




WERKSMANS  
ATTORNEYS

Basics of  
**business  
rescue toolkit**

# Introduction



Restructuring of companies in financial distress is on the increase globally. In line with this trend, Chapter 6 of the new Companies Act, No. 71 of 2008 (the Act) introduces business rescue to the South African business landscape.

South African companies that are financially distressed in South Africa now have an opportunity to reorganise and restructure. This has far-reaching effects on creditors, financial institutions, shareholders, employees and restructuring specialists.

This document highlights some of the Frequently Asked Questions around business rescue.

## 1. What is business rescue?

Business rescue proceedings are proceedings aimed 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;
- > a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession; and
- > the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities and equity (section 128(1)(b)).

## 2. What is the aim of business rescue?

The aim of business rescue is to restructure the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on solvent basis, or results in a better return for the creditors or shareholders of the company than would ordinarily result from the liquidation of the company (section 128(1)(b)(iii)).

## 3. What is 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. While the Act defines a business rescue practitioner as one or more persons, the business rescue provisions of the Act do not necessarily refer to or support joint appointments. Further, the word “person” in the Act includes a juristic person. It is therefore arguable, although unlikely, that a company can take appointment as a business rescue practitioner (section 128(1)(d)).

## 4. What is an affected person?

Affected persons are important roleplayers in the business rescue process. An affected person is a shareholder, creditor, employee (or their representative) or a registered trade union representing employees of the company. Affected persons have various rights throughout the business rescue process (section 128(1)(a)).

## 5. What is the test for business rescue?

The test for whether or not a company should be placed in business rescue is whether or not the company is financially distressed. The Act defines the words “financially distressed” (section 128(1)(f)) to mean that

- > 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 (commercial insolvency); or
- > it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (factual insolvency).

# **Rescue business proceedings**

## 1. When should a company commence business rescue?

A company should commence business rescue proceedings at the first signs of it being financially distressed, within the meaning of the Act. That is, either when it is reasonably unlikely that a company will be able to pay its debts when they fall due for payment in the immediately ensuing six months or when it is likely that the company will become insolvent in the immediately ensuing six months.

In a decision of the South Gauteng High Court, in the case of *Welman v Marcelle Props*, the court stated that “business rescue proceedings are neither for terminally-ill nor for chronically ill close corporations. They are for ailing corporations, which, given time, will be rescued and become solvent”. This statement supports the contention that at the first signs of financial distress, a company should apply for business rescue. Once a company is more than “financially distressed”, options other than business rescue become more attractive for ailing companies, such as liquidations.

## 2. How is a company placed in business rescue?

There are two main ways in which a company can be placed in business rescue, namely

- > when the board of directors of a company resolves by a simple majority that the company voluntarily commence business rescue proceedings and be placed under the supervision of a business rescue practitioner (section 129); or
- > when an affected person makes a formal application to court for an order placing the company under supervision and commencing business rescue proceedings (section 131), provided the company has not already been placed under business rescue in terms of section 129, on the basis that

- the company is financially distressed;
- the company has failed to pay over 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 otherwise just and equitable to do so for financial reasons.

There must also be a reasonable prospect of rescuing the company.

## 3. How does a company practically voluntarily commence business rescue proceedings?

The company must file Form CoR123.1 with the Companies and Intellectual Property Commission (CIPC). This must be accompanied by the resolution of the board of directors of the company (in which it resolves to commence business rescue proceedings and if it has a business rescue practitioner in mind at the time to nominate a certain person as the practitioner in the resolution) together with a statement setting out the facts upon which the resolution was founded. Thereafter, the company must comply with a number of notice and publication requirements prescribed by the Act.

## 4. What preliminary actions are required of a company that commences voluntary business rescue?

In terms of sections 129(3) and (4), once a company has commenced business rescue proceedings, pursuant to the passing of a board resolution in terms of section 129, the company must

- > within five business days of filing Form CoR123.1, the resolution and statement, with the CIPC
- publish a notice of the resolution, together with the sworn statement setting out the reasons

why the company is financially distressed and detailing the prospects of rescuing the company, to all affected persons; and

- appoint a business rescue practitioner;
- > after appointing a business rescue practitioner
- file a notice of the appointment of the business rescue practitioner within two business days with the CIPC; and
- publish a notice of the appointment of the business rescue practitioner to affected persons within five business days after the notice is filed.

## 5. What happens if the time periods in respect of voluntary business rescues are not adhered to?

With regard to voluntary business rescues, in terms of section 129(5)(a), if a company fails to comply with the provisions of sections 129(3) and (4), the resolution lapses and is a nullity and the company may not file a further resolution for a period of three months after the date on which the resolution was adopted, unless a court, on good cause shown, approves of the company filing a further resolution (section 129(5)(b)).

Further, an affected person can make application to court in terms of section 130(1)(a)(iii) to set aside the resolution on the grounds that the company has failed to satisfy the procedural requirements set out in section 129.

In a recent decision of our Supreme Court of Appeal in the case of *Panamo Properties (Pty) Ltd and Another v Nel and Others* NNO 2015 (5) SA 63 (SCA), however, it has been held that in order for a business rescue resolution to be declared null and void, and the business rescue proceedings in turn terminated, a formal application would need to be brought to court by an affected person to set aside the resolution. Accordingly, the automatic lapsing of the resolution as worded in the Act is not in fact automatic.

## 6. How can one object or oppose a business rescue resolution?

Section 130 provides that at any time after the adoption of a business rescue resolution and before the adoption of a business rescue plan, an affected person may apply to court for an order

- > setting aside the resolution on the grounds that (i) there is no reasonable basis for believing that the company is financially distressed; (ii) there is no reasonable prospect for rescuing the company; or (iii) the company has failed to satisfy the procedural requirements in section 129;
- > setting aside the appointment of the practitioner on the grounds that the practitioner (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 conditions that the court considers necessary to secure the interests of the company and any affected person).

A director of a company that votes in favour of a resolution may not apply to court to set aside the resolution or the appointment of the business rescue practitioner unless such person can satisfy the court that he acted in good faith on the basis of information that has since been found to be false or misleading (section 130(2)). Each affected person has a right to participate in a hearing contemplated by this section (section 130(4)).

## 7. What goes into the papers for an application to court for business rescue?

The decision of the Western Cape High Court, Cape Town, in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA423 (WCC)* was instructive about the nature of the evidence that must be placed before a court in order to ensure that an applicant indicates that there is a reasonable prospect that the company can be rescued and to ensure that an application for business rescue is successful.

Judge Eloff dismissed the application for business rescue. He held that "...it is difficult to conceive of a rescue plan that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable.

A business plan which is unlikely to achieve anything more than to prolong the agony... by substituting one debtor for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice". The court went on to state that the applicant must deal with "concrete and objectively ascertainable details in support of business rescue and which facts are beyond mere speculation". These facts should include

- > "the likely costs of rendering the company able to commence with its intended business or to resume the conduct of its core business";
- > the availability of "cash resources" to enable the company to meet its daily expenses and the nature of the funding on which the company will rely;
- > "the availability of any other necessary resources, such as raw materials and human capital"; and

- > "the reasons why the proposed business rescue plan will have a reasonable prospect of success".

The court went on to state that without such details, a court is not only unable to consider the prospects of the company continuing in existence on a solvent basis but is also unable to consider the alternative aim of securing a better return for the creditors of the company than would arise from a liquidation.

Similar sentiments were expressed by the courts in the case of *Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd & Others 2012 (2) SA 378 (WCC)*, *Swart v Beagles Run Investments 25 (Pty) Ltd & Others* (four creditors intervening) 2011 (5) SA 422 (GNP) and *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd & Another* (unreported case no 25051/2011, 22 February 2012).

The extent to which it is reasonably possible to include all the information that the court sets out in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* in all business rescue applications is a matter that is debatable.

## 8. How does one oppose a business rescue application to court?

Business rescue proceedings are generally launched on an urgent basis and thus the time periods ordinarily applicable to applications will generally not apply.

Any affected person on whom an application for business rescue has been served, may oppose such application in the manner in which any other application is ordinarily opposed by serving and filing a notice of intention to oppose the application and thereafter serving an answering affidavit on the applicant in accordance with the time periods set out in the notice of motion.

Any affected person opposing a business rescue may either request the court to dismiss the application together with any other appropriate order, including an order placing the company under liquidation.

## 9. How long do business rescue proceedings last?

Section 132 provides that business rescue proceedings should last for a period of three months. It is understood that during the three months, the business rescue practitioner must do his job by convening meetings for affected persons, consulting on the business rescue plan and thereafter implementing the plan if it is approved in accordance with the Act.

If 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

- > 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

- > deliver a report and each update in the prescribed manner to each affected person and to (i) the court (if the proceedings have been the subject of a court order); or (ii) the CIPC, in any other case.

The reporting requirements that come with extending the time frames are burdensome. These provisions provide business rescue practitioners with an incentive for conducting the process and implementing the plan, in the shortest possible time.

## 10. When does business rescue begin?

In terms of section 132 of the Act business rescue proceedings commence when –

- > the company (i) files a resolution to place itself under supervision in terms of section 129 of the 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 provisions of subsections (3) and (4) it must approach the court for leave to file another resolution if it wishes to do so within the three month restricted period);
- > a 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 a security interest (section 131(7)).

## 11. How does the business rescue process unfold?

Once a company commences business rescue proceedings either voluntarily (by way of a resolution in terms of section 129) (and in such a case, the preliminary actions have been taken) or by an order

of court (on application by an affected person in terms of section 131), the following actions are prescribed by the Act:

- > the practitioner must investigate the affairs of the company as soon as possible after the commencement of business rescue (section 141); within 10 business days after being appointed, the practitioner must convene a meeting of the creditors and a meeting of the employees and advise the meeting, among other things, of the prospects of rescuing the company (section 147 and 148);
- > the business rescue plan must be published by the company within 25 business days after the date on which the business rescue practitioner was appointed (section 150); and
- > the business rescue practitioner must convene a meeting of the creditors and any other holders of a voting interest, for the purpose of considering the proposed plan, within 10 business days of the publication of the business rescue plan (section 151).



## 12. When do business rescue proceedings end?

In terms of section 132 of the 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 business rescue proceedings with the CIPC; and
- > 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 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 (Form CoR125.3).

## 13. What happens if a company does not commence business rescue proceedings when it should?

If a company is financially distressed within the meaning of the Act but the board of directors of the company has not passed a resolution for the commencement of business rescue proceedings, the board must deliver a written notice to each affected person setting out the test for financial distress and the extent to which it applies to the company and the reasons why the board has taken a decision not to pass a resolution for the commencement of business rescue proceedings. The notice to affected persons is commonly referred to as the "section 129(7) notice" as it is set out in section 129(7) of the Act and the form used to notify affected person is Form CoR123.2 (Notice of Decision Not to Begin Business Rescue).

A decision to send out a section 129(7) notice must be well considered and exercised with caution, as such a notice advises the world at large that the company is financially distressed and on the verge of insolvency. This notice may give rise to a number of unintended consequences both in respect of directors and creditors of the company.

## 14. Is business rescue suitable for all companies?

Business rescue proceedings are not necessarily suitable for all companies. The type of company is, for the most part, determinative as to whether or not a company is a suitable candidate for business rescue. For instance, companies that are involved in retail are more suitable for business rescue than companies that have been set up for property investment purposes, as retail companies have a "business" that can be rescued, while property investment companies may not.

In a decision of the South Gauteng High Court, in the case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)(Pty) Ltd* 2012 JPR 0239 (GSC), the court considered the plausibility of business rescue in an instance where liquidation was preferable. In this instance, the court dismissed the application for business rescue and held that a liquidation of the company would achieve a similar result to that of a business rescue. This judgment makes it clear that prior to a company, or an affected person being placed in business rescue, consideration should be given to the nature of the company, the extent to which business rescue is the appropriate procedure for that company and the extent to which business rescue would be more beneficial for the company than liquidation. If the answer to the latter questions is in the affirmative, business rescue proceedings are likely to be successful. If not, liquidation may be the preferred alternative.

# **Rescue business practitioner**

## 1. What is the role of the business rescue practitioner?

The business rescue practitioner is required, as soon as possible after appointment, to investigate the company's affairs, business, property and financial situation, and thereafter consider whether there is any reasonable prospect of rescuing the company (section 141(2)).

- > During business rescue proceedings, the practitioner must notify the company, the court and affected persons if there is no reasonable prospect for the company to be rescued;
- > no longer reasonable grounds to believe that the company is financially distressed; or
- > evidence, in the dealings of the company before the commencement of business rescue proceedings, of
  - voidable transactions or a failure by the company or any director to perform any material obligation relating to the company, and the practitioner must direct the management of the company to take steps to rectify the problem; or
  - reckless trading, fraud or other contravention of any law relating to the company, the practitioner must forward the evidence to the appropriate authority for further investigation and possible prosecution and direct the management to take any necessary steps to rectify the matter (including recovering any misappropriated assets of the company) (section 141(2)).

## 2. What powers does a business rescue practitioner have during business rescue?

In terms of section 140 of the Act, the business rescue practitioner has a number of powers. The business rescue practitioner has full management and control over the company. He or she may delegate certain functions to a director on the board of the company or to a person who was part of the preexisting management of the company.

The business rescue practitioner may also remove any person who formed part of the pre-existing management of the company from its office or appoint a person (who does not have any other relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship, or is related to a person who has such a relationship) as part of the management of a company (section 140). In some instances, the practitioner will need to obtain the approval of the court for an appointment.

## 3. How is a business rescue practitioner appointed?

There are a number of ways in which a business rescue practitioner may be appointed:

- > a 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 (section 129(3));
- > 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 (section 130(6));
- > 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 necessary 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 the creditors (section 131(5)); or

- > the company, or the 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 and set aside that new appointment (section 139(3)).

## 4. Does a business rescue practitioner need to have specific qualifications?

Section 138 of the Act regulates the qualifications required for a business rescue practitioner. In order to qualify as a business rescue practitioner a person must be

- > a member in good standing of a legal, accounting or business management profession accredited by the CIPC (section 138(1)(a)); and
- > licensed as such by the CIPC (section 138(1)(b)).

From this, it appears that a person must satisfy both the above requirements for appointment. But Regulation 126 of the Act states that a person who is part of an accredited profession need not be licensed by the CIPC (Regulation 126(2)). Further direction on this is needed from the CIPC. In addition to the aforesaid, in terms of section 138, a prospective business rescue practitioner

- > must not be subject to an order of probation;
- > must not be disqualified from acting as a director of a company in terms of section 69(8) of the Act;
- > must not have any relationship with the company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by such relationship; and
- > must not be related to a person who has a relationship as contemplated above.

## 5. Are there certain categories of companies for which business rescue practitioners may take appointment?

Regulation 127 of the Act distinguishes between different categories of companies for the appointment of business rescue practitioners.

A person will be appointed as a senior practitioner if, immediately before being appointed as a practitioner, he or she actively engaged in business turnaround practice before the effective date of the Act or as a business rescue practitioner in terms of the Act for a combined period of at least 10 years. A senior practitioner can take appointment for a medium company (company with public interest score between 100 and 500) or of a large company (company with a public interest score of 500 or more).

An experienced practitioner is one who immediately before being appointed as a practitioner actively engaged in business turnaround practice before the effective date of the Act or as a business rescue practitioner in terms of the Act for a combined period of at least five years. Such person can take appointment for a small company (company with a public interest score of less than 100) or for a medium company (company with a public interest score between 100 and 500).

A junior practitioner is one who immediately before being appointed as a practitioner either (i) has not previously engaged in business turnaround before the effective date of the Act or acted as a business rescue practitioner in terms of the Act; or (ii) has actively engaged in business turnaround practice before the effective date of the Act or as a business rescue practitioner in terms of the Act for a combined period of less than five years. Such person can take appointment for only small companies (company with a public interest score of less than 100) or as an assistant to an experienced or senior practitioner.

## 6. How is the public interest score calculated?

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

## 7. Can a business rescue practitioner be removed from office?

In terms of section 139 of the Act, a business rescue practitioner may be removed from office either

- > by order of the court in terms of section 130(1)(b) on the basis of an affected person applying to court to set aside the appointment of a business rescue practitioner who has been appointed in terms of the board resolution on the basis that the business rescue practitioner either (i) does not satisfy the requirements for appointment (in terms 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

- > upon the request of an affected person, by way of an application to court, or of the courts own accord, if the business rescue practitioner is (i) incompetent or fails to perform his duties; (ii) fails to exercise the proper degree of care in the performance of his functions; (iii) engages in illegal acts or conduct; (iv) no longer satisfies the requirements for appointment in section 138; or (v) if the practitioner is incapacitated and unable to perform the function of his office, and is unlikely to regain that capacity within a reasonable period of time (section 139).

## 8. Can a business rescue practitioner, who has engaged with the company, creditors or shareholders, prior to the commencement of business rescue, take appointment as a practitioner?

Section 138 of the Act sets out the requirements for qualification as a business rescue practitioner. Section 138(1)(e) provides that *"A person may be appointed as the business rescue practitioner*

*of a company only if the person...(e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship"*.

This is supported by section 130(1)(b) and section 139(2)(e) of the Act which make provision for the removal of a business rescue practitioner if he is either not independent of the company or its management or has a conflict of interest or lack of independence, respectively.

The words "independent" and "conflict of interest" are not defined by the Act and the interpretation will need to be elaborated upon by our courts. However, while there is no definition for these words, the Act does define the word "related or inter-related" in section 2.

If our courts rely on the definition in section 2 of the Act to ascertain whether or not a practitioner is “independent”, then a business rescue practitioner will not, merely by virtue of his prior engagement with creditors or shareholders, be held to lack independence. Something more, some “other relationship” will need to exist. We are of the view that limited prior consultation with the creditors and shareholders of the company will not necessarily preclude such a person from taking appointment later on as a business rescue practitioner of the company and does not affect the business rescue practitioner’s independence.

A business rescue practitioner should engage with the creditors and shareholders before taking appointment in order to ensure that there is a reasonable prospect that the company can be saved.

## **9. How is a business rescue practitioner remunerated?**

In terms of section 143 the business rescue practitioner is entitled to charge the company for the remuneration and expenses incurred by the practitioner in accordance with the tariff prescribed by the Act.

The basic remuneration of a business rescue practitioner is to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, and may not exceed

- > R1,250 per hour (maximum of R15,625 per day) (inclusive of VAT) for a small company;
- > R1,500 per hour (maximum of R18,750 per day) (inclusive of VAT) for a medium company; or
- > R2,000 per hour (maximum of R25,000 per day) (inclusive of VAT) for a large company or a state-owned company.

In addition to the remuneration as determined by the tariff, the business rescue practitioner may also conclude a contingency agreement with the company for further remuneration if the business rescue plan is adopted or if it is adopted within a certain period of time or if any particular result or combination of results is attained.

This contingency agreement will only be binding if it is approved by (i) the holders of a majority of the creditors’ voting interests, present and voting at a meeting called to consider the agreement; and (ii) 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. Any creditor who votes against such an agreement may make application to court, within 10 business days after the date on which a vote was taken, for an order setting aside the proposed agreement on the basis that the agreement is not just and equitable or not reasonable having regard to the financial circumstances of the company.

In addition to remuneration, a practitioner is also entitled to be reimbursed for the actual costs of any disbursements incurred by the practitioner, or expenses incurred by the practitioner, to the extent reasonably necessary to carry out the practitioner’s functions and to facilitate the conduct of the company’s business rescue proceedings.

## **10. What are the liabilities of a business rescue practitioner during business rescue?**

Section 140(3) provides that during business rescue, the business rescue practitioner

- > is an officer of the court and is therefore obligated to report to the court in accordance with any applicable rules or orders;
- > has the responsibilities, duties and liabilities which are incumbent upon directors, in terms of sections 75, 76 and 77 of the Act; and
- > will not be liable for any act or omission performed in good faith in the course of the exercise of the powers and during the performance of his or her functions as a practitioner but may be held liable in terms of any law for any act or omission that amounts to gross negligence.

# **Effects of business rescue**

## 1. What happens to the directors during business rescue?

The directors of the company remain the directors. However, their powers and duties are constricted in that the business rescue practitioner has full management control over the company in substitution for the board of the company and its pre-existing management. In terms of section 137, the directors of the company

- > must continue to exercise the functions of a director, subject to the authority of the practitioner;
- > have a duty 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;
- > remain bound by the requirements concerning the personal financial interests of the directors or related persons; and
- > to the extent that the director acts in accordance with subsections (b) and (c) of this section, are relieved from the duties of a director as set out in section 76 (standards of directors conduct), and the incurrance of personal liability set out in section 77 (liability of directors and prescribed officers), other than section 77 (3) (a), (b) and (c).

If any director 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 it is approved by the practitioner (section 137(4)).

The directors of the company have a general duty to co-operate with, assist and attend to the requests of the practitioner at all times during business rescue and to provide the practitioner with any information about the company's affairs as may be reasonably required (section 142).

As soon as practically possible after the commencement of business rescue proceedings, the directors of the company must deliver all books and records that relate to the company and which are in the directors' possession to the business rescue practitioner. Within five business days after the commencement of business rescue proceedings, or such longer period as the practitioner may allow, the commencement of business rescue proceedings, or such longer period as the practitioner may allow, the directors must provide the practitioner with a statement of affairs containing certain information as prescribed by the Act (section 142). In terms of section 137(5) the practitioner may apply to court for an order to remove a director from his office if the director has

- > failed to comply with the duties imposed on him by the provisions of chapter 6; or
- > by an act or omission, has impeded, or is impeding, (i) the practitioner in the performance of his powers and functions; (ii) the management of the company by the practitioner; or (iii) the development or implementation of the business rescue plan.

## 2. What effect does business rescue have on employees?

Section 136 of the Act regulates the interests of employees during business rescue. It provides that employees who were, immediately prior to the institution of business rescue, employees of the company will remain employed by the company on the same terms and conditions on which they were employed prior to the commencement of business rescue proceedings except to the extent that changes occur in the ordinary course of attrition or if different terms and conditions are agreed between the employee and the company in accordance with labour laws.

## 3. What effect does business rescue have on shareholders?

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 that the court, or the business rescue plan, directs otherwise (section 137).

#### 4. What effect does business rescue have on a creditor?

When business rescue proceedings commence, the company continues to operate as before, but under the supervision of the business rescue practitioner and the creditors will need to comply with their obligations to supply goods or services to the company in the same manner in which they did prior to the commencement of business rescue proceedings, unless the agreement between the company and the creditor regulates the relationship between the parties in the event of an insolvency or business rescue.

However, it is understandable that unsecured creditors and lenders during business rescue would be wary of continuing to service or supply goods to the company on the same basis on which they did prior to a business rescue as their claims will be satisfied last in accordance with the order of preference for the payment of claims prescribed by the Act (Section135(3)(a)(iii)).

Further, if a company's obligations towards another have been suspended, or cancelled on application by the practitioner to court, the agreement regulating the relationship between the company and its creditor may prescribe the way in which the relationship between the parties will ensue in the event of insolvency or the commencement of business rescue. Failing this, it is likely in practice, that the reciprocal party to an agreement will not perform its obligations if the practitioner has suspended the performance of the company's obligations or cancelled the agreement and the other party will have a claim for damages in terms of section 136(3).

#### 5. Can a company be sued during business rescue?

Section 133 of the Act regulates the institution of legal proceedings against the company and the enforcement of any action against the company during business rescue. This is commonly referred to as the "statutory moratorium" or "stay" that arises from the moment that business rescue proceedings commence.

During business rescue proceedings, no legal proceedings (legal or arbitration proceedings), including enforcement action (execution of a court, or other, order) against the company or in relation to its in any forum (court or arbitral forum). However, there property, that belongs to it or which is lawfully in its possession, may be commenced or proceeded with are certain instances in which one would be able to commence or proceed with any legal proceedings or enforcement action against the company, in terms of section 133(a) to (f), namely

- > with the written consent of the practitioner;
- > with the leave of the court (and in accordance with any terms the court consider suitable);
- > as a set-off against any claim made by the company in any legal proceedings, irrespective as to whether those proceedings commenced before or after the business rescue proceedings began;
- > criminal proceedings against the company or any of its directors or officers;
- > proceedings concerning any property or right over which the company exercises the powers of a trustee; or
- > proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

#### 6. Can one enforce a suretyship or guarantee during business rescue?

Section 133(2) provides that during business rescue proceedings, a guarantee or surety provided by the company in favour of any other person may not be enforced by any person against the company except with the leave of the court and in accordance with any terms that the court considers to be just and equitable.

In a decision of the *Western Cape High Court*, in the case of *Investec Bank Ltd v Bruyns* 2011 JDR1563 (WCC) the court considered the meaning of section 133 and the status of a surety and guarantee provided by the company, or by another person or entity in favour of the company, during business rescue. It held that

- > section 133(2) is unambiguous in that it prohibits a third party from enforcing a suretyship or guarantee, provided by the company, against the company, during business rescue; and
- > the statutory moratorium that arises for the benefit of a company does not automatically arise for the benefit of a surety provided in favour of the company on the basis that the statutory moratorium is a personal defense that arises for the benefit of the principal debtor (i.e. the distressed company) and not for the benefit of a surety.



## **7. Can one enforce a surety or guarantee given by a third party in favour of the company?**

On the basis that a suretyship is an obligation accessory to the principal obligation, a business rescue plan that compromises a principal debt will similarly compromise the suretyship obligation granted by a third party in favour of the company in distress, unless provided otherwise in the business rescue plan and unless the terms of the suretyship maintain that the surety's obligation will ensue notwithstanding any compromise or discharge of the principal obligation. Third party guarantees, on the other hand, given in favour of the company in distress, create independent obligations and would also remain enforceable against the guarantor notwithstanding any discharge or compromise to the principal debt.

## **8. What effect does business rescue have on contracts?**

Section 136 also aims to regulate the position of the company in respect of its obligations in terms of any existing contracts in force at the time the business rescue proceedings commence.

Section 136(2) provides that the business rescue practitioner may, during business rescue proceedings, and despite any provision to the contrary in an agreement,

- > entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that
- arises under an agreement to which the company was a party at the commencement of business rescue proceedings; and that would otherwise become due during the proceedings;

- 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 contemplated above.

The proviso to the above is that, in terms of section 136(2A) a business rescue practitioner must not suspend or cancel respectively, any provision of an employment contract or an agreement to which sections 35A or 35B of the Insolvency Act 24 of 1936 (transactions on exchange and agreements providing for termination and netting) would apply if the company had been liquidated. Further, if a practitioner suspends a provision of an agreement relating to security granted by the company to a creditor, that provision continues to apply for the purposes of section 134.

## **9. Does the party to the contract that has been suspended or cancelled have any claim against the company?**

Section 136(3) provides that any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, may assert a claim against the company for damages.

## **10. What effect does a disposition of a company's assets have on a subsequent business rescue?**

Section 141(2)(c) provides that if at any time during the business rescue proceedings the practitioner concludes that "there is evidence, in the dealings of the company before the business rescue proceedings began, of voidable transactions, or the failure by the company or any director to perform any material obligation relating to the company, the practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps". The phrase "voidable transaction" is not defined by the Act and it is not yet clear whether or not such a phrase will take on the meaning ascribed to impeachable dispositions in terms of the Insolvency Act 24 of 1936. It is also not clear for what period of time prior to the commencement of business rescue proceedings transactions will be held to be voidable.

Werksmans Attorneys believe that the distribution of money or the sale of assets, in the ordinary course business, and prior to a business rescue commencing, would not be held to be a voidable transaction in the business rescue unless a business rescue practitioner can identify an element of fraud or dishonesty in the process.

# **Post commencement finance**

## 1. What is postcommencement finance?

Post-commencement finance is finance provided to the company once business rescue proceedings have commenced, or services rendered, or credit provided to, a company during its business rescue.

Section 135(1) of the Act also provides that any remuneration, reimbursement for expenses or other amount of money relating to employment that becomes due and payable by a company to an employee during business rescue, is also considered to be post-commencement finance.

## 2. Who can provide postcommencement finance?

Section 135(2) of the Act provides that “*during business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1).*” From this it appears that the Act does not prescribe who in fact may provide the finance. It could also include current suppliers or creditors of the business (as set out above).

## 3. Can post-commencement financiers obtain security for their finance?

Any finance provided by a post-commencement financier may be secured by utilising any asset of the company to the extent that it is not already encumbered (section 135(2)).

## 4. How do the claims of creditors rank in business rescue?

Section 135 of the Act sets out the manner in which the postcommencement finance claims of the creditors will be satisfied during business rescue (although the Act does not specify that this waterfall of payments applies only to post-commencement finance, this is how it is treated in practice).

These claims are payable from the free residue (i.e. not from the proceeds realised from the sale of secured assets or from the secured asset itself of the company in business rescue).

The claims of secured creditors remain protected during business rescue proceedings, in that the company and/or the business rescue practitioner cannot sell any asset over which a secured creditor holds security without his or her consent unless the proceeds from that sale would be sufficient to discharge the liability owing to such creditor in full.

As it stands, the general understanding and practice is that claims of creditors during business rescue will be paid in the following order of preference:

- > the fees and expenses (including legal and other professional fees) of the business rescue practitioner incurred during business rescue and other claims arising out of the costs of business rescue, payable from working capital or postcommencement finance;
- > the fees of employees which become due and payable after the commencement of business rescue;
- > secured and unsecured lenders or creditors for any loan or supply made after the commencement of business rescue, payable in the order in which it is incurred; and
- > any unsecured, concurrent post-commencement claim not satisfied as above.

Unsecured post-commencement finance (like any other unsecured creditor) is only paid after the proceeds realised from a disposal of secured asset are paid to the secured creditor. On the basis that the provision in the Act which deals with the ranking of claims does not refer specifically to the position of pre-commencement secured creditors, it is arguable that precommencement secured creditors will not be paid in terms of the aforesaid waterfall of payments during business rescue proceedings and that they should be treated like all other pre-commencement creditors and their position determined by the plan.

Section 135(4) of the Act provides that if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation (which would be paid first).

# **Business rescue plan**

## 1. What is a business rescue plan?

A business rescue plan is a plan developed and, if approved, implemented by the business rescue practitioner, which details the manner in which the practitioner envisages that the company will be rescued. The plan is the culmination of the business rescue process.

## 2. What must a business rescue plan contain?

Section 150 of the Act provides a framework for what the business rescue plan should look like. It provides that a business rescue plan must contain sufficient detail to assist affected persons in deciding whether or not they wish to accept or reject the plan. The business rescue plan must contain

- > background (including a list of assets, which assets are secured, list of creditors indicating secured, statutory preferent and concurrent creditors in terms of the laws of insolvency, probable dividend should insolvency ensue, a list of all holders of the company's securities, a copy of the written agreement concerning the business rescue practitioner's remuneration and a statement whether the business rescue plan includes a proposal made informally by a creditor of the company);
- > proposals (including the nature and duration of any specific moratorium, extent to which the company is to be released from payment of debts, 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, property of the company available to pay creditors' claims in terms of the business rescue plan, the order of preference in which the proceeds of the 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 of the company

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); and

- > assumptions and conditions (including a statement of the conditions that must be satisfied for the business rescue plan to come into operation and be fully implemented, effect on employees and their conditions of employment, the circumstances in which the business rescue plan will end and a projected balance sheet for the company and a statement of income and expenses for the ensuing three years).

## 3. How is a business rescue plan adopted?

A proposed business rescue plan will be approved on a preliminary basis if it is supported by the holders of more than 75% of the creditors' voting interests that were voted and when the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted (section 152(2)).

## 4. What happens if a business rescue plan is adopted?

A business rescue plan that is adopted is binding on the company, the creditors of the company and every holder of the company's securities whether or not such a person was present at the meeting, voted in favour of the adoption of the plan or, in the case of creditors, had proven their claims against the company (section 152(4)).

Section 154 reiterates the binding effect of an approved plan. It provides that once a business rescue plan is implemented in accordance with its terms, a creditor may lose its right to enforce the relevant debt or a part of it on the basis that it has acceded to the discharge of the debt. The creditor will also

be precluded from enforcing a debt that arose prior to business rescue, against the company, unless the business rescue plan provides otherwise.

## 5. What happens if a business rescue plan is rejected?

Section 153 of the Act deals with the instance in which a plan is rejected. If a business rescue plan is rejected, the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan or advise the meeting that the company will apply to court to set aside the result of the vote on the grounds that it was inappropriate. If a practitioner does not take the aforesaid action, an affected person may take such action (section 153(1)(a) and (b)), failing which the practitioner must file a notice of the termination of the business rescue proceedings (Form CoR152.2).

Further, any affected person or combination of affected persons may make a binding offer to purchase the voting interests of one or more persons who opposed the adoption of the plan (and whose opposition caused the plan to be rejected), at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person or those persons, if the company were to be liquidated (section 153(1)(b)(iii)).

# Claims

## **1. How are claims submitted for proof to the business rescue practitioner?**

It is not necessary to prepare a claim in the same format as with liquidation proceedings (i.e. by deposing to an affidavit) but standard proof of claim forms have been used to submit claims to the business rescue practitioner. It is not necessary to file a formal affidavit. A statement detailing the claim, together with supporting certificates of balance and documents would be sufficient proof of the claim.

The Act does not specify a time by when a claim should be submitted. However, section 147(1)(a)(ii) refers to the business rescue practitioner being in a position to “receive proof of claims by creditors” at the first meeting of creditors. The business rescue practitioner would then either accept or reject such claims. All claims that have been accepted by the business rescue practitioner would be included in the plan (section 150(2)(a)).

The Act does not detail up to when a creditor can submit a claim, but it is submitted that a creditor can do it up until the date of the adoption of the plan. In practice, and for the sake of certainty, the business rescue practitioner will notify creditors of the last date by which they can submit a claim.

## **2. What happens if business rescue proceedings are superseded by liquidation proceedings?**

If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation. That is, that the liquidator’s fees and expenses will rank in priority to that of the business rescue practitioner’s fees (section 135(4)).

## **3. Can a contribution become payable by a creditor who proves a claim?**

Unlike in liquidations, no contributions are payable by creditors who prove their claims against the company.

# **Interplay between business rescue and liquidation**



## 1. Are liquidations still an option?

Business rescue is recognised as a valuable part of the Act. Section 7(k) of the Act states that among the objectives of the Act is the aim to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”.

There has been a move away from a culture of liquidation to a culture of rescue, in that if a company is not able to be restored to a position of solvency, then the next best option is for it to at least achieve a better result for the creditors than would arise from liquidation. Liquidation is still an option, but it is the last resort.

## 2. What is the interplay between business rescue proceedings and liquidation proceedings?

If liquidation proceedings have already commenced, an application to court for business rescue will suspend the liquidation proceedings until the court has adjudicated on the application or when business rescue proceedings end when the court grants an order applied for (section 131(6)).

Further, the Act provides that a court may grant an order placing a company under business rescue at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company (section 131(7)). Our case law has confirmed that even a company that has been finally liquidated and which is being wound up, may subsequently be placed under business rescue.

If business rescue proceedings have commenced by way of an application to court, the company may not adopt a resolution for its liquidation until business rescue proceedings have terminated. The company must notify all affected persons of the order of the court within five business days of the date of the order (section 131(8)).

## 3. How does the test for financial distress differ from the solvency and liquidity test?

Section 4 of the Act sets out the “solvency and liquidity” test. It provides that a company will satisfy the solvency and liquidity test at a particular point in time if, considering all reasonably foreseeable financial circumstances,

- > the assets of the company, or the aggregate of the assets of the company, fairly valued, equal or exceed the liabilities, or aggregate liabilities of the company, fairly valued (factual insolvency); and
- > it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered (commercial insolvency).

The difference between the test for “financial distress” and that of “solvency and liquidity” is that a company will be financially distressed if it is either factually or commercially insolvent while a company will be said to be solvent and liquid if it satisfies both factual and commercial solvency. Further, for financially distressed companies, the question is whether or not the company will be factually or commercially insolvent in the immediately ensuing six months. It is a forward-looking test.

## 4. What is the difference between an insolvency practitioner and a business rescue practitioner?

Insolvency practitioners and business rescue practitioners are not the same. Each is appointed to fulfill different roles, which can be summarised as follows:

- > insolvency practitioner – a liquidator in any winding-up must recover and reduce into his possession all the assets and property of the company, movable and immovable, and must apply the proceeds so far as they extend in

satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto (section 391 of the Companies Act 61 of 1973); and

- > business rescue practitioner – a business rescue practitioner is responsible for investigating the company's affairs, business, property and financial situation in order to consider whether there is a reasonable prospect of the company being rescued and, if so, to propose a business rescue plan (section 141(1)).

Thus, a different skill set is required for an insolvency practitioner and a business rescue practitioner. Prior to the enactment of the Act there was some debate as to whether or not insolvency practitioners could take appointments as business rescue practitioners. Although there are many insolvency practitioners who qualify for appointment as business rescue practitioners, a new profession was created. Only licensed business rescue practitioners may be appointed.

## 5. Can a business rescue practitioner be appointed as a liquidator and vice versa?

Section 140(4) of the Act provides that to the extent that business rescue proceedings are terminated by placing the distressed company into liquidation, any person who acted as a business practitioner during the business rescue may not be appointed as a liquidator. This section is unambiguous. A business rescue practitioner may not subsequently act as a liquidator. However, the Act does not suggest that a liquidator may not be appointed as a business rescue practitioner if a company goes into business rescue subsequent to liquidation. It seems as though the liquidator could take appointment as a business rescue practitioner if he satisfies the requirements for qualification under section 138 of the Act.

# **General considerations**

### **1. Are companies filing for business rescue or making application to court?**

Business rescue is well underway. The CIPC, established in terms of section 185 of the Act, is tasked with the administration of voluntary business rescue filings (section 129) and matters related therewith and has to date received many filings for voluntary business rescue. A number of formal applications have also been made to court (section 131). There have been instances in which the courts have granted orders for business rescue and the judgments that have emanated from the courts have been informative and instructive in paving the way for the efficient application of business rescue.

### **2. Does business rescue interrupt prescription?**

If a person has a claim against the company and the enforcement of the claim is subject to a time limit, the time limit prescribed for the enforcement of such a claim will be suspended for the duration of the business rescue proceedings (section 133(3)).

### **3. Can a close corporation be placed under business rescue?**

Section 66(1A) of the Close Corporations Act 69 of 1984 provides that the business rescue provisions of the Act apply equally to close corporations as they do to companies.

# **Meet the authors**



Director and practice area head

**Eric Levenstein**

Johannesburg

T +27 11 535 8237

F +27 11 535 8737

E [elevenstein@werksmans.com](mailto:elevenstein@werksmans.com)

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*, *Who's Who Legal* and *Best Lawyers* 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).



Director

**Lauren Becker**

Johannesburg

T +27 11 535 8196

F +27 11 535 8796

E [lbecker@werksmans.com](mailto:lbecker@werksmans.com)

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 Law in 2014 and her Advanced Course in Business Rescue in 2013. In 2009/2010, Lauren was awarded the Philip Friedland Prize for the most successful candidate in the Attorneys Admission Examinations. Lauren has also been the recipient of a number of awards including for the Best Overall Performance at the School for Practical Legal Training in 2009 and the Adams & Adams Award for the Best Performance in Civil Procedure in 2007.

Lauren holds a Bachelor of Arts (*cum laude*) and an LLB (*cum laude*), both from the University of the Witwatersrand.

# **Meet the team**



**Director and practice area head**

**Eric Levenstein**  
Johannesburg

T +27 11 535 8237  
F +27 11 535 8737  
E elevenstein@werksmans.com



**Director**

**Nastascha Harduth**  
Johannesburg

T +27 11 535 8220  
F +27 11 535 8600  
E nharduth@werksmans.com



**Director**

**Brendan Olivier**  
Cape Town

T +27 21 405 5181  
F +27 11 535 8509  
E bolivier@werksmans.com



**Director**

**Lauren Becker**  
Johannesburg

T +27 11 535 8196  
F +27 11 535 8796  
E lbecker@werksmans.com



**Director**

**Harold Jacobs**  
Johannesburg

T +27 11 535 8182  
F +27 11 535 8682  
E hjacobs@werksmans.com



**Director**

**Zania Oosthuizen**  
Johannesburg

T +27 11 535 8176  
F +27 11 535 8515  
E zoosthuizen@werksmans.com



**Director**

**Walid Brown**  
Cape Town

T +27 21 405 5245  
F +27 11 535 8510  
E wbrown@werksmans.com



**Director**

**Corlett Manaka**  
Johannesburg

T +27 11 535 8145  
F +27 11 535 8645  
E cmanaka@werksmans.com



**Director**

**Lisa Silberman**  
Johannesburg

T +27 11 535 8134  
F +27 11 535 8734  
E lsilberman@werksmans.com



**Director**

**Rael Gootkin**  
Cape Town

T +27 21 405 5236  
F +27 11 535 8514  
E rgootkin@werksmans.com



**Director**

**Jaco Niemand**  
Cape Town

T +27 21 405 5128  
F +27 11 535 8522  
E jniemand@werksmans.com



**Director**

**Jason Smit**  
Johannesburg

T +27 11 535 8359  
F +27 11 535 8759  
E jsmit@werksmans.com



**Director**

**Jennifer Smit**  
Johannesburg

T +27 11 535 8447  
F +27 11 535 8647  
E jsmit@werksmans.com



**Director**

**Frikkie van Tonder**  
Johannesburg

T +27 11 535 8120  
F +27 11 535 8620  
E fvtonder@werksmans.com



**Associate**

**Neo Kgame**  
Johannesburg

T +27 11 535 8218  
F +27 11 535 8699  
E nkgame@werksmans.com



**Director**

**Jonathan Stockwell**  
Johannesburg

T +27 11 535 8439  
F +27 11 535 8639  
E jstockwell@werksmans.com



**Senior Associate**

**Tandiwe Matshebela**  
Johannesburg

T +27 11 535 8431  
F +27 11 535 8631  
E tmatshebela@werksmans.com



**Associate**

**Mahatma Khwidzhili**  
Johannesburg

T +27 11 535 8233  
F +27 11 535 8612  
E rwebster@werksmans.com



**Director**

**Dewald van den Berg**  
Johannesburg

T +27 11 535 8443  
F +27 11 535 8643  
E dvandenber@werksmans.com



**Senior Associate**

**Roxanne Webster**  
Johannesburg

T +27 11 535 8221  
F +27 11 535 8721  
E rwebster@werksmans.com



**Associate**

**Mariam Marquard**  
Cape Town

T +27 21 405 5169  
F +27 96 616 0718  
E mmarquard@werksmans.com



**Director**

**Anine van der Merwe**  
Johannesburg

T +27 11 535 8160  
F +27 11 535 8660  
E avandermerwe@werksmans.com



**Senior Associate**

**Lara von Wildenrath**  
Johannesburg

T +27 11 535 8489  
F +27 11 535 8689  
E lvonwildenrath@werksmans.com



**Associate**

**Kamiel Rajah**  
Johannesburg

T +27 11 535 8223  
F +27 11 535 8685  
E krajah@werksmans.com



## About us

Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm, serving multinationals, listed companies, financial institutions, entrepreneurs and government.

Operating in Gauteng and the Western Cape, the firm is connected to an extensive African legal alliance through LEX Africa.

LEX Africa was established in 1993 as the first and largest African legal alliance and offers huge potential for Werksmans' clients seeking to do business on the continent by providing a gateway to Africa.

With a formidable track record in mergers and acquisitions, banking and finance, and commercial litigation and dispute resolution, Werksmans is distinguished by the people, clients and work that it attracts and retains.

Werksmans' more than 200 lawyers are a powerful team of independent-minded individuals who share a common service ethos. The firm's success is built on a solid foundation of insightful and innovative deal structuring and legal advice, a keen ability to understand business and economic imperatives and a strong focus on achieving the best legal outcome for clients.



» Keep us close

**THE CORPORATE &  
COMMERCIAL LAW FIRM**  
A member of the LEX Africa Alliance  
[www.werksmans.com](http://www.werksmans.com)

» Keep us close

**THE CORPORATE &  
COMMERCIAL LAW FIRM**  
A member of the LEX Africa Alliance  
[www.werksmans.com](http://www.werksmans.com)