

# Business Rescue

Presenter: Wayne Clark



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# Presenter

## Wayne Clark

Wayne Clark has been involved in turn around management since 2007. He became a licenced business rescue practitioner in 2016. His other qualifications include Business Rescue Law and Business Administration & Management. Wayne's experience is both local and international. He has a strong passion in assisting SMEs with profitability and cash flow constraints to overcome their problems and return to financial viability.





# Introduction

The accountant is one of the first, other than the banks, to realise that a business is experiencing financial difficulties. One of the reasons for the low success rate of business rescue is that the directors of businesses take the option of business rescue too late, and in most cases the only element that they are interested in is the moratorium.

It is the duty of the accountant to inform the client or the directors of the situation and suggest corrective action to be taken. Business rescue started in 2011 and has had a rocky road which has resulted in the distrust of the process. It has however become more acceptable and a larger corporate company's have opted for business rescue as a means to survive.

The accounting profession is one of the accredited professions for becoming a business rescue practitioner. Accounting practises are looking at the business rescue process as an additional income stream to their practice. This should be approached with caution as the business rescue process is a specialised field and all consuming.

The choice is whether an accountant gains the required knowledge of the process to enable them to advise their clients effectively and refer a full time business rescue practitioner or become a full time business rescue practitioner.

The large corporate companies that have gone into business rescue of late are all over the news. There are however numerous SME companies that are in business rescue or would benefit from the process but cannot afford to as it's a costly exercise.

To be an effective business rescue practitioner in the SME environment a practitioner needs to be competent to handle all the aspects being, Financial, Business Management, legal, analytical, and more importantly negotiating skills. Nothing chases the cost of a business rescue like professional advice and legal action.

Hopefully by the end of this presentation you will have a better idea of the business rescue process and what it entails.

# Responsibilities of the accountant with respect to the companies act

There are various sections in the companies act that regulate the responsibility of the company and the accountant in respect of measuring and ensuring the financial stability of the company.

## **Section 4 - Solvency and Liquidity test**

A company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time;

The assets of the company, fairly valued, equal or exceed the liabilities of the company as fairly valued,

It appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered.

Factual **insolvency** is where the undertaking's liabilities exceed its assets, while **commercial insolvency** is a state of illiquidity where an undertaking is unable to pay its debts even though its assets may exceed its liabilities.

It stands to reason that for the calculation or determination the financial information used must be reliable and must be based on and satisfy the requirements of Section 28 regarding the keeping of accurate and complete accounting records and Section 29 which satisfies the requirements of the preparation of financial statements.

Note *It is an offence for a company with an intention to deceive or mislead any person to fail to keep accurate or complete accounting records and to keep records other than in the prescribed manner and form, if any, or to falsify any of its accounting records, or permit any person to do so or any person to falsify a company's accounting records.*

### **Section 22 – Reckless trading prohibited**

A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose or trade under insolvent conditions.

Note *If the commission has reasonable grounds to believe that a company is trading recklessly or is unable to pay its debt as they become due and payable in the normal course of business. the commission may issue a notice to the company to show cause why the company should be permitted to continue on its business. Should this not be done the commission may issue a notice requiring the company to cease business.*

**Financially distressed s 128(f)** – Directors obligation to advise effected parties should they realise that the company is distressed, but they decline to instituted business rescue proceedings s 129(7).



# What is Business Rescue

The express purpose of Business Rescue proceedings is to facilitate the efficient rehabilitation of a company that is Financially Distressed maximising the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so, continue in existence, resulting in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

Business rescue is governed by Chapter 6 of the companies act of 2008, as amended, and subsequent case law. And provides for:

The **temporary supervision** of the company, and the management of its affairs, business, and property by a business rescue practitioner.

During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in S140 has full management control of the company in substitution for its board and pre-existing management. **This includes taking over of the banking account mandate.**

## ***General moratorium***

During business rescue proceedings, no legal proceeding, including enforcement action against the company, or relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except as set out in S133(1) (a-f)

## ***Post Commencement finance***

Post-commencement finance is finance provided to the company once business rescue proceedings have commenced, or services have been rendered, or credit provided to a company during its business rescue.

### ***Development and implementation of a business rescue plan.***

The practitioner, after consulting with the creditors, other affected parties and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of Section 151.

### **History**

- Started with the introduction of Judicial management in the companies Act of 1926.
- JM retained in the new Companies Act of 1973
- In 2004, the policy document published by the department of trade and industry on its intended corporate law reform specifically mentioned the creation of a new corporate rescue procedure.
- Chapter 6 of the Companies Act 71 of 2008
- Effective 1 May 2011.

Section (7)K of the Act defines the purpose of chapter 6 as “Provide for the effective rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”

## **International Comparatives**

**UNCITRAL** – The United Nations Commission on International Trade Law – Eight Key Objectives of a robust and effective insolvency regime.

**World Bank** Principles for effective, Insolvency and Creditor / Debtor Rights System.

**US** - Chapter 11 of the US Bankruptcy code. (Trustee/ Examiner)

**UK** – Insolvency Act 1986, (Administrator) Changes

Insolvency Act 2000

Enterprise Act 2002

# The Business Rescue Test

The board of a company may resolve that the company voluntarily begin business rescue proceedings, if the board has reasonable grounds to believe:

- The company is financially distressed; and
- There appears to be a reasonable prospect of rescuing the company.

## **Financial Distress**

A company is “Financially Distressed” if it appears to be:

- Reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable, or
- Reasonably likely that the company will become Insolvent

within the immediately ensuing six months

## **Reasonable Prospect**

There are two goals to reasonable prospect

The company by restructuring its affairs, business, property, debt, other liabilities, and equity in a manner that maximises the likelihood of the company to continue in existence on a solvent basis.

OR

If it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company. (BRiL)

The most important test is whether you as a practitioner are going to take on the company as a client. Once you have signed your letter of acceptance and the CoR123.2 has been filed there is no turning back.

Remember if a company in business rescue goes into liquidation the chances of you getting paid, if you have not, is slim.

The window in which to make your decision is small so act wisely.

## **Letter of Engagement**

# To Rescue or to Liquidate

In *Welman V Marcelle Props CC and another...*, Tsoka J stated “In my view, business rescue proceedings are not for the terminally ill close corporation, nor are they for the chronically ill. They are for ailing corporations, which, given time will be rescued and become solvent.”

One of the biggest problems with business rescue is that companies take too long to consider business rescue and enter into the process too late, giving little chance of rescue.

## **Points to be considered**

Section 417 enquiry VS S141 Investigation

Cost of the liquidation.

Reasonable prospect BRiL

Loss of jobs



# Business Rescue Process

There are two ways that a company can enter into business rescue;

Voluntary S129 –

Court application – S131

We will discuss the Voluntary S129 approach as it has the most pitfalls.

Business rescue proceedings begin when the following documents are filed / lodged, in the prescribed manner with CIPC.

- Resolution passed by the board of the company to voluntarily begin business rescue proceedings. (Section 129)
- Resolution passed by the board designating a director or directors responsible for the signing of and lodging of all documentation required for business rescue process.
- A sworn affidavit by the responsible director stating that the business is financially distressed and the reasons therefore as well as the reasons for believing there is reasonable prospect for the business to be rescued.
- FORM CoR 123.1, duly signed by the responsible director
- A certified copy of the responsible director's ID document.

**The business rescue process begins when the required documents are filed with the commission in the prescribed manner.**

Within five (5) business days after the company has adopted and filed a resolution the company must;

- Publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person.
- Appoint a Business Rescue Practitioner. (BRP)

Within 2 business days after appointing a BRP the company must file the required documentation, as follows, with CIPC.

- Letter of acceptance from the business rescue practitioner.
- A resolution passed by the board appointing the business rescue practitioner
- A certificate detailing the Public interest (PI) Score of the company
- Form CoR 123.2, with CIPC, and inform all affected parties.

and within 5 business days after filing the notice, publish a notice of the appointment of a practitioner to each affected person.

Within 10 business days after being appointed, the practitioner must convene and preside over a **First meeting of Creditors** and convene and preside over a **First meeting of employees**.

Within 25 business days after being appointed the practitioner must publish a business rescue plan.

Within 10 business days after publishing the business rescue plan, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.

A least 5 Business days before the meeting the practitioner must deliver a notice of a meeting to all affected persons.

### **Voting process**

The proposed business rescue plan is preliminary approved if supported by

75% of the creditors voting interest that were voted, and  
50% of the votes in support of the plan include independent creditors.

Conditions to the approval and implementation

### **No Vote for the plan**

Practitioner can ask for a vote to prepare a revised plan  
Creditors can call for a vote for the practitioner to prepare a revised plan.  
Apply to the court to have an unreasonable vote set aside.

### **Substantive Implementation**

## **Contents of the Business Rescue Plan**

- Back ground
- Proposal
- Assumptions and conditions

### **S130 – Objections to company resolution.**

An effected person may apply to a court for an order;

- Setting aside the resolution on the grounds that;
  - There is no reasonable basis for believing that the company is financially distressed;
  - There no reasonable prospect for rescuing the company
  - The company has failed to satisfy the procedural requirements set out in S129.
- Setting aside the appointment of the practitioner, on the grounds that the practitioner.
  - Does not satisfy the requirements of section 138;
  - Is not independent
  - Lacks the necessary skills, having regard to the company's circumstances

### **S141 – Investigation of affairs of the company**

- (1) As soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.
- (2) If, at any time during business rescue proceedings, the practitioner concludes that:
  - a. There is no reasonable prospect for the company to be rescued, the practitioner must:
    - i. So, inform the court, the company, and all affected persons in the prescribed manner, and
    - ii. Apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation.

# Stake Holders Rights, Roles and Responsibilities during Business Rescue

## **S128 (1) refers to “affected persons”**

### **S137 Shareholders and Directors**

Each holder of any issued security of the company is entitled to;

- Notice of each court proceeding, decisions, meetings or other relevant event concerning the business rescue proceedings.
- Participate in any court proceedings arising during the business rescue proceedings
- Formally participate in a company’s business rescue proceedings to the extent provided for
- The right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in S152
- If the proposed business rescue plan is rejected to propose the development of an alternative plan.
- Present an offer to acquire the interest of any or all of the other creditors.
- Entitled to form a creditors committee and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.



## **Directors**

The Business rescue practitioner steps into the shoes of the directors but the directors are still responsible as follows

- Must continue to exercise the functions of director, subject to the authority of the practitioner.
- Exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so.
- Remains bound by the requirements of S75 concerning personal financial interest of the director or related person.
- To the extent that the director acts in accordance with section S76, and the liabilities set out in section S77(3) (a), (b) and (c).
- Must always attend to the requests of the practitioner and provide the practitioner with any information about the company's affairs as may reasonably be required.
- Be part of the formulation of the business rescue plan
- S142 Directors of the company to co-operate with and assist practitioner.

### **S145 - Creditors**

Each creditor is entitled to;

- Notice of each court proceeding, decisions, meetings or other relevant event concerning the business rescue proceedings.
- Participate in any court proceedings arising during the business rescue proceedings
- Formally participate in a company's business rescue proceedings to the extent provided for
- Informally participate in those proceedings by making proposals for a business rescue plan to the practitioner
- The right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in S152
- If the proposed business rescue plan is rejected to propose the development of an alternative plan.
- Present an offer to acquire the interest of any or all of the other creditors.
- Entitled to form a creditors committee and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.

## **S144 - Employees**

During a company's business rescue proceedings any employees of the company; who are represented by a registered trade union may exercise any rights set out collectively through their trade union, in accordance with applicable labour law.

Not represented by a registered trade union may elect to exercise any rights set either directly or by proxy through an employee organisation or representative.

Any money relating to employment which became due and payable by the company before the beginning of the business rescue proceedings and had not been paid is classified as a preferred unsecured creditor.

Employees are entitled to;

- Notice of each court proceeding, decisions, meetings or other relevant event concerning the business rescue proceedings.
- Participate in any court proceedings arising during the business rescue proceedings
- From a committee of employee representatives
- Be consulted by the practitioner during the development of the business rescue plan and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in Section 152(2).

### **S144 - Employees**

During a company's business rescue proceedings any employees of the company; who are represented by a registered trade union may exercise any rights set out collectively through their trade union, in accordance with applicable labour law.

Not represented by a registered trade union may elect to exercise any rights set either directly or by proxy through an employee organisation or representative.

Any money relating to employment which became due and payable by the company before the beginning of the business rescue proceedings and had not been paid is classified as a preferred unsecured creditor.

Employees are entitled to;

- Notice of each court proceeding, decisions, meetings or other relevant event concerning the business rescue proceedings.
- Participate in any court proceedings arising during the business rescue proceedings
- From a committee of employee representatives
- Be consulted by the practitioner during the development of the business rescue plan and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in Section 152(2).
- Be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan.
- If the proposed business rescue plan is rejected to propose the development of an alternative plan.
- Present an offer to acquire the interest of any or all of the other creditors.

# Becoming a licenced Business Rescue Practitioner

If a person is a member of good standing of a Legal, Accounting or business management profession accredited by the commission, has good character and integrity and is sufficiently educated, experienced and equipped to perform the functions of a business rescue practitioner. They may apply to the commission for a licence to serve as a business rescue practitioner, by completing and filing a Form CoR126.1 and paying the required fee.

In the last two years the commission has accredited certain professional bodies to licence practitioners. The requirements are basically the same, but the accredited bodies have their own assessment process which needs to be followed before a candidate is issued with a “Licence”.



### **S138 – Qualifications of Practitioner**

A person may be appointed as the business rescue practitioner of a company only if;

1. A member of good standing of a legal, accounting or business management profession accredited by the commission.
2. Has been licenced as such by the Commission
3. Is not prohibited in terms of section 162(7)
4. Would not be disqualified from acting as a director of the company in terms of section 69(8)
5. Does not have 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
6. Is not related to a person who has a relationship as contemplated in (5).

### **Business Rescue Practitioner classification**

- Junior practitioner
- Experienced practitioner
- Senior Practitioner

### **Company Classification & Rate**

	<b>PI Score</b>	<b>Hourly Rate</b>	<b>Daily rate</b>
Large Company	500 or more	R 2 000	R 25 000
Medium Company	100 – 500	R 1 500	R 18 750
Small company	100	R 1 250	R 15 625

**VAT Inclusive**

Reimbursements of actual costs

Contingency fee

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# Q&A

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