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#### **OVERVIEW**

The application of business rescue is well underway and becoming common practice in South Africa

Companies that have a reasonable prospect of being rescued, despite their distressed financial position, are seriously considering the option of business rescue as an alternative to liquidation.

In this pocket guide, we provide you with a concise overview of the business rescue process and its salient features.

The aim of this pocket guide is to assist business rescue practitioners, creditors, shareholders and employees with a user-friendly, infographic guide to the processes and proceedings involved in business rescue and to highlight the rights, duties and responsibilities of all stakeholders in the process.

This pocket guide, however, should be read together with the full text of Chapter 6 of the Companies Act 71 of 2008, as amended, (Companies Act) and with the regulations promulgated thereunder. This pocket guide is not, and does not aim to be, a guide to each and every provision of Chapter 6 of the Companies Act and the regulations promulgated thereunder. Where applicable, independent legal advice should be obtained.

Attorneys are well placed to assist all role players involved in the business rescue process. In our experience, each role player, be it a creditor, shareholder, employee of the company in distress, the business rescue practitioner, or a third-party acquirer, will require the assistance of external legal counsel when considering its position within the process.

Werksmans Attorneys is at the forefront of business rescue advisory services and has a team dedicated to advising all role players on all aspects of the business rescue process.



#### **IMPORTANT TERMINOLOGY**

### AFFECTED PERSON

a shareholder, creditor, employee (or their representative) or a registered trade union, if any, representing employees of the company (section 128(1)(a)).

#### BUSINESS RESCUE PRACTITIONER

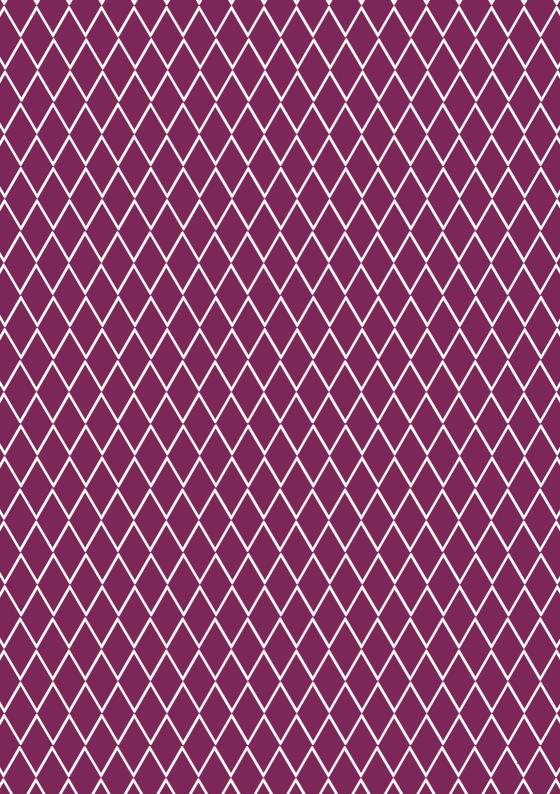
a business rescue practitioner is a person appointed, or two or more persons jointly appointed, to oversee a company during business rescue and to prepare a business rescue plan that achieves either of the objectives of business rescue (section 128(1)(d)).

#### INDEPENDENT CREDITOR

a person who is a creditor of the company (which can also include an employee of a company to the extent that such employee is also a creditor of the company) and not related to the company, a director of the company or the business rescue practitioner of the company (section 128(1)(g)).

#### **SECURITIES**

shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company (section 1).



# OBJECTIVES AND TEST OF BUSINESS RESCUE

#### **OBJECTIVES OF BUSINESS RESCUE**

The business rescue provisions of the Companies Act are designed to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company, and the management of its affairs, business and property, by a business rescue practitioner in substitution for the company's board and prior management; a temporary moratorium on the rights of claimants against the company or in respect of property in its lawful possession; and the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its affairs.

The aim of business rescue proceedings is therefore to restructure the affairs of the company in an attempt to ensure that the company continues in existence on a solvent basis or, failing this, at least provides a better return for the creditors and shareholders of the company than would ordinarily result from the liquidation of the company (section 128(1)(b)(iii)).

This is also the definition of "business rescue" (as set out in section 128(1)(e) of the Companies Act) and "rescuing the company" (as set out in section 128(1)(h) of the Companies Act).

#### **TEST FOR BUSINESS RESCUE**

#### FINANCIAL DISTRESS

The test for business rescue is derived from the meaning given to the term "financially distressed" by the legislature (section 128(1)(f)). A company will be financially distressed, within the meaning of the Companies Act, and in turn a suitable candidate for business rescue if within the ensuing six months the company will either (a) not be able to pay all of its debts as they become due and payable; or (b) will become insolvent – i.e.: with its liabilities exceeding its assets. The test for business rescue is therefore a six-month forward-looking test, it being whether or not the company will become insolvent (on its balance sheet) or unable to pay its debts as and when they fall due for payment (i.e. commercial insolvency).

#### REASONABLE PROSPECTS OF SUCCESS

The company must be capable of being rescued. In terms of the definition of "rescuing the company" in section 128(1)(h) of the Companies Act, this means that the company must be able to achieve one of the two outcomes of business rescue (as referred to above). The South African courts have considered numerous business rescue cases since the inception of the Companies Act and have provided guidance as to what is required in order to show that there is a "reasonable prospect" of rescuing a company. Our courts have indicated that for there to be a "reasonable prospect" of rescuing a company, one ought to indicate the cause of the demise of the company or the reasons for its failure and offer a remedy for such demise that is likely to be sustainable. In support of this, one would need to provide concrete and objectively ascertainable facts, which facts are beyond mere speculation, indicating that the remedy proposed is reasonable and sustainable.

## © 4. COMMENCEMENT OF BUSINESS RESCUE PROCEEDINGS

## COMMENCEMENT OF BUSINESS RESCUE PROCEEDINGS

Section 132(1) of the Companies Act deals with the commencement of business rescue proceedings.

In terms of section 132 of the Companies Act, business rescue proceedings commence when:

- > the company (i) files a resolution to place itself under supervision in terms of section 129 of the Companies Act; or (ii) applies to court for consent to file a resolution in terms of section 129(5)(b) (i.e. if a company fails to comply with the procedural and notification requirements, it must approach the court for leave to file another resolution if it wishes to do so within the three-month restricted period);
- > an affected person applies to court for an order placing the company under supervision in terms of section 131(1); or
- a court makes an order placing a company under supervision during the course of liquidation proceedings or proceedings to enforce security (section 131(7)).

#### MODES OF ENTRY INTO BUSINESS RESCUE

There are two ways in which a company can be placed under business rescue:

- Voluntarily when the board of directors of a company passes a resolution, by simple majority, and where the board of directors believes that (i) the company is financially distressed, within the meaning of the Companies Act, but (ii) that there is a reasonable prospect of rescuing the company in accordance with the objectives of the Companies Act (section 129); or
- > Compulsorily when application is made to court by an affected person (i.e. employee, its representatives or trade union, shareholder or creditor) of the company (section 131) on the basis that:
  - the company is financially distressed, within the meaning of the Companies Act;
  - the company has failed to pay any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters: or
  - it is just and equitable, for financial reasons; and
  - there is a reasonable prospect of rescuing the company.

The following flow charts provide a useful graphic presentation of the manner in which a company may commence business rescue proceedings.

## USINESS RESCUE

#### **VOLUNTARY BUSINESS RESCUE**

A COMPANY THAT HAS ADOPTED
A RESOLUTION TO COMMENCE
BUSINESS RESCUE PROCEEDINGS
CANNOT ADOPT A RESOLUTION TO
COMMENCE LIQUIDATION UNLESS
THE BUSINESS RESCUE RESOLUTION
HAS LAPSED OR THE BUSINESS
RESCUE PROCEEDINGS HAVE
BEEN TERMINATED
\$129(6)

OBJECTIONS TO BOARD RESOLUTION \$130(1)

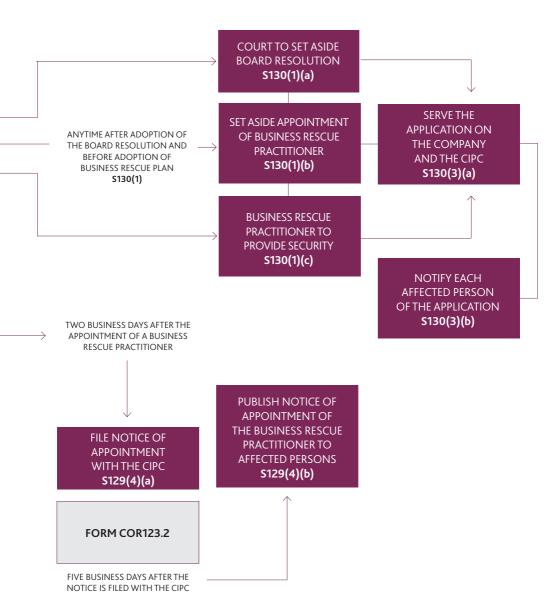
#### VOLUNTARY BUSINESS RESCUE

FORM COR123.1 SWORN STATEMENT AND BOARD RESOLUTION

VOLUNTARY BUSINESS RESCUE COMMENCES WHEN A COMPANY FILES THE RESOLUTION WITH THE CIPC \$132 APPOINT A BUSINESS RESCUE PRACTITIONER S129(3)(b)

WITHIN FIVE BUSINESS DAYS
OR WITHIN AN EXTENDED
TIME GRANTED BY THE CIPC
AFTER ADOPTING AND
FILING RESOLUTION

PUBLISH NOTICE OF RESOLUTION WITH SWORN STATEMENT TO AFFECTED PERSONS \$129(3)(a)



FAILURE TO COMPLY WITH THE PROCEDURAL AND NOTIFICATION REQUIREMENTS – RESOLUTION LAPSES

AND IS A NULLITY AND THE BOARD CANNOT FILE ANOTHER RESOLUTION FOR A PERIOD OF THREE

MONTHS FROM THE DATE OF THE LAPSED RESOLUTION

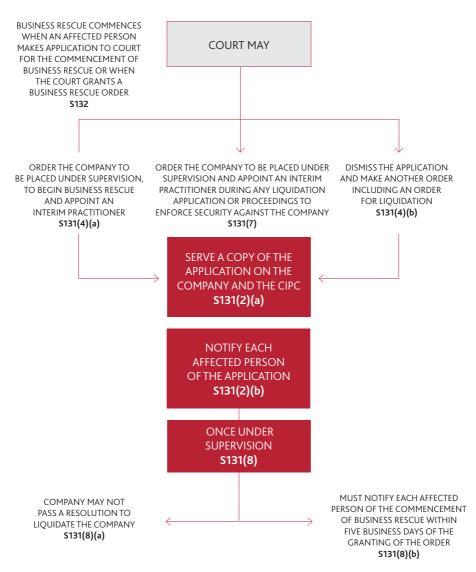
\$129(5)(a) AND (b)

CANNOT PASS A BOARD RESOLUTION FOR THE COMMENCEMENT OF BUSINESS RESCUE IF AN AFFECTED PERSON APPLIES TO COURT TO PLACE THE COMPANY UNDER BUSINESS RESCUE

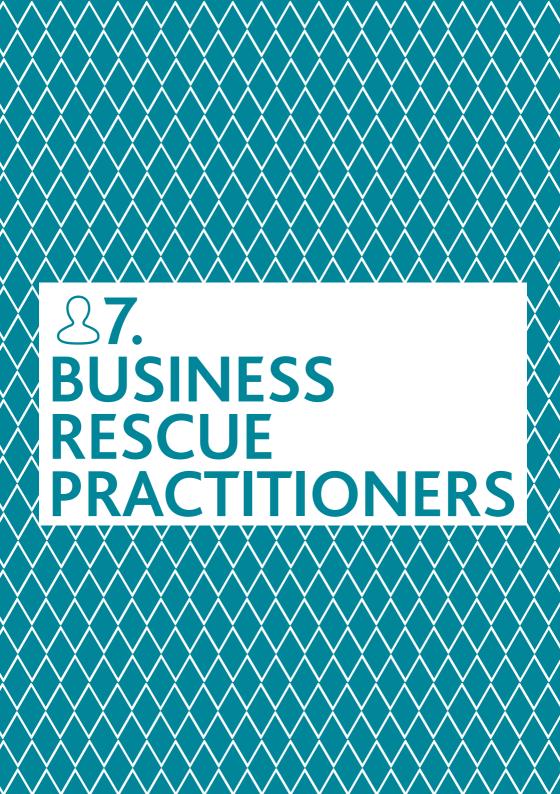
\$131(1)

## ©6. COMPULSORY BUSINESS RESCUE

#### **COMPULSORY BUSINESS RESCUE**



AN APPLICATION FOR THE COMMENCEMENT OF BUSINESS RESCUE SUSPENDS ANY LIQUIDATION PROCEEDINGS UNTIL EITHER
(i) THE COURT HAS ADJUDICATED UPON THE BUSINESS RESCUE APPLICATION; OR (ii) THE BUSINESS RESCUE PROCEEDINGS
END, IF THE COURT MAKES AN ORDER FOR THE COMMENCEMENT OF BUSINESS RESCUE



#### **BUSINESS RESCUE PRACTITIONERS**

A business rescue practitioner is the person (or the persons, if more than one practitioner is appointed) responsible for supervising and managing the company whilst it is under business rescue. It is essential that a practitioner with the necessary skills and qualifications is appointed and, where necessary, has the particular industry experience or expertise to supervise the business rescue of a particular company.

Such individuals have, among other things, the powers and functions incumbent on a board of directors of a company. Notwithstanding this, the board and individual members of the board are obligated to continue to perform their duties and functions, subject to the approval in each instance of the business rescue practitioner.

The following tables set out the manner in which business rescue practitioners are appointed, the size of the companies for which they are entitled to take appointment (as determined by the public interest score) and the remuneration that practitioners are entitled to receive.

APPOINTMENT OF A BUSINESS RESCUE PRACTITIONER						
Section 129(3)	Section 130(6)	Section 131(5)	Section 139(3)			
The company (i.e. the board) may, within five business days after the company has adopted and filed the resolution with the CIPC (or such longer time as the CIPC may allow on application to it), appoint a business rescue practitioner.	If the court, after considering an application brought by an affected person, sets aside the appointment of a business rescue practitioner, the court must appoint an alternate practitioner 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.	If a court, on application to it by an affected person, grants an order placing a company under business rescue, the court may make a further order appointing an interim practitioner who satisfies the requirements for appointment and who has been nominated by the affected person who applied to court. However, this appointment will be subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors.	The company, or an affected person who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application to object to the appointment of such new practitioner and set aside the new appointment.			

#### **PUBLIC INTEREST SCORE**

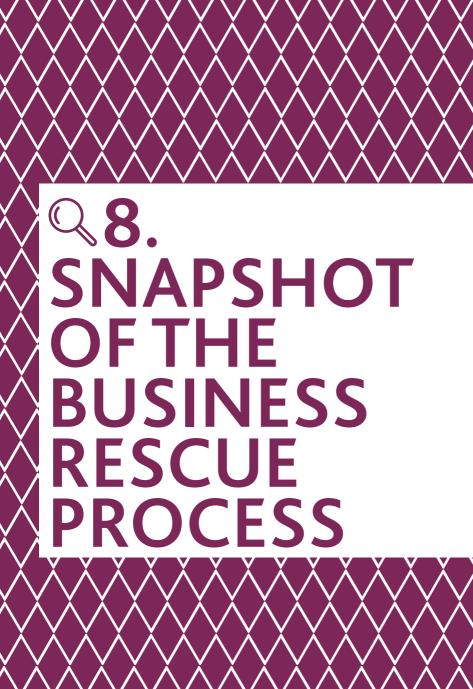
Regulation 26(2) of the Companies Act sets out the manner in which the public interest is calculated.

It provides that at the end of each financial year, the public interest score is calculated as the sum of the following:

- > a number of points equal to the average number of employees of the company during the financial year;
- > one point for every R1 million (or portion thereof) in third-party liability of the company, at the financial year end;
- > one point for every R1 million (or portion thereof) in turnover during the financial year; and
- > one point for every individual who, at the end of the financial year, is known by the company, in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities or in the case of a non-profit company, to be a member of the company, or a member of an association, that is a member of the company.

#### CATEGORIES OF BUSINESS RESCUE PRACTITIONERS REGULATION 127(2) Senior **Junior Experienced** A person who immediately A person who immediately A person who immediately before being appointed as a before being appointed as a before being appointed as a practitioner either: practitioner, actively engaged practitioner, actively engaged in business turnaround in business turnaround > has not previously practice before the effective practice before the effective engaged in business date of the Companies date of the Companies turnaround before the Act or as a business rescue Act or as a business rescue effective date of the practitioner in terms of practitioner in terms of Companies Act or acted the Companies Act, for a the Companies Act, for a as a business rescue combined period of at least combined period of at least practitioner in terms of five years. ten years. the Companies Act; or > has actively engaged in business turnaround practice before the effective date of the Companies Act or as a business rescue practitioner in terms of the Companies Act for a combined period of less than five years. Can take appointment for Such person can take A senior practitioner can small companies (company appointment for a small take appointment for a medium company (company with a public interest score company (company with a of less than 100) or as an public interest score of less with public interest score of assistant to an experienced than 100) or for a *medium* between 100 and 500) or for or senior practitioner. company (company with a large company (company a public interest score of with a public interest score of between 100 and 500). 500 or more).

REMUNERATION								
Tariff – Regulation 128		Contingency Fee – Section 143(2)	Expenses – Regulation 128(3)					
SMALL COMPANY	R1,250 per hour (maximum of R15,625 per day) (inclusive of VAT)	In addition to remuneration determined by the tariff, the business rescue practitioner may also conclude a <i>contingency</i>	A practitioner is also entitled to be reimbursed for the actual costs of any					
MEDIUM COMPANY	R1,500 per hour (maximum of R18,750 per day) (inclusive of VAT)	or further remuneration, which ee would be payable on the happening of any particular disbursements in disbursements in by the practition or expenses incurbately by the practition by the practition.	disbursements incurred by the practitioner, or expenses incurred by the practitioner, to the extent reasonably					
LARGE COMPANY	R2,000 per hour (maximum of R25,000 per day) (inclusive of VAT)	<ul> <li>the business rescue plan is adopted;</li> <li>the business rescue plan is adopted within a certain period of time;</li> <li>the inclusion of any particular result or combination of results within the business rescue plan; or</li> <li>the attainment of any particular result or combination of results.</li> <li>This contingency agreement will only be binding if it is approved by:</li> <li>the holders of a majority of the creditors' voting interests, present and voting at a meeting called to consider the agreement; and</li> <li>the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding up, present and voting at a meeting called for the purpose of considering the proposed agreement.</li> </ul>	necessary to carry out the practitioner's functions and to facilitate the conduct of the company's business rescue proceedings.					



## SNAPSHOT OF THE BUSINESS RESCUE PROCESS

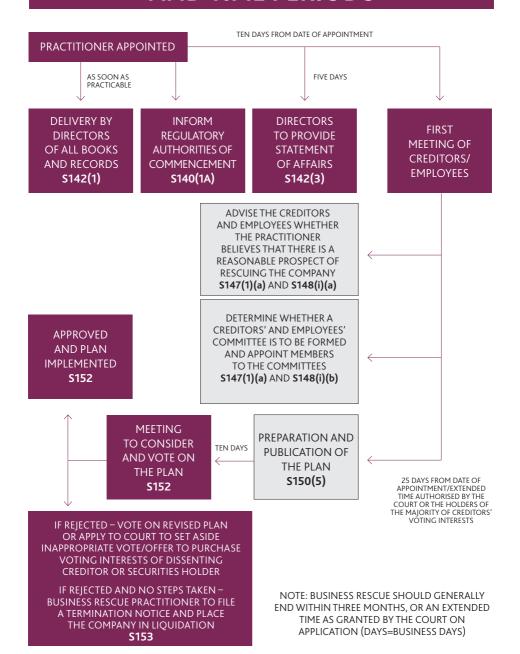
The business rescue process, from start to finish should, according to the Companies Act, last for a period of three months or such longer time as the court, on application by the business rescue practitioner, orders.

During this time, the business rescue practitioner is required to notify creditors and employees of the business rescue process, hold a meeting of creditors and employees of the company, prepare a business rescue plan, discuss the terms of the plan with the stakeholders of the company, publish the plan, present the plan to the creditors and shareholders of the company and procure a vote on the plan.

The practitioner is also at liberty to notify and convene additional meetings with any group/s of stakeholders that he or she wishes to notify or meet with, as the case may be, in order to give effect to the business rescue proceedings of the company.

The following flow chart indicates the salient time periods in the business rescue process from the date that the business rescue practitioner is appointed to the date on which a business rescue plan is put forward for approval.

### SNAPSHOT OF THE PROCESS AND TIME PERIODS





#### **EFFECT OF BUSINESS RESCUE**

The commencement of business rescue has an effect on each stakeholder of the company that has been placed in business rescue, from the creditors and employees, to the directors and shareholders of the company.

The commencement of business rescue also gives rise to the imposition of a moratorium on all current or future claims against the company or in relation to property belonging to the company or lawfully in its possession.

The commencement of business rescue, and depending on the terms and conditions of a business rescue plan, can also affect existing contracts concluded between the company and its suppliers or creditors and the extent to which any debt incurred by the company, prior to the commencement of business rescue, is compromised and discharged in full or in part.

In what follows, we have set out some of the salient features of business rescue, including the effect of the moratorium and the effects that the process may have on creditors, employees and shareholders of the company undergoing business rescue.

#### **MORATORIUM**

No legal proceedings, including enforcement action against the company or in respect of property belonging to the company or lawfully in its possession, may be commenced or proceeded with in any forum against the company – S133(1)

#### **Exceptions**

With the consent of the business rescue practitioner – \$133(1)(a)

With the leave of the court and in accordance with any terms the court considers just – S133(1)(b)

As set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began – S133(1)(c)

Criminal proceedings against the company or any of its directors or officers – S133(1)(d)

Proceedings concerning any property or right over which the company exercises the powers of a trustee – **\$133(1)(e)** 

Proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner – S133(1)(f)

#### **CREDITORS**

Creditors are entitled to:

- (a) a notice of any meeting, decision, court proceeding or other relevant event;
- (b) participate in any court proceedings;
- (c) formally participate in the business rescue proceedings;
- (d) informally participate in the business rescue proceedings by making proposals about the business rescue plan;
- (e) form a creditors' committee and consult with the practitioner on the development of the business rescue plan;
- (f) vote to amend, approve or reject a business rescue plan; and
- (g) propose the development of an alternate plan or acquire the voting interests of one or more affected persons **S145**

Can acquire the voting interests of one or more persons who opposed the adoption of the business rescue plan and whose opposition caused the plan to be rejected – S153(1)(b)(ii)

#### **EMPLOYEES**

During business rescue, employees who were employed before the commencement of business rescue proceedings continue to be employed on the same terms and conditions subject to (a) changes occurring in the ordinary course of attrition; (b) the employees and the company agreeing different terms in terms of labour laws – **S136(1)(a)** 

Any retrenchment during business rescue or in terms of any business rescue plan, must be conducted in terms of section 189 or 189A of the Labour Relations Act – **S136(1)(b)** 

#### **EMPLOYEES (CONT.)**

A business rescue practitioner may not suspend or cancel any provision of an employment contract unless the employee agrees or the amendment is done in accordance with labour laws – **S136(2A)** 

Employee is a preferred unsecured creditor for any monies owing to such employee before business rescue commenced and not paid before business rescue – **\$144(2)** 

Employees are entitled to:

- (a) a notice of any meeting or other relevant event;
- (b) participate in any court proceedings;
- (c) form an employees' committee;
- (d) consult with the practitioner on the development of the business rescue plan;
- (e) be present and make submissions at the meeting held to vote on the business rescue plan;
- (f) vote, if they are creditors; and
- (g) propose the development of an alternate plan or acquire the voting interests of one or more affected persons **\$144(3)**

#### **SHAREHOLDERS**

Securities holders are entitled to:

- (a) a notice of any meeting, decision, court proceeding or other relevant event;
- (b) participate in any court proceedings;
- (c) formally participate in the business rescue proceedings;
- (d) vote to amend, approve or reject a business rescue plan; and
- (e) propose the development of an alternate plan or acquire the voting interests of one or more affected persons **S146**

Securities holders are entitled to vote in respect of any business rescue plan that alters their rights – **\$153(3)(c)(i)** 

If securities holders of any class, and whose rights are affected by any business rescue plan, support the adoption of the plan by a majority vote, the plan will be finally approved – S152(3)(c)(ii)

Securities holders can acquire the voting interests of one or more persons who opposed the adoption of the plan and whose opposition caused the plan to be rejected – S153(1)(b)(ii)

#### **CONTRACTS**

During business rescue proceedings, the business rescue practitioner may:

- (i) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that (a) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and (b) would otherwise become due during those proceedings S136(2)(a)
- (ii) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company as contemplated in (i) **\$\frac{136(2)(b)}\$**

Any agreement, or provision of an agreement, that has been suspended or cancelled, will give rise to a claim for damages – **S136(3)** 

If a business rescue practitioner suspends a provision of an agreement relating to security granted by the company, that provision continues to apply for the purposes of section 134 – with respect to any proposed disposal of property by the company S136(2A)(c)

#### **DISCHARGE OF DEBT**

A business rescue plan that is adopted is binding on the company and on each creditor of the company and every holder of the securities of the company whether or not such person (i) was present at the meeting; (ii) voted in favour of the adoption of the plan; or (iii) proved their claims against the company – **S152(4)** 

A business rescue plan *may* provide that if it is implemented in accordance with its terms, a creditor who has *acceded* to the discharge of the whole or part of the debt owing to that creditor, will lose the right to enforce the debt – **S154(1)** 

A creditor is not entitled to enforce any debt owing by the company prior to the commencement of business rescue, if a plan is adopted and implemented, *unless the business rescue plan provides otherwise* – **S154(2)** 

## ©10. BUSINESS RESCUE PLAN

#### **BUSINESS RESCUE PLAN**

Once the business rescue practitioner has convened all the necessary meetings of stakeholders and any additional meetings that he or she believes are beneficial for the administration of the business rescue, the business rescue practitioner is required to prepare and publish a business rescue plan.

Section 150 of the Companies Act sets out the minimum detail that should be included in a business rescue plan. A business rescue plan can therefore contain much more detail than that which is identified by section 150, but should as far as possible contain at least the items set out in such section.

This is in fact the most important stage of the business rescue process as the business rescue plan contains the plan that the business rescue practitioner believes will either facilitate the rehabilitation of the company so that it can continue to trade on a solvent basis, after business rescue, or if this is not possible, at least achieve a better dividend for the creditors, shareholders and employees of the business than they would receive if the company were placed in liquidation.

What follows is a listing of the salient features required in the formulation of the business rescue plan.

## CONTENT FOR A BUSINESS RESCUE PLAN

#### PART A - BACKGROUND

The background section should include, as far as possible, the following information:

- > a list of all the material assets of the company, and any security held over such assets as at the commencement of business rescue;
- > a list of the creditors of the company as at the commencement of business rescue and the classification of such creditors as secured, statutory preferent and concurrent in terms of the laws of insolvency and which of the creditors have proved their claims;
- > probable dividend that would be received by creditors, in their classes, if the company were to be liquidated;
- > a list of the holders of the company's issued securities;
- > a copy of the written agreement concerning the practitioner's remuneration; and
- > a statement about whether the plan includes a proposal made informally by a creditor of the company.

#### PART B - PROPOSALS

The proposal section should, as far as possible, contain the following information:

- > the nature and duration of any moratorium for which the business rescue plan makes provision;
- > the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
- > the ongoing role of the company, and the treatment of any existing agreements;
- > the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;
- > the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;
- > the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and
- > the effect that the business rescue plan will have on the holders of each class of the company's issued securities.

#### PART C - ASSUMPTIONS AND CONDITIONS

The assumptions and conditions section must, as far as possible, contain the following information:

- > a statement of the conditions that must be satisfied, if any, for the business rescue plan to (a) come into operation; and (b) be fully implemented;
- > the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;
- > the circumstances in which the business rescue plan will end;
- > a projected (a) balance sheet for the company; and (b) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business rescue plan is adopted; and
- > the projected balance sheet and statement (a) must include a notice of any material assumptions on which the projections are based; and (b) may include alternative projections based on varying assumptions and contingencies.

The business rescue plan must conclude with a certificate by the practitioner stating that any (a) actual information provided appears to be accurate, complete and up to date; and (b) projections provided are estimates made in good faith on the basis of factual information and assumptions set out in the plan.

## 

# **VOTING ON A BUSINESS RESCUE PLAN**

Once a business rescue plan has been published, a meeting must be convened for the purpose of voting on such business rescue plan. The creditors and securities holders of the company (the latter if their rights are altered by the terms of the business rescue plan) are entitled to:

- > vote for an amendment of the plan;
- > vote for the adoption of the plan by way of a preliminary approval of the plan
- > vote to reject the business rescue plan; or
- > abstain from voting on the plan.

Importantly, if a creditor, or securities holders for that matter, votes against the adoption of a business rescue plan, and consequently the plan is not voted in, the business rescue practitioner, or any affected person in the event that the business rescue practitioner does not take any action, may:

- > call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan;
- > apply to court to set aside the result of a vote on the basis that the vote was inappropriate; or
- make a binding offer to purchase the voting interest of one or more affected persons who opposed the adoption of the plan, at a value independently and expertly determined to be the fair and reasonable estimate of the return that such person or persons would receive if the company were to be placed in liquidation.

The following flow chart sets out a diagrammatic representation of the manner in which votes can be cast in respect of a business rescue plan and the consequences which flow from voting either for the adoption of a business rescue plan or for the rejection of a business rescue plan.

# **VOTING ON A BUSINESS RESCUE PLAN**

TEN BUSINESS DAYS AFTER PUBLISHING THE PLAN

# S151 MEETING

MEETING OF CREDITORS AND ANY OTHER HOLDERS
OF A VOTING INTEREST TO CONSIDER THE PLAN
\$151(1)

PRACTITIONER TO CALL **PRACTITIONER TO FOR A PRELIMINARY INVITE DISCUSSION AND VOTE OF APPROVAL** CONDUCT A VOTE ON ON THE PLAN **ANY MOTIONS** S152(1)(e) S152(1)(d) SUPPORTED BY AMEND THE PLAN IN **HOLDERS OF MORE** ANY MANNER MOVED THAN 75% OF THE AND SECONDED CREDITORS' VOTING BY HOLDERS OF **INTERESTS THAT** CREDITORS' VOTING WFRF VOTED INTERESTS AND S152(2)(a) SATISFACTORY TO THE PRACTITIONER S152(1)(d)(i) VOTES IN SUPPORT OF THE PLAN INCLUDED AT LEAST 50% OF DIRECT THE THE INDEPENDENT **PRACTITIONER** 

ALTERS THE RIGHTS
OF ANY CLASS
OF HOLDERS OF
THE COMPANY'S
SECURITIES
\$52(3)(c)

CREDITORS' VOTING

INTERESTS THAT

**WERE VOTED** 

S152(2)(b)

DOES NOT ALTER
RIGHTS OF ANY
CLASS OF SECURITIES
HOLDERS – APPROVAL
IS THEN THE FINAL
ADOPTION OF THE
PLAN, SUBJECT TO
PLAN CONDITIONS
\$152(3)(b)

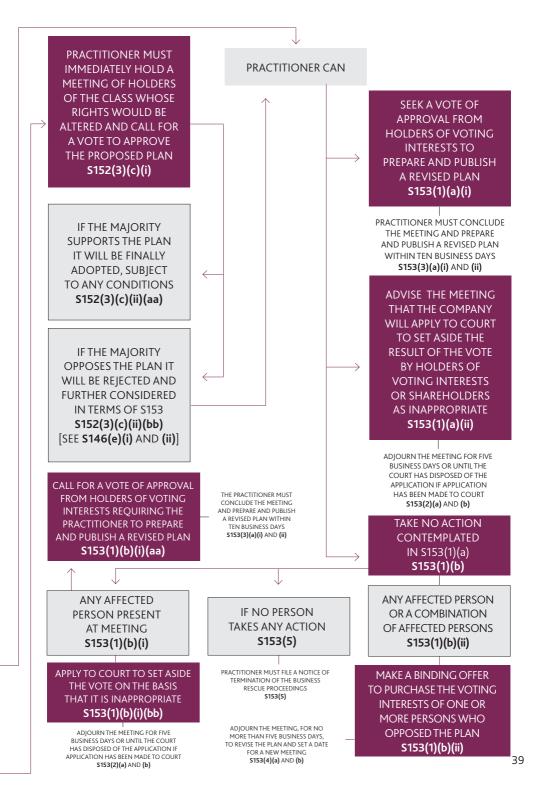
PLAN IS NOT
APPROVED – THE PLAN
IS REJECTED AND MAY
BE CONSIDERED IN
TERMS OF \$153
\$152(3)(a)

TO ADJOURN THE

MFFTING IN ORDER

TO REVISE THE

PLAN FOR FURTHER CONSIDERATION \$152(1)(d)(ii)



# 912. VALUE ASCRIBED TO CLAIMS

# **VALUE ASCRIBED TO CLAIMS**

In respect of any decision contemplated in Chapter 6 that requires the support of the holders of creditors' voting interests:

- a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company (section 145(4)(a)); and
- > a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in a liquidation of the company (section 145(4)(b)).

### Therefore:

- each secured creditor and each unsecured creditor whose claim is not in any way subordinated by way of agreement, has a voting interest equal to the value of the amount owed to that creditor by the company; and
- each concurrent creditor whose claim is subordinated has a voting interest valued at the amount which such concurrent creditor could reasonably expect to receive on a liquidation of the company.

In a vote called in terms of section 152(1)(e) of the Companies Act, the proposed business rescue plan will be approved on a preliminary basis if:

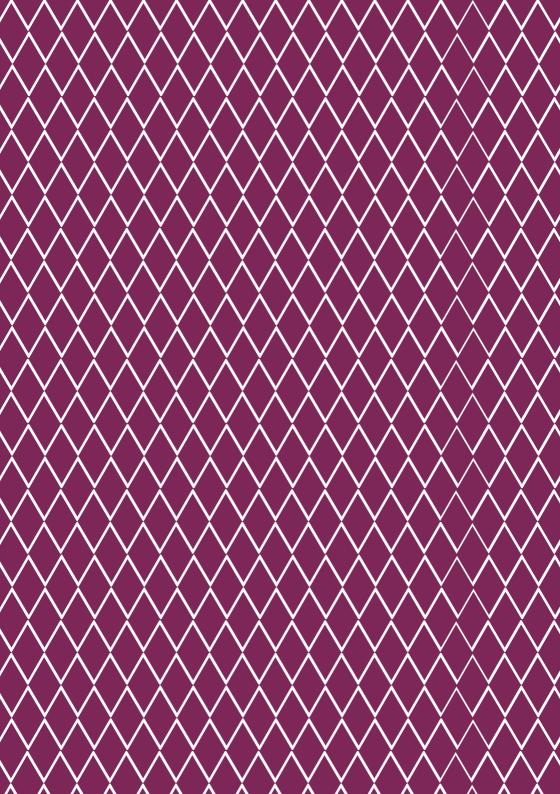
- > it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and
- > the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.

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# TERMINATION OF BUSINESS RESCUE PROCEEDINGS

Section 132(2) of the Companies Act deals with the termination of business rescue proceedings. In terms of section 132 of the Companies Act, business rescue proceedings end when:

- > the court sets aside the resolution or order that began the business rescue proceedings or when the court converts business rescue proceedings into liquidation proceedings;
- > the business rescue practitioner files a notice (Form CoR125.2) of termination of the business rescue proceedings with the CIPC (and applies to court to terminate the business rescue proceedings if the company is no longer financially distressed and if the company was placed in business rescue by order of the court) (S141(2)(a)(ii) and S141(2)(b)(i)); or
- > a business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the Companies Act or a business rescue plan has been adopted and the business rescue practitioner has subsequently filed a notice of substantial implementation of the plan with the CIPC (Form CoR125.3).







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Dr. Eric Levenstein has been a director of Werksmans Attorneys since 1993 and is the head of the firm's Insolvency, Business Rescue & Restructuring practice. He specialises in litigation and dispute resolution with a particular focus on business rescue, insolvency and restructuring, banking and finance and corporate recovery of debt.

His expertise extends to director liability issues. He regularly delivers seminars and writes for various publications on these topics among others. He is the Chairperson of the South African Restructuring & Insolvency Practitioners Association (SARIPA) and sits on the board of INSOL International, a worldwide group of insolvency practitioners.

Eric has been recognised with leading marketplace accolades by various credible international ranking organisations such as Chambers Global, The Legal 500, PLC Which Lawyer to name a few. Eric's research cumulated in him being awarded a Doctorate of Laws (LLD) on the topic of Business Rescue from the University of Pretoria in 2016. Eric is also the author of South African Business Rescue Procedure (published in October 2017 by Lexis Nexis).



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Lauren Becker has been a director at Werksmans Attorneys since March 2016 and works in the firm's Litigation & Dispute Resolution Practice. She specialises in Insolvency, Business Rescue & Restructuring Advisory and Litigation as well as general Commercial Litigation. Lauren is also a member of the Insolvency, Business Rescue & Restructuring Practice Group at Werksmans.

Lauren completed her Certificate Course in Advanced Company
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In 2009/2010, Lauren was awarded the Philip Friedland Prize for the
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Lauren has also been the recipient of a number of awards including
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Lauren holds a Bachelor of Arts (cum laude) and an LLB (cum laude), both from the University of the Witwatersrand.

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# MEET THE INSOLVENCY, BUSINESS RESCUE & RESTRUCTURING PRACTICE GROUP



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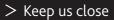


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