

Business Rescue

Presenters: Caryn Maitland CA(SA)

Ask Questions

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Caryn Maitland

Caryn is a qualified CA(SA and RA, who has lectured extensively at UKZN (and other institutes) where she lectured Advanced Financial Accounting up until 2011 as well as co-ordinating the module on the Pietermaritzburg campus and was appointed Section Head of Financial Accounting and Deputy Head of the School of Accounting (managing the Pietermaritzburg campus) prior to leaving UKZN.

She has conducted independent workshops and seminars for professional accountants since 2006 on various topics and has consulted on a number of technical issues. Since January 2011, she has focused on her own business as technical freelance consultant and trainer to those working within the accounting profession. Caryn is a technical advisor to the SAICA Eastern Region Midlands District, Northern District and Southern District Associations, as well as the Small Practice Interest Group in Durban – specialising in financial reporting (IFRS, IFRS for SME's and general accounting), assurance, legislation and ethics. Caryn has a passion for Corporate Governance, which together with her Companies Act specialism and Financial Management for Non Financial Management lecturing background, has served her well in consulting and advising various Boards of Directors in recent years.

Caryn is also a platform presenter for various institutes as well as many small to medium accounting practices across the country and into Southern Africa. Maitland was appointed as a visiting Associate Professor to the University of Limpopo tasked with mentoring their Financial Accounting staff (Aug 2011 to Dec 2013).

Maitland's passion is IFRS and IFRS for SME's and was delighted at the opportunity granted in 2013 to serve on the APC subcommittee constituted to investigate the need for Micro GAAP and the role of IFRS for SME's for small and medium sized practitioners. Caryn, also serves on the Joint Accountants, Auditors and Attorneys Committee of SAICA, and is part of the School Governing Body project initiated by SAICA in KwaZulu-Natal, and has been appointed as an alternative member to the APC in June 2020

Caryn was elected as the first woman Chairperson for the Midlands District Association for SAICA in 2018 and also serves on the Eastern Region SMP Committee as well as the Local Subvention Committee for SAICA. In 2019 Caryn was appointed to the SAICA Eastern Region Council. As someone who is committed to environmental affairs, Caryn serves as a non-executive director for the Institute of Natural Resources, a Non Profit Company focusing on research. Since 2018 Caryn has worked extensively with commerce and industry, assisting analysts, directors and other users of financials to interpret, prepare, analyse and forecast based on the results of financial statements.



Session Objectives

- Understand business rescue in its full context;
- Understand financial distress vs going concern;
- Understand business rescue proceedings;
- Understand the roles, rights and responsibilities of stakeholders; and
- Know how to become a licensed business rescue practitioner.

Content of Session

What is business rescue?

The business rescue test.

To rescue or to liquidate?

Business rescue proceedings.

Stakeholders' rights, roles and responsibilities.

Voluntary vs involuntary winding up of a company.

Deregistration of a company.

Becoming a licensed business rescue practitioner.

Business Rescue defined

Business rescue, as defined by the Companies Act 2008,

- aims to facilitate the rehabilitation of a company
- that is "financially distressed"
- by providing for: the temporary supervision of the company and 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.

Can we talk about insolvency openly?

Risk being held accountable under defamation law

Self fulfilling prophecy

Warning signs??

Solvency and Liquidity

Company Act S4: Solvency and Liquidity

These are now defined:

Section 4(1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time—

- (a) the assets of the company, as **fairly valued**, equal or exceed the liabilities of the company, as fairly valued; and
- b)* it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of—
 - (i) 12 months after the date on which the test is considered; or
 - (ii) in the case of a distribution contemplated in paragraph (a) of the definition of “distribution” in section 1, 12 months following that distribution.

Beware: IFRS 13 Fair value Measurement

Going Concern vs Financial Distress vs Insolvency

Going Concern

Financial Factors

Net liabilities or current liabilities
Borrowings due
Withdrawal of creditor support
Negative cash flow
Adverse ratios
Operating losses
Dividends in arrears
Unable to pay creditors
Credit to COD
Unable to obtain financing

OPERATING FACTORS

Intention to liquidate
Loss of key management
Loss of market, customer, supplier, etc.
Labour difficulties
Supply shortage
New competitor

Going Concern

OTHER FACTORS

Non-compliance with legal
requirements

Pending litigation

Changes in laws and regulations

Underinsured catastrophes

Insolvency Tests

Factual insolvency

Liabilities exceed its assets

Commercial insolvency

Cannot pay debts as and when they fall due (liquidity)

Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd (936/12) [2013]

ZASCA 173 (28 November 2013)

Financial Distress Test

It appears to be reasonably unlikely

That the company will be able to pay all of its debts as they become due and payable within the immediately ensuing 6 months

OR

Become factually insolvent in the impending 6 months

Insolvency and restructuring procedures

Formal insolvency procedures

Placed in liquidation per Chapter 14 of **Companies Act, No 61 of 1973** (Old Act still regulates)

Involuntary liquidation

Formal restructuring procedures

Chapter 6 of Companies Act 2008

Business Rescue (S128 to S154); and

Compromise arrangements (S155)

International trend in line with UK and USA

Insolvency and restructuring procedures

Informal insolvency and restructuring procedures

Get ALL creditors together and make a plan

All creditors must agree and agreement must be binding on all

Creditors enter into an undertaking not to make an application to court to place company in liquidation or business rescue

Liquidation

Aim

Process – Solvent or insolvent (voluntary??)

Old Act: position and powers of liquidator, administration of liquidated estates

Insolvent Company - can be done voluntarily by Board of Directors

Formal application by the company, a shareholder or creditor (among others)

Solvent

Initiated by company voluntarily and conducted by company/creditors

By Court Order

Commencement of Liquidation

Involuntary: insolvent (Old Act)

Process commences when resolution lodged with companies registered office

Court order – on presentation to court of application, when order is finally granted

Voluntary: solvent (New Act)

On resolution lodged with registered office

When court order granted

Court involvement

Compulsory liquidation require involvement by the Court

Voluntary liquidation – no Court involvement required

Court involvement

Litigation on-going before liquidation

Liquidator wants to recover assets that were not disposed of for value

Management of Company

Company remains a corporate body and retains its power

From commencement of liquidation

Cease to carrying on its business, except winding up

Voluntary winding-up, directors powers cease except if sanctioned by liquidator or

Creditors (if wind up requested by them)

Members (if wind up requested by them)

Master appoints a suitable Liquidator on receipt of Court Order or Special Resolution

Filing of Claims

Creditors claims are filed with support and affidavit

File claims with liquidator

Call a meeting with liquidator

Costs for the creditors account

Only creditors that have proved their claims will benefit from a distribution

Liquidations can take between 6months to 2 years to wrap up

Effect on Employees

Employment contracts – immediately suspended

Liquidator may cancel in due time after due consideration

All suspended contracts not already terminated, will be automatically terminated 45 days after final appointment of liquidator

Employees not required to render services once process commenced and company not required to pay for any services received

Employees have a limited but preferred claim in liquidation process

Effect on Contracts

Unless there is an express statutory provision to the contrary
Contracts remain in effect when company placed in liquidation
Liquidator needs to timeously make a decision as to whether or not
the executory contracts will continue

Effect on Creditors

Claims will be ranked and paid in out in accordance with preference determined by law

After winding up costs, creditors paid in their pro-rata share.

Preferential creditors paid before concurrent creditors

Secured creditors paid from disposal of secured asset

Concurrent (plus partly settled secured and preferential creditors)
paid from residual

Effect on Shareholders

Paid last....

Pending claims, litigation, arbitration

All civil proceedings against the company shall be suspended until liquidator appointed, and

Any attachment or execution put in force against the estate or assets of the company after the commencement of the winding up shall be void

Pending claims, litigation, arbitration

Every person that has or intends to institute litigation against the company for claims before the litigation

Must inform liquidator within 4 weeks of appointment
And give liquidator 3 weeks before commencing proceedings

No notice given – action deemed to be abandoned unless court otherwise directs

Voidable transactions

Any transaction entered into by the debtor company before the liquidation whereby it has disposed of property belonging to it for no value or a manner that has the effect or intention of prejudicing creditors or preferring one above the other is a voidable or undue preference transaction and may be set aside

Directors or prescribed officer liability

A director (including alternate), a prescribed officer,
or a person who is a member of a committee of the board, or of the
audit committee

Is prohibited from trading with a company recklessly, with gross
negligence, with the intent to defraud any person or for any
fraudulent purpose

Directors or prescribed officer liability

Can be held personally liable

Jointly and severally

Criminal offence S214

10 years imprisonment or max of R1 million fine

Bellini v Paulsen and others (17096/2009) 2012 ZAWCHC 199 (28 Nov 2012)

Contravention of the Act: personal liability

When is a business person reckless?

“... The defendant, with reckless disregard of his duties, allowed this situation to continue... ..well knowing that the company had no assets and no way of servicing the debt.”

NB: S218(2) of Companies Act

Compliance through personal liability

S218(2)

Any person who contravenes the provisions of this Act

Is liable to any other person

For any loss or damage suffered by that person as a result of that
contravention

Consider the differences

Reckless trading

Gross negligence

Group scenario...

Common law fraud

Statutory fraud

Financially distressed

Directors Responsibilities

S4 Solvency and Liquidity Test

Maintain accounting records (S28)

Financial Statements (S29 and S30)

Declaration of personal interests (S75)

Act with fiduciary care (S76)

Consider business rescue if in financial distress S129(7)

Business Rescue

Where is the accounting professional?

NOCLAR?

Reportable irregularities

Companies Act

Auditing Professions Act

Tyre Corporation Cape Town (Pty) Ltd and others vs GT

Logistics(Pty) Ltd and others (2016)

Commercial and/or factual insolvency an absolute bar for business rescue, or is there still hope?

Can the company be saved??

Business Rescue

Board initiates if Company financially distressed with rescue prospects.

Resolution only effective when filed and can't be passed during liquidation proceedings.

Within 5 business days of filing resolution notice must be given to every 'affected person' (i.e. SH, Cred. & Employees) and appointing Practitioner.

Within 2 business days of notice Business Rescue Practitioner (BRP) appointment must be filed and within 5 further business days, notice given.

Failure to comply leads to lapsing, 3 month break.

Resolution bars liquidation.

If no resolution then board must advise affected persons.

Business Rescue

An affected person can oppose resolution up until adoption of BR Plan.

An affected person may apply to court for BR Plan .

BR Proceedings begin with resolution and end with, adoption or rejection of BR Plan, conversion to liquidation and have an extendable period of 3 months.

During proceedings there are limitations on legal proceedings against co. and ability of co. to dispose of property. Also, doesn't affect employment and Practitioner can suspend contracts.

Business Rescue

Within 10 business days of appointment the practitioner must convene a first meeting of creditors and / or employees.

After consultation with affected persons, Practitioner must propose BR Plan

Within 10 business days of BR Plan Practitioner must convene affected persons meeting to consider BR Plan.

BR Plan must be published within 25 business days of appointment of Practitioner.

BR Plan must be adopted by 75% of creditors (value) and 50% of Individual Creditors.

Business Rescue

If BR Plan is rejected then Practitioner or Affected Person's may vote to revise plan or to apply to court to set aside vote.

Affected Person's may make binding offer to buy out dissenting voters interests.

BR Plan may provide for cancellation of part of creditors' claims.

Compromise is similar but no need for financial distress and simpler process

Deregistration of a Company

Refer to Part G Sections 70 to 83 of the Companies Act 2008

How to become a BR Practitioner

Dual registration with CIPC and membership body

Need an extensive resume (minimum of 5 years post qualification experience)

Continuous CPD

**Thank you for your
participation**