



**BUSINESS RESCUE – PROBLEMS AND
PITFALLS:
Corporate Governance Conference
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Business Rescue ... Problems and Pitfalls?

- ▶ **Companies Act, 2008 commenced on 1 May 2011**
- ▶ **Introduced an entirely new process of restructuring companies in financial distress... namely the Business Rescue Process**
- ▶ **4 months down the line – is it working?**



Business Rescue ... Problems and Pitfalls?

- ▶ **Interpretation of certain definitions in Chapter 6 of the Act**
- ▶ **Appointment of Business Rescue Practitioners**
- ▶ **Licences of Business Rescue Practitioners**
- ▶ **Role of the Commission for Intellectual Property and Companies (CIPC)**
- ▶ **Role of the Courts... procedure**
- ▶ **Practical issues in the BR process, the BR plan, post commencement finance, first meeting of creditors, voting in the BR plan**
- ▶ **Applications for BR... how many have resulted in BR orders?**



International Principles

- ▶ Moratorium of creditor claims critical?
 - ▶ A moratorium of some kind is crucial for the success of a corporate rescue procedure
 - ▶ Some jurisdictions allow for a general or wide moratorium, some offer more limited protection
 - ▶ Clear that moratorium is an important tool for creating a breathing space to allow for the success of the BR proceeding
- ▶ Cram-down provision an important feature?
 - ▶ Need to bind dissenting creditors (avoids smaller creditors holding larger creditors to ransom!)
 - ▶ If not, minority creditors can hold process to ransom by holding out for a “better deal”
 - ▶ A majority of creditors required to make process workable
 - ▶ Is the sanction of the court needed to ensure equitable treatment of creditors or can we proceed with the informal “private pre-pack” option?



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Sometimes I wish daddy wasn't a bankruptcy lawyer. No matter what book he reads to me, he's only interested in chapter 11.



Chapter 6 of The Companies Act 71 of 2008

The role players?

- ▶ The company (and it's Board)
- ▶ The director (in his personal capacity.... Personal liability?)
- ▶ The creditor (financial institutions, suppliers, landlords etc...)
- ▶ The post-commencement financier
- ▶ The shareholders
- ▶ The security holders (holder of shares, debentures or other instruments)
- ▶ The trade union (representing employees)
- ▶ The employee
- ▶ The Business Rescue Practitioner ("BRP")
- ▶ The attorney
- ▶ The court (court driven process... need for specialised courts?)
- ▶ All will have a role to play in the Business Rescue Process!



Chapter 6 of The Companies Act 71 of 2008

- ▶ Some important definitions...
- ▶ “Affected Person” in relation to a company means –
 - ▶ a shareholder or creditor of the company;
 - ▶ any registered trade union representing employees of the company; and
 - ▶ if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives



Chapter 6 of the Companies Act 71 of 2008

- ▶ “Business Rescue” - means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
 - ▶ the temporary supervision of the company, and of the management of its affairs, business and property;
 - ▶ a temporary moratorium 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 plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis **or**, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company



Chapter 6 of The Companies Act 71 of 2008

- ▶ Definitions continued..
- ▶ “Business Rescue Practitioner” - means a person appointed or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and ‘practitioner’ has a corresponding meaning
- ▶ “Financially Distressed” - in reference to a particular company at any particular time, means that-
 - ▶ it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
 - ▶ it appears to be reasonably likely that the company will become “insolvent” within the immediately ensuing six months
- ▶ What is the position if the company is already insolvent? Is it “financially distressed”?
- ▶ “Supervision” means the oversight imposed on a company during its Business Rescue proceedings.



Companies Act, 2008 – Definition of Financial Distress and what is meant by the word “insolvent”

- ▶ There is no definition of “insolvent” in the Act
- ▶ “Insolvent” can mean:
 - ▶ Commercial Insolvency: Company cannot pay its debts as and when they fall due (cash flow test); or
 - ▶ Factual (Technical) Insolvency: Company’s liabilities exceeds its assets (balance sheet test)
- ▶ Section 4 of the Act may assist –
 - ▶ A company will satisfy the Solvency & Liquidity Test, if, considering all reasonably foreseeable financial circumstances of the company at that time -
 - (a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued (**factual insolvency**); and
 - (b) 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?**)

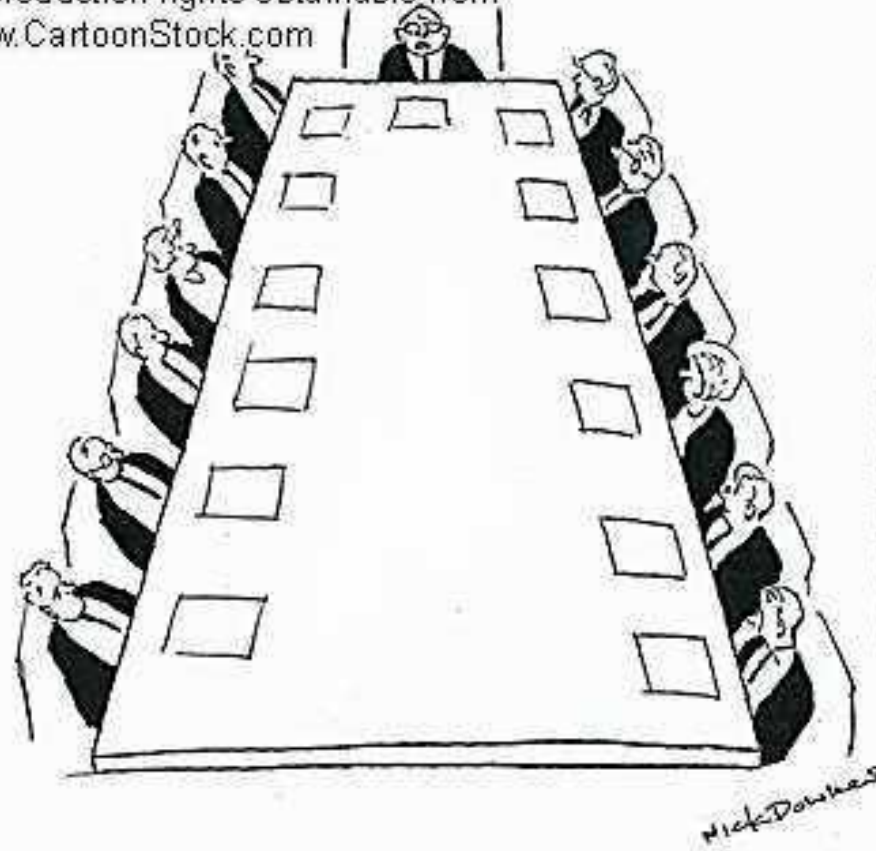


Companies Act, 2008

- ▶ The Section 129(7) Notice –
- ▶ If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128(1)(f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section
- ▶ This is a key requirement which will focus directors' minds in any financially distressed company



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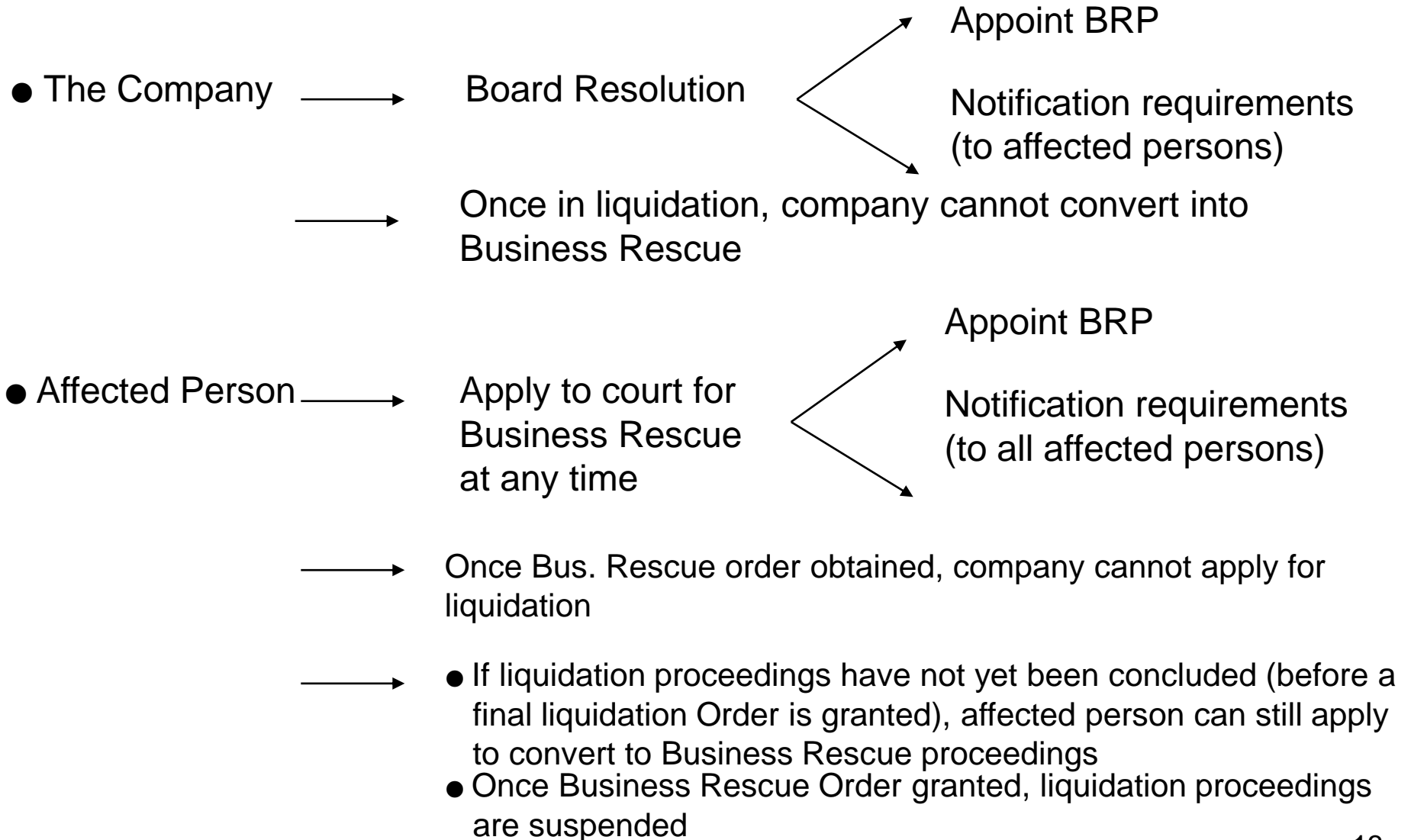


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"The motion has been moved and seconded
that we panic."



In Summary – Commencement of Business Rescue occurs as follows-





General Moratorium (Automatic Stay) on Legal Proceedings against Company

- ▶ Section 133
- ▶ No legal proceedings (including enforcement actions) against the company or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with 'in any forum', except:
 - ▶ with the written consent of the BR practitioner
 - ▶ with the leave of the court
 - ▶ as a set-off against any claim made by the company in legal proceedings, irrespective of when the proceedings commence
 - ▶ criminal proceedings against the company / directors
 - ▶ proceedings concerning any property or right over which the company exercises the powers of a trustee
 - ▶ proceedings by a regulatory authority in the execution of its duties after written notification to the BR practitioner



General Moratorium (Automatic Stay) on Legal Proceedings against Company

- ▶ Will affect perfection of securities
 - ▶ General notarial bond
 - ▶ Need to perfect GNB prior to liquidation
 - ▶ Dangerous for GNB holder if a conversion from business rescue to liquidation
 - ▶ Will be no time to apply to court to perfect GNB
- ▶ If creditor believes BR plan is not going to succeed, there is a possibility (in terms of the exceptions to Section 133) that such creditor could apply to Court to perfect its GNB
- ▶ In terms of Section 131(7), the Court can during proceedings to perfect security, *mero motu*, place the company into BR



General Moratorium (Automatic Stay) on Legal Proceedings against Company

- ▶ Cession of book debts
 - ▶ Does a calling up of a cession equate to an “enforcement action”? (open to question... probably not... only to “judicial enforcement”)
 - ▶ Calling up of a cession of book debts after the commencement of BR would probably not equate to an enforcement by the bank “in relation to property (debtors book) belonging to the company”?
 - ▶ Therefore, the Bank would possibly be able to enforce its rights in terms of its cession of book debts subsequent to the commencement of BR proceedings
- ▶ Section 134(1)(b) - If a company has ceded its book debts to the bank, it is arguable that such book debt is no longer in its lawful possession
- ▶ Notification in terms of Section 129(7) – constitutes a warning to GNB holder to rush to court to perfect!



Pitfalls in Court Process of BR

- ▶ Application to court made on the basis that the company is financially distressed and urgently requires the appointment of a BRP
- ▶ Date of commencement of the BR proceeding is the date of issue of the application in the High Court
- ▶ If application is opposed, the court order for BRP may only be granted some weeks later... what happens to the company in the interim period?

Answer:

- 1) Company is subject to the BR proceeding in that there can be no commencement of legal proceedings against the company subsequent to date of commencement, but the company continues to function as normal;
- 2) Only when the BR order is granted and the BR Practitioner is appointed, will the BR process (supervision) commence.



Post-commencement Finance Affects

- **Employees**
- **Financial institutions**

- ▶ Section 135
- ▶ Any remuneration or other amount relating to employment that becomes payable to an employee during BR, but is not paid
 - ▶ such amount is regarded as post-commencement financing; and
 - ▶ must be paid in the order of preference set out in sub-section 3(a), which envisages pari passu payment of all such claims, but these employee claims will have preference over claims of lenders under sub-section (2) – irrespective if such claims are secured – and all the unsecured claims against the company
- ▶ Employees will be placed in a position of “super-priority” creditors (above lenders) after BR proceedings commence
- ▶ Post-commencement financing (such as from financial institutions) may be obtained during BR proceedings and any such financing (Section 135(2)):
 - ▶ May be secured to the lender by utilizing any asset of the company to the extent that it is not encumbered
 - ▶ Will be paid in the order of preference set out in sub-clause 3(b)
- ▶ Will there be assets left in the company over which security can be taken? In all likelihood, at this stage, all assets will already be encumbered!



Post-commencement Finance

- ▶ Only practitioner's remuneration and costs incurred in running BR proceedings and existing secured claims, will rank higher than employee claims (Section 135(3)) – “costs of administration”
- ▶ Order of preference for repayment to post-commencement lenders, is the order in which the debt was incurred (the earliest in time loan financier will get the priority).
- ▶ If BR proceedings superseded by a liquidation order, the preference conferred in terms of this section remains in force during liquidation proceedings (Section 135(4)) – therefore all employee/financier claims are converted into a “super-priority” category after BR proceedings terminate and are superseded by a liquidation!
- ▶ This would motivate trade unions and employees to always ensure that BR proceedings are chosen as the favoured procedure. i.e. employees can “leap frog” their claims into that of a “super-priority” claim! (in the ordinary course, employees remain preferent creditors in a liquidation).



Effect of BR on Contracts

Contracts generally

- ▶ 136(2) During BR proceedings and despite any provision of an agreement to the contrary, during BR proceedings, the BR practitioner may
 - a) entirely, partially or conditionally suspend, for the duration of the BR proceedings, any obligation of the company that-
 - i. arises under an agreement to which the company was a party at the commencement of the BR proceedings; and
 - ii. would otherwise become due during those proceedings; or
 - b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company is party.
- ▶ Other party to the agreement may only assert claim for damages (no specific performance) – radical departure!?
- ▶ Can only cancel if apply to court.



Effect of BR on Directors

- ▶ Section 137 - During BR proceedings, directors
 - ▶ must continue to exercise their functions as director, subject to authority of the BR practitioner (NOTE: the Board of Directors is not replaced);
 - ▶ have a duty to the company 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)
 - ▶ must attend to the requests of the practitioner at all times, and provide any requested information about the affairs of the company as may reasonably be required
 - ▶ Is this a “Debtor in possession” scenario?
 - ▶ Is there an implication that “directors” will continue to manage the company and not the BR practitioner? – Probably not, but depends on the skill of the BR practitioner in managing this process and interaction with directors
 - ▶ Directors may try and appoint their own nominee/puppet BR practitioner. Can be dangerous as “bad” directors remain in control... DIP is the result!



Business Rescue Practitioners

- ▶ Qualifications (Section 138 as amended) (English Version)
- ▶ 138(1) – A person may be appointed as the BR practitioner of a company only if the person-
 - a) is a member in good standing of a legal, accounting or business management profession that is subject to regulation by a regulatory authority;
 - b) has been licensed as such by the Commission
(NOTE: Afrikaans version of the Act is different, it has “of” [or] between a(i) and (ii)), however, the English version was signed and is the applicable version)
 - c) is not subject to an order of probation in terms of Section 162(7)... (delinquent director provisions)
 - d) would not be disqualified from acting as a director of the company in terms of Section 69(8)... (delinquent director, unrehabilitated insolvent, removed from office on grounds of misconduct involving dishonesty, has been convicted of an offence for, inter alia, theft, fraud, forgery and perjury)
 - 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; and
 - f) is not related to a person who has a relationship contemplated in paragraph (e).



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"He's been brought in to save the company."



Summary – Parties eligible for appointment as BRPs

There are 3 categories of persons eligible for appointment as BRPs

1. Member in good standing of a legal, accounting or business management profession that is subject to regulation by a regulatory authority – Section 138(1). Regulation 126(1) – do not need to be licensed? (conflict between English and Afrikaans version of the Act)
2. Licensed by the Commission (Section 138(2))
Regulation 126(2) – apply for license to the Commission. Commission will license-
 - a) if applicant is of good character and integrity; and
 - b) applicant's education and experience are sufficient to equip the applicant to perform the functions of a BRP
3. Regulation 127(2)(c)
Also eligible for appointment as BRPs are –
 - i. senior practitioners – actively involved in Business Turnaround Practice for at least 10 years
 - ii. experienced practitioner – actively involved in Business Turnaround Practice for at least 5 years
 - iii. junior practitioner –
 - a) either has not previously been engaged in a BT practice; or
 - b) has actively been engaged in BT practice for 5 years.



Regulations to Companies Act published (29 November 2010) for Public comment

- ▶ Regulation 128 – Tariff of fees for BR Practitioners
- ▶ Regulation 128(1) states –
 - ▶ The basic remuneration of a BR Practitioner, as contemplated in section 143(1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed -
 - ▶ R1250 per hour, to a maximum of R15625 per day, (inclusive of VAT) in the case of a small company
 - ▶ R1500 per hour, to a maximum of R18750 per day (inclusive of VAT) in the case of a medium company; or
 - ▶ R2000 per hour, to a maximum of R25000 per day (inclusive of VAT) in the case of a large company or a state owned company
 - ▶ Regulation 128(2) states that 128(1) does not apply to, limit or restrict any “further remuneration” for a BR Practitioner as contemplated in section 143(2) – (4) which allows BR Practitioners to agree on remuneration structure
 - ▶ In addition to the remuneration determined in accordance with section 143(1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner’s functions and facilitate the conduct of the company’s Business Rescue Proceedings



Business Rescue Practitioners

- ▶ Remuneration of BR Practitioners (section 143)
 - ▶ The BR Practitioner entitled to charged an amount to the company for remuneration and expenses in accordance with the tariff as prescribed in the Act
 - ▶ The BR Practitioner may propose an agreement with the company in respect of further remuneration which can be calculated on a contingency basis relating to either the adoption of the Business Rescue plan or alternatively the attainment of a particular result / combination of results relating to the Business Rescue proceedings



Business Rescue Practitioners

- ▶ Removal and replacement of BR Practitioners (Section 139)
 - ▶ May only be removed by an order of court in terms of Section 130 (objection application) or in terms of Section 139
 - ▶ In terms of Section 139(2), grounds for removal include incompetence or failure to perform the duties of a BR practitioner of the particular company, failure to exercise the proper degree of care in the performance of functions, engaging in illegal acts or conduct, conflict of interest or lack of independence
 - ▶ In terms of Section 139(3), the company or the creditor who nominated the BR practitioner must appoint a new practitioner if the BR practitioner has been removed from office (subject to the right of an affected person to bring a fresh application in terms of Section 130(1)(b) to set aside the appointment)
 - ▶ NOTE: A BR practitioner appointed by way of a company resolution can only be removed in terms of an application brought to object to the appointment of a BR practitioner in terms of Section 130(1)(b), or after taking the appointment in terms of Section 139(2)



Business Rescue Practitioners

- ▶ General powers and duties of BR practitioner (Section 140)
 - ▶ Full management control in substitution for the company's board and pre-existing management, but may delegate powers to former board member or pre-existing management
 - ▶ May remove from office any existing officer or appoint any new officer
- ▶ Is responsible for developing and implementing a business rescue plan
- ▶ Unclear what is meant by "in substitution for the company's board". See Section 137(2)(a): "directors must continue to exercise the functions of director, subject to the authority of the BR practitioner"?



Business Rescue Practitioners

- ▶ During BR process, the BR practitioner is an “officer of the court”, has responsibilities, duties and liabilities of a director as set out in Sections 75 to 77, but is not liable for any act or omission in good faith
- ▶ Skill set of BR Practitioner very different to that of a liquidator?
- ▶ BR practitioner may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to “gross negligence” in the exercise of the powers and performance of the functions of BR practitioner
- ▶ Possibility of BR Practitioner being sued by the liquidator or creditors if BR fails and company goes into liquidation
- ▶ Insurance – deep pocket syndrome!



Business Rescue Practitioners

- ▶ Investigation of affairs of company (Section 141)
 - ▶ Must investigate affairs and then decide if there is any prospect of rescuing the company (if not, must inform court and apply for termination of BR proceedings and commencement of liquidation)
 - ▶ If evidence of voidable transactions found, reckless trading or fraud, BR practitioner must forward the evidence to the appropriate authorities for further investigation and/or prosecution and must also direct management to rectify matter including recovering any misappropriated assets of the company
- ▶ What is meant by a “voidable transaction” in the context of BR?
- ▶ Importantly there is no sanction on BR practitioner if non-compliance with these obligations!
- ▶ Question arises as to whether BR practitioner should have similar rights to liquidator under insolvency? (Section 417 enquiries etc...)



Directors of a Company to co-operate with and assist BR Practitioner

- ▶ Section 142(1)
As soon as practicable after Business Rescue proceedings begin, each director of a company must deliver to the practitioner all books and records that relate to the affairs of the company and are in the director's possession.
- ▶ Section 142(2)
Any director of a company who knows where other books and records relating to the company are being kept, must inform the practitioner as to the whereabouts of those books and records.
- ▶ Section 142(3)
Within five business days after business rescue proceedings begin, or such longer period as the practitioner allows, the directors of a company must provide the practitioner with a statement of affairs containing, at a minimum, particulars of the following:
 - a) any material transactions involving the company or the assets of the company, and occurring within 12 months immediately before the business rescue proceedings began;



Directors of a Company to Co-operate with and Assist BR Practitioner

- b) any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company;
 - c) the assets and liabilities of the company, and its income and disbursements within the immediately preceding 12 months;
 - d) the number of employees, and any collective agreements or other agreements relating to the rights of employees;
 - e) any debtors and their obligations to the company, and
 - f) any creditors and their rights or claims against the company.
- ▶ Section 142(4)
No person is entitled, as against the practitioner of a company, to retain possession of any books or records of the company, or to claim or enforce a lien over any such books or records.



Practical issues

- ▶ Delay in appointment of BRP...
 - ▶ Company resolution or court order appoints BRP
 - ▶ Delay in his/her appointment
 - ▶ Problem... company is subject to a BR order but with no-one to supervise it under BR!
 - ▶ Immense damage caused to the company by such delay
 - ▶ Delay would prejudice the successful implementation of a BR plan



Rights of Creditors during BR

▶ Section 145

▶ Creditors are entitled to:

- notice of each court proceeding, decision, meeting or other relevant event;
- participate in every court proceeding arising from BR;
- formally participate in company's business rescue proceedings;
- informally participate in BR proceedings by making proposals for a BR plan to the practitioner;
- the right to vote to amend, approve or reject a BR plan and, if the plan is rejected, to propose the development of an alternative plan or present an offer to acquire the interests of any or all of the other creditors in terms of Section 153



Rights of Creditors during BR

- Creditors are entitled to form a creditors' committee and through that committee to be consulted by the practitioner on the development of a BR plan;
- provisions relating to voting interests in Section 145(4) are as follows –
 - a secured or unsecured creditor (preferent creditor) has a voting interest equal to the value of the amount owed to that creditor by the company; 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 such a liquidation of the company
- practitioner must determine whether creditors are independent for purposes of BR proceeding and request a suitably independent person to independently and expertly appraise and value an interest contemplated in Section 145(4). Such valuation is subject to review together with a re-valuation of the creditors' voting interest.



Business Rescue Proceedings – First Meeting of Creditors

- ▶ Section 147(1) - Within 10 business days after being appointed, the BR practitioner must convene and preside over a first meeting of creditors, at which –
 - a) the BR practitioner –
 - i. must inform the creditors whether the BR practitioner believes that there is a reasonable prospect of rescuing the company; and
 - ii. may receive proof of claims by creditors; and
 - b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee.



Business Rescue Proceedings – First Meeting of Creditors (Section 147)

- 2) The BR practitioner must give notice of the first meeting of creditors to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the BR practitioner, setting out the –
 - a) date, time and place of the meeting; and
 - b) agenda for the meeting
- 3) At any meeting of creditors, other than the meeting contemplated in Section 151, a decision supported by the holders of a simple majority of the independent creditors' voting interests voted on a matter, is the decision of the meeting on that matter i.e. 51% majority vote.
 - ▶ NOTE: At the first meeting of creditors, an "interim practitioner" nominated by an affected person and appointed by the Court in terms of Section 131(5), must be ratified by the holders of the majority of the independent creditor's voting interests. The BR practitioner appointed by the company in terms of a resolution does not have to be ratified at the first meeting of creditors!



Development and approval of BR plan

- ▶ Proposal of BR plan (Section 150)
- ▶ BR practitioner must prepare a BR plan after consulting with creditors, other affected persons and management of the company
- ▶ BR plan must contain all information reasonably required by affected persons to decide whether or not to accept or reject plan.



Development and approval of BR plan

- ▶ Plan must be divided into 3 parts:
 - Part A: Background (including list of assets, which assets are secured, list of creditors indicating secured, statutory preferent and concurrent in terms of laws of insolvency, probable dividend should insolvency ensue, list of all holders of companies securities, a copy of the written agreement concerning the BR practitioner's remuneration, a statement whether the BR plan includes a proposal made informally by a creditor of the company)
 - Part B: Proposals (including nature and duration of moratorium, extent to which 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 BR plan, the order of preference in which the proceeds of the property will be applied to pay creditors of the BR plan is adopted, the benefits of adopting the BR 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 BR plan will have on the holders of each class of the company's issued securities).



Development and approval of BR plan

- ▶ Part C: Assumptions and Conditions (including a statement of the conditions that must be satisfied for the BR plan to come into operation and be fully implemented, effect on employees and their conditions of employment, the circumstances in which the BR plan will end and a projected balance sheet for the company and a statement of income and expenses for the ensuing 3 years)
- ▶ All of the above to be prepared on the assumption that the proposed business plan is adopted.



Development and approval of BR plan

- ▶ Proposed BR plan must conclude with a certificate by BR practitioner stating that information provided appears to be accurate, complete and up to date, and projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement (if inaccurate certificate... BR practitioner may be sued by liquidator or creditors for damages)
- ▶ BR plan must be published by company within 25 business days after date on which practitioner appointed, or such longer time as may be allowed by:
 - The court, on application by the company; or
 - The holders of a majority of the creditors' voting interests.



Meeting to determine Future of Company

- ▶ Section 151

Within 10 business days after publishing a business rescue plan in terms of Section 150 -

- 1) the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan;
- 2) At least 5 business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out –
 - a) the date, time and place of the meeting;
 - b) the agenda of the meeting; and
 - c) a summary of the rights of affected persons to participate in and vote at the meeting.
- 3) The meeting contemplated in this Section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with Sections 152 and 153.



Development and approval of BR plan

- ▶ Section 152(2) –
BR plan approved on a preliminary basis if:
 - ▶ Supported by the holders of more than 75% of the creditors' (all creditors – secured, unsecured) voting interests that were voted (in value); and
 - ▶ The votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted (Note: independent creditors are defined as creditors but who are persons not related to the company, a director or the BR Practitioner)
- ▶ Section 152(3)(a)-
If a proposed BR plan is not approved on a preliminary basis, it is rejected and may only be considered further in terms of Section 153
- ▶ Section 152 (3)(b) –
If a proposed BR plan is approved on a preliminary basis and the plan does not alter the rights of any class of the company's securities, the plan is finally adopted subject to any conditions upon which the plan is contingent being satisfied.



Development and Approval of BR plan

- ▶ Section 152(3)(c)

If a proposed BR plan does alter (impairment) the rights of any class of holders of the company's securities then –

- i. the BR practitioner must call a meeting of the holders of the class or classes of securities whose rights would be altered by the plan and call for a vote by them to approve the adoption of the proposed BR plan; and
- ii. if, in a vote, (contemplated by (i)), a majority (51%) of the voting rights that were exercised, support the plan, it will have been finally adopted.



Failure to Adopt a BR Plan

- ▶ Section 153(1)
 - a) If a business rescue plan has been rejected as contemplated in Section 152(3)(a) or (c)(ii)(bb), the practitioner may-
 - i. seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
 - ii. advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

“Inappropriate”? – grounds are set out in section 153(7)



Failure to Adopt a BR Plan

▶ Section 153(1)

b) If the practitioner does not take any action contemplated in paragraph (a) –

i. any affected person present at the meeting may-

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

ii any affected person, or combinations of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, 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



Failure to Adopt a BR Plan

- ▶ “Binding Offer” – if it is an “offer”, how can it be binding without acceptance?
- ▶ “Liquidation Value” – the “break up value” that a creditor would receive as a dividend on its claim upon the liquidation of the company, taking all liquidation costs into account
- ▶ “Voting Interest” – defined as an “interest recognized, appraised and valued in terms of section 145(4) to (6)”
- ▶ Section 145(4) – (6) relates to decisions requiring the support of the holders of creditors’ voting interests (deals with secured, unsecured voting on value and concurrent creditors subordinated in a liquidation voting at a liquidation value)
- ▶ “One or more persons”? – is this limited to creditors only... or does it include shareholders/holders of securities?



Failure to Adopt a BR Plan

- ▶ Section 146(e) contemplates holders of company's securities being able to make an offer to acquire the interest of any or all the creditors or other holders of the company's securities in the manner contemplated in section 153
- ▶ Question: Can creditors buy out dissenting shareholders and vice-versa?
- ▶ Section 153(5)
If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings



Failure to Adopt a BR Plan

- ▶ Section 153(6)
A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of sub-section (1)(b)(ii)
- ▶ Section 153(7)
On an application contemplated in sub-section (1)(a)(ii) or (1)(b)(i)(bb), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to-
 - a) the interests represented by the person or persons who voted against the proposed business rescue plan;
 - b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
 - c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.



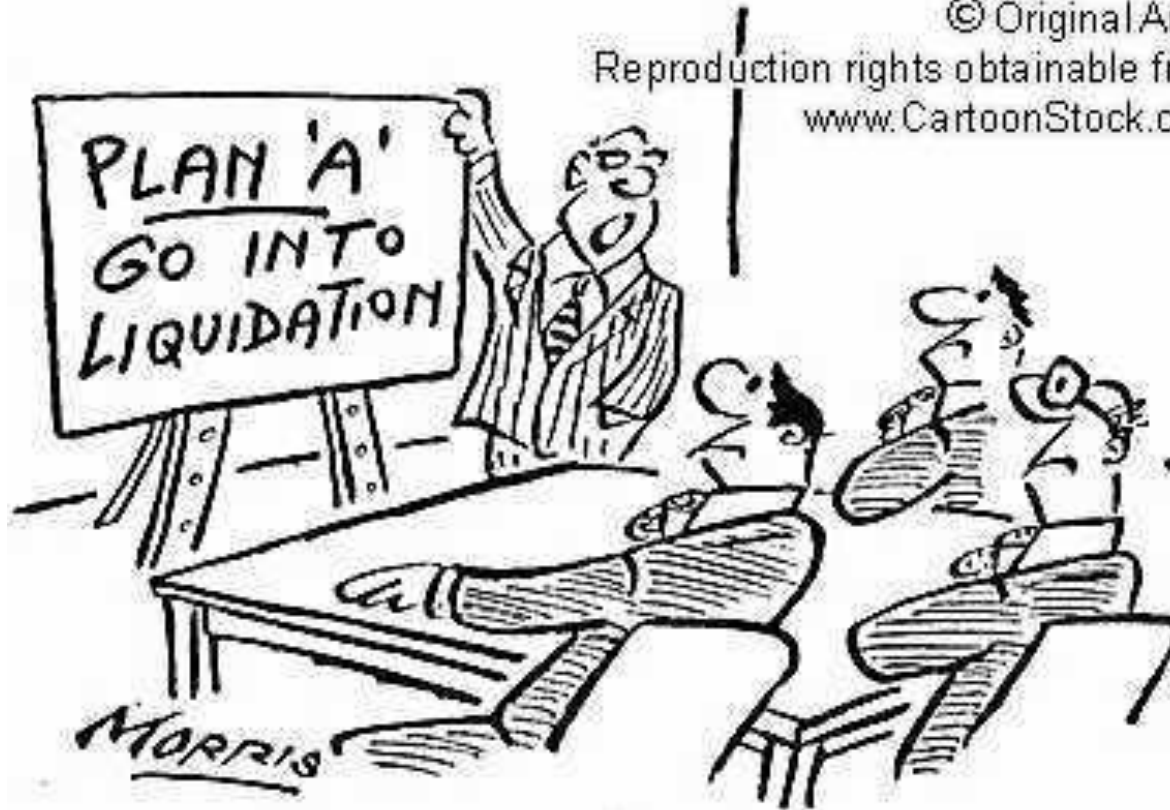
Discharge of debts and claims

Section 154

- ▶ A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it
- ▶ If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan
- ▶ Note – if underlying principle debt goes... so does the suretyship obligation - for example against a director.



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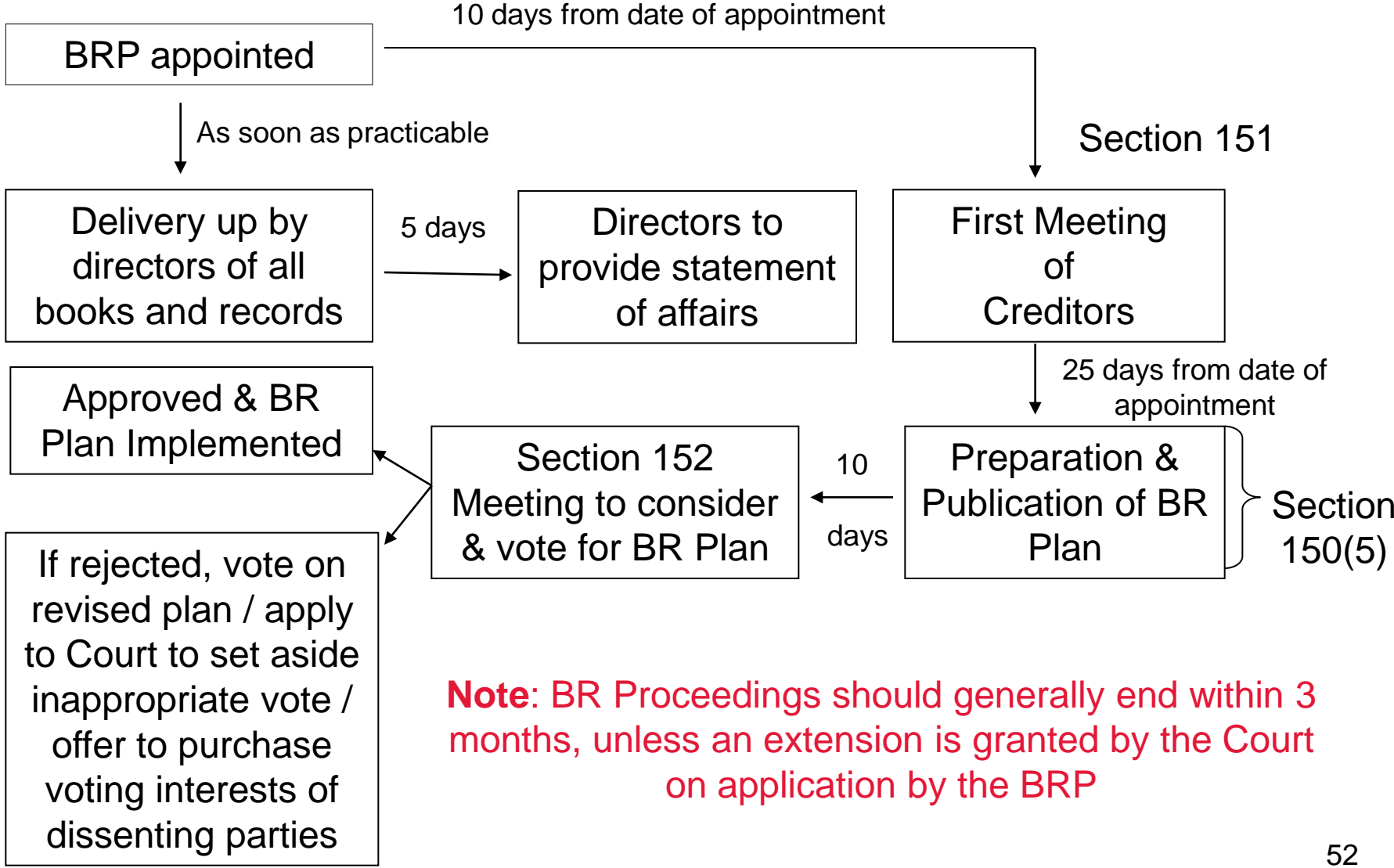


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"That leaves plan 'B' - absconding with the remaining funds."



Flow Chart – Business Rescue Proceedings (Days = Business Days)



Note: BR Proceedings should generally end within 3 months, unless an extension is granted by the Court on application by the BRP



Business Rescue Applications to Date

▶ Beagles Run Investments

Must show that the company will either be able to carry on business on a solvent basis or that the creditors will receive a better dividend than in a liquidation

▶ Major Truck & Bus

- Application dismissed by South Gauteng High Court
- Reasons – unlicensed practitioner
- Formalities not complied with (incorrect forms used, inadequate service of notices, no extension for appointment of practitioner, liquidation application launched to prevent a further resolution being passed by the company i.t.o s129)

▶ Pinnacle Point

- First application brought on 27 May 2011, then withdrawn
- Second application brought on 27 June 2011 and order commencing BRP granted on 28 July 2011
- The BR process appears to be running with a BRP appointed and licensed by the Commission



Business Rescue Applications to Date continued

▶ Miranda Minerals

- Pending before the North Gauteng High Court
- Shareholders/directors dispute..... BR order sought in order to resolve matters?
- 34 applicants brought an application for leave to intervene
- Affidavits currently being exchanged
- Special court/judge allocation granted in terms of section 128(1)(e)(ii)(bb)

▶ Blyvooruitzicht Gold Mining Company Ltd

- filed for BR because of drop in grade of product, work stoppages, high electricity costs
- requires some R80 million in financial assistance to December 2011
- fully drawn down credit facility
- BRP appointed and is running with process



Business Rescue – A Tool for Restructuring?

- ▶ If a consensual deal as between the company and its creditors is not possible, BR may be a viable alternative as it may cram down an agreed BR plan on all parties
- ▶ Where there is tension between creditors, the company and shareholders – BR may be a far better prospect than liquidation
- ▶ Parties will have to focus their minds... assess the BR value as against liquidation value
- ▶ The Section 153 (1)(b)(ii) buy out alternative by affected persons of dissenting voting interests could become a very effective tool for “picking-up” claims of dissenting voters who are frustrating the process
- ▶ BR remains an option to replace the power/control of a dysfunctional board by appointing a BR practitioner



General areas of concern

- ▶ Non-alignment with insolvency laws
- ▶ Should entire process not be found in Insolvency Act or in a Unified Insolvency Act?
- ▶ Procedure open to abuse by debtor company and employees – shifting of elements of control away from creditors
- ▶ Provisions designed to assist and benefit certain stakeholders - might be the downfall of the system
- ▶ BR practitioners –dealt with by the regulations.. Is the skill set correct? New industry created... BRP's!



General areas of concern

- ▶ Will process become tariff or fee driven?
- ▶ Insufficient remedies at the disposal of the practitioner – should have same powers as liquidators to set aside transactions and to interrogate management (e.g. Section 417 enquiries)
- ▶ May require further alignment with corporate governance? (e.g. insolvent trading)
- ▶ Time frames may be unworkable.. Significant delays caused by court process and service requirements
- ▶ BR practitioner forced to deal with directors and management who caused the downfall of the company in the first instance.
- ▶ Appeal process to BR Orders that are over turned could seriously hamper the continued functioning of the company in the interim period resulting in the company having to go into liquidation



General areas of concern

- ▶ Directors already faced with the prospect of personal liability may find themselves reluctant to assist BR practitioner
- ▶ Post commencement finance... where will securities come from (all assets already encumbered)?
- ▶ Ultimate question:
- ▶ “Where is the money?” – who will provide the “post-commencement” finance?
- ▶ Cumbersome process.... As very court driven?
- ▶ Aim: Maximising the returns for all stakeholders!



Some Positive Aspects of Chapter 6 Proceedings

- ▶ Introduction of a corporate rescue mechanism to replace judicial management
- ▶ Brings us into line with overseas jurisdictions (Chapter 11 and Administration procedures)
- ▶ Provides a dual gateway (voluntary and compulsory route) into BR
- ▶ Basic mechanics are workable, it is the detail that will be a challenge to implement
- ▶ Process may result in a glut of litigation as stakeholders test veracity and practical applications of the new legislation
- ▶ Qualifications and ability of BR practitioner will be key to successful implementation
- ▶ Management as between creditors, employees and directors will be critical (BR practitioner will need a high level of people skills)
- ▶ Challenge for Corporate South Africa (lawyers, financial institutions, labour unions and directors) will be.....

- ▶ ***"To change the mindset of industry from a liquidation culture to a rescue culture!"***



Thank you

Eric Levenstein

Director, Werksmans Inc

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