



HECKROODT & ASSOCIATES

ATTORNEYS & BUSINESS RESCUE PRACTITIONERS

CHAPTER 6 BUSINESS RESCUE AND COMPROMISE WITH CREDITORS *Part* *Business rescue proceedings*

Application and definitions applicable to Chapter 5

128. (1) In this Chapter—

1. (a) **“affected person”**, in relation to a company, means—
 - (i) a shareholder or creditor of the company;
 - (ii) any registered trade union representing employees of the company; and
 - (iii) if any of the employees of the company are not represented by a 10 registered trade union, each of those employees or their respective representatives;
2. (b) **“business rescue”** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
 1. (i) the temporary supervision of the company, and of the management of its 15 affairs, business and property;
 2. (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 3. (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other 20 liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible

for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;
3. (c) **“business rescue plan”** means a plan contemplated in section 150;
4. (d) **“business rescue practitioner”** means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and ‘practitioner’ has a corresponding meaning; 30

5. (e) “**court**”, depending on the context, means either—

(i) the High Court that has jurisdiction over the matter; or (ii) either—

(aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of 35 subsection (3); or

(bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3); 40

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

1. (i) 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 45
2. (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;

7. (g) “**independent creditor**” means a person who—

1. (i) is a creditor of the company, including an employee of the company who

is a creditor in terms of section 144(2); and 50

2. (ii) is not related to the company, a director, or the practitioner, subject to subsection (2);

8. (h) “**rescuing the company**” means achieving the goals set out in the definition of “**business rescue**” in paragraph (b);

9. (i) “**supervision**” means the oversight imposed on a company during its 55 business rescue proceedings; and

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(j) “**voting interest**” means an interest as recognised, appraised and valued in terms of section 145(4) to (6).

(2) For the purpose of subsection (1)(f), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds shares of that company. 5

(3) For the purposes contemplated in subsection (1)(e) or in any other law, the Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.

Company resolution to begin business rescue proceedings 10

129. (1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company. 15 (2) A resolution contemplated in subsection (1)—

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as 20 contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must—

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was 25 founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)(b), a company must—

1. (a) file a notice of the appointment of a practitioner within two business days after making the appointment; and
2. (b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

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(5) If a company fails to comply with any provision of subsection (3) or (4)— 35

1. (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
2. (b) the company may not file a further resolution contemplated in subsection (1)

for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, 40 approves the company filing a further resolution.

(6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2). 45

(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128(1)(e) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section. 50

Objections to company resolution

130. (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

(a) setting aside the resolution, on the grounds that— 55 (i) there is no reasonable basis for believing that the company is financially

distressed;

(c)

practitioner— 5 (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 10 conditions that the court considers necessary to secure the interests of the company and any affected persons.

2. (ii) there is no reasonable prospect for rescuing the company; or
3. (iii) the company has failed to satisfy the procedural requirements set out in

section 129;

(b) setting aside the appointment of the practitioner, on the grounds that the

(2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of—

(a) subsection (1)(a) to set aside that resolution; or 15 (b) subsection (1)(b) to set aside the appointment of the practitioner appointed by

the company,

unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading. 20

(3) An applicant in terms of subsection (1) must—

(a) serve a copy of the application on the company and the Commission; and (b) notify each affected person of the application in the prescribed manner.

(4) Each affected person has a right to participate in the hearing of an application in terms of this section. 25

(5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may—

1. (a) set aside the resolution—
 - (i) on any grounds set out in subsection (1); or
 - (ii) if, having regard to all of the evidence, the court considers that it is 30 otherwise just and equitable to do so;
2. (b) afford the practitioner sufficient time to form an opinion whether or not— (i) the company appears to be financially distressed; or
 - (ii) there is a reasonable prospect of rescuing the company, and after receiving a report from the practitioner, may set aside the company's 35 resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and
3. (c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, includ- ing— 40
 - (i) an order placing the company under liquidation; or
 - (ii) if the court has found that there were no reasonable grounds for believing

that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, 45 unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76(4) and (5).

(6) If, after considering an application in terms of subsection (1)(b), the court makes an order setting aside the appointment of a practitioner— 50

1. (a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and
2. (b) the provisions of subsection (5)(b), if relevant, apply to the practitioner 55 appointed in terms of paragraph (a).

Court order to begin business rescue proceedings

131. (1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. 60

(b)

business rescue proceedings, if the court is satisfied that — (i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation 10 under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or
dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

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(2) An applicant in terms of subsection (1) must —

(a) serve a copy of the application on the company and the Commission; and (b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section. 5

(4) After considering an application in terms of subsection (1), the court may —

(a) make an order placing the company under supervision and commencing

(5) If the court makes an order in terms of subsection (4)(a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent 20 creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until — 25

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for. (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any

time during the course of any liquidation proceedings or proceedings to enforce any 30 security against the company.

(8) A company that has been placed under supervision in terms of this section — (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section

132(2); and 35 (b) must notify each affected person of the order within five business days after

the date of the order.

Duration of business rescue proceedings

132. (1) Business rescue proceedings begin when —

(a) the company — 40

(i) files a resolution to place itself under supervision in terms of section 129(3); or

(ii) applies to the court for consent to file a resolution in terms of section 129(5)(b);

2. (b) a person applies to the court for an order placing the company under 45 supervision in terms of section 131(1); or
3. (c) during the course of liquidation proceedings, or proceedings to enforce a security interest, a court makes an order placing the company under supervision.

(2) Business rescue proceedings end when— 50

1. (a) the court—
 - (i) sets aside the resolution or order that began those proceedings; or (ii) has converted the proceedings to liquidation proceedings;
2. (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or 55
3. (c) a business rescue plan has been—

(i) proposed and rejected in terms of Part D of this Chapter, and no affected

person has acted to extend the proceedings in any manner contemplated in section 153; or

(a)

(b)

(c)

the company may dispose, or agree to dispose, of property only— (i) in the ordinary course of its business;

(ii) in a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the practitioner; or 40

(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;

any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in 45 lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and

despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, 50 irrespective whether the property is owned by the company, except to the extent that the practitioner consents in writing.

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(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

(3) If a company's 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— 5

(a) 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

(b) deliver the report and each update in the prescribed manner to each affected person, and to the— 10

(i) court, if the proceedings have been the subject of a court order; or (ii) Commission, in any other case.

General moratorium on legal proceedings against company

133. (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

- (a) with the written consent of the practitioner;
- (b) with the leave of the court and in accordance with any terms the court

considers suitable; (c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the

business rescue proceedings began;

- (d) criminal proceedings against the company or any of its directors or officers; or
- (e) proceedings concerning any property or right over which the company

exercises the powers of a trustee.

(2) During business rescue proceedings, a guarantee or surety by a company in favour

of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

Protection of property interests

134. Subject to subsections (2) and (3), during a company's business rescue proceedings—

- (a)
- (b)
- (c)

the company may dispose, or agree to dispose, of property only— (i) in the ordinary course of its business;

(ii) in a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the practitioner; or

(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;

any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and

despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective whether the property is owned by the company, except to the extent that the practitioner consents in writing.

(2) The practitioner may not unreasonably withhold consent in terms of subsection (1)(c), having regard to—

- (a) the purposes of this Chapter;
- (b) the circumstances of the company; and

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- (c) the nature of the property, and the rights claimed in respect of it.

(3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must—

(a) obtain the prior consent of that other person, unless the proceeds of the 5

disposal would be sufficient to fully discharge the indebtedness protected by

that person's security or title interest; and (b) promptly—

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or 10

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.

Post-commencement finance

135. (1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an 15 employee during the company's business rescue proceedings, but is not paid to the employee—

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection (3)(a).

(2) During its business rescue proceedings, the company may obtain financing other 20

than as contemplated in subsection (1), and any such financing—

1. (a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

2. (b) will be paid in the order of preference set out in subsection (3)(b).

(3) After payment of the practitioner's remuneration and costs referred to in section 25 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—

(a) in subsection (1) will be treated equally, but will have preference over—

(i) all claims contemplated in subsection (2), irrespective whether or not

they are secured; and 30 (ii) all unsecured claims against the company; or

(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of 35 any claims arising out of the costs of liquidation.

Effect of business rescue on employees and contracts

136. (1) Despite any provision of an agreement to the contrary—

(a) during a company's business rescue proceedings employees of the company

immediately before the beginning of those proceedings continue to be so 40 employed on the same terms and conditions, except to the extent that—

(i) changes occur in the ordinary course of attrition; or

(ii) the employees and the company, in accordance with applicable labour

laws, agree different terms and conditions; and

(b) any retrenchment of any such employees contemplated in the company's 45

business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act No. 66 of 1995), and other applicable employment related legislation.

(2) Subject to sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may cancel or suspend entirely, partially or conditionally any provision of an agreement to which the company is a party at the commencement of the business rescue period, other than an agreement of employment.

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(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.

(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.

Effect on shareholders and directors

137. (1) 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 —

(a) that the court otherwise directs; or

(b) contemplated in an approved business rescue plan.

(2) During a company's business rescue proceedings, each director of the company —

1. (a) must continue to exercise the functions of director, subject to the authority of the practitioner;
2. (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;
3. (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and
4. (d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).

(3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.

(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.

(5) At any time during the business rescue proceedings, the practitioner may apply to a court for an order removing a director from office on the grounds that the director

has —

(a) (b)

failed to comply with a requirement of this Chapter; or by act or omission, has impeded, or is impeding —

(i) the practitioner in the performance of the powers and functions of practitioner;

2. (ii) the management of the company by the practitioner; or
3. (iii) the development or implementation of a business rescue plan in

accordance with this Chapter.

(6) Subsection (5) is in addition to any right of a person to apply to a court for an order contemplated in section 162.

