

7 May 2020

Dear Member

**Business rescue proceedings for companies**

By: **BARNARD INC.**

The Companies Act, 71 of 2008, (the Act) came into effect on May 1, 2011 with the purpose of assisting to grow companies across all sectors of the economy and provide for the efficient rescue and recovery of financially distressed companies.

Insolvency and liquidation may not be the only result – alternative legal mechanisms exist to relieve the financial pressure faced by your business.

**Your legal solutions explained - Business Rescue Solutions for Financially Distressed Companies**

**What is Business Rescue?**

Business rescue is proceedings that are initiated by the directors of a company or affected person(s) to facilitate the financial rehabilitation of a company that is financially distressed. This can either be done by way of resolution or an application to the court.

**What is a company?**

A “company” in terms of the Act includes companies both private and public – this will also include close corporations. All reference in this discussion to companies will, therefore, include close corporations and, in turn, all reference to directors will include the members of a close corporation.

**When is a company financially distressed?**

A company is financially distressed if it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the ensuing six-month period or the company will become insolvent within the ensuing six-month period.

**Are there obligations for directors of a distressed company?**

The directors may pass a resolution to voluntarily begin business rescue proceedings, alternatively, they must inform all affected persons that the company is financially distressed and provide reasons for not adopting such a resolution. Depending on the surrounding circumstances, the directors of the company may be held personally liable for any damages suffered by the company and/or affected persons for trading in distressed circumstances (reckless trading).

**How do you commence voluntary business rescue proceedings?**

The directors of a company must pass a resolution for the company to voluntarily begin business rescue proceedings. It is advised that this process is undertaken with specialist assistance to ensure compliance with all the requirements as set out in the Act and the regulations to the Act

### **Are there other parties that have rights in these proceedings?**

Yes. They are called “affected persons”, and include creditors, shareholders, employees, or their representatives, as well as trade unions

### **How does the rehabilitation process work?**

A business rescue practitioner is appointed to conduct a financial investigation and temporarily supervise the management of the company. The practitioner is appointed by the board of the company. The Act also provides for a temporary moratorium (commonly referred to as a “hold”) in respect of any legal or enforcement action against the company. The business rescue practitioner is mandated in terms of the Act to publish a business rescue plan which outlines the financial restructuring of the company in such a manner that the likelihood of its continued existence on a solvent basis is maximized.

### **What is a business rescue practitioner?**

A person who complies with the requirements as set out in Section 138 of the Act, and who is certified by the Companies and Intellectual Property Commission (CIPC) as qualified to manage the affairs of a company. Depending on the field of practice of the practitioner there might be other regulatory bodies involved. Koos Benadie, director at the firm, is also registered as a business rescue practitioner.

### **Are there advantages for the directors of a company and a company when opting for business rescue?**

Most certainly, there is a general moratorium on legal and enforcement proceedings against the company. Creditors are barred from exercising any right in respect of any property in the lawful possession of the company. The company is afforded the opportunity to restructure its business operations without the proverbial “wolf knocking at the door”. The company can, therefore, continue to use the property (for instance machinery or equipment) in its lawful possession to continue business operations. Consequently, the company is given time to get its house in financial order, whilst continuing to do business and using the property at its disposal.

### **When do business rescue proceedings begin?**

When the directors file the resolution with CIPC to place the company in business rescue or an application is made to the court to place the company under supervision.

### **Is this a structured procedure?**

Yes. The whole process is clearly outlined in the Act and all parties in business rescue proceedings, i.e. the practitioner, directors, company, employees, and creditors are bound by the prescriptions of the Act.

### **Are business rescue proceedings still an option when a third party has initiated liquidation proceedings?**

Yes. The process must then be initiated by way of a formal court application setting out the grounds why there are reasonable prospects of rescuing the company. The court will finally determine whether the company should be afforded the opportunity to enter into business rescue proceedings or face be liquidated. In this instance, voluntary business rescue proceedings will no longer be available to the company.

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