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Commencement of Business Rescue

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Introduction

- Two entry routes into business rescue
 - Board resolution filed with CIPC (voluntary commencement) - 91% of all BR cases; or
 - Application to court (compulsory commencement)
- Commencement leads to appointment of BRP
- Automatic consequences such as moratorium on legal proceedings against the company

Voluntary commencement (s 129)

- Board resolution
- Shareholders do not have this power
- Has no force or effect until filed with CIPC

Restriction on voluntary commencement

- Resolution to commence BR may not be “adopted” if liquidation proceedings have already been “initiated”
- Meaning of initiated is not defined –
 - is it the same as commenced or
 - after commencement or
 - before commencement

Requirements for voluntary commencement

- Board must have reasonable grounds to believe –
 - company is financially distressed, and
 - there appears to be a reasonable prospect of rescuing the company
- Subjective view of directors and objective view of a reasonable director

Obligation to commence (s 129(7))

- If board has reasonable grounds to believe that the company is financially distressed but decides not to adopt business rescue resolution
- Must deliver written notice to every affected person of type of financial distress and reasons for not entering business rescue
- Notice could trigger section 22(2) notice by CIPC
- No other direct sanctions for non-compliance

Resolution by board of directors

- Must be a valid resolution as prescribed by section 73:
 - Notice to all directors
 - Majority must be present
 - Each director has one vote
 - Majority vote required for approval
- Otherwise the resolution is invalid and a nullity
- Form CoR 123.1 must be used to file resolution with CIPC plus documents as prescribed in Practice Note 3 of 2021, including sworn statement as required by s 129(3)(a)
- BR commences on filing of resolution (s 132(1)(a)(i)) (but see Practice Note 3 of 2021: mere submission does not constitute filing))

Appointment of business rescue practitioner

- Must be appointed within 5 business days after filing resolution
- Or such longer time as the CIPC on application will allow
- Within 2 days after appointment, notice of appointment must be filed on Form 123.2
- Accompanied by supporting documents as required by Practice Note 22 of 2022 (including Letter of Good Standing from BRP's accredited Professional Body)

Notice to affected persons

- Within 5 business days after filing board resolution, company must publish notice of resolution and its effective date to every affected person as prescribed by Regulation 123(2)
- Including sworn statement of relevant facts why resolution was taken
- Substantial compliance?
- Within 5 business days after filing notice of appointment of BRP, company must publish a copy of this notice to every affected person

Failure to comply with procedural requirements (s 129(5))

- If company fails to comply with procedural requirements of s 129(3) or (4) –
 - Resolution to commence BR “lapses and is a nullity”
 - Company may not file a further resolution within 3 months except with permission of the court
- But SCA decided otherwise in *Panamo Properties v Nel*
 - BR will only be terminated when court sets aside the resolution if considered just and equitable

Remedies for affected persons (s 130)

- Application to court to
 - Set aside board resolution
 - ✓ No reasonable basis for believing company is financially distressed or
 - ✓ No reasonable prospect for rescuing the company or
 - ✓ Non-compliance with procedural requirements of s 129(3) and (4)
 - **and** it is just and equitable
 - Set aside appointment of business rescue practitioner
 - Demanding security from BRP
- But only until rescue plan has been approved

Commencement by application to court (s 131)

- Unless the company has adopted a resolution to begin business rescue proceedings
- Any affected person may apply
- Company or directors in that capacity may not apply
- Applicant must **serve** a copy of the application on the company
- and **notify** each affected person as prescribed by the regulations
- Each affected person has the right to participate in the hearing

Effect of application on liquidation proceedings (s 131(6))

- When **application** “is made” for business rescue it suspends current liquidation proceedings until court has adjudicated upon BR application
- Meaning of “liquidation proceedings”?
- An application for BR can be made “at any time” (s 131(1))
- Effect of suspension
- When is application made for purposes of s 131(6)?

Compulsory commencement (s 131)

- Application to court by affected person
- Court may also order business rescue during liquidation proceedings or
- Proceedings to enforce any security against the company

Requirements for BR order

- Financial distress and reasonable prospect of rescue
- Financial distress as defined in s 128 –commercial or factual (balance-sheet) insolvency
 - current or future?
- Alternatives –
 - failure to pay over employment-related amounts i.t.o. public regulation or contract or
 - otherwise just and equitable “for financial reasons”

Prospect of rescue

- Reasonable prospect of achieving one of the two goals contained in definition of business rescue
- No definition of reasonable prospect
 - Objectively reasonable, based on concrete facts, not speculation
 - Not a checklist
- No final plan required on application but at least a strategy or achievable draft plan
- Opposition by major creditor(s)
- Better return for creditors – resources likely to be available

Business rescue order

- Section 131(4) – the court may make an order placing the company under supervision and commencing business rescue proceedings
- Court must then also appoint an interim business rescue practitioner nominated by the applicant
- Section 132(1)(b) – business rescue proceedings begin when an affected person applies to the court for an order i.t.o. section 131(1) ?!!!!
- Company must notify each affected person within 5 business days of order

Limited duration of business rescue proceedings

- Section 132(3) – if not ended 3 months after commencement or longer period allowed by the court
 - Practitioner must provide monthly progress report to each affected person and
 - (To court or) CIPC
- Report must be filed together with Form CoR 125.1

Termination of business rescue proceedings (s 132(2))

- By court order
 - resolution or order commencing BR set aside
 - BRP must apply if no reasonable prospect of rescue and apply for liquidation ; or no financial distress if commenced by court order (s 141(2))
 - “converting” BR to liquidation
- Practitioner filing notice of termination
- Business rescue plan
 - Rejected and no further action taken by an affected person (filing of notice required?)
 - Adopted and notice of substantial implementation filed (Form CoR125.3)
- Form CoR125.2 for all other terminations