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Effect of Business Rescue (“BR”) on Shareholders and Directors

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Rights of shareholders

- “Affected person”
- Rights to commence, have notice of and participate in BR (right to be consulted on the plan)
- Voting rights – only if plan “alters rights” attached to shares
- Remuneration agreement –only holders of a majority of the voting rights attached to any “shares that entitle the shareholder to a portion of the residual value of the company on a winding up”

Rights and duties of directors

- Role of Business Rescue Practitioner (“**BRP**”) versus role of board of directors
- Directors must continue to exercise their functions as directors subject to the authority of the BRP – retain certain fiduciary duties but relieved of others
- Directors must cooperate with the BRP and must also furnish company books and records and a statement of affairs
- Actions taken on behalf of the company that require the approval of the BRP are void unless approved by the BRP
- Removal and replacement of directors by the BRP

How meaningful are the various shareholder rights?

- Right to bring an application for BR
 - Very rarely exercised – far easier for directors to pass a resolution than for an affected party to participate in costly and protracted court proceedings. The board is almost always best placed (leaving aside instances of fraud/corruption) to decide whether or not a company should go into BR. Applications brought by affected parties are inevitably opposed by the company (because if board thought BR was a solution, it would have passed a resolution).
- Right to set aside a resolution passed by the board
 - Court application
 - Company not in financial distress
 - There is no reasonable prospect of rescue - liquidation
 - Procedural errors – courts less likely to set aside on this ground than in the early days
 - Set aside appointment of the BRP – long line of cases - this is also very hard to do

- Right to have notice of BR proceedings
 - Entitlement to receive the notices filed with CIPC once BR has already commenced.
 - Not a right to notice of a meeting called for the purposes of passing a resolution commencing BR.
- Right to participate in BR proceedings
 - Right to be consulted meaningfully on the plan before it is published, even though might not be entitled to vote on the plan.
 - Listed companies ? Hlumisa case
 - Practically, unless shareholders are also creditors, they are rarely involved in the drafting of the plan or BR itself.

• Voting Rights

- Only triggered if plan alters rights attached to shares – Not clear what this means.
- Typical BR plan - compromise the creditors, sell the business and assets and use the proceeds to pay creditors so as to clean up the company and then hand it back to the board.
- Dilution of the value of the shares would not impact on the rights attached to those shares so would not trigger a shareholder vote.
- Section 112 of the Companies Act provides that a company may not dispose of all or a greater part of its assets unless the disposal has been approved by a special resolution of shareholders.

What is the role of the Board in a BR?

- BRP takes over full management control of the company in substitution of its board – Ragavan v Optimum Coal Terminal (Pty) Ltd, SCA (31 March 2023)
- Directors must cooperate with the BRP – must furnish him/her with books and records and a statement of affairs
- What happens in practice? Who signs contracts concluded during BR?
- Does the board continue to meet and pass resolutions? Must directors still be paid fees? What if they don't cooperate? Can they resign or be fired?
- What if the board was corrupt? BRP does not have the same focus or powers as a liquidator.

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