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Study Guide

Business Rescue

Study Guide

The purpose of this study guide is to serve as a roadmap through your learning journey and should be used to keep track of what is required in order to pass the examination and be awarded a Business Rescue Specialist License (SAIBA).

The study guide refers to the relevant textbook chapters that should be studied before completing the quiz for each unit. It is important to ensure that you have mastered the learning objectives.

Contents

The Companies and Intellectual Property Commission (CIPC) has, on 28 June 2017, accredited the South African Institute of Business Accountants (SAIBA) as a professional body for business rescue practitioners in terms of Section 138(1) of the Companies Act, 2008.

1. Introduction to Business Rescue and Important Definitions

1.1 Introduction to Study Unit 1

Restructuring of companies in financial distress is on the increase globally. South African companies now have the opportunity to reorganise and restructure via the business rescue process.

The business rescue mechanism provides a company with breathing space and allows financially distressed entities to restructure their affairs, under the supervision of a business rescue practitioner, in terms of a business rescue plan. Business rescue should be seen as an opportunity to restructure and re-organise the financially distressed company's affairs to enable the company to continue to trade on a solvent basis, as a commercially viable entity.

This study unit will introduce you to business rescue and covers the following topics:

- The concept of business rescue
- The rescue landscape prior to the introduction of the new business rescue legislation
- An overview of judicial management and its shortcomings
- The "corporate rescue" trend and international examples
- A summary of the key features of business rescue
- An introduction to Chapter 6 of the Companies Act 71 of 2008 ("Companies Act") and Important definitions

1.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand the key concepts of business rescue and how it has evolved in the South African legal context
- Define the important terminology relating to the business rescue process
- Understand judicial management and its shortcomings
- Appreciate the objectives of the rescue mechanism set out in Chapter 6 of the Companies Act

1.3 Textbook Chapters

First read through the following chapters in the prescribed textbook, South African Business Rescue Procedure by Dr Eric Levenstein:

- Chapter 6: The establishment of a business rescue regime for South Africa
- Chapter 7: Introduction to Chapter 6 of the 2008 Companies Act

1.4 Quiz

Complete the unit's Knowledge Assignment.

1.5 Conclusion: Study Unit 1

To conclude, business rescue proceedings are proceedings aimed to facilitate the rehabilitation of a company that is financially distressed by providing for

- the temporary supervision of the company, and the management of its affairs, business and property by a business rescue practitioner;
- a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities and equity (section 128(1)(b)).

Business rescue proceedings are not necessarily suitable for all companies. The type and size of the company is for the most part determinative as to whether or not a company is a suitable candidate for business rescue. For instance, companies that are involved in retail are more suitable for business rescue than companies that have been set up for property investment purposes, as retail companies have a "business" that can be rescued, while property investment companies may not.

Prior to a company, or an affected person, placing a company in business rescue, consideration should be given to the nature of the company, the extent to which business rescue is the appropriate procedure for that company and the extent to which business rescue would be more beneficial for the company as opposed to liquidation. If there is a realistic prospect of rescue, then business rescue proceedings are likely to be appropriate for the particular company. If not, liquidation may be the preferred alternative.

The business rescue process is very much a consultation driven process and the focus of the business rescue practitioner is to create a business rescue plan that will ring-fence the value that is left in the business and give the business a fresh start to achieve the following goals:

1. to enable the company to continue to trade in a solvent position into the future, or
2. provide a better dividend than what a creditor would have received under liquidation.

2. Grounds for Commencement of Business Rescue Proceedings

2.1 Introduction to Study Unit 2

This study unit deals with the objectives of business rescue in terms of section 128(1)(b)(iii) of the Companies Act and the manners in which a company can be placed under business rescue. The requirements relevant to

the two entry routes into business rescue are different and are regulated by different provisions of the Companies Act.

This study unit covers the following topics:

- A recap of Chapter 6 of the Companies Act 71 of 2008
- The objectives of business rescue
- The grounds for commencement of business rescue
- Persons who will be forewarned of financial distress

2.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand the objectives of business rescue proceedings
- Comprehend the timelines of the business rescue process
- Know the different grounds of commencement of business rescue proceedings
- Understand the risks of delaying the business rescue process
- Grasp the importance of the difference between liquidation and business rescue
- Distinguish the role players within the business rescue process
- List the various role players that will be forewarned of a company's financial distress
- Be aware of the relevant sections and statutory notices that must be considered at the commencement of business rescue

2.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure by Dr Eric Levenstein:

- Chapter 7: Introduction to Chapter 6 of the 2008 Companies Act

2.4 Quiz

Complete the unit's Knowledge Assignment.

2.5 Conclusion: Study Unit 2

In terms of section 128(1)(b)(iii) of the Companies Act, business rescue has two objectives, which are to either:

1. restructure the affairs of the company in an attempt to ensure that the company continues in existence on a solvent basis; or
2. if it is not possible for the company to so continue in existence, to provide for a better return for the company's creditors and shareholders than would ordinarily result from the immediate liquidation of the company.

There are two ways in which a company can be placed under business rescue, namely:

1. Voluntary business rescue proceedings – when the board of directors of a company passes a resolution to place the company under business rescue. This process is regulated by section 129 of the Companies Act.

2. Compulsory business rescue proceedings – when application is made to court to place the company under business rescue by an affected person. This process is regulated by section 131 of the Companies Act.

Voluntary business rescue proceedings commence when the requisite documents are filed with the Companies and Intellectual Property Commission (CIPC). On the other hand, compulsory business rescue proceedings, following an application to court, commences once an order is granted by the court for the commencement of business rescue.

There are various parties within the business rescue environment. Affected persons are important role players in the business rescue process. An affected person is a shareholder, creditor, employee (or their representative) or a registered trade union representing employees of the company. Affected persons have various rights throughout the business rescue process (section 128(1)(a)).

The business rescue filing procedure is governed by Practice Note 1 of 2020 as issued in terms of Regulation 4 of the Companies Regulation, 2011 (replacing Note 3 of 2019). A copy of the Practice Note is listed in section 14 of this course (Additional Material). The Practice Note 1 of 2020 took effect from 1 April 2020.

3. Commencement by Board Resolution

3.1 Introduction to Study Unit 3

Voluntary business rescue proceedings commence through the passing of a resolution by the board of directors of a financially distressed company. This voluntary route into business rescue proceedings is the most frequently used entry route into business rescue and is increasingly relevant in today's context. Once the board of directors of a company resolves to voluntarily commence business rescue proceedings, a business rescue practitioner is appointed by the company and is tasked with supervising the company for the duration of the business rescue proceedings.

When contemplating business rescue, a number of factors ought to be considered by the company's board of directors. Accordingly, in this study unit, the various requirements, processes, and legislative requirements relevant to the commencement of business rescue through a board resolution will be explored.

This study unit includes the following topics:

- An overview of the entry points into business rescue proceedings
- A discussion of voluntary business rescue proceedings commenced by board resolution
- The grounds for the commencement of business rescue proceedings by the board of directors
- The pre-assessment of the affairs, business, and prospects of the company.
- The two restrictions on the resolution to commence business rescue
- Setting aside the resolution commencing business rescue

3.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand and explain the two entry points into business rescue proceedings
- Know the difference between voluntary and compulsory business rescue

- Grasp the factors that ought to be considered when contemplating voluntary commencement
- Understand the importance of having a reasonable prospect that the company can be rescued ("the reasonable prospect test")
- List the documentation required by the CIPC when filing for voluntary business rescue
- Realize the importance of the pre-assessment that need to be conducted by the business rescue practitioner, including the initial assessment regarding the availability of post-commencement finance
- Be aware of the two restrictions on the resolution to commence business rescue
- Understand the two approaches to the type of actions that qualify as having initiated liquidation proceedings by or against the company
- Know the implications of non-compliance with section 129(3) or (4) relating to the resolution to begin business rescue proceedings
- Understand section 130 and the impact of affected persons setting aside the resolution commencing the business rescue proceedings

3.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure by Dr Eric Levenstein:

- Chapter 8 - Commencement and duration of the business rescue process.
- Chapter 8.1 - Commencement of business rescue proceedings.
- Chapter 8.2 - Voluntary commencement.

3.4 Quiz

Complete the unit's Knowledge Assignment.

3.5 Conclusion: Study Unit 3

A company should commence business rescue proceedings at the first signs of it being financially distressed, within the meaning set out in section 128(1)(f) of the Companies Act.

A company will be financially distressed, within the meaning of the Companies Act, and in turn a suitable candidate for business rescue if within the ensuing six months the company will either

a) not be able to pay all of its debts as they become due and payable; or
b) will become insolvent – i.e.: with its liabilities exceeding its assets.

The test for business rescue is therefore a six-month forward looking test, it being whether or not the company will become insolvent (on its balance sheet) or unable to pay its debts as and when they fall due for payment (i.e. commercial insolvency).

The company must be capable of being rescued. In terms of the definition of "rescuing the company" in section 128(1)(h) of the Companies Act, this means that the company must be able to achieve one of the two outcomes of business rescue (as referred to above). The South African courts have considered numerous business rescue cases since the inception of the Companies Act and have provided guidance as to what is required in order to show that there is a "reasonable prospect" of rescuing a company. Our courts have indicated that for there

to be a "reasonable prospect" of rescuing a company, one ought to indicate the cause of the demise of the company or the reasons for its failure and offer a remedy for such demise that is likely to be sustainable. In support of this, one would need to provide concrete and objectively ascertainable facts, which facts are beyond mere speculation, indicating that the remedy proposed is reasonable and sustainable.

In order for a company to practically voluntarily commence business rescue proceedings the company must file Form CoR123.1 with the Companies and Intellectual Property Commission ("CIPC") and this must be accompanied by the resolution of the board of directors of the company (in which it resolves to commence business rescue proceedings, and if it has a business rescue practitioner in mind at the time, to appoint a certain person as the practitioner) together with a statement setting out the facts upon which the resolution was founded. Thereafter, the company must comply with a number of notice and publication requirements prescribed by the Act.

In terms of section 129(3) and (4), once a company has commenced business rescue proceedings, pursuant to the passing of a board resolution in terms of section 129, the company must –

- within five business days of filing the Form CoR123.1, resolution and statement, with CIPC,
    - publish notice of the resolution, together with a sworn statement as to the reasons why the company is financially distressed, detailing the prospects of rescuing the company, to all affected persons; and
    - appoint a business rescue practitioner;
- after appointing a business rescue practitioner,
    - file a notice of the appointment of the business rescue practitioner within two business days with CIPC; and
    - publish a notice of the appointment of the business rescue practitioner within five business days after the notice is filed

With regard to voluntary business rescues, in terms of section 129(5)(a), if a company fails to comply with the provisions of sections 129(3) and (4), the resolution lapses and is a nullity and the company may not file a further resolution for a period of three months after the date on which the resolution was adopted, unless a court, on good cause shown, approves of the company filing a further resolution (section 129(5)(b).

Further, it must be noted an affected person can make an application to court in terms of section 130(1)(a)(iii) to set aside the resolution on the grounds that the company has failed to satisfy the procedural requirements, set out in section 129.

Section 130 provides that at any time after the adoption of a business rescue resolution, an affected person may apply to court for an order –

- setting aside the resolution on the grounds that
    - (i) there is no reasonable basis for believing that the company is financially distressed;
    - (ii) there is no reasonable prospect for rescuing the company; or
    - (iii) the company has failed to satisfy the procedural requirements in section 129;
- setting aside the appointment of the practitioner on the grounds that the practitioner
    - (i) does not satisfy the requirements of section 138;
    - (ii) is not independent of the company or its management; or
    - (iii) lacks the necessary skills, having regard to the company's circumstances; or
- requiring the 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 person).

Further to the above, it is worth mentioning that a director of a company that votes in favour of a resolution may not apply to court to set aside the resolution or the appointment of the business rescue practitioner in terms of section 130, unless such person can satisfy the court that he or she acted in good faith on the basis of

information that has since been found to be false or misleading (section 130(2)). Each affected person has a right to participate in a hearing in terms of section130 (section 130(4)).

A voluntary business rescue application cannot be filed if a compulsory business rescue application has been initiated or if liquidation proceedings have already been initiated by or against the company.

4. Commencement of Business Rescue proceedings by Order of Court and the duration of Business Rescue

4.1 Introduction to unit 4

The second way in which a company can be placed under business rescue is when an application is made to court, by an affected person, to place the company under business rescue. This process is regulated by section 131 of the Companies Act.

This study unit includes the following topics:

- Overview of compulsory commencement – Section 131 of the Companies Act.
- The "reasonable prospect for rescuing the company" test.
- The duration and termination of business rescue proceedings in terms of section 132 of the Companies Act

4.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand who can apply to the court for business rescue and who is not authorized to do so
- Master and explain the provisions of section 131 of the Companies Act
- Know the procedures that must be followed when applying to the court for an order placing a company under business rescue
- Understand the effect of applying to court to place a company under business rescue in circumstances where liquidation proceedings have already been commenced
- Have knowledge regarding the test to ensure that there is a reasonable prospect for rescuing the company
- Be familiar with the duration of the business rescues process
- Adhere to the requirements set out in the Companies Act when the company's business rescue process is extended or prolonged beyond the time frame envisaged in the Act
- Follow the correct procedure to terminate the business rescue process

4.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure by Dr Eric Levenstein:

- Chapter 8 - Commencement and duration of the business rescue process.
- Chapter 8.3 - Compulsory commencement.
- Chapter 8.4 - Duration of business rescue proceedings.

4.4 Quiz

Complete the unit's Knowledge Assignment.

4.5 Conclusion: Study Unit 4

If a company is placed under Business Rescue by way of a court order, the court may appoint an interim business rescue practitioner who was nominated by the affected person who applied to court. However, the appointment is subject to the ratification by the holders of the majority of the independent creditors' voting interest at the first meeting of creditors.

An "affected person" is defined as:

- a shareholder of the company,
- a creditor of the company,
- any registered trade union representing the employees of the company, or
- the employees themselves.

An "affected person" cannot be:

- The company itself or its directors (in their capacities as such) for the purposes of section 131 of the Companies Act

The applicant must (in terms of section 131(2)) notify the company, the CIPC and all the affected persons of the application, and each affected person is entitled to participate in the hearing of the application (section 131(3)). The court is given wide powers and discretion in the hearing of such applications contemplated in section 131. Furthermore, any liquidation application pending at the time of the application is stayed until the business rescue application is dispensed with or the business rescue proceedings have been concluded.

It is worth noting that the court order envisaged in section 131 can also be made at any time during liquidation proceedings. A company which has so been placed under business rescue by a court order may not apply for liquidation until the business rescue proceedings have concluded. Finally, each affected person must be notified within 5 days of such an order being granted by the court (section 131(8)).

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.

The following should be included in the application to the court for business rescue:

- "the likely costs of rendering the company able to commence with its intended business or to resume the conduct of its core business";
- the availability of "cash resources" to enable the company to meet its daily expenses and the nature of the funding on which the company will rely;
- "the availability of any other necessary resources, such as raw materials and human capital"; and
- "the reasons why the proposed business rescue plan will have a reasonable prospect of success".

The business rescue proceedings will commence as soon as the business rescue order is granted by the court.

The application to the court to place a company into business rescue can be opposed by any affected person on whom an application for business rescue has been served, by serving and filing a notice of intention to oppose the application and thereafter serving an answering affidavit in the application in accordance with the time periods set out in the notice of motion. Any affected person opposing a business rescue may either request the court to dismiss the application together with any other appropriate order, including an order placing the company under liquidation.

If business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow,
the practitioner must –

- 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; and
- deliver a report and each update in the prescribed manner to each affected person and to
  (i) the court (if the proceedings have been the subject of a court order); or
  (ii) the CIPC, in any other case.

The reporting requirements that come with extending the time frames are burdensome. These provisions provide business rescue practitioners with an incentive for conducting the process and implementing the plan, in the shortest possible time, but in any event within the three-month period. However, in practice, business rescue proceedings are extended from time to time with the support of the majority of creditors and can take anything from 6 months to 2 years, depending on the complexities of the business.

In terms of section 132 of the Act business rescue proceedings end when –

- the court sets aside the resolution or order that began the business rescue proceedings or when the court converts business rescue proceedings into liquidation proceedings;
- the business rescue practitioner files a notice (Form CoR125.2) of termination of business rescue proceedings with CIPC;
- a business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the Act; or
- a business rescue plan has been adopted and the business rescue practitioner has subsequently filed a notice of substantial implementation of the plan (Form CoR125.3).

5. Legal consequences of Business Rescue Proceedings: The General Moratorium on legal proceedings and the Protection of Property Interests

5.1 Introduction to Study Unit 5

The Companies Act contemplates certain timelines during business rescue proceedings that must be adhered to by the business rescue practitioner. These timelines will be discussed in this study unit.

Furthermore, a key feature of business rescue proceedings is that the Companies Act provides for a general moratorium that prevents the third-parties (including creditors) from instituting legal proceedings (including enforcement actions) against the company during business rescue proceedings. The question that has been the subject of much litigation over the last few years is whether a creditor may institute and continue with legal steps against the surety of the debtor company whilst the debtor company is under business rescue. A surety

in its ordinary meaning is either an individual or an entity that binds itself as surety and co-principal debtor for the liabilities of a debtor company. This question any many others are dealt with in this study unit.

This study unit includes the following topics:

- An overview of the timelines in business rescue
- The general moratorium on legal proceedings – section 133
- The exceptions to the moratorium
- Benefit of the moratorium
- Sureties and guarantees by the company
- Protection of property interests

5.2 Learning Objectives

After studying this study unit, you should be able to:

- Explain and set out the timelines within the business rescue process.
- Understand the moratorium, the exceptions thereto and the benefits of the moratorium.
- Understand the difference between sureties and guarantees.
- Understand the impact that the release of a company's debt during the business rescue process has on the obligations of a surety.
- Understand the various mechanisms in the Companies Act that provide for the protection of property interests and why it is important that property interests are protected in the context of business rescue.
- Know the difference between a general notarial bond and a special notarial bond

5.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure by Dr Eric Levenstein:

- Chapter 9.1 – Timelines in business rescue – an overview
- Chapter 9.3 – General moratorium on legal proceedings
- Chapter 9.4.7 – Protection of property interests

5.4 Quiz

Complete the unit's Knowledge Assignment.

5.5 Conclusion: Study Unit 5

In terms of section 133(1) of the Companies Act, no legal proceedings, including enforcement action, may be commenced or continued with in any forum against the company, or in relation to any property belonging to the company, or lawfully in its possession, during the business rescue proceedings. This moratorium provides the company with "breathing space", while the business rescue practitioner attempts to rescue and restructure the company through the implementation of a business rescue plan.

Sureties and Guarantees

In common law, a surety is discharged if the principal obligation is extinguished due to the accessory nature of the suretyship. An independent guarantee, on the other hand, due to the fact that it is a principal obligation, can only be discharged if there is performance of the principal obligation or payment on the part of the guarantor.

The Companies Act provides that where a company is placed under business rescue and the company has bound itself as surety or provided a guarantee, no legal proceedings may be instituted against the company in respect of such surety or guarantee without the leave of the court.

It is worth noting that in the event that the company fails to execute its obligations while under business rescue proceedings, and a demand is made on a guarantee, the guarantor does not enjoy the same protection offered to the company in business rescue, and will be obliged to pay if the demand is valid. Where an independent guarantee has been provided, the creditor will be entitled to proceed against the guarantor, simply because the guarantee establishes a separate principal obligation.

The Companies Act is silent on whether a creditor may institute legal proceedings against the surety of a debtor company that is placed under business rescue.

In considering the effect of business rescue on sureties, it is important to be aware of the following scenarios relating to sureties:

a) Where a company has signed as surety for a debtor in favour of a creditor and the surety company subsequently goes under business rescue. The situation is clearly dealt with in Section 133(2) of the Companies Act, which states that during business rescue proceedings, a surety by a company in favour of any other person may not be enforced by any other person against the surety except with leave of the court. The result of this is that in the situation envisaged above, the surety company under business rescue may not be sued by the creditor.

b) Where a company is the principal debtor, and another person signs as surety for the company in favour of the company's creditor and the debtor company subsequently goes under business rescue.
This situation has not been specifically dealt in the Act. It has therefore been left to the courts to decide whether the protection afforded to the surety company in this situation extends to the person who signs as surety for the debtor company in this situation. In the matter of *Investec Bank LTD v Bruyns* 2012 (5) SA 430 (WCC) the creditor was of the view that the moratorium that exists in favour of the company whilst under business rescue does not extend to the surety, but only to the company itself. It was argued that the business rescue defence was a personal defence for the benefit of the company only. The surety however argued the contrary and maintained that the defence was a defence in law which extended to the surety as well.

The Court (Acting Judge Rogers presiding) however ruled in favour of the creditor with the Court reasoning that the defence provided by the Act was only for the Company, and does not extend to the surety as it is a personal defence and not a defence in law. In this case the debtor company had been placed under business rescue but no business rescue plan had been adopted and implemented.
In a more recent judgment of *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* (2014) 3 ALL SA 500 (WCC), the Court found in favour of the surety and not the creditor. However, it is important to take note that unlike the previous judgment the facts were not similar. In this matter, the Court was not called upon to make a finding of whether the moratorium extends to a surety or not. The Court was called upon

to decide whether when a creditor accepts a payment in full and final settlement at a meeting of creditors and in terms of an approved business rescue plan, the creditor may still thereafter proceed with steps against the surety. The Judge, who was the same Judge as in the Investec case, concluded that under those circumstances the creditor may not proceed against the surety especially when the deed of suretyship was silent on those circumstances. The deed of surety was silent on whether a creditor was entitled to proceed against a surety notwithstanding the fact that the creditor reached a compromise with the principal debtor. The Court determined that the obligation of a surety is accessory in nature and accordingly the extinction of the principal obligation extinguishes the obligation of the surety. The creditor, by reaching a compromise in full and final settlement with the company in terms of an approved business rescue plan, accordingly extinguished the obligation of the surety.

Rogers' decision appears to be premised inter alia on the following considerations:

- there is no statute dealing with this situation and we therefore ought to follow the common law; and
- under the general principles of the law of suretyship, where a debtor has been released from its liability, the surety is released from such liability as well.

To summarise, a creditor may proceed with steps against a surety of a debtor company in business rescue at the commencement of the business rescue proceedings whilst the company enjoys protection. Furthermore, the creditor may not proceed against the surety of a debtor company in business rescue after the adoption of a business rescue plan which provides for the discharge of the principal debt, unless the deed of surety stipulates otherwise.

c) The precedent established by the courts is that where a business rescue plan provides for a discharge/release of the distressed company (the principal debtor) from a principal debt by way of compromise in full and final settlement, the sureties for the company are as a result also discharged of their liability to the creditor. This will be the case even if the creditor voted against the plan.

The business rescue practitioner may include a provision in the plan having the effect that the sureties will lose their right to recover any amounts they have paid to a creditor of the company from the company itself. What the legislation also made clear is that a creditor, whether they assent or dissent to the business rescue plan, once it has been adopted without preservation of their right against a surety, that right falls away. The only way to retain their right against third parties, such as a surety, is to insist, before a vote is taken on the plan, for the inclusion of a term in the business rescue plan that their right against a surety will be preserved. Whether or not the business rescue practitioner includes this provision may well depend on how much voting (power) rights the creditor has to sway the outcome of whether the plan is assented to and adopted or not. The larger the creditor, the more significant its voting power and the more likely its request to retain its rights against the surety will be accepted by the business rescue practitioner.

It is important for the business rescue practitioner to know whether the creditor was prudent and ensured that their rights against sureties were properly set out in the business rescue plan or whether it was stipulated from the outset in the suretyship agreement. Should the deed of suretyship stipulate that the surety should remain liable despite any business rescue compromise then the creditor ought to be entitled to proceed against such surety despite the compromise.

Another way in which a creditor can protect itself, is to insist that security be provided in the form of a guarantee rather than a suretyship.
It is worth noting that a business rescue practitioner is not empowered to consent to enforcement against the company of claims based on guarantees and suretyships.

6. Legal consequences of Business Rescue proceedings: Effects on Employment and Other Contracts

6.1 Introduction to Study Unit 6

When a company has been placed under business rescue (voluntarily or by way of a court order), there are several legal consequences that follow. These legal consequences have an impact on not only the company's activities, but also on its stakeholders, including its employees and other contracting parties.

This study unit covers the following topics:

- The effect of business rescue proceedings on the employees of the company
- The status and participation of employees during the company's business rescue proceedings
- The effect of business rescue proceedings on the contracts of the company
- The suspension and/or cancellation of contracts during business rescue proceedings

6.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand how to balance the needs of employees and the interests of creditors and other stakeholders
- Understand the concept of ensuring job security within the context of business rescue proceedings as opposed to liquidation
- Know what employees are entitled to during business rescue.
- Be familiar with the difference between the business rescue practitioner consulting with employees and being instructed by employees
- Know when legal proceedings or enforcement actions can be brought against the property of a company during business rescue
- Know that a company in business rescue that unlawfully occupies premises after a lease has been validly cancelled cannot rely on the moratorium against legal proceedings to justify its illegal occupation
- Know that a company in business rescue cannot rely on the moratorium against legal proceedings when it is in unlawful possession of property
- Understand that the business rescue practitioner should urgently, after appointment, analyse the company's contracts and suspend or cancel prejudicial contracts that have a detrimental effect on the company's viability, solvency, or ability to trade effectively
- Understand the effects and impact that the suspension or cancellation of a contract with a creditor may have

6.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure by Dr Eric Levenstein:

- Chapter 9.5.2 – Employees
- Chapter 9.5.3 – Contracts

6.4 Quiz

Complete the unit's Knowledge Assignment.

6.5 Conclusion: Study Unit 6

Employees

Section 136 of the Companies Act regulates the interests of employees during business rescue. It provides that employees who were, immediately prior to the institution of business rescue, employees of the company, will remain employed by the company on the same terms and conditions on which they were employed prior to the commencement of business rescue proceedings except to the extent that:

1. changes occur in the ordinary course of attrition or
2. if different terms and conditions are agreed between the employee and the company in accordance with labour laws.

Furthermore, in terms of section 136(1)(b) of the Companies Act, any retrenchments in terms of any business rescue plan, must be conducted in terms of section 189 or 189A of the Labour Relations Act 66 of 1995, and other applicable employment related legislation. It is important to note that in terms of section 144 of the Companies Act, an employee is a preferred unsecured creditor for any monies owing to such employee which became due and payable to an employee before business rescue commenced and had not been paid to that employee before the commencement of business rescue. Any money that becomes due to the employee after the commencement of the business rescue proceedings, will be regarded as post-commencement finance (PCF).

Contracts

The business rescue practitioner should urgently analyse the company's contracts after being appointed. Section 136 aims to regulate the position of the company in respect of its obligations in terms of any existing contracts that may apply at the time the business rescue proceedings commenced.

Section 133(1) states that during business rescue proceedings, no legal proceeding against the company, including enforcement action, or in relation to any property belonging to the company, or lawfully in its possession may be commenced in any forum except –

- with the written consent of the practitioner,
- with the leave of the court and in accordance with any terms the court considers suitable,
- as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began,
- criminal proceedings against the company or any of its directors or officers.

Section 136(2) provides that the business rescue practitioner may, during business rescue proceedings, and despite any provision to the contrary in an agreement –

- entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –
  - arises under an agreement to which the company was a party at the commencement of business rescue proceedings; and
  - would otherwise become due during the proceedings;

- apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated above.

The proviso to the above is that, in terms of section 136(2A), a business rescue practitioner must not, suspend or cancel, any provision of an employment contract or an agreement to which section 35A or 35B of the Insolvency Act 24 of 1936 (transactions on exchange and agreements providing for termination and netting) would apply if the company had been liquidated. Further, if a practitioner suspends a provision of an agreement relating to security granted by the company to a creditor, that provision continues to apply for the purposes of section 134.

In terms of section 136(3) of the Companies Act, any agreement, or provision of an agreement, that has been suspended or cancelled, will give rise to a claim for damages in favour of a party affected thereby. However, the damages claim will be paid in terms of the business rescue plan, and since it will only be a concurrent claim against the company, the full damages amount will rarely be paid to the claimant and would be compromised.

Cancellation of contracts by the business rescue practitioner can only be done by application to the court.

A prudent approach for landlords would be to include a standard event-of-default clause in their standard form contracts enabling them to terminate their agreements, at their discretion, once a business rescue process commences.

7. Post Commencement Finance

7.1 Introduction to Study Unit 7

In any rescue regime, a degree of financial support is required through the provision of additional funding known as post-commencement finance (PCF). One of the critical components of the business rescue process and plan involves securing turnaround finance to meet short-term trade obligations (such as working capital requirements), covering turnaround/restructuring costs, and restoring the company's balance sheet to solvency.

Section 135 of the Companies Act provides for post commencement finance, which ranks in preference to existing unsecured claims against the debtor company. The ranking of post commencement finance is an attempt by the legislators to stimulate turnaround financing for distressed businesses, and is an important feature of the business rescue process. Sourcing the required level of post-commencement finance is a critical objective that must be achieved by the business rescue practitioner. Without it, the business rescue process is doomed to failure.

This study unit includes the following topics:

- Overview of post-commencement finance
- Sources of post-commencement finance
- Types of post-commencement finance
- The ranking of post-commencement finance - in business rescue
- The ranking of post-commencement finance - in a liquidation scenario post-business rescue

7.2 Learning Objectives

After studying this study unit, you should be able to:

- Explain the concept of post commencement finance
- List the various sources of post commencement finance
- Distinguish between the two types of post commencement finance
- Understand that costs or liabilities that arise out of an agreement that was concluded prior to business rescue proceedings, and which costs were incurred during business rescue proceedings, will not constitute "post-commencement financing" or "costs arising out of the costs of business rescue proceedings"
- Understand which creditors will be elevated to preferent (PCF) status
- Know the ranking of claims in the business rescue process, taking into consideration claims by secured creditors under section 134(3)
- Know that a business rescue practitioner enjoys a preference in respect of his or her remuneration
- Familiarise yourself with the ranking of claims in a liquidation scenario post-business rescue

7.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure:

- Chapter 9.6 – Financing the rescue: post-commencement finance

7.4 Quiz

Complete the unit's Knowledge Assignment.

7.5 Concluding unit 7

Post-commencement finance is finance provided to the company once business rescue proceedings have commenced. Section 135(1) of the Act also provides that any remuneration, reimbursement for expenses or other amount of money relating to employment that becomes due and payable by a company to an employee during business rescue, is also considered to be post commencement finance.

Unless a creditor concludes a new agreement (makes application) or concludes an addendum to its current agreement which provides that any services provided during business rescue will enjoy a preference during business rescue, such creditor will not enjoy any preference as set out in section 135 of the Companies Act. Business rescue practitioners should reconsider the manner in which they treat the provision of goods and services after the commencement of the business rescue process and should only elevate costs and/or liabilities to preferent (PCF) status if they are of the view that the contract and the service provided by the creditor is vital to the successful rescue of the company.

The Companies Act does not prescribe who in fact may provide the finance. Existing bankers, shareholders, third party funders and distressed debt investors are all likely sources of post-commencement finance.

Any finance provided by a post-commencement financier may be secured by utilising any asset of the company to the extent that it is not already encumbered (section 135(2)).

Under normal circumstances, a lender would be reticent to lend money to a distressed business that may have a short or no future. In order to encourage lending, post- commencement financiers are effectively 'bumped up' the list of creditors. They are third on the list behind only the business rescue practitioner and his/her expenses/advisors as well as any employees who are owed money by the company (s135(1)). It is even possible for these post-commencement financiers to obtain security for their loan provided that the asset over which they take security, has not already been encumbered.

In terms of Section 135(3) of the Act claims in business rescue rank in the following order:

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

There are risks with post commencement finance lending which must not be ignored. If the business rescue is unsuccessful and the business is liquidated, the liquidation costs rank in preference to those that had provided post-commencement finance.

If there is more than one post-commencement lender, then these lenders are paid out in the order in which their loans were incurred. There is the risk of there being insufficient funds for these lenders, after the business rescue practitioner's remuneration and expenses as well as the employees have been paid out. A particularly high-risk scenario is where there are no unencumbered assets against which to secure the post commencement finance loan.

These risks can be allayed or even prevented by the lender. In all likelihood, diligent post-commencement financiers will conduct their research and perform their due diligence before investing. Certainly, factors such as the prospects of success of rescue, the honesty and ability of the business rescue practitioner, the nature of the security to be given for the loan are the main criteria (and there are more) to be taken into account when making the decision to provide post-commencement finance.

There is no denying that post commencement finance is a high risk, high reward scenario. However, if the financier is thorough in his/her research and is willing to take a chance, then there is no reason why it cannot be turned into a profitable outcome- at least for the financier.

Should a business rescue process fail and a company be placed in liquidation the business rescue practitioner enjoys a preference in respect of his or her remuneration to claim against the free residue after the costs of the liquidation, but before post-commencement financiers and any other unsecured creditors.

8. Legal consequences – The effects on Shareholders, Directors and Creditors

8.1 Introduction to Study Unit 8

This study unit addresses the effects of business rescue proceedings on shareholders, directors and creditors during the business rescue process.

This study unit includes the following topics:

- The effect of business rescue on shareholders
- The role and obligations of directors during business rescue
- The role and treatment of creditors during business rescue
- The first meeting of creditors

8.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand the effect of business rescue proceedings on shareholders and their voting rights during the business rescue proceedings
- Know when an alteration in the classification or status of any issued securities/shares of a company is valid
- Understand the role and obligations of directors during business rescue
- Understand that the business rescue practitioner has a wide discretion in relation to the management of the company and can remove obstructive directors
- Understand the implications of section 162, whereby a business rescue practitioner can have a director declared delinquent
- Know that no lien is allowed to be claimed over books and records relating to the affairs of the company as the business rescue practitioner is required to consider and investigate all the affairs of the company
- Learn about the role and treatment of creditors during the business rescue process
- Know that a creditor's voting rights can be purchased by way of a binding offer and at what value
- Understand the workings of a creditor committee
- Know the voting rights of creditors
- Be aware that if the business rescue commenced by way of a court order, the business rescue practitioner's appointment must be ratified by a majority of independent creditors at the first meeting of creditors, in terms of section 131(5) of the Companies Act
- Understand the effect of business rescue on the claims of creditors

8.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure:

- Chapter 9.2 – The first meeting of creditors
- Chapter 9.4.5 – Directors and cooperation with the business rescue practitioner
- Chapter 9.5 – Treatment of creditors, employees and contracts

8.4 Quiz

Complete the unit's Knowledge Assignment.

8.5 Concluding unit 8

Shareholders

During business rescue proceedings, an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent that the court, or the business rescue plan, directs otherwise (section 137). Securities are shares, debentures, or other instruments irrespective of their form of title, issued or authorised to be issued by a profit company.

During business rescue proceedings, shareholders are entitled to the following rights:

- The right to notice of any relevant event concerning the business rescue proceedings;
- The right to participate in the company's business rescue as provided for in the Act;
- The right to vote to approve or reject a proposed business rescue plan, if the plan would alter the rights associated with the class of securities; and
- if the rescue plan is rejected, the right to
    - propose the development of an alternative plan;
    - present an offer to acquire the interests of any or all of the creditors.

When it comes to the adoption of the business rescue plan, shareholders are permitted to vote only when the plan purports to alter rights associated with the class of securities they hold or as creditors in instances where they have made loans to the company, however, they will not be construed as independent creditors.

Therefore even though shareholders are seen as affected persons and may participate in the proceedings, they have restricted rights in that where the rescue plan has no effect on shareholders' rights, they would be precluded from voting for its adoption.

Directors

Determining financial distress has far greater consequences for a director than a simple balance sheet consideration. In terms of section 129(7) of the Companies Act, there is an onerous obligation placed on a board of directors of a company wherein if the board determines that a business is in fact in financial distress, they are to either adopt a resolution to commence with business rescue proceedings, alternatively, deliver a written notice to each of its creditors, employees, trade unions and shareholders, setting out, inter alia, its reasons for not voluntarily commencing business rescue proceedings.

Failure to adhere to the provisions as set out in the Act could result in a director being held personally liable for the losses incurred by the company. Section 77 of the Companies Act speaks to this personal liability and explains that where a director knowingly carried on the business of the company recklessly or with the intent to defraud creditors or other stakeholders, he/she shall be held personally liable for any loss incurred by the company. Section 214 goes even further to provide for criminal liability for those directors trading a company on a reckless basis.

All directors should be asking themselves the following two important questions:

1. Is it reasonably unlikely that the company will be able to settle all its debts as they become due and payable in the ensuing six months? Or,
2. is it reasonably likely that the company will become insolvent within the immediately ensuing six months?

If the answer is yes, directors should consider filling for voluntary business rescue.

Once a company has filed for business rescue the directors of the company remain directors of the company but their powers and duties are restricted in that the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management. During this period all directors are still bound by director's fiduciary duties and duties regarding personal financial interests and can incur personal liability as determined by the Act.

The business rescue practitioner has a wide discretion in relation to the management of the company and can appoint or remove a person as part of management.

In terms of section 162 of the Companies Act, a company, a shareholder, a director, company secretary or prescribed officer of the company, a registered trade union that represents employees of the company, or any other representative of the employees of the company, may apply to court for an order declaring a person delinquent. Such a declaration will be made if the person is a director or, within 24 months immediately preceding the application was a director. The courts have also declared directors, who have failed to discharge their duties under the Companies Act, to be delinquent, and have granted leave to the companies involved to claim damages from such director for losses incurred as a result of such director's conduct.

It is therefore incumbent on South African directors to take cognisance of the impact of section 162 of the Companies Act (declaration of delinquent directors) and to take steps to ensure that they do not open themselves up to the possibility of being declared delinquent. Directors who are declared to be delinquent may also be held criminally liable under section 214 of the Companies Act.

Creditors

When business rescue proceedings commence, the company continues to operate as before, but under the supervision of the business rescue practitioner and creditors will need to comply with their obligations to supply goods or services to the company in the same manner in which they did prior to the commencement of business rescue proceedings, unless the agreement between the company and the creditor regulates the relationship between the parties in the event of an insolvency or business rescue. However, it is understandable that unsecured creditors and lenders during business rescue would be wary of continuing to service or supply goods to the company on the same basis on which they did prior to a business rescue as their oustanding pre-commencement claims will be satisfied last in accordance with the order of preference for the payment of claims prescribed by the Companies Act (S135(3)(a)(ii)).

Further, if a company's obligations towards another party have been suspended, or cancelled on application by the practitioner to court, the agreement regulating the relationship between the company and its creditor may prescribe the way in which the relationship between the parties will ensue in the event of an insolvency or the commencement of business rescue. Failing this, it is likely in practice, that the reciprocal party to an agreement will not perform its obligations if the practitioner has suspended the performance of the company's obligations or cancelled the agreement and the other party will have a claim for damages in terms of section 136(3).

Creditors are entitled to:

- Notice of court proceedings, meetings, decisions or other business rescue relevant proceedings.
- Participate in business rescue proceedings to the extent provided for in the Act.
- Formally participate in the business rescue proceedings in terms of Chapter 6.

- Informally participate in the business rescue proceedings by making proposals to the business rescue practitioner.

The first meeting of creditors (section 147):

- Should be convened and presided over by the practitioner within 10 days after such practitioner's appointment.
- At the meeting, the practitioner must inform the creditors whether he or she believes that there is a reasonable prospect of rescuing the company. The creditors may present proof of claims to the practitioner as well as determine whether or not to form a committee of creditors.
- A decision at the meeting is approved if it is supported by the holders of a simple majority of the independent creditors' voting interests. However, it is important to note that this does not apply to a meeting convened for the purpose of considering a proposed business rescue plan.
- If the business rescue commenced by way of a court order, the business rescue practitioner's appointment must be ratified by a majority of independent creditors at the first meeting of creditors, in terms of section 131(5) of the Companies Act. (Not applicable to voluntary commencement, in terms of section 129.)

Each creditor has the right to vote to amend, approve or reject the business rescue plan.

If the business rescue plan is rejected, creditors can:

- Propose the development of an alternative plan or to present an offer to acquire the interests of other creditors.
- Creditors may form a creditors committee with which the business rescue practitioner must consult during the business rescue process

In respect of any decision requiring the support of creditors voting interest, votes are determined in value and not in number.

The business rescue practitioner must:

- determine if the creditor is independent.
- get a suitably qualified person to appraise a likely distribution
- give written notice of such an appraisal 15 days before the section 151 meeting

Within 5 days of receipt, the affected person may apply to court to:

- review business rescue practitioner's determination that a creditor is independent or not
- review, re-appraise and revalue the voting interest.

In respect of any decision contemplated in Chapter 6 that requires the support of the holders of creditors' voting interests:

- a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company (section 145(4)(a)); and
- a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in a liquidation of the company (section 145(4)(b)).

Therefore

- each secured creditor and each unsecured creditor whose claim is not in any way subordinated by way of agreement, has a voting interest equal to the value of the amount owed to that creditor by the company; and

- each concurrent creditor whose claim is subordinated has a voting interest valued at the amount which such concurrent creditor could reasonably expect to receive on a liquidation of the company.

In a vote called in terms of section 152(1)(e) of the Companies Act, the proposed business rescue plan will be approved on a preliminary basis if

- it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and
- the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.

There is no set format for submitting a claim; however, it is recommended that a claim be submitted in the form of an affidavit. It is advisable for the business rescue practitioner to receive claims at a very early stage in order to assess the extent of the existing liabilities of the company. In this way, the business rescue practitioner can determine whether there is a reasonable prospect of rescuing the company.

9. The Business Rescue Practitioner: Qualifications and Appointment

9.1 Introduction to Study Unit 9

When a Company has adopted a resolution to place the company under business rescue, the company must appoint a business rescue practitioner within five days after the resolution was adopted. On the other hand, when a company's business rescue proceedings are commenced by an order of court in terms of section 131, the court may appoint an interim practitioner whose appointment may then be ratified at the first meeting of creditors.

The role of the business rescue practitioner is to guide and supervise the company through the business rescue process.

This study unit includes the following topics:

- The role and appointment of business rescue practitioners
- The qualifications of business rescue practitioners
- The remuneration of business rescue practitioners
- The removal of business rescue practitioners

9.2 Learning Objectives

After studying this study unit, you should be able to:

- Be able to define the tasks of the business rescue practitioner
- Know the rules and regulations to qualify as a business rescue practitioner
- Have learned the different categories of companies and how to categorize them
- Be able to calculate the public interest score of a company
- Be familiar with the 3 groups of business rescue practitioners and the years of experience needed to move into a more experienced group
- Know how the fees of a business rescue practitioner are calculated and where fees are ranked in terms of all claims
- Understand the grounds on which a business rescue practitioner can be removed

9.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure:

- Chapter 9.4 - Management of the company in the rescue process: the business rescue practitioner

9.4 Quiz

Complete the unit's Knowledge Assignment.

9.5 Concluding unit 9

A business rescue practitioner is a person appointed, or two or more persons jointly appointed, to oversee a company during business rescue. While the Companies Act defines a business rescue practitioner as one or more persons, the business rescue provisions of the Companies Act do not necessarily refer to or support joint appointments. Further, the word "person" in the Companies Act includes a juristic person. It is therefore arguable, although unlikely, that a company can take appointment as a business rescue practitioner (section 128(1)(d)).

Section 138 of the Companies Act regulates the qualifications required for a business rescue practitioner.
In order to qualify as a business rescue practitioner a person must be

- a member in good standing of a legal, accounting or business management profession accredited by the CIPC (section 138(1)(a)); and
- licensed as such by the CIPC (section 138(1)(b)).

From this, it appears that a person must satisfy both the above requirements for appointment. But Regulation 126 of the Act states that a person who is part of an accredited profession need not be licensed by the CIPC (Regulation 126(2)). Further direction on this is needed from the CIPC.

In addition to the aforesaid, in terms of section 138, a prospective business rescue practitioner

- must not be subject to an order of probation;
- must not be disqualified from acting as a director of a company in terms of section 69(8) of the 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

In terms of section 143 the business rescue practitioner is entitled to charge the company for the remuneration and expenses incurred by the practitioner in accordance with the tariff prescribed by the Companies Act.

The basic remuneration of a Business Rescue Practitioner is to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, and may not exceed -

- R1,250 per hour (maximum of R15,625 per day) (inclusive of VAT) for a small company;
- R1,500 per hour (maximum of R18,750 per day) (inclusive of VAT) for a medium company; or
- R2,000 per hour (maximum of R25,000 per day) (inclusive of VAT) for a large company or a state-owned company.

In addition to its remuneration as determined by the tariff, the business rescue practitioner may also conclude a contingency agreement with the company for further remuneration if the business rescue plan is adopted or if it is adopted within a certain period of time or if any particular result or combination of results is attained.

This contingency agreement will only be binding if it is approved by –

(i) the holders of a majority of the creditors' voting interests, present and voting at a meeting called to consider the agreement; and
(ii) 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, present and voting at a meeting called for the purpose of considering the proposed agreement.

Any creditor who votes against such an agreement may make application to court, within ten business days after the date on which a vote was taken, for an order setting aside the proposed agreement on the basis that the agreement is not just and equitable or not reasonable having regard to the financial circumstances of the company.

Regulation 26(2) of the Act sets out the manner in which the public interest score is calculated. It provides that at the end of each financial year, the public interest score 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 R1 million (or portion thereof) in third party liability of the company, at the financial year end;
- one point for every R1 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
    - In the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
    - 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.

In addition to remuneration, a practitioner is also entitled to be reimbursed for the actual costs of any disbursements incurred by the practitioner, or expenses incurred by the practitioner, to the extent reasonably necessary to carry out the practitioner's functions and to facilitate the conduct of the company's business rescue proceedings.

10. The Business Rescue Practitioner: Power, Duties and Liabilities

10.1 Introduction to unit 10

Business rescue practitioners have the powers and functions incumbent on a board of directors of a company. Notwithstanding this, the board and individual members of the board are obligated to continue to perform their duties and functions, subject to the approval in each instance of the business rescue practitioner.

When this situation occurs, we often find immediate tension arising between the duly appointed practitioners and the board of directors. Such directors (who have never been through a business rescue process before)

are often confused and somewhat bewildered by their change of status and are often unsure as to their continued role in the company.

In this unit we explore the powers, duties and liabilities of the business rescue practitioner during the business rescue proceedings.

This study unit includes the following topics:

- A recap of the role of the business rescue practitioner
- The duties of the business rescue practitioner
- The management powers of the business rescue practitioner
- The investigative powers of the business rescue practitioner
- The liabilities of the business rescue practitioner

10.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand the roles of directors as governed by section 75 and 76 of the Companies Act
- Understand the liabilities of directors as governed by section 77 of the Companies Act
- Know that the company is the focus of the business rescue process and that the best interest of the company must be looked after
- Be aware of section 218(2) during the business rescue process
- List the grounds for removing a director from office
- Outline the provisions relating to appointment of a person as part of management
- Understand the investigative powers of the business rescue practitioner
- Know when the business rescue process should be discontinued
- Understand when the business rescue practitioner can be held personally liable.
- Be aware that the practitioner should disclose to any party who contracts with a company in business rescue the fact that the company is subject to the provisions of Chapter 6

10.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure:

- Chapter 9.4 – Management of the company in the rescue process: the business rescue practitioner

10.4 Quiz

Complete the unit's Knowledge Assignment.

10.5 Concluding unit 10

In terms of section 140 of the Companies Act the business rescue practitioner has full management and control over the company. The practitioner may delegate certain functions to a director on the board of the company or to a person who was part of the pre-existing management of the company. The business rescue practitioner may also remove any person who formed part of the pre-existing management of the company

from its office or appoint a person (who does not have any other 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 that relationship, or is related to a person who has such a relationship) as part of the management of a company. In some instances, the practitioner will need to obtain the approval of the court for an appointment.

Section 140(3) provides that during business rescue the business rescue practitioner –

- is an officer of the court and is therefore obligated to report to the court in accordance with any applicable rules or orders;
- has the responsibilities, duties and liabilities which are incumbent upon directors, in terms of sections 75, 76 and 77 of the Act; and
- will not be liable for any act or omission performed in good faith in the course of the exercise of the powers and during the performance of his functions as a practitioner but may be held liable in terms of any law for any act or omission that amounts to gross negligence.

11. The Business Rescue Plan

11.1 Introduction to unit 11

In every business rescue process, there must be a plan setting out how the company will be turned around. The business rescue plan details how the practitioner plans to rescue the financially distressed company, and may include *inter alia* strategies for increasing turnover, finding new markets, cutting overheads or finding an equity investor. The business rescue practitioner, when appointed, will have as his or her immediate focus, the objective of publishing and, if approved, implementing the business rescue plan.

We will expand upon the different aspects involved in the business rescue plan. Such as its place in the business rescue procedure, its aims, and its goals.

This study unit includes the following topics:

- The content of business rescue plans and essential clauses
- The consideration of and voting on the business rescue plan
- The implementation of the business rescue plan
- Failure to adopt the business rescue plan
- The discharge of debts and claims

11.2 Learning Objectives

After studying this study unit, you should be able to:

- Explain the content and essential clauses that should be included in the business rescue plan
- Know the provisions of section 151, which relate to the meeting to consider and vote on the business rescue plan
- Know how the business rescue plan is adopted and approved
- Understand the binding effect of the business rescue plan on creditors
- Understand the implementation process of the business rescue plan
- Know what happens if a business rescue plan is rejected?
- Understand the binding offer in terms of section 153(1)(b)(ii) and what is meant by an inappropriate vote in terms of section 153 (1)(a)(ii)

- Know how claims are submitted for proof to the business rescue practitioner
- Have learned how to discharge debts and claims

11.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure:

- Chapter 9.7 – The business rescue plan

11.4 Quiz

Complete the unit's Knowledge Assignment.

11.5 Conclusion: Study Unit 11

The approval of the business rescue plan is in fact the most important stage of the business rescue process as the business rescue plan contains the plan that the business rescue practitioner believes will either facilitate the rehabilitation of the company so that it can continue to trade on a solvent basis, after business rescue, or if this is not possible, at least achieve a better dividend for the creditors, shareholders and employees of the business than they would receive if the company were placed in liquidation.

The plan must deal with, inter alia, the background of the company, proposals on how the company will be rescued, and assumptions or conditions, if there are any, upon which the plan is based. Section 150(1) of the Companies Act provides that the business rescue practitioner must consult the creditors and other affected persons, as well as the management of the company, in the process of preparing the plan.

The content of the business rescue plan covers the following three features:

1. The Background
2. Proposals
3. Assumptions and Conditions

Background

The background section should include, as far as possible, the following information:

- a list of all the material assets of the company, and any security held over such assets as at the commencement of business rescue;
- a list of the creditors of the company as at the commencement of business rescue and the classification of such creditors as secured, statutory preferent and concurrent in terms of the laws of insolvency and which of the creditors have proved their claims;
- probable dividend that would be received by creditors, in their classes, if the company were to be liquidated;
- a list of the holders of the company's issued securities;
- a copy of the written agreement concerning the practitioner's remuneration; and
- a statement about whether the plan includes a proposal made informally by a creditor of the company.

Proposals

- The proposal section should, as far as possible, contain the following information:
- the nature and duration of any moratorium for which the business rescue plan makes provision;
- the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
- the ongoing role of the company, and the treatment of any existing agreements;
- the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;
- the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;
- the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and
- the effect that the business rescue plan will have on the holders of each class of the company's issued securities.

Assumptions and Conditions

- The assumptions and conditions section must, as far as possible, contain the following information:
- a statement of the conditions that must be satisfied, if any, for the business rescue plan to (a) come into operation and (b) be fully implemented;
- the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;
- the circumstances in which the business rescue plan will end;
- a projected (a) balance sheet for the company and (b) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business rescue plan is adopted ; and
- the projected balance sheet and statement (a) must include a notice of any material assumptions on which the projections are based and (b) may include alternative projections based on varying assumptions and contingencies.

The business rescue plan must conclude with a certificate by the practitioner stating that any

(a) actual information provided appears to be accurate, complete, and up to date and
(b) projections provided are estimates made in good faith on the basis of factual information and assumptions set out in the plan.

The business rescue practitioner is required to publish the plan within 25 days of his/her appointment, unless the business rescue practitioner has been granted permission by the court or the holders of a majority of the creditors' voting interests for the plan to be published outside the prescribed time limit.

Once a business rescue plan has been published, a meeting must be convened for the purpose of voting on such business rescue plan. The creditors and securities holders of the company (the latter if their rights are affected by the terms of the business rescue plan) are entitled to

- vote for an amendment of the plan;
- vote for the adoption of the plan – by way of a preliminary approval of the plan;
- vote to reject the business rescue plan; or
- abstain from voting on the plan.

Importantly, if a creditor, or securities holders for that matter, votes against the adoption of a business rescue plan, and consequently the plan is not voted in, the business rescue practitioner, or any affected person in the event that the business rescue practitioner does not take any action, may –

- call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan;
- apply to court to set aside the result of a vote on the basis that the vote was inappropriate; or
- make a binding offer to purchase the voting interest of one or more affected persons who opposed the adoption of the plan, at a value independently and expertly determined to be the fair and reasonable estimate of the return that such person or persons would receive if the company were to be placed in liquidation.

A business rescue plan that is adopted is binding on the company, the creditors of the company and every holder of the company's securities, whether or not such person was present at the meeting, voted in favour of the adoption of the plan or, in the case of creditors, had proven their claims against the company.

When a business rescue plan is adopted, if it makes provision for the company to be released from the payment of its debts to creditors, those creditors are not entitled to claim the balance of their claims against the company, even after the business rescue process is terminated and the company is trading as a solvent company again (section154).

12. Compromise with Creditors in terms of Section 155

12.1 Introduction to unit 12

Business rescue is a comprehensive procedure where a business rescue practitioner is appointed for the implementation of a plan to rescue the company from its financial distress. On the other hand, a section 155 compromise makes provision for the restructuring of the company's affairs without the appointment of a business rescue practitioner. In terms of Section 155, the company may propose a compromise or arrangement to its creditors.

This process is not new to South Africa law and the Companies Act of 1973 already made provision of this kind, however, it was costly and cumbersome (old section 311 compromise procedure in the 1973 Companies Act). The company also do not have an automatic moratorium available to prevent creditors from taking legal action against the company as it does have during business rescue proceedings.

A company which is in financial distress it would seem have only two options, either commence with business rescue proceedings or enter into a restructuring agreement with its creditors in terms of section 155.

When a company intends to enter into a compromise or arrangement with its creditors the company must provide a detailed proposal, similar to that of a business rescue plan, to its creditors together with a notice as to when the meeting is scheduled for the creditors of the company to vote on the proposal.

This study unit includes the following topics:

- Overview of compromises
- Compromises in terms of section 155 of the Companies Act 71 of 2008
- The proposal to creditors
- The adoption of the proposal
- Compromises versus business rescue

12.2 Learning Objectives

After studying this study unit, you should be able to:

- Understand the process of reaching a compromise with creditors
- Have learned the provisions of section 155
- Know the difference between business rescue and reaching a compromise with the creditors
- Be able to list the information that needs to form part of the proposal submitted to the directors regarding reaching a compromise with the creditors
- Have learned how a proposal is adopted and approved

12.3 Textbook chapters

First read through the following chapter in the prescribed textbook, South African Business Rescue Procedure:

- Section 155 of the Companies Act 71 of 2008

12.4 Quiz

Complete the unit's Knowledge Assignment.

12.5 Concluding unit 12

In order for a Section 155 compromise or arrangement to be accepted, 75% of the company's creditors must vote in favour of the compromise or arrangement.

A section 155 compromise or arrangement procedure is more streamlined than business rescue proceeding but it is to be noted that the company does not have the protection of an automatic moratorium against legal proceedings during the period of negotiation of the section 155 proposal as is the case with business rescue proceedings.

Here are factors to consider when entering into a compromise with creditors:

1. A compromise is an informal method of restructuring the company's obligations with all the creditors, or a certain class of creditors. A minority of non-consenting creditors can be bound if the majority agrees. The number of creditors of many companies is often so large that it may be difficult if not impossible for the company to negotiate terms with each creditor on an informal basis. A section 155 compromise can work where there is a small number of creditors and where the consent of a majority of creditors may be obtained. The compromise procedure in terms of section 155 overcomes the practical difficulty of obtaining the individual consent of every creditor to approve a compromise proposal.

2. The courts have given a wide interpretation as to what a compromise or arrangement can entail. For example, the courts have accepted that a compromise can provide for a special or alternative means of winding-up a company or for the take-over of a company. A compromise must entail an agreement to either resolve any disagreement between the parties regarding the terms of the financial obligations or to amend the terms of the financial obligations to allow the company to be better placed to meet its debts.

3. A compromise may be entered into whether or not the company is financially distressed. It provides a proactive step that the board of a company can take to restructure the company's financial affairs. A

company is precluded from entering into a compromise with creditors if it is already engaged in business rescue proceedings.

4. A compromise can only be proposed by the board of the company (or by the liquidator if the company is being wound up). This can be done by delivering a copy of the proposal and notice of the meeting to consider it, to all relevant creditors whose names or addresses are known or can reasonably be obtained by the company.

5. The contents of the proposal will depend on the nature of the proposed compromise but must contain the minimum information set out in section 155. The proposal must provide sufficient information to allow creditors to decide whether to reject or accept a compromise. If there has been any material non-disclosure or an inaccurate disclosure of information in the proposal which would have induced creditors to vote differently, the court can refuse to sanction the compromise due to a lack of compliance with section 155(3). Creditors must be given sufficient information to make an informed decision.

6. Unlike business rescue proceedings, a company does not have the protection of an automatic moratorium against legal action during the period of renegotiation with creditors. The approach to creditors must be carefully handled because to make or offer to make any arrangement with creditors to release the company wholly or partially from its debts is an act of insolvency under the Insolvency Act. Where a company which is not in financial distress wants to enter into a compromise with creditors, the board of the company should consider providing additional financial information in the proposal which demonstrates that the reasons for entering into a compromise are not due to financial distress.

7. Prior to the finalisation of the compromise, any creditor can apply to court to put the company under business rescue or liquidation. Placing the company under business rescue or liquidation would bring the negotiations for a compromise to an end unless a Business Rescue Practitioner or liquidator decides to pursue the negotiations

8. The proposal for a compromise can only be adopted at the meeting of creditors if supported by a majority representing at least 75 per cent in value of the creditors or relevant class of creditors. The creditors can vote in person or by proxy. 'Value' in this context means actual value determined at the time of voting, and not at some earlier date.

9. The company must consider how the section 155 restructuring process will affect the position of parties who have bound themselves as sureties for any of the company's financial obligations. This is important because section 155(9) specifically makes provision for a creditor to retain its rights against the surety of the debtor company. A surety can, for instance, be protected from liability if the compromise itself provides that the surety is released wholly or partly from liability or the unpaid debt is not immediately enforceable against the surety.

10. Once the proposal setting out the compromise or arrangement with creditors has been adopted, the company may apply to court for an order sanctioning the proposal. Court sanction is not necessary where a contractual compromise or arrangement was unanimously adopted by all creditors and the company is satisfied that there is no risk that any single minority creditor may have been excluded from the voting process. Where there has not been a unanimous approval of the proposal, the company can opt to have the proposal sanctioned by the court because then the proposal becomes binding on all the creditors whether or not they have agreed to it. This court order is final and binding on all the relevant creditors, from the date on which the court order sanctioning the compromise is filed with the Companies and Intellectual Property Commission.

13. Case Study

Complete the Case Study within 2,5 hours.

You will have three attempts.

A 60% pass rate applies.

14. Additional Material

The following additional material are provided on the online portal:

- Practice Note 1 of 2020 - Business Rescue Filing Procedures (unit 2)
- Notice 36 of 220 – CIPC confirmation letter to acknowledge the appointment of the BRP.
- Notice 2 of 2019 - Guideline for the Application for licensing as a Business Rescue Practitioner (Conclusion)
- Form CoR 123.1- Notice of beginning of business rescue proceedings
- Form CoR 123.2 – Notice of appointment of business rescue practitioner
- Form CoR 123.3 – Notice of decision not to begin business rescue proceedings
- Form CoR 125.1 – Business rescue status report
- Form CoR 125.2 – Notice of termination of business rescue proceedings
- Form CoR 125.3 – Notice of substantial implementation of business rescue plan
- Form CoR 126.1 – Application for practitioners' license
- Form CoR 126.2 – Registration certificate

15. Glossary, Abbreviations & Terminology

BRP	Business Rescue Practitioner
SCA	Supreme Court of Appeal
PCF	Post Commencement Finance
GNB	General Notarial Bond
CIPC	Companies and Intellectual Property Commission
BRIL	Better return than in Liquidation

16. Conclusion

An aversion to destroying companies by way of the liquidation process has been recognised for decades and, in any event, liquidation is recognised internationally as having a very poor outcome for the company and its stakeholders and for the economy of the jurisdiction concerned.

Business rescue in South Africa replaced judicial management in 2011 as a restructuring mechanism and has kick-started a whole new industry for lawyers and business rescue practitioners.

The business rescue process is a great tool in ensuring that businesses are salvaged and rehabilitated, and the loss of employment minimised. It is also an opportunity for investors looking to acquire valuable businesses and assets out of companies in business rescue at discounted rates.

As we have seen in this SAIBA Business Rescue License, business rescue provides a unique option for saving a company teetering on the brink of insolvency. The aim is to provide the financially distressed company with the opportunity for a fresh start, and where the failing entity, can have its business, debt, contracts, employment and management, restructured in a manner that places the company back into the market on a solvent basis. The new puppet masters are the business rescue practitioners.

They pull the strings in the rescue process and have the power to supervise the distressed entity to ensure the most favourable outcome. These practitioners come from different backgrounds and professions, and with different personality traits and skill sets. The business rescue practitioner is a key factor in the success of the process.

There is no doubt that the learning curve of rescue practice is steep, but it is certainly rewarding. By becoming a business rescue practitioner, one is provided with the unique opportunity to assist in the restructuring of financially distressed companies and where, through the proper and diligent application of Chapter 6 of the Companies Act, one can avert the negative outcome of a liquidation, and most importantly be in a position where jobs and livelihoods can be retained through the rescue process.

Business rescue practice is both exciting and rewarding and the fact that our rescue legislation incorporates most of the common themes of rescue principles found around the world can make South Africans proud. We can safely say that restructuring practice in South Africa has finally been brought into line with that available in international jurisdictions.

On successful completion the Exam Preparation course and exam to obtain a SAIBA Business Rescue License, the next step will be to apply for licensing as a Business Rescue Practitioner at CIPC.

Refer to the guideline for the application process under section 14 Additional Material.

On successful CIPC registration your journey will begin as a Junior Business Rescue Practitioner and with experience will develop into a Senior Business Rescue Practitioner.

CATEGORIES OF BUSINESS RESCUE PRACTITIONERS REGULATIONS 127 (2)

Junior	Experienced	Senior
A person who immediately before being appointed as a practitioner either: • has not previously engaged in business turnaround before the effective date of the Companies Act or acted as a business rescue practitioner in terms of the Companies Act; or • has actively engaged in business turnaround practice before the effective date of the Companies Act or as a business rescue practitioner in terms of the Companies Act for a combined period of *less than five years*.	A person who immediately before being appointed as a practitioner, actively engaged in business turnaround practice before the effective date of the Companies Act or as a business rescue practitioner in terms of the Companies Act, for a combined period of *at least five years*.	A person who immediately before being appointed as a practitioner, actively engaged in business turnaround practice before the effective date of the Companies Act or as a business rescue practitioner in terms of the Companies Act, for a combined period of *at least ten years*.
Can take appointment for *small companies* (company with a public interest score of less than 100) or as an assistant to an experienced or senior practitioner.	Such person can take appointment for a *small company* (company with a public interest score of less than 100) or for a *medium company* (company with a public interest score of between 100 and 500).	A senior practitioner can take appointment for a *medium company* (company with public interest score of between 100 and 500) or for a *large company* (company with a public interest score of 500 or more)

We wish you the best!

| THANK YOU |