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THE BUSINESS RESCUE PRACTITIONER: POWERS, DUTIES AND LIABILITIES

10





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rescue practitioner

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Recap of the role of the business rescue practitioner

- The business rescue practitioner is the most important party in the business rescue process
- Chapter 6 confers broad powers on the business rescue practitioner
- During business rescue, the business rescue practitioner is given full management control of the company in substitution for its incumbent board of directors and pre-existing management – section 140(1)(a)
- The business rescue practitioner may also delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company – section 140(1)(b)
- The business rescue practitioner may remove from office any person who forms part of the pre-existing management of the company or appoint a person as part of the management of a company, whether to fill a vacancy or not – section 140(1)(c)
- The business rescue practitioner must develop and implement the business rescue plan – section 140(1)(d)
- Important statutory powers, duties and obligations are imposed on the business rescue practitioner
- The business rescue practitioner is required to adhere to strict timelines in order to conduct an efficient business rescue process
- Business rescue practitioners are tasked with ensuring that the business remains afloat and that the company's management remains functional
- Importantly, practitioners must obtain post-commencement finance and engage with all relevant stakeholders including creditors, employees and shareholders, in order to achieve the objectives of business rescue

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Duties of the business rescue practitioner

- Business rescue practitioners are officers of the court during a company's business rescue proceedings – section 140(3)(a)
- Practitioners are therefore required to report to the court in accordance with any applicable rules of, or orders made, by the court – section 140(3)(a)
- In terms of section 140(1A), the practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment
- It is important for business rescue practitioners to ensure that they remain independent throughout the business rescue process
- A conflict of interest or lack of independence constitutes a ground for removal in terms of section 139(2)
- The business rescue practitioner must also balance interests carefully in the course of his or her administration of the company in rescue
- This entails a balancing act which tests the practitioner's competence, independence and ability. Failure to balance these interests may lead to the demise of the company through liquidation



Duties of the business rescue practitioner

- Business rescue practitioners have the same responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77 of the Companies Act – section 140(3)(b)
- Section 75 deals with the declaration of directors of directors' financial interests
- Section 76 deals with the standards of directors' conduct
- Section 77 deals with the liability of directors and prescribed officers
- Accordingly, in terms of section 76(3), business rescue practitioners must ensure that they exercise their powers and functions –
 - In good faith and for a proper purpose
 - In the best interests of the company; and
 - With the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company, and having the general knowledge, skill and experience of the [practitioner]
- The practitioner must also keep section 218(2) in mind
- Section 218(2) provides that any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention



Duties of the business rescue practitioner

- Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and others (10862/14) [2015] ZAKZPHC 21 (20 March 2015)
- The court confirmed that a business rescue practitioner has the same responsibilities, duties, and liabilities as those of a director of the company, as set out in section 75 to 77 of the Companies Act
- The duties of the business rescue practitioner are non-negotiable. Every practitioner must act bona fide and in the best interests of the company
- Business rescue practitioners have the duty to exercise independent discretion and cannot blindly follow the instructions of a shareholder or of anyone else who appointed them
- The business rescue practitioner assumes the same liabilities as that of directors or prescribed officers of the company in terms of section 77 of the Companies Act
- The business rescue practitioner is also liable for any breach of fiduciary duty which results in losses, damages or costs unnecessarily incurred by the company
- Accordingly, the court held that the business rescue practitioner must be trustworthy, open, independent, impartial, competent and capable



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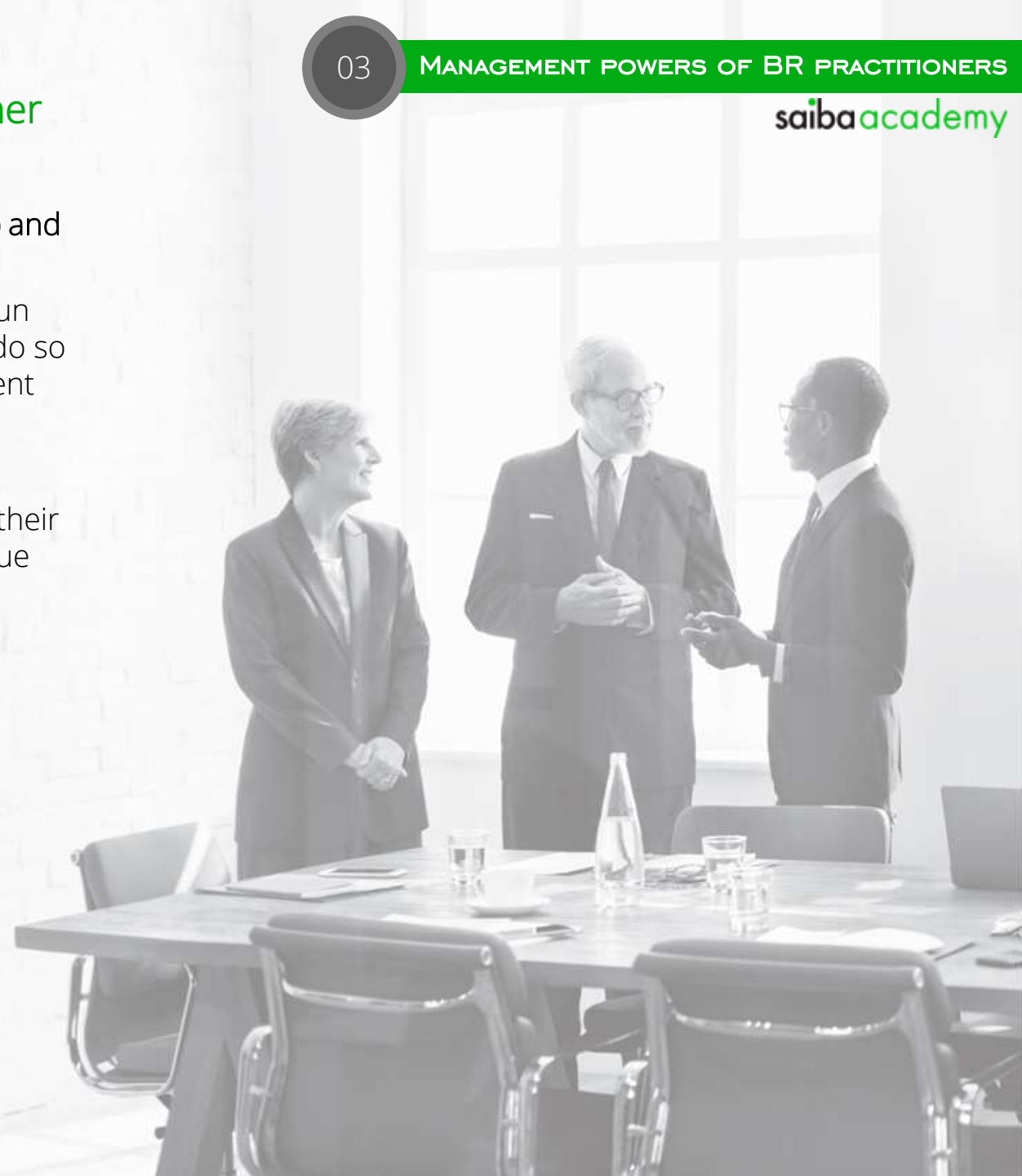
Management powers of the business rescue practitioner

- In terms of the US Chapter 11, the "debtor in possession" approach is followed whereby the bona fide management of the company continues as if the company were not placed under any form of administration
- However, South Africa has not followed this approach, and has rather adopted the British and Australian approach where the property and affairs of the company are placed into the hands of an independent practitioner, although the board of directors remain intact (hybrid approach)
- As aforementioned, Chapter 6 confers broad powers on the business rescue practitioner and in terms of section 140(1), during a company's business rescue proceedings, the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management



Management powers of the business rescue practitioner

- *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and another* [2014] All SA 862 540 (WCC)
- The court held that the business rescue practitioner is obliged to run and control the company while it is under business rescue and to do so in substitution of its board of directors and pre-existing management
- The business rescue practitioner must not to allow the company's existing directors to interfere in such obligation
- Existing management and directors may only continue to exercise their powers and functions subject to the authority of the business rescue practitioner in terms of section 137(2)(a)



Management powers of the business rescue practitioner

- In addition to the above, the business rescue practitioner may also delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company – section 140(1)(b)
- Notwithstanding this power to delegate, it is important to note that the legislature intended that the business rescue practitioner should be more than a nominal figurehead responsible for the rehabilitation of the company
- In terms of section 140(1)(c), the practitioner may remove from office any person who forms part of the pre-existing management of the company or appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to section 140(2)
- As set out in section 137(5), the business rescue practitioner has the power to remove a director from office, at any time during the business rescue proceedings
- The grounds for removing a director from office are as follows –
 - The director failed to comply with a requirement of Chapter 6 of the Companies Act; or
 - by act or omission, has impeded, or is impeding –
 - ❖ the BRP in the performance of the powers and functions of practitioner
 - ❖ the management of the company by the Business Rescue Practitioner or
 - ❖ the development or implementation of a business rescue plan in accordance with this Chapter 6 of the Companies Act.



Management powers of the business rescue practitioner

- As aforementioned, section 140(1)(c), the business rescue practitioner may appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to section 140(2)
- Section 140(2) provides that, except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person –
 - has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or
 - is related to a person who has a relationship as contemplated above



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Investigative powers of the business rescue practitioner

- Chapter 6 gives business rescue practitioners considerable investigative powers
- Section 141 provides that as soon as practicable after being appointed, a business rescue practitioner must investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued
- If, at any time during business rescue proceedings, the business rescue practitioner concludes that there is no reasonable prospect for the company to be rescued, the business rescue practitioner must so inform the court, the company, and all affected persons in the prescribed manner and apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation – section 141(2)(a)
- If, at any time during business rescue proceedings, the business rescue practitioner concludes that there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings or otherwise, file a notice of termination of the business rescue proceedings – section 141(2)(b)



Investigative powers of the business rescue practitioner

- Lastly, in terms of section 141(2)(c), if, at any time during business rescue proceedings, the business rescue practitioner concludes that there is evidence, in the dealings of the company before the business rescue proceedings began, of voidable transactions, or the failure by the company or any director to perform any material obligation relating to the company, the business rescue practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps
- If there is evidence of reckless trading, fraud or other contravention of any law relating to the company, the practitioner must forward the evidence to the appropriate authority for further investigation and possible prosecution
- Furthermore, the business rescue practitioner must direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company



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Liabilities of the business rescue practitioner

- As aforementioned, the business rescue practitioner may be held liable in terms of section 77 of the Companies Act
- In addition, the business rescue practitioner must be aware of section 218(2) which provides for liability in respect of contraventions of the provisions of the Companies Act, which result in any other person suffering loss or damage, as a result of that contravention
- However, in addition to the above provisions, section 140(2)(c)(i) – (ii) specifically deals with the liability of business rescue practitioners
- In this regard, section 140(2)(c)(i) provides that the business rescue practitioner is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of the practitioner
- However, in terms of section 140(2)(c)(ii), the business rescue practitioner may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of the practitioner



Important case law to consider

- Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province (20800/2014) ZASCA 61 (14 April 2016)
- In this case the Supreme Court of Appeal was tasked with determining whether there is a duty of a party to disclose business rescue proceedings
- The Supreme Court of Appeal held that failure to disclose that the company was under business rescue proceedings during the adjudication process of the tender nullified the award of the tender to the company and had to be set aside
- It is submitted that a practitioner is under a general duty of good faith to disclose to any party, including any post-commencement supplier of goods and services, who contracts with a company in business rescue the fact that the company is subject to the provisions of Chapter 6
- Failure to make such disclosure should be deemed to be material and would, result in the nullity of any contract concluded on the basis of what ought to be deemed to be a misrepresentation
- The practitioner could in such circumstances be liable for damages or losses caused to the counterparty who supplied goods and services on the basis of the misrepresentation



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End of Unit 10

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