



**INSOL**  
INTERNATIONAL



# The business rescue plan

Mr Peter van den Steen (Metis Strategic Advisors, Johannesburg) and  
Mr Phahlani Mkombo (Genesis Corporate Solutions, Centurion)

# FRAMEWORK

1. Introduction – what is a business rescue plan (“BR plan”)
2. Contents of a BR plan
3. Requirements for the adoption of a BR plan
4. Meeting to vote on a BR plan
5. The consequences of a failure to adopt a BR plan
6. The binding effect of an approved and adopted BR plan
7. Implementation of a BR plan and a reasonable prospect of rescuing a company
8. Q&A and Discussion

# 10.1 WHAT IS A BR PLAN?

- A business rescue plan is a **proposal to creditors on how the company will be rescued**.
- A plan must contain sufficient information for creditors and other affected persons in order to make **an informed decision whether to support or vote in favour or reject the plan**.
- It must have **realistic or achievable milestones** with realistic timelines and not just a wishful thinking or pie in the sky.
- A plan must be prepared in **consultation with management, board, creditors and other affected persons** (i.e. employees, shareholders & other critical stakeholders). Normally, this would include:
  - employees committee
  - Creditors committee
  - Lenders committee
  - Shareholders etc.
- It must be written in plain and simple English for **everyone to understand** – always avoid legalese language.
- It must be done in such a way that it **balances the interests of all stakeholders**.
- Once a plan is adopted, it is **binding on everyone** whether or not that creditor voted for or against the plan.

# 10.2 CONTENTS OF A BR PLAN

- A plan is divided into **3 parts** and must at a minimum contain the following information (not necessarily in this sequence):
  - **Part A – Background:**
    - ✓ Background to the company, statutory information and its business;
    - ✓ Factors that resulted in the company being financially distressed and being placed under business rescue.
    - ✓ List of material assets – at book value as at commencement of business rescue.
    - ✓ List of creditors – indicating which creditors is secured, preferent and concurrent.
    - ✓ Probable liquidation dividend that creditors would have received in liquidation – this should be done independently.
    - ✓ List of holders of the company's issued securities.
    - ✓ Written agreement concerning BRP's remuneration.
    - ✓ Statement as to whether (or not) the plan includes a proposal made informally by a creditor.

## 10.2 CONTENTS OF A BR PLAN

- **Part B – Proposal:**

- ✓ This part describes the terms of the Proposal and includes, inter alia, the benefits and/or effect of adopting the plan as opposed to the company being placed into liquidation.
- ✓ Nature and duration of moratorium
- ✓ Extent to which the company is to be released from payment of its debts or extent to which the debt is to be converted into equity.
- ✓ Ongoing role of the company & treatment of agreements
- ✓ Property of the company available to pay creditors
- ✓ Effect of adopting the plan
- ✓ Effect that the plan will have on holders of company's issued securities.

## 10.2 CONTENTS OF A BR PLAN

- **Part C – Assumptions & Conditions:**

- ✓ This part sets out, inter alia, what conditions need to be fulfilled in order for the plan to become effective, and to be implemented.
- ✓ Effect of the plan on employees & their terms and conditions.
- ✓ Circumstances on which the plan will end.
- ✓ Projected balance sheet, income statement & 3 year cashflow.

- **BRP's certificate:**

- ✓ The plan must end with a certificate by the BRP stating that information provided appears to be accurate, complete & up to date, and that projections provided are estimates made in good faith.

## 10.2 CONTENTS OF A BR PLAN



There is **no one size fits all solution**. The content and structure of the plan will differ from one plan to the other, but it must at minimum have all the prescribed minimum requirements.



The plan is also dependent on the **specific circumstances and complexities** of that rescue, e.g., a plan predicated on a sales/disposal process will differ from a plan predicated on the implementation of an operational turnaround plan.



There is **no hard and fast rule** in terms of what to include or exclude. BRP's are at liberty to include whatever they deem necessary in the plan as long as it is not illegal or unlawful.



It has now become standard practice to include a **dispute resolution mechanism** in the plan.



The plan must be structured in such a way that it **allows or is flexible to be amended** before or at the creditors meeting.

# 10.3 REQUIREMENTS FOR ADOPTION OF BR PLAN

The plan will be approved if:

It is supported by the holders of **more than 75%** of the creditors voting interests that voted, and

- The votes in support of the proposed plan **include at least 50% of the independent creditors voting interests** if any, that voted

If the plan does not alter the rights of the holders of any class of company's securities or shareholders, **then approval of the plan on a preliminary basis will be deemed as final.**

If the plan has the **effect of altering the rights of shareholders or company's securities**, the BRP must immediately convene a meeting with the holders of the company's securities or shareholders whose rights will be affected to vote on the plan.

The plan will be approved or adopted if **the majority (simple majority)** of the shareholders or company's securities whose rights will be affected vote in support of the adoption of the plan.



# 10.3 REQUIREMENTS FOR ADOPTION OF BR PLAN



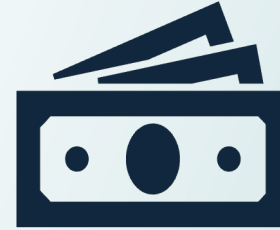
Voting is usually by way ballot forms and proxies for those who are unable to attend.



In recent times, most meetings are held virtually.



All creditors with approved claims are eligible to vote. Creditors with disputed claims will not vote.



Creditors with post commencement claims may be allowed to vote.



Usually, BRPs rely on the company's records for voting purposes.



If there is a dispute on the claim, the matter is usually dealt with or resolved in terms of the dispute resolution mechanism.

## 10.4 MEETING TO VOTE ON THE BR PLAN

- **A meeting must be held within 10 business days** after “publication” (see notice requirements & regulations for publication requirements)
- **At this meeting:**
  - Introduce the plan to creditors (and shareholders if required)
  - BRPs view on reasonable prospect
  - Employee’s representative to address the meeting
  - Invite discussion on the plan
- **2 possible outcomes:**
  1. Conduct vote
  2. Proposed amendments
    - Discretionary element (to the satisfaction of BRP), can be done on the spot – proposer, seconder, vote for inclusion (simple majority) and then vote on o/all plan
    - Adjourn meeting to consider further and amend accordingly or otherwise, reconvene to vote again within 5 days

## 10.4 MEETING TO VOTE ON THE BR PLAN

- ✓ Socialize and pre-sensitise with key players before hand
- ✓ Be well prepared – there will always be “left field” questions
- ✓ Gather as many proxy votes ahead of time as possible
- ✓ Quick results re voting essential – have assistance in place to do so and deliver result before meeting is closed
- ✓ Be prepared for making small amendments quickly and if reasonable incorporate and have included before conducting the vote
- ✓ Have the meeting in a calm environment and if possible, in person (place of worship and community centers work well and are cost effective)

## 10.4 MEETING TO VOTE ON THE BR PLAN



- G5 meeting was held at the Rosebank Church. Massive venue that could accommodate many people plus parking etc. very reasonably priced and in the heart of Sandton.
  - Very calm and orderly
  - Nobody raised their voice or acted in an “unbecoming fashion” (we have seen lots of that in the past)
- Stay away from hosting at law firms as much as possible – lawyers make everyone nervous and on edge
- “I don’t know” is an honest answer. Do the homework and revert – at the meeting if possible. Make the effort.
- Be humble and demonstrate empathy. A “take it or leave it” attitude and trying to show folks how clever you think you are will get you nowhere. You will fail with the wrong attitude no matter how good your plan.

## 10.5 THE CONSEQUENCES OF A FAILURE TO ADOPT A BR PLAN

1. BRP (and if BRP does not – then any affected person with voting interest):
  - Ask for vote to **revise BR plan**
  - Advise meeting that Co. will apply to **set aside rejecting** votes (inappropriate)

OR


2. Affected person can make binding offer to purchase the voting interest of one or more persons that voted against the BR plan (liquidation value - independently and expertly determined)
  - Subsequent steps to **adjourn**, await outcomes, re-publish, re-convene etc.
  - If options are exhausted → “promptly **file for the termination** of business rescue proceedings”

## 10.5 THE CONSEQUENCES OF A FAILURE TO ADOPT A BR PLAN

- ✓ Be prepared to make small and reasonable amendments at the 151 meeting to get it approved and adopted. Alternatively amend, re-publish, notices and new meeting i.e. 151,152,153 all apply afresh
- ✓ Inappropriate vote challenge is not easy. Courts tend to be sympathetic to dissenting voters focused on their own outcomes. (compare vs Liquidation outcome)
- ✓ Binding offer = minefield. Messy and unresolved. Not restricted to affected person present and voting at the meeting – example → opens the door for s/holders who's rights might be unaffected.
- ✓ Procedures are NB. Non-compliance can render such acts invalid if properly challenged.

# 10.5 THE CONSEQUENCES OF A FAILURE TO ADOPT A BR PLAN

- ▶ Paranoia helps! Prepare, prepare, prepare.
  - Rule of thumb - 2 to 3 hours prep-time per one hour expected in real life
- ▶ Leverage = estimated liquidation outcome.
  - Ensure that everyone in the room is reminded thereof. (in a non-threatening manner!! – remember empathy)
- ▶ Have help and experts on hand (especially legal).
  - A lot can be happening at the meeting (all at the same time) so have help at hand – people who can track matters and assist if need be.
- ▶ Let lawyers speak to lawyers outside the open forum wherever possible. (Breakaway).
  - Creditors get irritated with lawyers measuring their egos against each other in open forum – it can derail the entire meeting.
- ▶ Let lawyers speak to or respond to legal questions and comments from lawyers in the room – use judgement. Limit the “air time”.

 **A BRP that has engaged and socialized the BR plan sufficiently in advance and ahead of the meeting should in most cases get the plan approved and adopted at the first meeting.**



## 10.6 THE BINDING EFFECT OF AN APPROVED AND ADOPTED BR PLAN

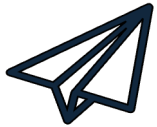
- 152(4) – once a plan has been adopted it is **binding on all creditors and shareholders** *whether or not:*
  - *they were present at the meeting,*
  - *voted against the adoption of the plan or*
  - *(as creditor) had proven their claims against the company.*
- 154(2) – Once the adopted plan has been **implemented** a creditor is **not entitled to enforce any debts owned by the company** immediately before the beginning of BR proceedings except to the extent provided for in the BR plan.



## 10.6 THE BINDING EFFECT OF AN APPROVED AND ADOPTED BR PLAN



- The adopted plan is **binding on all affected parties**
  - even those that were not present and voting, and
  - those that did not know about the BR



- BRP and their team need to try their best to **ensure that notices and information re the BR are made available as far and wide** as possible - - - > go the extra mile



- Not everyone can practically be covered
  - with thousands of creditors and shareholders and additional affected persons (not necessarily creditors) its easy to miss.
  - thankfully courts are reasonable in this regard



- **Regulatory bodies are concurrent.**
  - Don't participate (other than SARS – sometimes) and don't understand.



- **Blackmail creditors** – deal with them on a case by case basis.
  - BRP may differentiate between creditors.



- **Timing of claims** – pre-BR claims related to agreements concluded pre-BR but become known after commencement.

## 10.6 THE BINDING EFFECT OF AN APPROVED AND ADOPTED BR PLAN



- Over roughly the same period as the Marikana massacre (mining community) was the BR including the Burnstone Gold Mine near Belfour in South Africa.
- Needed to reduce pressure in the system. Preserve assets of the mine.
- 50km radius/small creditors
  - Well received – even by those that were not beneficiaries
  - Banks financed with PCF
  - Immediate economic relief
  - Tremendous goodwill
- Nobody was prepared to assist in the science, geography or the math – BRP did it on his own. (people were scared) (Took advice and applied his mind)

## 10.7 IMPLEMENTATION OF A BR PLAN AND A REASONABLE PROSPECT OF RESCUING A COMPANY

- ✓ 152(5) – BRP to take necessary steps to:
  - Satisfy conditions on which BR plan is contingent
  - Implement the BR plan as adopted
- ✓ 152(6)(a) – BRP has the power to determine the consideration for and to issue any authorized shares notwithstanding restrictive provisions of s38 and s40 of the Act.
- ✓ 152(6)(b) – BRP has power to amend MOI notwithstanding s16, s36 and s37 of the Act
- ✓ 152(7) – pre-emptive right of s/holder (as per s39 of the Act, does not apply with respect to an issue of shares by the co in terms of an approved BR plan (unless the plan states otherwise)
- ✓ Fundamental transactions (s112(1)(a)) pursuant to an adopted BR plan are not subject to the restrictive conditions of s112 and s115 of the Act.
- ✓ Notice of substantial implementation as per 152(8) when this has been achieved

## 10.7 IMPLEMENTATION OF A BR PLAN AND A REASONABLE PROSPECT OF RESCUING A COMPANY

- ✓ 141(2)(a)&(b) – during BR proceedings either no reasonable prospect of rescue (a) or no longer financially distressed (b) the BRP must:
  - In the case of (a) – inform court, company and affected persons and apply to court to discontinue BR proceedings and place into liquidation

Or

- In the case of (b) - inform court, company and affected persons and terminate BR proceedings
- ✓ But “substantial implementation” is not defined → therefore the BRP should clearly define it in the BR plan in a section dedicated to it.
- ✓ Small deviations can be expected – the plan should cater for BRP to make such amendments provided they do not prejudice affected persons. Such amendments should not:
  - Permit unilateral amendments by the BRP
  - Attempt to circumvent s152, s145 and s146 of the Act
- ✓ s41(3) needs to be noted. i.e. BRP may issue new shares without s/holder approval, but only provided the new issued shares do not confer voting rights which exceed 30% threshold. Is this deliberate of a drafting error by the drafter of Chapter 6?

## 10.7 IMPLEMENTATION OF A BR PLAN AND A REASONABLE PROSPECT OF RESCUING A COMPANY



- Additional complications of an approved and adopted plan if the company is **listed on the JSE**:
  - Suspension of trading in co's shares
    - ✓ Information confidentiality in BR is a major challenge
    - ✓ PCF providers need to be able to “look under the bonnet”
    - ✓ Advisors and lawyers representing affected persons want information transparency
    - ✓ BRPs are obliged to consult with creditors and affected parties
    - ✓ Price sensitive info is floating around from the moment the company enters BR proceedings
    - ✓ Engage with JSE asap and get the shares suspended
  - Categorized transactions
    - ✓ JSE and the Act are two separate sets “rules”. What is achievable in BR is not necessarily supported by JSE regulations.
  - Engage with JSE to address the compliance/non-compliance with the numerous JSE regulations.

# Q&A AND DISCUSSION

