

09

THE BUSINESS RESCUE PRACTITIONER: QUALIFICATIONS AND APPOINTMENT




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Presented by

Dr Eric Levenstein

The role and appointment of
Business Rescue Practitioners

01

The Qualifications of Business
Rescue Practitioners

02

The Remuneration of Business
Rescue Practitioners

03

The Removal of Business
Rescue Practitioners

04

CONTENTS 09

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The role and appointment of
Business Rescue Practitioners

01

The Qualifications of Business
Rescue Practitioners

02

The Remuneration of Business
Rescue Practitioners

03

The Removal of Business
Rescue Practitioners

04

CONTENTS 09

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The role and appointment of business rescue practitioners

- The business rescue practitioner is the most important party in the business rescue process
- From the moment that a business rescue practitioner is appointed, the practitioner enjoys full management control and supervises the board of directors and pre-existing management – section 140(1)(a)
- The business rescue practitioner is also tasked with developing and implementing the business rescue plan – section 140(1)(d)
- In terms of section 128(1)(d), a business rescue practitioner is defined as a person appointed or two or more persons appointed jointly, to oversee a company during business rescue proceedings
- The words "two or more persons" allows for the possibility of a junior and an experienced or senior practitioner being appointed jointly
- "person" – contemplates the appointment of a company but this is not practically possible
- The Companies Act imposes a variety of duties and obligations on business rescue practitioners
- Business rescue practitioners are also required to adhere to strict timelines as set out in the Companies Act



The role and appointment of business rescue practitioners

- In practice, business rescue practitioners are usually one of the following -
 - Accountants
 - Lawyers
 - Business Turnaround Specialists; and
 - Ex-liquidators
- The skills required of a business rescue practitioner are distinct from that required from a liquidator – the practitioner needs to be able to “turn the company around”!
- Practitioners must ensure that they keep the business afloat and that the company's management remains intact
- Business rescue practitioners must also pursue post-commencement finance and engage with all relevant stakeholders including creditors, employees and shareholders
- A high degree of expertise in management and business strategy is required when developing and implementing a business rescue plan
- The focus at all times must be the rescue or rehabilitation of the enterprise



The role and appointment of business rescue practitioners

- In summary, business rescue practitioners are tasked with inter alia –
 1. Drafting the business rescue plan for approval by creditors and other stakeholders
 2. Overseeing and directing the ongoing conduct and operations of the company and its business
 3. Attending to the restructuring of the affairs and business of the company
 4. Obtaining post-commencement finance
 5. Engaging with creditors, shareholders, employees and prospective officers of the company
 6. Negotiating changes to the workforce and new employment terms
 7. Suspending and/or cancelling existing contracts that are prejudicial to the company
 8. Considering possible retrenchments
 9. Investigating the affairs of the company
 10. Putting the business rescue plan to the vote in terms of section 150
 11. Implementing the approved business rescue plan according to its terms
 12. Filing a notice of substantial implementation of the business rescue plan; and
 13. Converting the business rescue proceedings into liquidation proceedings in appropriate circumstances



The role and appointment of business rescue practitioners

- Business rescue practitioners are appointed in one of two ways –
 1. by the company as set out in section 129(3)(b), within five business days after commencing business rescue in terms of a board resolution as contemplated in section 129; or
 2. by the court in terms of section 131(5), after making an order placing the company under supervision and commencing business rescue proceedings
- It is important to note that an appointment of a business rescue practitioner in terms of section 131(5) is an interim one. The appointment by the court of the interim practitioner must be ratified at the first meeting of creditors as contemplated in section 147, by a majority of independent creditors' voting interests
- Such ratification is not required where the business rescue practitioner is appointed in terms of a section 129(3)(b) where business rescue is commenced voluntarily by a board resolution
- Accordingly, the appointment of a practitioner by the directors of the company through a section 129 resolution is final as there is no requirement for ratification in terms of the Act



“ WE CAN CHANGE THE WORLD
AND MAKE IT A BETTER PLACE.
IT IS IN YOUR HANDS TO MAKE
A DIFFERENCE. ”

- Nelson Mandela

The role and appointment of
Business Rescue Practitioners

01

The Qualifications of Business
Rescue Practitioners

02

The Remuneration of Business
Rescue Practitioners

03

The Removal of Business
Rescue Practitioners

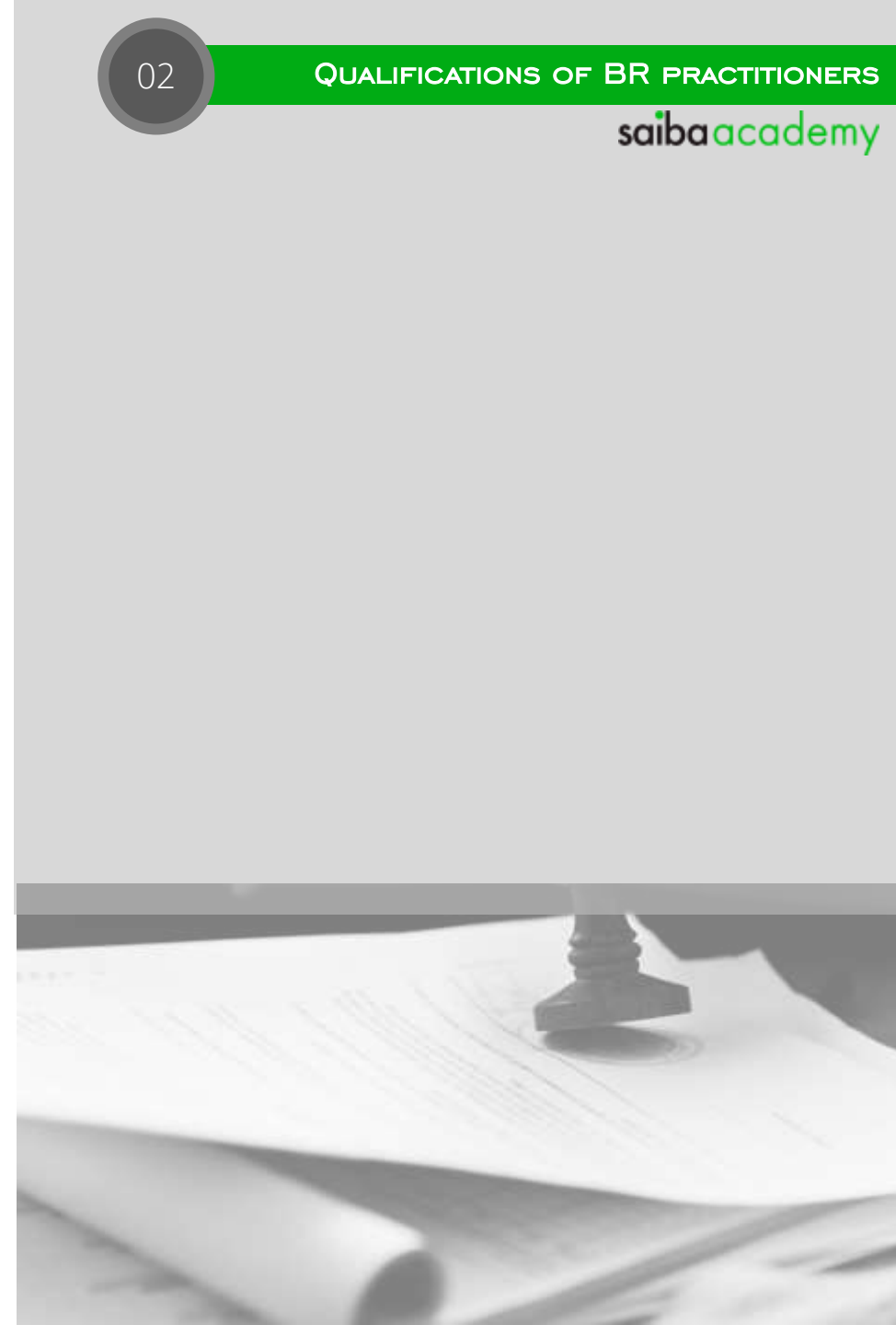
04

CONTENTS 09

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The Qualifications of Business Rescue Practitioners

- The qualifications of business rescue practitioners are set out in section 138
- In terms of section 138(1)(a) and (b), to be appointed as a business rescue practitioner -
 - one must be a member in good standing of a legal, accounting or business management profession accredited by the Companies & Intellectual Properties Commission (CIPC)
 - one must be licensed as a business rescue practitioner by the CIPC
- Licenses may be withdrawn or suspended by the CIPC – section 138(2)
- Regulation 126 suggests that a person who is part of an accredited profession need not be licensed by the CIPC
- In terms of section 138(1)(c)-(f), prospective business rescue practitioners –
 - must not be subject to an order of probation in terms of section 162(7) of the Companies Act;
 - must not be disqualified from acting as a director of a company in terms of section 69(8) of the Companies Act;
 - must not have any relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by such relationship; and
 - must not be related to a person who has a relationship as contemplated above



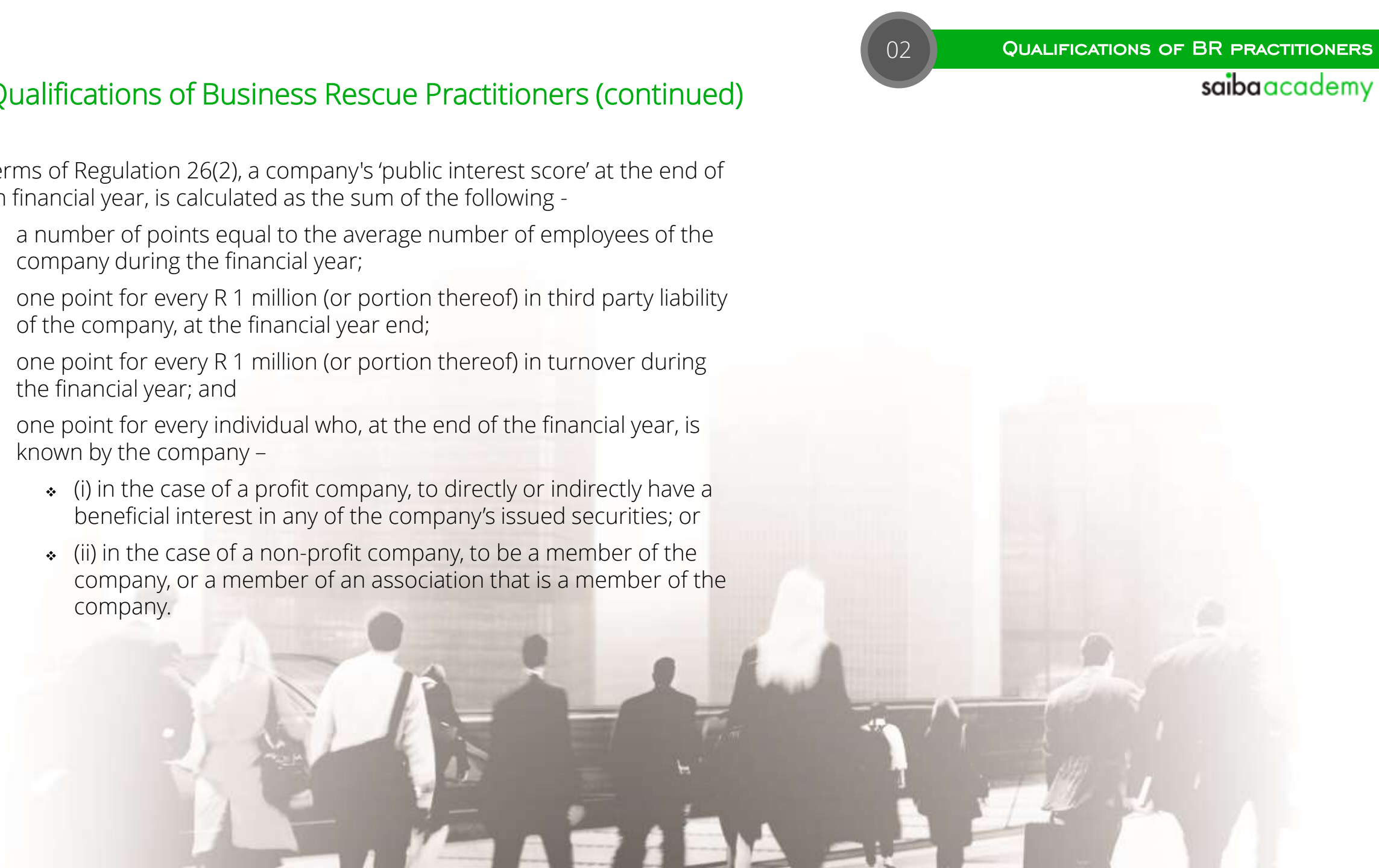
The Qualifications of Business Rescue Practitioners

- Regulation 127 of the Companies Regulations of 2011 provides for different categories of companies and business rescue practitioners
- Regulation 127(2)(b) provides for the following groups of companies undergoing business rescue proceedings –
 1. **Large companies** being any company, other than a state owned company, whose most recent public interest score, as calculated in terms of regulation 26(2) is 500 (five-hundred) or more;
 2. **Medium companies** being any public company whose most recent public interest score, as calculated in terms of regulation 26(2), is less than 500 (five-hundred), or any other company, other than a state owned company, whose most recent public interest score, as calculated in terms of regulation 26(2), is at least 100 (one-hundred) but less than 500 (five-hundred); and
 3. **Small companies** being any company, other than a state owned or public company, whose most recent public interest score, as calculated in terms of regulation 26(2), is less than 100 (one-hundred).



The Qualifications of Business Rescue Practitioners (continued)

- In terms of Regulation 26(2), a company's 'public interest score' at the end of each financial year, is calculated as the sum of the following -
 - a number of points equal to the average number of employees of the company during the financial year;
 - one point for every R 1 million (or portion thereof) in third party liability of the company, at the financial year end;
 - one point for every R 1 million (or portion thereof) in turnover during the financial year; and
 - one point for every individual who, at the end of the financial year, is known by the company -
 - ❖ (i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
 - ❖ (ii) in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company.



The Qualifications of Business Rescue Practitioners

- Regulation 127(2)(c) provides for three groups of practitioners, namely senior practitioners, experienced practitioners, and junior practitioners
- **Senior practitioner** means a person who is qualified to be appointed as a business rescue practitioner in terms of section 138(1) and who, immediately before being appointed as practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of at least 10 years.
- **Experienced practitioners** being a person who is qualified to be appointed as a business rescue practitioner in terms of section 138 (1) and who, immediately before being appointed as practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of at least 5 years
- **Junior practitioners** means a person who is qualified to be appointed as a business rescue practitioner in terms of section 138 (1) and who, immediately before being appointed as practitioner for a particular company, has either -
 - not previously engaged in business turnaround practice before the effective date of the Act, or acted as a business rescue practitioner in terms of the Act; or
 - has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of less than 5 years.



The Qualifications of Business Rescue Practitioners

- Regulation 127(3) – a junior practitioner may be appointed as the practitioner for any particular small company; but may not be appointed as the practitioner for any medium or large company, or for a state owned company unless as an assistant to an experienced or senior practitioner
- Regulation 127(4) – an experienced practitioner may be appointed as the practitioner for any particular small or medium company; but may not be appointed as the practitioner for any large company, or for a state owned company unless as an assistant to a senior practitioner.
- Regulation 127(5) – a senior practitioner may be appointed as the practitioner for any company.



The role and appointment of
Business Rescue Practitioners

01

The Qualifications of Business
Rescue Practitioners

02

The Remuneration of Business
Rescue Practitioners

03

The Removal of Business
Rescue Practitioners

04

CONTENTS 09

saibaacademy

The remuneration of business rescue practitioners

- In terms of section 143(1), the practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with statutory tariffs
- In practice, business rescue practitioners charge fees in accordance with the tariffs set out in Regulation 128(1)
- In addition to fees charged per tariff, business rescue practitioners may also charge in terms of an agreement providing for further remuneration – section 143(2)
- These fees are calculated on a contingency basis and are related to –
 - the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such plan;
 - or the attainment of any particular result or combination of results relating to business rescue proceedings
- Such contingency agreements must be approved by holders of a majority of the creditors' voting interests at a meeting called to consider such an agreement and by the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding up



The remuneration of business rescue practitioners

- In terms of section 143(4), a creditor or shareholder who voted against a proposal for further remuneration may apply to court within 10 business days after the date of voting on that proposal for an order setting aside the agreement on the following grounds –
 - That the agreement is not just and equitable; or
 - The remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company
- Tariff in terms of Regulation 128(1) -
 - R1250 per hour (max of R15 625 per day) (incl. VAT) - small company.
 - R1500 per hour (max of R18 750 per day) (incl. VAT) - medium company; or
 - R2000 per hour (max of R25 000 per day) (incl. VAT) - large company or state owned company
- In terms of Regulation 128(3), business rescue practitioners are reimbursed for actual costs of disbursements incurred by the practitioner, or expenses incurred by the practitioner, to extent reasonably necessary to carry out the practitioner's functions and to facilitate the conduct of the business rescue



Success fees to business rescue practitioners

- *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 (25 March 2020)
- Facts: the appellant creditor entered into a "success fee" agreement with the respondent business rescue practitioners. The agreement provided that the appellant pay the business rescue practitioners a sum of money once the business rescue practitioners had implemented the business rescue plan. The business rescue practitioners invoiced the appellant for payment after substantial implementation, but the appellant refused to make payment
- Questions: was the remuneration agreement concluded outside the ambit of section 143 of the Companies Act prohibited? Was the payment of such fee unlawful or contrary to public policy?
- Held – the "success fee" agreement concluded by the parties was neither prohibited, illegal nor contrary to public policy
- The facts indicated that the "success fee" agreement was such that it did not cause any prejudice to the body of creditors, as it did not affect the distribution paid to them
- There is nothing in section 143 of the Companies Act that suggests that an agreement not falling within its ambit is void
- Business rescue practitioners in this case did not breach their duty to act with good faith
- The court held that it is not unlawful or in contravention of the Companies Act for a business rescue practitioner to be paid a success fee by a third party outside the confines of section 143 of the Companies Act



The ranking of the business rescue practitioner's claim for remuneration during business rescue

- The ranking of post-commencement claims is set out in section 135(3) as follows –
 1. Business rescue practitioners' remuneration, expenses and claims incurred in terms of section 143 arising out of the costs of the business rescue proceedings
 2. post-commencement financing obligations that are related to the remuneration of employees from the date of commencement of the business rescue proceedings
 3. secured lenders or creditors, for any loan/supply of goods or services made after business rescue proceedings have commenced (secured post-commencement finance)
 4. Unsecured lenders/creditors, for any loan/supply of goods or services made after business rescue proceedings commenced (unsecured post-commencement finance)
 5. Secured lenders or other creditors, for any loan or supply of goods made before business rescue proceedings commenced
 6. Employees, for any remuneration which became due and payable before business rescue proceedings commenced
 7. Unsecured lenders or other creditors for any loan or supply of goods and services made before business rescue proceedings commenced
- Accordingly, in terms of section 135(3), business rescue practitioners' remuneration and expenses enjoy a preference above other post-commencement financiers
- Section 143(5) of the Companies Act also provides that to the extent that the business rescue practitioner's remuneration and expenses are not fully paid, the business rescue practitioner's claim for those amounts will rank in priority before the claims of secured and unsecured creditors



The ranking of the business rescue practitioner's claim if the company is subsequently liquidated

- When a company is placed in liquidation, the position of the creditors is crystallised as at the date of the commencement of the liquidation (i.e. a concursus creditorum is formed).
- following an unsuccessful business rescue, payment of the business rescue practitioner's remuneration and expenses, ranks behind –
 - secured pre-commencement claims – being claims in respect of which the creditor holds security (eg. over the property of the company by virtue of a landlord's legal hypothec, a pledge, a right of retention or a special mortgage); and
 - Claims in respect of the costs of the liquidation (Section 97 of Insolvency Act, read with section 135(4) of the Companies)
- Accordingly, in a liquidation scenario, business rescue practitioners may only claim against the free residue, and their claims are only paid out after the costs of the liquidation and the liquidator's fees (incurred in the administration of the winding-up) have been satisfied
- Nevertheless, in terms of section 135(4), the practitioner's claim in respect of remuneration still ranks before post-commencement financiers and any other secured and unsecured creditors
- This was confirmed in *Diener NO v Minister of Justice and others (South African Restructuring and Insolvency Practitioners Association (SARIPA) and others as amici curiae)* [2018] 1 All SA 317 (SCA)



The role and appointment of
Business Rescue Practitioners

01

The Qualifications of Business
Rescue Practitioners

02

The Remuneration of Business
Rescue Practitioners

03

The Removal of Business
Rescue Practitioners

04

CONTENTS 09

saibaacademy

The removal of business rescue practitioners

- A business rescue practitioner may only be removed by an order of court either in terms of section 130 (objection application) or in terms of section 139
- Section 130(1)(b) of the Companies Act provides that at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order setting aside the appointment of the business rescue practitioner, on the grounds that the business rescue practitioner –
 - does not satisfy the requirements of section 138
 - is not independent of the company or its management; or
 - lacks the necessary skills, having regard to the company's circumstances
- An affected person may also apply to a court for an order requiring the business rescue practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons



The removal of business rescue practitioners (continued)

- Section 130(2) provides that an affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court to set aside the appointment of the practitioner appointed by the company, unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.
- In terms of section 130(6), where a court makes an order setting aside the appointment of a business rescue practitioner, the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and must if applicable, afford the practitioner sufficient time to form an opinion whether or not –
 - the company appears to be financially distressed; or
 - there is a reasonable prospect of rescuing the company



The removal of business rescue practitioners

- In terms of section 139(2) of the Companies Act, a court may remove a business rescue practitioner from office, upon request of an affected person, or on its own motion, based on any of the following grounds –
 - incompetence or failure to perform the duties of a business rescue practitioner
 - failure to exercise the proper degree of care in the performance of the business rescue practitioner's functions
 - engaging in illegal acts or conduct
 - that the practitioner no longer satisfies the requirements set out in section 138(1)
 - conflict of interest or lack of independence, or
 - the business rescue practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time
- In terms of section 139(3), the company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130(1)(b) to set aside that new appointment



Grounds for the removal of business rescue practitioners

- The meaning of "failure to exercise the proper degree of care in the performance of the business rescue practitioner's functions" is important
- Chapter 6 does not provide any guidance in this regard
- However business rescue practitioners, in addition to the powers and duties specifically conferred by Chapter 6, have the responsibilities, duties and liabilities of a director as per sections 75 to 77 of the Companies Act – section 140(3)(b)
- Courts will undoubtedly have regard to factors relating to directors' duties, responsibilities and liabilities, when determining whether a business rescue practitioner has exercised the proper degree of care in the performance of functions
- It is also important to note that business rescue practitioners must ensure that they remain independent throughout the business rescue process
- Creditors who believe that any class of creditors is being favoured in any manner would have good grounds to launch an application for the practitioner's removal
- Conflicts of interest also constitute a significant consideration and are a ground for removal in terms of section 139



Case law on the removal of business rescue practitioners

Oakbay Investments Proprietary Limited v Tegeta Exploration Resources Proprietary Limited and others ZAGPPHC 411 (30 August 2019)

- Application was brought by Oakbay to remove the business rescue practitioners of Tegeta on the basis that the business rescue practitioners had a conflict of interest
- The business rescue practitioners acted as such for a number of companies in the Oakbay group
- The business rescue practitioners were accused of vilifying the Guptas who were the ultimate shareholder (through Oakbay) in Tegeta.
- Oakbay accused the business rescue practitioners of bias for disclosing a without prejudice offer made by the Oakbay for a successful fee based on the sale of Tegeta (this success fee was not agreed to by the creditors); and
- The business rescue practitioners allegedly purposefully omitted to include an intercompany loan from Optimum Coal Mine (OCM) which was Tegeta's largest asset because they also acted as business rescue practitioners for Tegeta.
- Court found that the applicant in fact failed to disclose that the inter company loan had been subordinated and that the alleged conflict of interest had been raised based on previous plans which had since been amended to account for the findings in a forensic report
- Court found that there was no conflict of interest as the OCM loan had been resolved; BUT
- Importantly the appointment of co-business rescue practitioners served as a safety net against bias and any potential conflicts; and
- It was in the public interest for the business rescues to be finalised expeditiously
- In this case, the court declined to remove the business rescue practitioners



Case law on the removal of business rescue practitioners

Gupta v Knoop N.O and others [2019] ZAGPPHC 960 (13 December 2019)

- Knoop and Klopper were appointed as business rescue practitioners in respect of the business rescue of Islandsite Investments Proprietary Limited and Confident Concepts –
- An Application was brought for the removal of the business rescue practitioners on the basis that, inter alia –
- The business rescue practitioners did not act in good faith; did not exercise a proper degree of care and skill, did not act as required by officers of the court
- The court found that by virtue of their role as officers of the court it is of utmost importance that they act in good faith and in accordance with the standards set out in the Companies Act;
- The court found that the business rescue practitioners had failed in this duty as they had unabatedly sold assets without having a plan regarding how the respective businesses were going to operate going forward; and
- Their continued earning of remuneration without timeously concluding the business rescue proceedings was at odds with their mandate and duties in terms of the Companies Act
- The court found further that the business rescue practitioners suspected unlawful criminal conduct on behalf of the erstwhile board and failed to report this suspicion to the relevant authorities.
- The court found that this omission tainted the proper execution of the business rescue and also indicated that they failed to act impartially as officers of the court.
- The court found that the business rescue practitioners should be removed on the grounds that they had failed to perform their duties as business rescue practitioners in terms of section 139(2); and that there was a conflict of interest and a lack of independence
- In this case, the court ordered the removal of the business rescue practitioners



End of Unit 09

THANK YOU



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