Business rescue and s 155 compromises in terms of the Companies Act 2008

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28.1 – Introduction

- Given the current economic climate, business rescue proceedings are becoming increasingly relevant
- 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
- 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

28.1 – 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
- 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

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28.2 – Selected Definitions in section 128(1) of the Companies Act

"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.

28.2 – Selected 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.

28.3 – Commencement of business rescue proceedings by the board

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

28.3 – Commencement of business rescue proceedings by the board continued….

- Section 129(7) deals with the publication of a written notice of financial distress to all affected persons if the board decides not to adopt a resolution commencing business rescue, despite the board of the company having reasonable grounds to believe that the company is financially distressed
- The section 129(7) notice has certainly focused the minds of many directors on the issue of determining financial distress
- When this notice is sent out, the company will be informing all its creditors that it is financially distressed, with the effect that creditors who continue to deal with it do so at their own risk
- Another issue for directors to consider are the consequences of failing to send out a section 129(7) notice, as such failure may, potentially, expose such directors to personal liability on the basis that the company's business was carried on recklessly and with intent to defraud creditors

28.4 – Requirements for appointment as a BRP

- 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

28.4 – Requirements for appointment as a BRP continued….

- In terms of section 138, the practitioner must be a member in good standing of a legal, accounting or business management profession accredited by the CIPC or the practitioner must be licensed as such by the CIPC
- The CIPC may license any qualified person to practice in terms of Chapter 6 and may suspend or withdraw any such license in the prescribed manner
- Section 138(1)(d) – a person may be appointed as the business rescue practitioner of a company only if the person would not be disqualified from acting as a director of the company
- Section 138(1)(e) – a person may be appointed as the business rescue practitioner of a company only if the person does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship

28.4 – Requirements for appointment as a BRP continued…

- The Companies Regulations, 2011 provides definitions that classify companies as "large", "medium" or "small"
- Business rescue practitioners are also classified as –
  - "senior" (at least 10 years' experience in a business turnaround practice or as a business rescue practitioner in terms of the Companies Act);
  - "experienced" (at least 5 years' experience in a business turnaround practice or as a business rescue practitioner in terms of the Companies Act); or
  - "junior" (no experience, or less than 5 years' experience in a business turnaround practice or as a business rescue practitioner in terms of the Companies Act)
- A junior practitioner may be appointed in a small company or another company as an assistant to a senior or experienced practitioner
- An experienced practitioner in a small or medium company, or in a large or state-owned company as an assistant to a senior practitioner
- A senior practitioner may be appointed for any company

28.4 – Requirements for appointment as a BRP continued…

- A business rescue practitioner may be removed by an order of court in terms of section 130 or section 139 of the Companies Act
- Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:
  - incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
  - failure to exercise the proper degree of care in the performance of the practitioner's functions;
  - engaging in illegal acts or conduct;
  - if the practitioner no longer satisfies the requirements set out in section 138(1);
  - conflict of interest or lack of independence; or
  - the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

28.5 – Setting aside of resolution or appointment of practitioner

- The commencement of business rescue proceedings must not be an abuse of process and should be brought in good faith and for a proper purpose
- In view of the fact that the initiation of voluntary business rescue proceedings is open to potential abuse, affected persons are afforded certain protections, in appropriate circumstances
- In terms of section 130(1), at any time after the adoption of a resolution commencing business rescue, and until the adoption of a business rescue plan, an affected person may (after notice to other affected persons) apply to court for an order –
  - (a) setting aside the resolution, on the grounds that –
    - there is no reasonable basis for believing that the company is financially distressed;
    - there is no reasonable prospect for rescuing the company; or
    - the company has failed to satisfy the procedural requirements set out in section 129

OR

28.5 – Setting aside of resolution or appointment of practitioner continued…

- (b) setting aside the appointment of the practitioner, on the grounds that the practitioner –
  - does not satisfy the requirements of section 138 (discussed above);
  - is not independent of the company or its management; or
  - lacks the necessary skills, having regard to the company's circumstances …

- In terms of section 130(4), affected persons have an automatic right to participate in the section 130 proceedings without the need for an order authorising them to do so
- After the adoption of the business rescue plan, an affected person is not entitled to apply to court for an order setting aside the board resolution commencing business rescue proceedings or an order setting aside the appointment of the practitioner in terms of this section

28.6 – Commencement of business rescue proceedings by an affected person

- Compulsory business rescue begins with an affected person (creditor, shareholder, registered trade union, employee or employee representative) applying to the High Court to place the company concerned in business rescue
- Section 131 provides that unless a company has adopted a resolution to begin business rescue proceedings, an affected person may apply to a court at any time with notice to each affected party “in the prescribed manner” for an order placing a company under supervision and commencing business rescue proceedings
- An applicant seeking an order commencing business rescue must nominate a business rescue practitioner for appointment in its application
- If the court subsequently makes an order placing the company into business rescue, the court may make a further order appointing as interim practitioner, the person so nominated. This appointment is subject to ratification by a majority of the independent creditors at the first meeting of creditors

28.6 – Commencement of business rescue proceedings by an affected person continued…

- In order to succeed with an application in terms of section 131, any one of the following jurisdictional requirements must be demonstrated, namely:
  - that the company is financially distressed; or
  - the company has failed to pay over any amount in respect of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
  - it is otherwise just and equitable to do so for financial reasons.
- Regardless of which jurisdictional requirement is present, in each instance there must also be a reasonable prospect for rescuing the company

28.7 – Conversion of liquidation to business rescue

- In terms of section 131(7) of the Companies Act, -
  - a court may *mero motu* place a company into business rescue at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company
- In terms of section 141(2) of the Companies Act, -
  - if at any time during business rescue proceedings, the business rescue practitioner concludes that there is no reasonable prospect for the company to be rescued, the practitioner must so inform the court, the company and all affected persons, in the prescribed manner, and apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation

28.8 Report on progress of business rescue proceedings

- If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must -
  - (a) prepare a report on the progress of the business rescue proceedings and update it at the end of each subsequent month until the end of those proceedings; and
  - (b) deliver the report and each update in the prescribed manner to each affected person and to the court, if the proceedings have been the subject of a court order, or the Commission in any other case.

28.9 Moratorium

- 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
- 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

28.9 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

28.10 Post-commencement finance

- 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
- 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

28.10.1 Practitioner's remuneration in section 143

- Section 143 deals with the business rescue practitioner's remuneration
- Section 135(3) of the Companies Act specifically provides that the first expenses to be paid in a business rescue proceeding are those of the business rescue practitioner and the expenses arising from the business rescue proceedings itself
- The business rescue practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of section 143(6)
- In terms of section 143(2), the practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in section 143(1), to be calculated on the basis of a contingency related to –
  - (a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or
  - (b) the attainment of any particular result or combination of results relating to the business rescue proceedings.
  - Section 143(3) specifically requires an agreement for further remuneration to be approved "at a meeting called for the purpose of considering the proposed agreement". Without the approval at a meeting called for the purpose to approve the agreement, such a fee is invalid.

28.10.1 Practitioner's remuneration in section 143 continued…

- The basic remuneration of a business rescue practitioner, as contemplated in section 143(1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed:

(a) R1,250 per hour, to a maximum of R15,625 per day, (inclusive of VAT) in the case of a small company; or

(b) R1,500 per hour, to a maximum of R18,750 per day, (inclusive of VAT) in the case of a medium company; or

(c) R2,000 per hour, to a maximum of R25,000 per day, (inclusive of VAT) in the case of a large company, or a state-owned company.

(d) In addition to the remuneration determined in accordance with section 143(1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.

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28.10.2 - Creditors secured before business rescue proceedings

- The provisions of section 134 provide for the disposal of property only when it is required for the normal operation of the business of the company or as part of the business rescue plan
- Section 134 regulates the position when property disposed of by a company is held by a creditor as security for its claim and aims to protect such secured creditor from any potential prejudice that may flow from the actions taken by the company or the business rescue practitioner, during the course of the business rescue proceedings
- Agreements for the disposal of property have to comply with the prerequisites set out in section 134, namely:
- 1) the property must be disposed of in the ordinary course of the company's business;
- 2) the disposal must be in terms of a bona fide transaction at arm's length, for fair value, and must be approved in advance and in writing by the practitioner; or
- 3) alternatively, the disposal must occur in terms of a transaction contemplated within and undertaken as part of the implementation of an approved business rescue plan.

28.10.2 - Creditors secured before business rescue proceedings continued…

- If during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must:
- (a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
- (b) promptly –
  - (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
  - (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.
- Accordingly, there must be prompt payment by the company of the proceeds of the disposition to the holder of the security and the payment must fully discharge the indebtedness of the company to that creditor.

28.10.3 - Employee remuneration

- Section 135(1) deals with remuneration, reimbursement for expenses or other amounts of money relating to employment that become due and payable by a company to an employee during the company's business rescue proceedings.
- These amounts are regarded as post-commencement financing and enjoy a higher order of preference
- In terms of section 144(2) of the Companies Act, 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 Chapter 6.
- The preference afforded to employees under section 144(2) may not be compromised in a business rescue plan, even if such plan is properly voted on and adopted.

28.11 - Effect of business rescue on contracts

- Business rescue practitioners, once appointed, must identify which agreements to which the company is a party are "prejudicial" or "detrimental" to the ongoing viability or solvency of the company.
- Typically, lease agreements with high rentals, loan agreements with excessive interest payment terms, or supply agreements with unfair pricing arrangements are potential subjects of suspension during the course of business rescue
- Section 136 of the Companies Act determines that despite any provision of an agreement to the contrary, during business rescue proceedings the practitioner may –
  - entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –
    - arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
    - would otherwise become due during those proceedings; or
  - apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated above.

28.11.1 – Protection of employees

- Employees are dealt with specifically in business rescue proceedings. Not only do they rank as super-priority creditors in the ranking of claims, they are also entitled to participate in the business rescue proceedings
- Employees stand to gain substantial benefits from business rescue proceedings when compared with a liquidation
- A company is obliged to retain the services of the employees and their salaries, that become due and payable by the company during the business rescue proceedings, are regarded as post-commencement finance and thus have preferential status
- The favourable position of employees, in contrast to the situation in a liquidation, is confirmed by the fact that section 144 of the 2008 Companies Act deals in great detail with the rights of employees during a company's business rescue proceedings

28.12 – Protection of property interests

- If during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must obtain the prior consent of that other person unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest
- the practitioner must promptly pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness, or provide security for the amount of those proceeds to the reasonable satisfaction of that other person
- Section 134(1)(c) provides that despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing

28.12 – Protection of property interests continued…

- If during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must obtain the prior consent of that other person unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest
- the practitioner must promptly pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness, or provide security for the amount of those proceeds to the reasonable satisfaction of that other person
- Section 134(1)(c) provides that despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing

28.13 – Investigation of the affairs of the company

- In terms of section 141 of the Companies Act, the business rescue practitioner is required to investigate the affairs, business, property and financial situation of the company. In this regard, section 141(2) provides as follows:
  - If, at any time during business rescue proceedings, the practitioner concludes that –

    (a) there is no reasonable prospect for the company to be rescued, the practitioner must –

    (i) so inform the court, the company, and all affected persons in the prescribed manner; and

    (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;

    (b) there are no longer reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and –

    (i) if the business rescue process was confirmed by a court order, or initiated by an application to the court, apply to a court for an order terminating the business rescue proceedings; or

    (ii) otherwise, file a notice of termination of the business rescue proceedings.

28.13 – Investigation of the affairs of the company continued…

- In terms of section 141(2)(c), if there is evidence in the dealings of the company before the business rescue proceedings began of –
  - voidable transactions, or the failure by the company or any director to perform any material obligation relating to the company, the practitioner must take any necessary steps to rectify the matter and may direct the management to take appropriate steps;
  - reckless trading, fraud or other contravention of any law relating to the company, the practitioner must –
    - forward the evidence to the appropriate authority for further investigation and possible prosecution; and
    - direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.

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28.14 – First meeting of creditors

- Within ten business days after being appointed, the practitioner must convene and preside over a first meeting of creditors at which the practitioner must inform the creditors whether he believes that there is a reasonable prospect of rescuing the company
- The practitioner may also receive proof of claims by creditors at this meeting
- At the first meeting, the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee
- At any meeting except where the proposed rescue plan is considered, a simple majority carries the day

28.15 – Consideration of business rescue plan

- 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

28.15 – Consideration of 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.

28.15 – Consideration of 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

28.16 – The position of sureties

- *Van Zyl v Auto Commodities (Pty) Ltd* (279/2020) [2021] ZASCA 67
  - where a provision contemplating a discharge of debt is contained in the business rescue plan and a creditor "accedes" to such discharge, the debt will cease to exist and the creditor who has acceded to the proposal will not only lose the right to enforce the debt owed to them by the company in business rescue, but the debt itself is discharged
  - it is unclear as to what is required for a creditor to "accede" to the discharge of the debt, the most obvious way would be by voting in favour of the business rescue plan that provides for such discharge
  - in view of the accessory nature of a suretyship, the liability of a surety is dependent on the existence of the obligations of a principal debtor. The result of this is that if a principal debtor's obligations (or debt) is discharged whether by payment or release, the surety's obligations under the suretyship would likewise be discharged. This is, of course, subject to any terms of the deed of suretyship that may preserve the surety's liability notwithstanding the release or discharge of the principal debtor

28.16 – The position of sureties continued…

- *Van Zyl v Auto Commodities (Pty) Ltd* (279/2020) [2021] ZASCA 67 continued ….
  - the court held that whilst a creditor cannot enforce the debt that the company owed to it when business rescue commenced (due to the operation of section 154(2)), this did not necessarily mean that the amount is no longer owning to the creditor. The inability to enforce a debt does not equate to a discharge of the debt
  - This is in contrast with the position under section 154(1), which contemplates a complete discharge of the debt, by virtue of the creditor "acceding" to such discharge
  - On this basis, the court held that section 154(2) does no more than render the debt unenforceable, to some extent, against the company (as principal debtor), but leaves the suretyship and the obligations of the surety untouched
  - Accordingly, section 154(2) does not affect or extinguish the liability of a surety for a debt of the company

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28.17 – Failure to adopt the business rescue plan

- If a business rescue plan has been rejected (not approved) the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that such vote was "inappropriate"
- If the practitioner does not take such action, any affected person present at the meeting may call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan, or apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was “inappropriate”
- In terms of section 153(1)(b)(ii), any affected person (or combination of affected persons) may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person (or those persons) if the company were to be liquidated

28.17 – Failure to adopt the business rescue plan continued…

- The aim of section 153(1)(b)(ii) is to ensure that those affected persons who wish to vote in favour of a plan that has not been approved are given an opportunity to buy out voting interests in order to get to the required threshold of 75 per cent as set out in section 152(2)
- In this way, this provision prevents deadlocks and forces dissenting or holdout creditors to sell out at negligible value
- All creditors who oppose the adoption of the plan by voting it down are therefore at risk, as they can be bought out at liquidation value, if they dissent on the vote
- Liquidation value refers to a fair and reasonable estimate, independently and expertly determined, of what the holder of a voting interest would receive if the company were to be liquidated
- *African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others* 2015 (5) SA 192 (SCA)
  - A binding offer is binding on the person who made the offer, not on the person to whom the offer is made without acceptance of the offer
  - once a binding offer is made to purchase a voting interest, the holder of the voting interest is not summarily divested of it without being able to determine the affordability of the offer on the part of the offeror
  - The offeree is therefore not in the position to force the offeree to accept the offer

28.18 – Compromise with creditors (section 155 of the Companies Act)

- Section 155 provides for a compromise between a company and its creditors
- In terms of section 155(1), section 155 applies to a company regardless of whether or not it is financially distressed as defined in section 128(1)(f)
- However, it is important to note that section 155 does not apply where a company is under business rescue proceedings
- Accordingly, where a company is finalising or negotiating a compromise, a creditor may apply to court as an affected person to place the company under supervision and commence business rescue proceedings, in terms of section 131
- Placing a company under business rescue will have the effect of bringing the negotiations for a compromise to an end
- It is important to note that a liquidator where a company is being wound up may propose an arrangement or a compromise of its financial obligations
- Accordingly, liquidation is not a bar to a compromise in terms of section 155 and a liquidator may be bound to the compromise

28.18 – Compromise with creditors (section 155 of the Companies Act) continued…

- It is important to keep in mind that a compromise does not afford the company protection through a statutory moratorium as in the case of business rescue
- For this reason, the danger exists that aggressive or greedy creditors may threaten to launch or in fact launch winding up applications on the basis that the company is unable to pay its debts
- In terms of section 155(2), the board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to
- every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and
- the Companies and Intellectual Property Commission
- Based on the above, the process in terms of section 155 is driven by the directors or a liquidator, as the case may be
- Only the board of a company, or its liquidator, if it is being wound up, have locus standi to make a proposal as contemplated in section 155(2) to propose a compromise
- It is not necessary for a company to get approval from the court to propose a compromise

28.18 – Compromise with creditors (section 155 of the Companies Act) continued…

- Section 155(3) provides that a compromise presented by the board of directors, or the liquidator must contain all the information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal, and must be divided into three parts – Parts A, B, and C
- Section 155(3) prescribes certain minimum requirements for information to be included in three parts of the proposal
- In terms of section 155(5) a proposal must conclude with a certificate by an authorised director or prescribed officer of the company stating that any factual information provided appears to be accurate, complete, and up to the date; and projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement

28.18 – Compromise with creditors (section 155 of the Companies Act) continued…

- In terms of section 155(6), a proposal will have been adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by –
  - majority in number, representing at least 75% in value of the creditors or class, as the case may be;
  - present and voting in person or by proxy, at a meeting called for that purpose
- Therefore, there are two requirements –
  - a majority in number of creditors who are present or represented by proxy and who vote on the proposal, irrespective of the value of their claims, must support the proposal; and
  - such majority must own or represent at least 75% of the total value of all creditors' claims
- There is no minimum quorum requirement in terms of the Companies Act
- It is noteworthy that the first requirement serves to protect smaller creditors from larger creditors pushing through a proposal to their detriment

28.18 – Compromise with creditors (section 155 of the Companies Act) continued…

- In terms of section 155(7), where a proposal is adopted as contemplated in subsection (6), the company may apply to the court for an order approving the proposal (not peremptory)
- Although it is no longer obligatory to obtain the approval of the proposal from the court, it seems that the compromise will have to be sanctioned by the court in order to be enforceable against all the parties concerned
- A court, on an application may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to –
- the number of creditors of any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal; and
- in the case of a compromise in respect of a company being wound up, the report of the Master of the High Court as required in terms of the Companies Act 61 of 1973

28.18 – Compromise with creditors (section 155 of the Companies Act) continued…

- The final step in the section 155 process is set out as follows in section 155(8)
- In terms of section 155(8), a copy of an order of the court sanctioning a compromise must be filed by the company with the Companies and Intellectual Property Commission within five business days;
- In addition, the order of the court must be attached to each copy of the company's Memorandum of Incorporation that is kept at the company's registered office, or elsewhere as contemplated in section 25;
- Lastly, it is important to note that the court order sanctioning the compromise or arrangement is final and binding on all of the company's creditors or all of members of the relevant class of creditors, as the case may be, as of the date on which it is filed
- Notwithstanding the above, in terms of section 155(9), an arrangement or compromise as contemplated in section 155 does not affect the liability of any person who is a surety of the company

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Thank You