



Business rescue: All is not lost yet

In these harsh economic circumstances we find ourselves in, it can be difficult for all businesses, from small enterprises to large ones, to survive financially. More and more businesses are unable to meet their financial obligations when it falls due and creditors are lurking around every corner.

Most businesses will by the end of this month not be able to cover its operational expenses or debt as it becomes due and payable. Debt may thus accumulate to such an extent that it exceeds the assets and leaves the business insolvent. This is a worrying prospect from a business point of view and without proper security, the chances of qualifying for a bank loan is unlikely. The prospects are alarming, but all is not lost yet and there are still some cards in your hand left to play.

What is business rescue?

Placing your business in business rescue is one of the options to save it. Businesses are important for economic growth and therefore our courts of law are focused on saving a business rather than liquidating it. Business rescue provides for a rehabilitation process whereby a business can be saved from its financial problems. These steps are stipulated

in the Companies Act¹ and includes supervision over the whole business, its management, its assets and keep the business running as a going concern over a foreseeable period of time.² A temporary moratorium (freeze) will be placed on the rights of creditors to institute legal proceedings.³ The next step is to set up and implement a rescue plan going forward, to guide and assist the business to return to business (as solvent) as usual and to settle where all debt possible and/or structure by agreement with debtors an achievable repayment plan for the debt. Where settlement of all debt is not possible, the main goal of the implemented plan is to place the creditors and shareholders/members in a better position than they would have been if the business had to be liquidated from the outset.⁴ Business rescue is therefore beneficial for business' continuity, for the shareholders, the creditors as well as the employees.

When can I place my business under business rescue?

According to the Company Act only financially distressed companies and close corporations can be rehabilitated.⁵ Your business needs to fall within the financially distressed category to qualify for business rescue. The Companies Act addresses two possible scenarios⁶ of which you only have one to comply with.

Firstly:

“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 six months”

The focus here is on not being able to pay your debts as they become due and payable within the upcoming six months. An important aspect is that certainty is not required about being able to discharge your debt. It only needs to appear

¹ Act 71 of 2008.

² Section 128(b)(i) of the Companies Act.

³ 128(b)(ii).

⁴ Section 128(b)(iii).

⁵ 128(b).

⁶ 128(f)(i) & (ii).

“reasonably unlikely”. The wording is very broad and open, and the formulation thereof makes it easier to proof.

Secondly:

“it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months”

The criteria here is threatening insolvency. Certainty thereof is not essential, a mere likelihood is enough. This requirement is broader than the one first mentioned as in this case the extent of your liabilities are included and not only your debt. The test for insolvency is therefore to determine whether your liabilities will exceed your assets in the ensuing 6 months. Only assets and liabilities relating to the following six months may be applied for the test.

Who and how can a business be placed under business rescue?

The Companies Act provides for two methods where by a business may be placed under business rescue.⁷ Firstly on a voluntary basis, by way of resolution by the board of a company, being satisfied that the business is under financial stress and no reasonable prospect of rehabilitating and restoring the business, appears.⁸

Secondly on a forced basis, by any affected person⁹ i.e. a shareholder, creditor, employee or their representative who can apply to court for an order placing the business under supervision and to commence business rescue proceedings.¹⁰ This route will be relevant in the event of the board of the company not wanting to place the business under voluntary supervision.

⁷ Section 131(1).

⁸ Section 129(1)(a) & (b).

⁹ “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 registered trade union, each of those employees or their respective representatives.

¹⁰ Section 131(1).

The processes that need to be followed for your business to be placed under business rescue.

In case of the board passing a resolution on the voluntarily method basis, the following few compulsory requirements need to be met for the resolution to be valid and enforceable.¹¹

The resolution adopted by the board has no force or effect until it is filed. After the company adopted and filed the resolution, the company must publish a notice of the resolution and a statement setting out the facts and reasons for its decision. The notice must be circulated to all affected persons. The company must also appoint a business rescue practitioner beforehand. His consent to accept the appointment must be in writing. The company has 5 days to comply with the above requirements.¹²

After the appointment of the said practitioner the company has 2 business days to file a notice of appointment. The company then has 5 business days after the notice was filed to publish a copy thereof to all the affected persons.¹³

It is important to keep in mind that the above mentioned resolution may not be adopted where any liquidation proceedings have already been initiated against the company or by the company. The contrary also applies and no liquidation steps can be taken against the business once the resolution to start business rescue proceedings has been adopted. If the requirements are not met, the resolution taken by the board becomes null and void. The company may in such case not file another resolution for business rescue and voluntary supervision for another 3 months after the date of adopting the resolution having lapsed.¹⁴ It is therefore important to comply with the requirements thoroughly.

The second method being the forced one where any affected person can apply for a court order, the applicant must serve a copy of the application for business rescue on the company's registered address and notify all the effected persons of the application on the prescribed way.¹⁵ All effected persons has a right to intervene, but is not obligated to

¹¹ 129(5).

¹² Requirement 1: Section 129(3)(a) & (b).

¹³ Requirement 2: Section 129(4)(a) & (b).

¹⁴ Section 129(5).

¹⁵ 131(2).

participate in the court proceedings.¹⁶ The court will only grant an order to place the business under supervision and to commence business rescue proceedings, should it be satisfied that the company is financially in distress, has failed to fulfill any monetary obligation in respect of employment related matters, for financial just and equitable reasons and lastly a reasonable prospect to rehabilitate the company.¹⁷

If liquidation proceedings have already commenced against or by the company at the time of launching the application for business rescue such application will for the time being suspend any pending liquidation proceedings.

By rehabilitating a business, by way of business rescue proceedings, the objectives of the Company Act are fulfilled. It has the interest of all relevant parties at heart, is transparent and allows businesses breathing space when it is needed most. The ripple effect of rehabilitation extends as wide as nearby communities due to the salary dependency of employees to maintain their families.

All is not lost, you can save your business, your livelihood and that of your employees. This may be the solution you have been waiting for.

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¹⁶ 131(3).

¹⁷ 131(4)(a)(i),(ii),(iii).