

StraussDaly

COVID-19 Business Rescue

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## HOW BUSINESS RESCUE CAN COME TO THE AID OF BUSINESSES AFFECTED BY THE CORONA VIRUS LOCKDOWN

### INTRODUCTION

The COVID 19 Pandemic has had a catastrophic impact on the world's economy and South Africa is most certainly not exempt therefrom. Coupled with the recent downgrade of South Africa to that of a junk status, the South African economy has received a double blow.

Whilst the world economy and that of South Africa's will eventually recover, the lag effect of the impact of this corona virus will continue for many, many months if not years. It will not be "business as usual". The world as we once knew it will be different. Businesses will, now more than ever, need the relief not only as offered to a limited extent to compliant businesses by the South African banks, and to a limited extent by the South African Revenue Services, and more recently by various property organisations, but more so, businesses will need the relief and protection offered from the **Business Rescue Proceedings** (moratorium on claims) as provided for in our Companies Act 71 of 2008 ("the Act").

Save for the essential services businesses, every other business, conducted through a company or a close corporation, which has had to close down during this lockdown period, will find some benefit in considering business rescue as an option to follow post the lockdown period. It is inevitable that almost every business so affected by this lockdown, will at some stage not be able to pay all its debts as and when those debts become due and payable. In fact, such businesses will then fall squarely within the definition of "**financially distressed**", which then allows such businesses to commence with business rescue proceedings.

**Financially distressed** as defined in the Act refers to a business (company/close corporation) which appears reasonably unlikely to be able to pay all its debts as such debts become due and payable within the immediately ensuing 6 months, or where it appears that there is a reasonable likelihood of that business becoming insolvent within the immediately ensuing 6 months.

## OBJECT OF BUSINESS RESCUE

The object of Business Rescue is to rehabilitate a company (and whilst references in this note is only made to a company, business rescue applies equally to close corporations), that is **financially distressed** by providing for: -

1. the temporary supervision of the company and management of its affairs, business and property by the Business Rescue Business rescue practitioner;
2. the temporary moratorium on the rights of claimants against the company and in respect of property in the company's possession; and
3. the development and implementation of a Business Rescue Plan ("**plan**"), if approved, to rescue the company by either restructuring the company's affairs, its business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing to be able to trade back to solvency OR if that is not possible, to realise to sell the assets of the company so as to give a better return to creditors than in the case of liquidation.

## MORATORIUM AND SUSPENSION OF OBLIGATIONS BENEFIT OF BUSINESS RESCUE

But for the COVID 19 pandemic, every solvent/profitable/valuable company would not have considered themselves as being a candidate for falling within the definition of **financially distressed**. But now, financially distressed is currently in their contemplation. Those companies ran good businesses, and can become good businesses again. But to get there, those companies are going to need time, they are going to need a break from the monthly commitments, they are going to have to restructure the monthly commitments over a period of time so that they can trade back to being that good/solvent/profitable/valuable business again. Business rescue in general, provides that break/moratorium that may need.

Business rescue not only puts a halt on the institution of any legal proceedings against the company, including any enforcement action against the company or in relation to any assets belonging to the company or against assets lawfully in possession of the company, but also allows a **business rescue practitioner** ("**practitioner**") to suspend any obligation of the company that arises out of an agreement to which the company was party to. This can be a partial, conditional or entire suspension of such obligation.

This moratorium and suspension of obligations commences when the company is placed into business rescue and will end is when the company is taken out of business rescue.

This the suspension of obligations will extend for example to any rental/lease payments, instalment payments for the financing of motor vehicles/equipment and any form of loan repayments and the like. However, the suspension of such obligations does entitle the third party concerned to claim any damages it may have suffered as a result of such suspension. Often, the payments during the suspension period will then be repaid over a period of time once the company is able to afford such payments.

For the business rescue business rescue practitioner to enjoy the benefit of any suspension of obligations, the company must not in arrears with its obligation to the third party which has resulted in a right to cancel any such agreement by the third party concerned. If that is the case, the arrears would have to be brought up to date for the **practitioner** can invoke suspension provisions.

#### HOW TO COMMENCE WITH BUSINESS RESCUE

1. The directors of the **financially distressed** company can pass a resolution to place the company in business rescue. This resolution, together with a sworn statement setting out the grounds and reasons as to why the directors believe that the company is **financially distressed** and why they believe that there is a reasonable prospect of the company being rescued, together with a form nominating a **business rescue practitioner** is sent to the Companies and Intellectual Property Commission CIPC who registers the Resolution thereby placing the company in business rescue and confirming the appointment of the nominated **practitioner**, or
2. An **affected person** (a shareholder or creditor of the company, any registered trade union representing the employees; and any employee of the company) may apply to court to place the company under business rescue and appoint a **practitioner**. For a court to grant an order placing a company under Business Rescue, the court must be satisfied that: the company is **financially distressed** and there is a reasonable prospect of the company being rescued

#### DUTIES OF A BUSINESS RESCUE BUSINESS RESCUE PRACTITIONER

In summary, the business rescue business rescue practitioner has the full management and control of the company during the business rescue proceedings. He must develop a **plan** to be considered by **affected persons** and implement the **plan** if such has been adopted. If at any time the **business rescue practitioner** concludes that there is no reasonable prospect

for the company to be rescued, the **practitioner** may apply to court for an order terminating business rescue proceedings and placing the company into liquidation or file for notice of termination of the business rescue proceedings;

## **RIGHTS OF EMPLOYEES AND CREDITORS DURING BUSINESS RESCUE PROCEEDINGS**

### Employees

Employees continue to be employed by the company on the same terms and conditions as they were prior to the company being placed in business rescue and any retrenchment of the employees must take place in accordance with the respective provisions of the Labour Relations Act. Employees are entitled to be consulted with throughout the business rescue proceedings and afforded sufficient opportunity to make submissions towards the rescue of the company.

To the extent that there are any monies due to the employees at the date of commencement of business rescue, such employee is entitled to submit a claim for payment which claim will be treated as a preferential claim. Employees are entitled to vote at any meeting and their **voting interest** is calculated in accordance with the extent of their claim as against the company at date of Business Rescue.

### Creditors

Creditors may make proposals formally or informally in regard to the development of a **plan**. Creditors are entitled to vote to amend, approve or reject a **plan** or propose a development of an alternative **plan**. A creditor's **voting interest** is based on what the creditor's claim amount is as at date of commencement of business rescue

## **BUSINESS RESCUE PLAN**

After consultation with creditors and other **affected persons**, the **business rescue practitioner** must prepare a **plan** for consideration and possible adoption at a meeting convened specifically for the consideration of the **plan**. The structure of the **plan** will include:

### Background

1. A list of material assets of the company and which assets are held as security.
2. A list of creditors, which list will also detail those that would enjoy different preferences on insolvency-example secured, statutory preferent and concurrent.

3. The probable dividend that creditors would receive the event of a liquidation.
4. A list of the shareholding in the company.
5. A copy of any written agreement with the company as to the **practitioner's** remuneration.

#### Proposals

1. The nature and duration of the moratorium.
2. The extent to which the company is to be released from the payment of its debts.
3. How the company intends to treat existing agreements.
4. What property will be available to pay the creditor's claim is in terms of the **plan**.
5. The order of preference that creditors will be paid.
6. The benefits of adopting the **plan** as opposed to placing the company in liquidation.
7. The effect that the **plan** may have on shareholders.

#### Assumptions and Conditions

1. What conditions must be satisfied for the **plan** to come into operation and for it to be fully implemented.
2. The effect, if any, on employees.
3. The circumstances under which the **plan** will end.
4. If the **plan** makes reference to the continued trading of the company, a projected balance sheet of the company and statement of income and expenses for the ensuing 3 years must be included. Reference in these projections must include what material assumptions have been made and what provisions there are for contingencies.

#### **MEETING TO CONSIDER THE PLAN**

1. The **practitioner** has 25 business days from date of his appointment to publish the **plan**. If the **practitioner** cannot to do so within the prescribed time, he must timeously secure extension of time within which to publish the **plan**. The creditors, voting on a simple majority must authorise the extension.
2. Once the **practitioner** has published the **plan** he must, within 10 business days from date of publication, convene a meeting to consider the **plan**. All **affected persons** can attend such meeting.
3. At the meeting to consider the **plan**, the **practitioner** will present the **plan**, inform the meeting whether he believes there is a reasonable prospect of the company been rescued, provide an opportunity for employees representatives to address the meeting, invite discussions and entertain vote on any motions to amend the **plan**, or direct the

**practitioner** to adjourn the meeting to revise the **plan** further, and call for a vote to adopt the **plan**.

4. For a **plan** to be adopted, it must be supported by holders of more than 75% of the creditors **voting interest** that was voted, and be supported by at least 50% of the independent creditors voting interest that were voted. Independent creditors are those creditors that are not related to the company in any way, for example directors and shareholders or subsidiary companies.

### **BINDING NATURE OF AN ADOPTED PLAN**

Once a **plan** has been adopted, it is binding on the company and on each of the creditors of the company and every holder of the company's securities (shareholders), whether or not such person was present at the meeting or voted in favour or against the adoption of the **plan**.

### **FAILURE TO ADOPT A PLAN**

In the event that the plan is rejected by the majority of the creditors, the practitioner or if the practitioner fails to take the following steps, any **affected person** present at the meeting may: initiate a vote requiring the **practitioner** to prepare and publish a revised plan, or apply to the court to set-aside the result of the vote, or making a binding offer purchase the voting interest of the party opposing the adoption of the **plan**. Should the above not be possible the **practitioner** is obligated to apply for termination of business rescue proceedings and file for liquidation of the company.

### **POTENTIAL IMPACTS OF AN ADOPTED BUSINESS RESCUE PLAN**

A **plan** may provide that a creditor, who has agreed to the discharge or reduction of the debt owing to such creditor, will lose the right to enforce the relevant debt or part of it. If a **plan** is approved and implemented in accordance with the provisions of the Act, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of business rescue proceedings, except as provided for in the **plan**.