



INSOL
INTERNATIONAL



Participation by creditors

Juliette de Hutton (Bowmans, Johannesburg)

THE RIGHT OF AND THE PARTICIPATION BY CREDITORS IN THE BUSINESS RESCUE PROCESS

- Rights of affected persons, including creditors, dealt with throughout Chapter 6 of the Companies Act.
- Section 145 provides specifically for the participation by creditors in the business rescue process.
- Creditors determine success or failure of process

NOTIFICATION

- Section 145(1)(a) - every creditor is entitled to notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings.
- Regulation 125(2) of the Companies Regulations - the BRP must give notice to creditors by: -
 - Delivering a copy of the notice to each creditor [Regulation 7]; or
 - Informing each creditor of the availability of a copy of the notice [section 6(11)(b)(ii) and Regulation 6]; and
 - Conspicuously displaying a copy of the notice – registered office, website, electronic system of exchange if listed company

PARTICIPATION IN ANY COURT PROCEEDINGS

- Section 131(3) – specific right.
- Section 145(1)(b) - general right of creditors to participate in any legal proceedings.
- leave of the court to intervene in the proceedings is not required.
- does not give rise to the requirement that creditors be joined in all litigation.

FORMAL AND INFORMAL PARTICIPATION IN THE BUSINESS RESCUE PROCEEDINGS

- section 145(1)(c) – formal participation
- section 145(1)(d) – informal participation
- Recognition that participation may take place in a less formal manner by way of approaches to the BRP specifically to make proposals regarding the business rescue plan that he is required to prepare.
- Every plan is required to include a statement recording whether it includes a proposal made informally by a creditor.

RIGHTS IN THE ADOPTION OF THE BUSINESS RESCUE PLAN

- Section 145(2) :
 - the right to vote to amend, approve or reject a proposed plan (in the manner contemplated in section 152); and
 - if the proposed plan is rejected, a further right to:
 - propose the development of an alternative plan (in the manner contemplated in section 153); or
 - present an offer to acquire the interests of any or all of the other creditors (in the manner contemplated in section 153).

CREDITORS' COMMITTEE

- Section 145(3) - entitled to form a creditor's committee.
- Appointment of the creditor's committee regulated by section 147(1)(a).
- The functions, duties and membership of the committee provided for in section 149.

CREDITORS' COMMITTEE contd

- may be a member only if:-
 - an independent creditor of the company;
 - an agent, proxy or attorney of an independent creditor, or other person acting under a general power of attorney; or
 - authorised in writing by an independent creditor to be a member.

CREDITORS' VOTING INTEREST

- Many decisions made on the basis of a vote by creditors.
- Section 128(1)(j) contains a definition of “voting interest”: **“an interest as recognized, appraised and valued in terms of section 145(4) to (6)”**.
- Both secured and unsecured creditors have a vote equal to the value of amount owed to them by the company. - only exception is *“a concurrent creditor who would be subordinated in a liquidation”*.

The Commissioner, SARS v Beginsel NO

reference to “a concurrent creditor who would be subordinated in a liquidation” does not include all concurrent creditors, but rather only *“those concurrent creditors who have subordinated their claims in a liquidation in terms of a subordination or back-ranking agreement”*.

VOTING INTEREST contd

- BRP required to determine whether a creditor is “**independent**”.
- The level of support required for plan to be approved: **section 152**
A plan requires the support of more than **75%** of creditors voting interest that were voted and at least **50%** of the independent creditors’ voting interests that were voted.
- At any meeting of creditors other than the meeting called for the purpose of considering a business rescue plan, a decision supported by the holders of a simple majority of the independent creditors voted on a matter, is the decision of the meeting on that matter.

THE FIRST MEETING OF CREDITORS

- BRP must convene and preside over a first meeting of creditors within 10 business days of his appointment.
- The business rescue practitioner must give notice of the first meeting of creditors to every creditors of the company whose name and address is known to, or can reasonably be obtained by, him, setting out:
 - **date**, **time** and **place** of meeting; and
 - **agenda** for the meeting.

REASONABLE PROSPECTS OF RESCUING THE COMPANY

- Term has been extensively considered in relation to **section 131(4) of the Companies Act 2008** (where it is used in relation to the requirements for the commencement of business rescue proceedings).
- No reason why the term should not be interpreted in the same manner in relation to section 147(1).
- If there is obviously no reasonable prospect of rescuing the company, the BRP would be obliged to inform the creditors of this fact at this first meeting. The business rescue proceedings should then be terminated and converted to liquidation proceedings.

PROOF OF CLAIMS

- Chapter 6 does not stipulate any formal procedure or even expressly state that creditors are required to prove their claims.
- However, the fact that section 147 contemplates the receipt of proofs of claim at the first meeting suggests that claims may, or perhaps even should, be proved by creditors.
- BRPs should then examine the claims submitted in comparison with the company's own records to determine whether they are valid.
- Process for disputed claims

INDEPENDENT CREDITORS

Defined as a person who is:

- a creditor of the company, including an employee of the company who is a creditor in terms of [section 144\(2\)](#); and
- not related to the company, a director, or the business rescue practitioner, subject to [section 128\(2\)](#). [Section 128\(2\)](#) provides that an employee is not related to a company purely by virtue of being a member of a trade union that holds securities.
- The term “related” is defined in the Companies Act.

JOINDER OF CREDITORS ON LEGAL PROCEEDINGS ARISING DURING THE BUSINESS RESCUE PROCEEDINGS

- The test for joinder in legal proceedings generally is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice that party if it is not joined.
- If an order cannot be sustained without necessarily prejudicing the interest of third parties that have not been joined, then those third parties have a legal interest in the matter and should be joined.
- Applying this general test, the courts have confirmed that where an application is brought to set aside a business rescue plan that has been adopted by creditors, all creditors should be joined to those legal proceedings [*ABSA Bank Ltd v Naude NO and others 2016 (6) SA 540 (SCA)*]

JOINDER OF CREDITORS ON LEGAL PROCEEDINGS ARISING DURING THE BUSINESS RESCUE PROCEEDINGS

Contd

- Position if published but not yet adopted?
- The court has also emphasised that there may be cases where, because of the specific facts involved, joinder under the common law (that is, because creditors have a direct and substantial interest) is necessary even though a business rescue plan has not yet been adopted.
- In accordance with these principles, in a matter where it was sought to interdict the section 151 meeting, the courts held that joinder of creditors was not necessary: *Cooper NO and another v Knoop NO and others*
- Where not joined always entitled to intervene: *Blue Nightingale Trading 709 (Pty) Ltd v Nkwe Platinum*

THANK YOU

