

[HOME](#)[LEGAL TOPICS](#)[PRESS OFFICE](#)[EVENTS](#)[STUDENT ZONE](#)[CAREERS](#)[ABOUT](#)

[Home](#) » [Insolvency & Business Rescue Updates](#) » [Considering business rescue](#)

Considering business rescue



Provided By **LEXISNEXIS**

We're Committed To Our Vision Of 'Enhancing The Potential Of The African Continent By Advancing The Rule Of Law'. With Our Strong Community Of Legal Professionals, We Advance The Practice Of Law. Through Our Corporate S... **MORE**

By **JOHN DE VILLIERS**

Directors wanting to address problems in financially distressed companies need to be proactive, diligent and aware of all options available to them, including the option of business rescue, its value and the importance of its timing.

Since its introduction in the [Companies Act](#) in 2011 as a mechanism, business rescue has gained acceptance as a viable alternative to liquidation for financially distressed companies and businesses. With its successful implementation, companies like SAA, Comair and Edcon have been allowed to recover and to maintain their status as going concerns, thereby preserving jobs and aiding economic recovery. Companies with their backs to the wall after the looting and damage in Kwa-Zulu Natal and Gauteng might therefore consider business rescue as a solution as opposed to an informal restructuring, which could result in aggressive creditors filing for liquidation, or as an enforced last resort, liquidation.

Overview

With business rescue a business practitioner who understands business is appointed to allow the company to trade back to solvency and/or to deliver a better dividend to creditors than that which they would have received with liquidation proceedings.

The advantages of business rescue include: (See *Business Rescue in the Time of Covid-19* – Dr Eric Levenstein at <https://www.youtube.com/watch?v=Qy8xHgt4Ecs>)

1. The publication of a business rescue plan, the intention of which is to restructure and rescue the business.
2. Business rescue imposes a statutory moratorium on claims against the company, except with the written consent of the business practitioner or by leave of court.
3. After its commencement, finance/funding is sought, from banks and third parties and when obtained, provides the finance necessary to prop the business up as a sustainable entity during the restructuring process.
4. It enables a compromise of burdensome debt and allows for a fresh start, as creditors will get less, but more than they would have in liquidation.
5. It allows for a suspension/cancellation of prejudicial contracts.
6. It protects directors from reckless trading – because the company is handed over to practitioners and the reckless trading provision is no longer relevant.
7. It allows for the mothballing of the business – for example Comair planes were placed in short term active storage pending the recommencement of scheduled flight operations, (Comair Limited <https://www.comair.co.za/business-rescue>) thereby ringfencing costs and helping the company to hold out until the resumption of business.
8. A reset or restructure could see asset sales and sell offs by companies with strong balance sheets, continuing in a slimmed down form, or entertaining into merger and acquisition negotiations.

When? A question of timing

In terms of section 128(f) of the Companies Act:

(f) “**financially distressed**”, in reference to a particular company at any particular time, means that

1. it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
2. it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

The test essentially allows a six-month window, whereby looking ahead, the directors still see value to be had in the company. They need to be proactive, diligent and aware of options available to them. It can be a very close call and some court decisions have adopted a narrow interpretation of “financially distressed”. Unfortunately, if business rescue is left too late, and the company is clearly insolvent, no finance will be forthcoming and liquidation is the only option, with directors potentially finding themselves being held liable for reckless trading in terms of section 22 of the Companies Act.

However, once decided upon, it is very important that they involve experienced turnaround specialists/attorneys who are skilled in restructuring and saving what is left.

See also:

- [What happens to a surety obligation when the principal debtor is in business rescue?](#)
- [Business rescue proceedings – The last resort to save your company.](#)
- [Set it off: Postponement of a final winding up order pending the determination of a counterclaim](#)
- [Book on ‘hot topic’ Business Rescue set to launch](#)

(This article is provided for informational purposes only and not for the purpose of providing legal advice. For more information on the topic, please contact the author/s or the relevant provider.)



[John de Villiers](#)



John de Villiers has been the editor of the LexisDigest (formerly the GhostDigest) since its inception in February 2003. He joined the then Korbitec as a software tester in May... [Read more about John de Villiers](#)

[Click here to send a legal query to John de Villiers](#)

Share



Insolvency & Business Rescue Updates articles on GoLegal

What happens to a surety obligation when the principal debtor is in business rescue?

Set it off: Postponement of a final winding up order pending the determination of a counterclaim

Final liquidation order – Not so final?

Some challenges associated with business rescue proceedings

PROVIDED BY:



BY












[John de Villiers](#)

John de Villiers has been the editor of the LexisDigest (formerly the GhostDigest) since its inception in February 2003. ...

[SEND A LEGAL QUERY TO JOHN DE VILLIERS](#)

EXPERTS IN INSOLVENCY & BUSINESS RESCUE UPDATES

	<p>Eversheds Sutherland 5 Relevant articles</p>
	<p>Fluxmans Attorneys 8 Relevant articles</p>
	<p>Gildenhuis Malatji Incorporated 2 Relevant articles</p>
	<p>KISCH IP 1 Relevant articles</p>
	<p>LexisNexis 3 Relevant articles</p>
	<p>Sabinet 2 Relevant articles</p>
	<p>SchoemanLaw Inc 1 Relevant articles</p>



Facilitating *access* to information



UPCOMING EVENTS

Series: Three steps to becoming a better leader (Part 3)

OCT 21 @ 2:00 PM

Unpacking accountability structures and disciplinary proceedings – Directors and employees

OCT 25 @ 11:00 AM

How to cultivate healthy client relationships

NOV 3 @ 11:00 AM

Privacy on – and offline: What your business needs to know and do!

NOV 10 @ 11:00 AM - 12:00 pm

The do's and don't's of responsible social media usage – Both the greatest threat and asset to your business

DEC 2 @ 11:00 AM

Want the latest legal news and views in your box?

Your email address

Subscribe



With our
**PERSONAL
LOAN**

ABOUT US

GoLegal is a leading industry news and information portal for the South African legal sector, catering to attorneys, corporate counsel, legal scholars, policy makers and other corporate and legal interest groups.

[READ MORE >](#)

OUR SERVICES

Promote Legal Conferences, Events and Seminars

Advertise with GoLegal

Privacy Policy

FOLLOW US



SIGN UP FOR OUR NEWSLETTER

Want the latest legal news and views in your box?

SUBSCRIBE