



INSOL
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INSOL International / SARIPA Programme in South African Business Rescue

Chapter 1 – Introduction to Business Rescue

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Outline of Presentation

- General Introduction and a bird's eye view of the business rescue procedure
- Important definitions in section 128(1) of the Companies Act
- Overview of the business rescue procedure
- The creditor versus debtor focused approach
- Two objectives of business rescue
- Entry routes into business rescue
- The business rescue practitioner
- Moratorium

Outline of Presentation continued....

- Post-commencement finance
- The business rescue plan
- Creditors
- Directors
- Employees
- Shareholders
- When is business rescue most appropriate?
- Case Study – Fast Flights Airlines Limited

1.5 General Introduction and a bird's eye view of the business rescue procedure

- Given the current economic climate, business rescue proceedings are becoming increasingly relevant – recent example: Tongaat Hulett
- The Companies Act 71 of 2008 (which came into operation in May 2011) introduced business rescue proceedings to the South African legal and restructuring landscape
- Business rescue replaced the outdated judicial management procedure
- The aim of business rescue is to allow for the supervision of financially distressed companies by a business rescue practitioner with the objective of either rescuing the company and allowing it to trade out of its financial predicament, or if this is not possible, offering the company's creditors and shareholders a better dividend than would otherwise be achieved through liquidation
- Attempting to restructure financially distressed companies (as opposed to simply liquidating them) has been the new global trend
- Business rescue accords with the "corporate rescue culture" and other international standards of corporate rescue USA (Chapter 11 proceedings) and the UK (Administration)
- Having some knowledge of the new restructuring dispensation is essential as most companies may be exposed to business rescue at various levels

1.5 General introduction continued.....

- Business rescue attempts to secure and balance the opposing interests of creditors, shareholders and employees
- Traditionally, South African insolvency law could be regarded as a "pro-creditor" regime
- In contrast, the business rescue process is characterised by an emphasis on the balancing of the rights and interests of all relevant stakeholders
- A shift from creditors' interests to a broader range of interests
- The rationale is to preserve the business, coupled with the experience and skill of its employees, which may in the end prove to be a better option for creditors in securing the full recovery of the debt – Focus is on "saving companies not destroying them"
- Business rescue and its application and interpretation are a continuously evolving concept, as reflected in the numerous judgements handed down by South African courts on the subject

1.5 General introduction continued.....

- The 4 principles of business rescue:
 - Maximising returns for creditors;
 - Avoiding the piece meal sale of assets at "fire-sale" values;
 - Retaining and preserving the goodwill of the business of the company; and
 - Keeping businesses afloat in order to preserve employment.



1.5 General introduction continued.....

A BIRD'S EYE VIEW OF THE BUSINESS RESCUE PROCESS

- a) The important definitions in business rescue
- b) The debtor focused approach of Chapter 6 of the Companies Act 2008 (as opposed to the creditor-focused approach seen in traditional insolvency law)
- c) The two objectives of business rescue
- d) When business rescue may be most appropriate



1.6.1 Important definitions in section 128(1) of the Companies Act

"Affected person"

- Section 128(1)(a) of the Companies Act 2008 defines "affected person" as follows:
- "'Affected person', in relation to a company, means -
- (a) a shareholder or creditor of the company;
- (b) any registered trade union representing employees of the company; and
- (c) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;"

1.6.2 Important definitions in section 128(1) of the Companies Act continued.....

"Business rescue"

- proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –
 - temporary supervision of the company, and of the management of its affairs, business and property;
 - temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 - 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
 - results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

1.6.3 Important definitions in section 128(1) of the Companies Act continued.....

"Business Rescue Practitioner"

- "Business rescue practitioner" means a person appointed, or two or more persons appointed jointly, in terms of Chapter 6 of the Companies Act 2008 to oversee a company during business rescue proceedings and "practitioner" has a corresponding meaning.



1.6.4 Important definitions in section 128(1) of the Companies Act continued.....

"Court"

- "Court", depending on the context, means either-
- (a) the High Court that has jurisdiction over the matter; or
- (b) either-
- (i) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of section 128(3) of the Companies Act 2008; or
- (ii) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of section 128(3) of the Companies Act 2008.

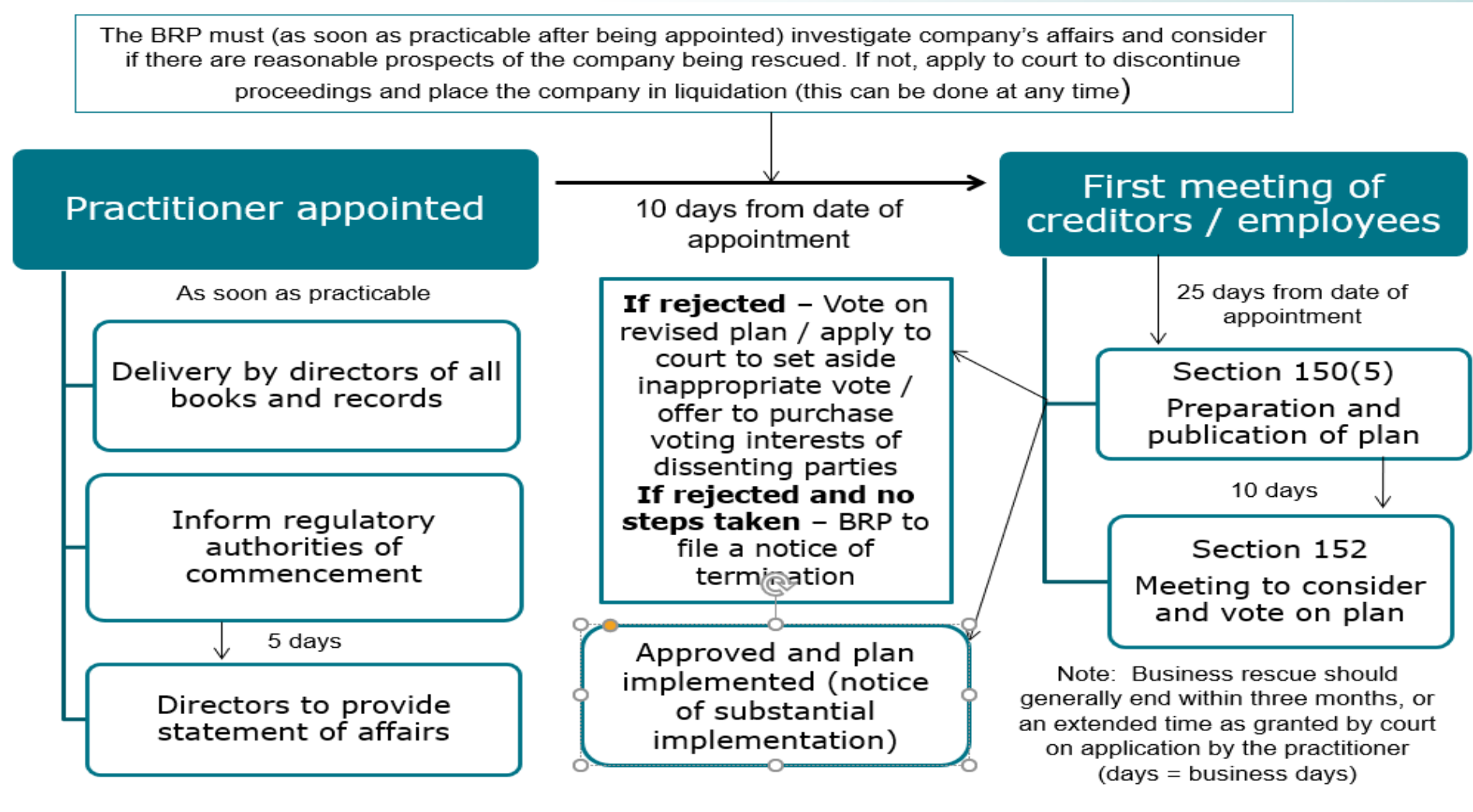


1.6.5 Important definitions in section 128(1) of the Companies Act continued.....

"Financially distressed" -

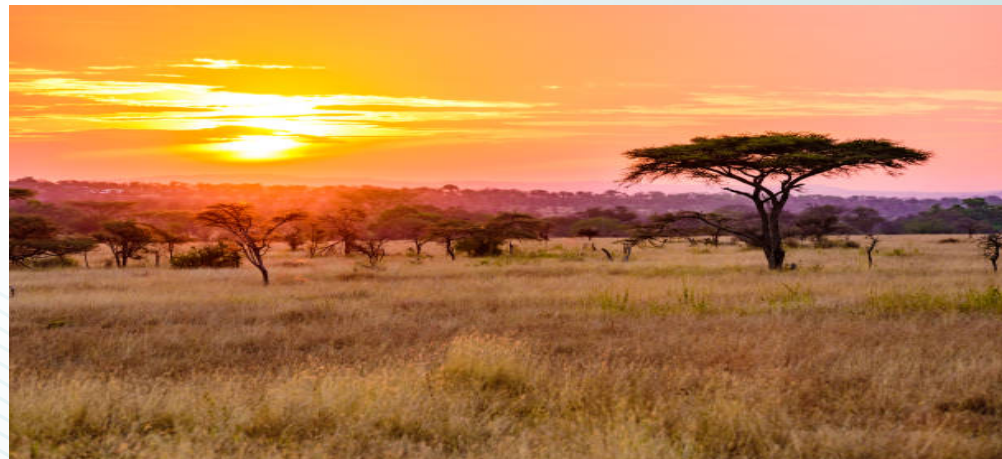
- in reference to a particular company at any particular time, means that —
 - it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
 - it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- The test for financial distress is forward-looking
- It is intended to allow directors of companies to look into the future to determine whether the company is reasonably likely to run into cash-flow problems in the immediate ensuing six-month period.
- This six-month period was determined to be a sufficient period of time to allow directors to consider business rescue before it is too late.

1.7 Overview of the business rescue procedure/process



1.7.1 The creditor focused vs the debtor focused approach

- Pro-creditor regime or pro-debtor?
- Balance the rights and interests of all stakeholders Section 7(k)
- Breathing space = Moratorium = Key feature of the business rescue process
- Commercial Insolvency vs Factual Insolvency
- The objective – Approval of the business rescue plan
- Key – Implementation of the business rescue plan



1.7.2 Two objectives of business rescue

"Business Rescue"

- 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
 - results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company

1.7.3 Entry routes into business rescue

Two entry routes into the business rescue process

- The first route is a company resolution (voluntary commencement)
- The second is a formal court application by an affected person (compulsory commencement)
- In terms of section 129(1), a company's board of directors can pass a resolution in terms of which the company resolves to commence the business rescue process
- These two important restrictions on the commencement of voluntary business rescue proceedings
- A resolution commencing business rescue proceedings cannot be adopted if liquidation proceedings have already been initiated by or against the company
- A resolution to commence business rescue is of no force and effect until it has been filed with the CIPC

1.7.4 The business rescue practitioner

- During a company's business rescue proceedings, the business rescue practitioner, in addition to any other powers and duties set out in Chapter 6, has full management control of the company in substitution for its board and pre-existing management
- The business rescue practitioner is an officer of the court for the duration of a company's business rescue proceedings, and must report to the court in accordance with any applicable rules of, or orders made, by the court
- A business rescue practitioner also has the same responsibilities, duties and liabilities of a director of the company, as contemplated in sections 75 to 77 of the Companies Act
- A business rescue practitioner may be held liable in accordance with any relevant law for the consequences of any act of omission amounting to gross negligence in the exercise of the powers and performance of the functions of a practitioner
- Given the important role played by business rescue practitioners during the business rescue process, Chapter 6 of the Companies Act sets out various specific requirements that must be satisfied before a practitioner may be appointed to act as such during business rescue proceedings
- Importance of a pre-assessment report

1.7.5 Moratorium (Section 133)

- A primary aim of business rescue proceedings is to offer a distressed company some breathing space to allow its affairs to be restructured in such a way as to allow it to continue to operate as a going concern
- This is achieved through a general moratorium on claims (a "stay" on claims)
- The moratorium on claims is a fundamental aspect of any successful rescue mechanism, aimed at the restructuring of the debt of a company that is financially distressed
- Section 133 of the Companies Act –
 - provides that during business rescue proceedings, no legal proceeding, including enforcement action, 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 practitioner or with the leave of the court and in accordance with any terms the court considers suitable

1.7.5 Moratorium continued....

- The High Court has exclusive jurisdiction over business rescue matters, and as such, a party seeking to initiate proceedings, including those that concern an employment-related claim, against a company in business rescue, must secure the written consent of the business rescue practitioner or obtain the leave of the High Court to institute those proceedings
- Arbitration proceedings are legal proceedings for which the written consent of the business rescue practitioner or the leave of the court is required in terms of section 133
- The moratorium on legal proceedings in section 133 finds no application in legal proceedings against a company's business rescue practitioner in connection with the business rescue plan including its interpretation, adoption or implementation

1.7.6 Post-commencement finance (Section 135)

- Post-commencement finance is the life-blood of the company while it is undergoing its restructuring process under business rescue
- Post-commencement finance is funding that is provided to the company after the date of commencement of business rescue proceedings
- In view of the importance of securing some level of ongoing finance in order to continue functioning in the marketplace, the Companies Act provides statutory protection and elevates the status of such funding above the claims of the company's pre-business rescue creditors (waterfall of payments in a business rescue)
- Without such preference being conferred, very few, if any, lenders would be prepared to continue to finance a company in circumstances where it is financially distressed and has been placed under business rescue
- During business rescue proceedings the company may obtain "finance" secured by the unencumbered assets of the company but payable after business rescue practitioners' remuneration and costs related to the proceedings and claims related to employment arising during the rescue proceedings in the order of preference indicated in section 135 of the Companies Act

1.7.7 The business rescue plan (Section 150)

- The practitioner, after consulting the creditors, other affected persons, and the management of the company, is obligated to prepare a business rescue plan for consideration and possible adoption at a meeting convened for this purpose
- The consideration of the business rescue plan is the most significant part of the business rescue process, as the business rescue plan will ultimately, if voted in and approved, give the company a chance to be rescued
- Section 150 contains detailed provisions of the information that must be contained in a proposed plan
- The detailed information required in terms of section 150 is to ensure that sufficient information is placed before the creditors and other stakeholders in order that they may make an informed decision regarding the adoption (or not) of the plan
- The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was 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

1.7.7 The business rescue plan continued.....

- A rescue plan is adopted by creditors (subject to approval by holders of securities if their interests are affected) if it is supported by 75% of voting interests and 50% of independent creditors' voting interest
- A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of the 2008 Companies Act. The court has no power to cram down a plan on creditors which they have not discussed and voted on at such a meeting
- A secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company.
- An adopted plan is binding on the company in business rescue, and all the creditors and holders of the company's securities. Once adopted or approved in terms of section 152, a business rescue plan forms the foundation of the business rescue proceedings to which all the affected persons are bound. It is binding on the company, on each creditor and on every holder of securities of the company whether or not that person was present at the meeting, voted in favour of adoption of the plan or in the case of creditors, had proven their claims against the company.

1.7.7 The business rescue plan continued.....

- In terms of section 154(1), 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
- In terms of section 154(2), if a business rescue plan has been approved and implemented in accordance with Chapter 6, a creditor that is owed a debt immediately before the beginning of the business rescue process is not entitled to enforce any debt owed to it by the company, except to the extent provided in the business rescue plan

1.7.8 Creditors

- 145 Participation by creditors
- (1) Each creditor is entitled to- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings; (b) participate in any court proceedings arising during the business rescue proceedings; (c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and (d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.
- (2) In addition to the rights set out in subsection (1), each creditor has- (a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and (b) if the proposed business rescue plan is rejected, a further right to- (i) propose the development of an alternative plan, in the manner contemplated in section 153; or (ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.
- (3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.

1.7.8 Creditors

- (4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests- (a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and (b) 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.
- (5) The practitioner of a company must- (a) determine whether a creditor is independent for the purposes of this Chapter; (b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4)(b); and (c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151.
- (6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to- (a) review the practitioner's determination that the person is, or is not, an independent creditor; or (b) review, re-appraise and re-value that person's voting interest, as determined in terms of subsection (5)(b).

1.7.9 Directors

- Section 137(2)
- (2) During a company's business rescue proceedings, each director of the company-
- (a) must continue to exercise the functions of director, subject to the authority of the practitioner;
- (b) has 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;
- (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and
- (d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).

1.7.10 Employees

- Section 144
- Rights of employees
- (1) During a company's business rescue proceedings any employees of the company who are- (a) represented by a registered trade union may exercise any rights set out in this Chapter- (i) collectively through their trade union; and (ii) in accordance with applicable labour law; or (b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.
- (2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

1.7.10 Employees

- (3) During a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to- (a) notice, which must be given in the prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union, of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings; (b) participate in any court proceedings arising during the business rescue proceedings; (c) form a committee of employees' representatives; (d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152(1)(c); (e) be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152(1)(c); (f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection (2); and (g) if the proposed business rescue plan is rejected, to- (i) propose the development of an alternative plan, in the manner contemplated in section 153; or (ii) present an offer to acquire the interests of one or more affected persons, in the manner contemplated in section 153.

1.7.10 Employees

- (4) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of- (a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and (b) in the case of a defined benefit pension scheme, the present value at the commencement of the business rescue proceedings of any unfunded liability under that scheme.
- (5) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.

1.7.11 Shareholders

- Section 137(1)
- Effect on shareholders and directors
- (1) 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-
 - (a) that the court otherwise directs; or
 - (b) contemplated in an approved business rescue plan

1.7.11 Shareholders continued....

Shareholders (security holders) – Section 146

- During a company's business rescue proceedings, each holder of any issued security of the company is entitled to—
 - (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings;
 - (c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter;

1.7.11 Shareholders continued....

Shareholders (security holders) – Section 146

- (d) vote to approve or reject a proposed business rescue plan in the manner contemplated in section 152, if the plan would alter the rights associated with the class of securities held by that person; and
- (e) if the business rescue plan is rejected, to— (i) propose the development of an alternative plan, in the manner contemplated in section 153; or (ii) present an offer to acquire the interests of any or all of the creditors or other holders of the company's securities in the manner contemplated in section 153.

1.8 When is business rescue appropriate?



DO NOT LEAVE IT TOO LATE!

1.8 When is business rescue appropriate?

- In *Antonie Welman v Marcelle Props 193 CC*, it was held that business rescue proceedings are not for terminally ill corporations, but are rather for ailing entities which, if given time, may be rescued and become solvent. Accordingly, not all companies are suitable for business rescue, and much will depend on the specific cause of the company's financial distress.




1.8 Case Study?



FAST FLIGHTS AIRLINES LIMITED

Self assessment questions for Chapter 1

See page 23 of notes



Q & A



Thank You

