

Rescue your business in three months

Through the New Companies Act, the business rescue practitioner gets the responsibility as an officer of the Court to develop and implement, if approved, a plan to rescue the company that maximises the likelihood of the company continuing in existence on a solvent basis. This often results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

The purpose of business rescue

The purpose of business rescue is to allow the practitioner the opportunity to take control over the management of the company with the view to improving the financial standing of the company to the benefit of creditors, employees and all other interested parties.

The financial standing of a company cannot reasonably be improved overnight or within a few months. In order for business rescue proceedings to be effective and for the business to be profitable and sustainable, the practitioner must be given a reasonable time frame within which to successfully implement the business rescue plan.

The duration of business rescue proceedings therefore must be subjective and tailored to suit the financial situation and potential of the particular company in question. It would be an injustice to apply strict and narrow time frames within which business rescue proceedings should be implemented.

In the interest of all parties, however, business rescue proceedings also cannot be given unlimited reign and an indefinite period within which to be implemented. In order for a practitioner to effectively and speedily attempt to turn around the company, strict controls, measures and forms of accountability need to be kept in place in order to protect the interests of all affected parties. Section 132(3) of the Companies Act creates that very instrument of control and accountability.

The legalities

In terms of section 132(3) of the Companies Act, 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 must:

- 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 to each affected person, and to the:
 - Court, if the proceedings have been the subject of a court order; or
 - Companies and Intellectual Property Commission (the commission), in any other case.

After implementation of the business rescue plan, whether successfully or unsuccessfully, there comes a point where the practitioner must eventually evaluate the financial standing of the company and terminate business rescue proceedings.

In terms of section 141(2) of the Companies Act if, at any time during business rescue proceedings, the practitioner concludes that:

a) There is no reasonable prospect for the company to be rescued, the practitioner must:

- Inform the court, the company, and all affected persons accordingly; and
- Apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;

b) There no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must inform the court, the company, and all affected persons, and

- If the business rescue process was confirmed by a court order or initiated by an application to court, apply to a court for an order terminating the business rescue proceedings; or
- Otherwise, file a notice of termination of the business rescue proceedings with the commission

Tools at your disposal

Business Rescue is another tool that the business owner has in his or her arsenal in these tough trading conditions but it is not an easy road and it reminds me of this parable below:

Frog in a Milk-Pail

A frog was hopping around a farmyard, when it decided to investigate the barn. Being somewhat careless, and maybe a little too curious, he ended up falling into a pail half-filled with fresh milk. As he swam about attempting to reach the top of the pail, he found that the sides of the pail were too high and steep to reach.

He tried to stretch his back legs to push off the bottom of the pail but found it too deep. But this frog was determined not to give up, and he continued to struggle. He kicked and squirmed and kicked and squirmed, until at last, all his churning about in the milk had turned the milk into a big hunk of butter. The butter was now solid enough for him to climb onto and get out of the pail! The lesson: Never Give Up!

Business rescue proceedings must end if the practitioner decides that the company cannot be rescued, or if his rescue plan is rejected, or if the company emerges from financial distress, or finally, if the business rescue is successfully implemented.

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