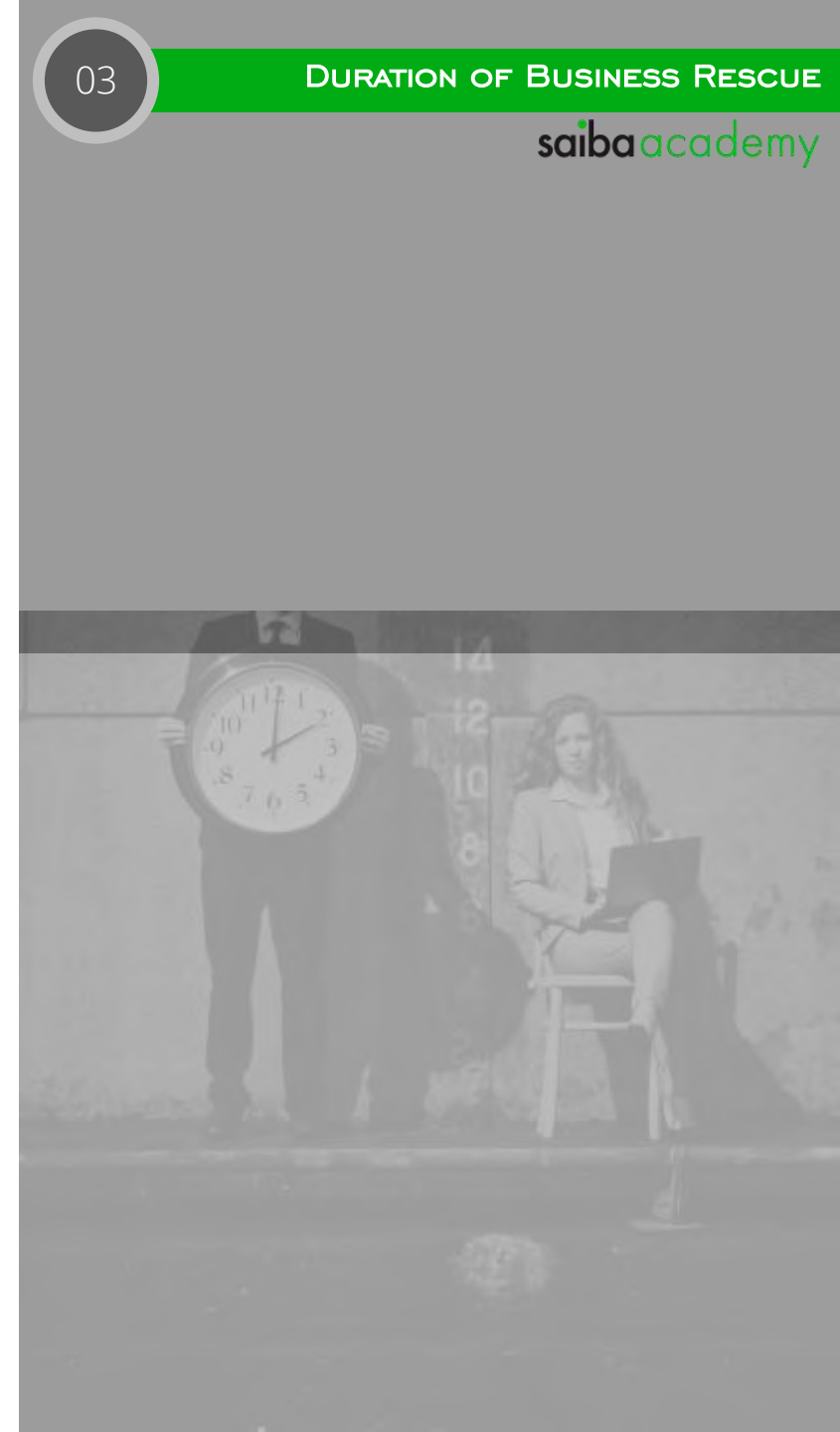
Duration of Business Rescue

Section 132(1) – business rescue proceedings **begin** when:

1. the company files a resolution to place itself under supervision
2. the company applies to the court for consent to file a resolution in terms of section 129(5)(b)
3. An affected person applies to the court for an order placing the company under supervision
4. A court makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest

Section 132(2) – business rescue proceedings **end** when:

1. The court sets aside the section 129 resolution or the court order in terms of section 131 that began the business rescue proceedings;
2. The court converts the business rescue proceedings into liquidation proceedings (where an affected person brings an application to argue that the company is no longer financially distressed or that there is no reasonable prospect of the company being rescued)
3. The business rescue practitioner files with the CIPC a notice of the termination of business rescue proceedings
4. A business rescue plan has been proposed and rejected, and no affected person has acted to extend the proceedings in any manner; or a business rescue plan has been adopted, and the practitioner has subsequently filed a notice of substantial implementation of that plan



Duration of Business Rescue

- Once a Business Rescue Plan has been approved, the Business Rescue Practitioner must implement it
- The complexity of the plan will depend on the company's size, the complexity of its business, the size and number of its subsidiaries, as well as its employees and creditors
- In terms of the Act, business rescue proceedings should effectively take no longer than 3 months
- This 3-month period is relatively short when one considers the activities that the Business Rescue Practitioner is required to undertake during this period
- A Business Rescue Plan devised to rescue a distressed company may require a period longer than 3 months to finalise
- The duration of business rescue procedure is dependent on a multiplicity of factors
- Business rescue cannot continue indefinitely without any rescue in sight. Delaying the inevitable liquidation of a company is discouraged



Duration of Business Rescue

- **Section 132(3)** – If the company's business rescue proceedings have not ended within three months or such time as the court may allow, certain reporting requirements must be adhered to by the Business Rescue Practitioner
- The Business Rescue Practitioner will have to:
 1. Prepare a report on the progress of the business rescue proceedings and update it at the end of each subsequent month until the end of those proceedings.
 2. Deliver the report and each update in the prescribed manner to each affected person and to the court if the proceedings have been the subject of a court order; or the CIPC in any other case.
- **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA)**
- In terms of section 132(2)(c) rejection of business rescue plan by the majority of the creditors usually sounds the death knell of the proceedings



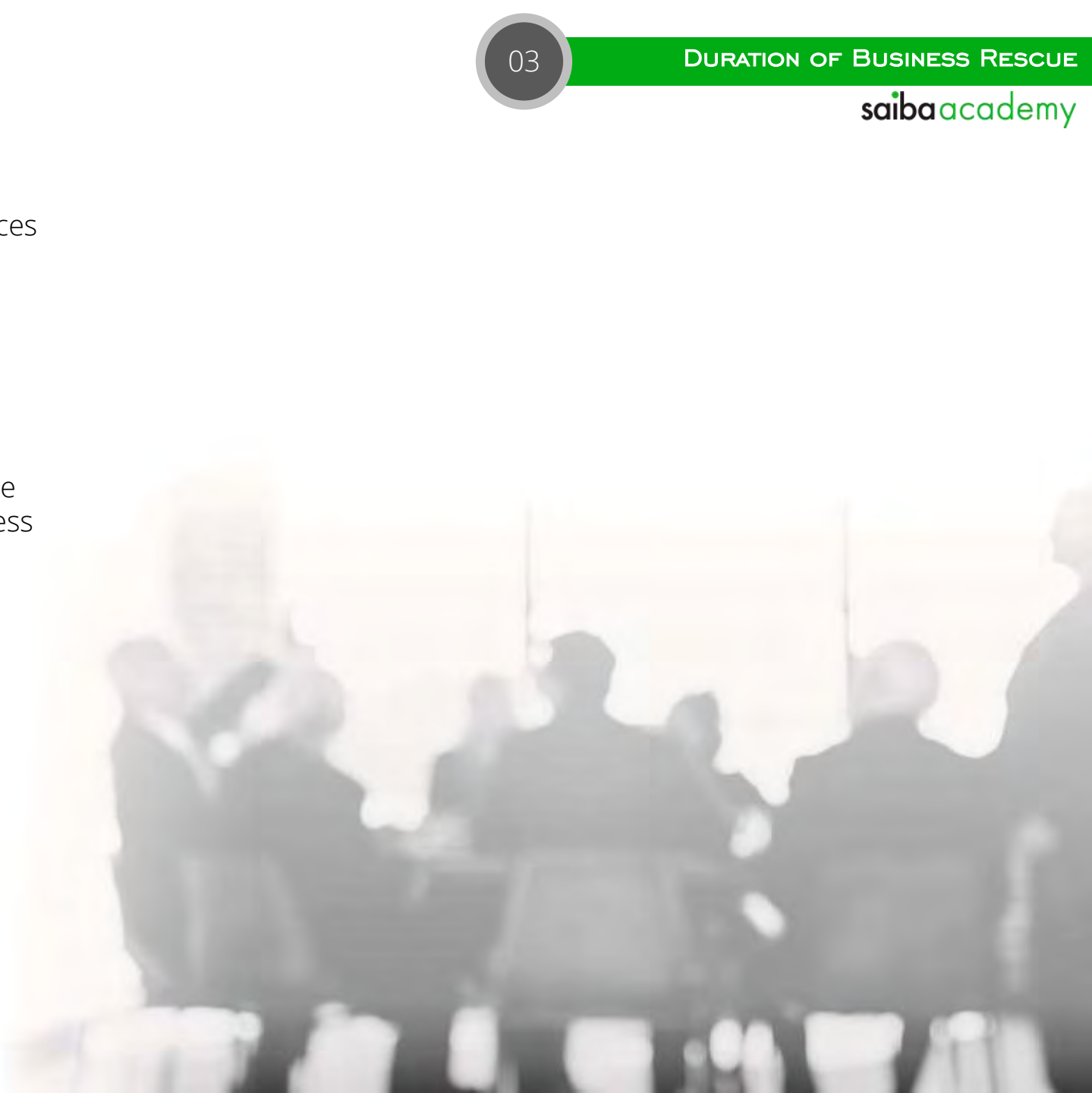
Prolonged Business Rescue Proceedings

- Creditor can apply for liquidation during the course of prolonged business rescue proceedings
- One cannot have a situation where a Business Rescue process runs indefinitely without any rescue in sight
- Prolonged Business Rescue processes may result in diminished liquidation dividends which will affect creditors' ability to recover
- **Standard Bank of South Africa Limited / Dalhousie Land Corporation Proprietary Limited & Others (unreported case, no. 2014/42541)** - creditor can apply for the liquidation of a company with leave of the court – needs to demonstrate that the business rescue is limping along



Termination of Business Rescue

- Notices of termination must be distinguished from notices of substantial implementation
- Notices of termination are filed if there are reasonable grounds to believe that the company is no longer financially distressed, provided business rescue commenced by way of resolution
- The business rescue practitioner files a notice of substantial implementation only when a business rescue plan has been adopted and implemented of the business rescue proceedings with the CIPC



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End of Unit 04

THANK YOU

