

## Covid-19 **Business Rescue**

### **LIFE AFTER LOCKDOWN: CREDITORS' PARTICIPATION IN THE BUSINESS RESCUE PROCESS**

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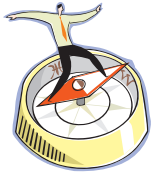
**It is a sombre reality** that as the South African economy prepares to re-open on 1 May 2020, albeit on a limited basis, many businesses may be forced to remain closed indefinitely. It is naïve to assume that business trading will immediately return to pre-lockdown conditions. On the contrary, many owners will be reviewing whether it is financially viable for them to re-open at all given the economic climate we currently find ourselves in, not to mention the stark unpredictability of the future.

Many businesses will need to seriously consider whether they can sustain the costs of being open (think rental, salaries, etc.) while revenue potentially remains subdued for an extended, indefinite period of time. In short, a relaxation of the lockdown Regulations is certainly not a panacea for all to return to normal.

Inevitably, and certainly for the small to medium sized businesses, a decision needs to be made. For a business incorporated as a company or close corporation who wishes to avoid the drastic step of liquidation, business rescue ought to be seriously considered. It is important to remember that insolvency and business rescue have different focuses. As the name suggests, business rescue is precisely that: a rescue of the business with the object of surviving and providing a better return than otherwise on insolvency.

The purpose of this article is not to address the entire statutory business rescue regime as set out in the Companies Act 71 of 2008, but rather to focus on and identify the position of a creditor when one of its debtors enters into business rescue, voluntarily or compulsory, and the rights and the role afforded to such creditor.

The commencement of business rescue proceedings places a general moratorium on the rights of creditors to enforce claims against a company and therefore creditors cannot institute legal proceedings against the company under business rescue. Once a business is placed under business rescue, it will operate as before, albeit under the supervision of a business rescue practitioner. While creditors will need to continue to fulfil their obligations to the company, the supervision will mean there will be an immediate limitation of the rights of creditors. However, this



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does not mean that creditors have no say in the process whatsoever. In fact, the contrary applies and creditors ought to be made aware of the significant role they play in the process.

Creditors, along with shareholders, employees (or their representatives) or a registered trade union representing employees of the company, are defined in Section 128(1)(a) of the Companies Act as “affected persons”. These affected persons are important stakeholders in the business rescue process and ought to all have a say in the business rescue plan and its consequences.

Section 145(1) of the Companies Act provides for specific participatory rights of creditors outlined. In short, each creditor is entitled to:

- Notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
- Participate in any court proceedings arising during the business rescue proceedings;
- Formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter; and
- Informally participate in those proceedings by making proposals for a business rescue plan to the business rescue practitioner.

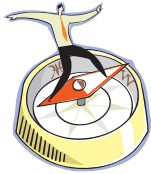
In addition to the rights set out above, each creditor has a right to vote to amend, approve or reject a proposed business rescue plan. If the business rescue plan is rejected, a creditor has the additional right to either propose the development of an alternative plan or present an offer to acquire the interests of any or all other creditors.

While Section 145 of the Companies Act identifies the applicable rights, which are broad and mostly uncomplicated, a right only has value if exercised. Smaller creditors tend to err on the side of caution and frequently adopt a “head in the sand” approach and wait for others to get involved rather than involve themselves.

If a large company with numerous creditors is under business rescue, it may be advantageous for creditors to form a “creditors committee”, which the business rescue practitioner would be required to consult while the business rescue plan is being developed. The creditors committee may not give instructions to the business rescue practitioner, but has a right to receive and consider reports relating to the business rescue process.

It is significant to note that the role of creditors in the Companies Act extends





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far wider than just being statutory rights. Commercial concerns assume as much significance with the essential question being whether the business can in fact be rescued. In business rescue proceedings, all creditors, no matter how small a claim they may hold, should engage actively in the business rescue process; they ought to vigorously interrogate the rescue plan and proposals put forward by the business rescue practitioner.

This means that creditors ultimately require two different skill sets to participate and engage meaningfully in the business rescue process. The first skill is legal, so as to ensure strict compliance with the myriad of statutory participatory rights set out in Chapter 6 of the Companies Act. The second skill is more commercial, such that the prospects of success through business rescue are reasonable and even possible so as to ascertain that it would make commercial sense for the business to be rescued.

If a creditor wants to actively participate in the business rescue process, the devil is very often in the detail and much time and often expertise is required from them. For example, Section 150 of the Companies Act concerns the contents of a proposed business rescue plan. Business rescue plans are generally lengthy and complicated at first glance and often require legal assistance in working through them. This can be very daunting to creditors, especially smaller creditors, who lack the time and/or the finances to be involved, let alone the skill set to challenge the plan. However, creditors need to know that if they actively participate in the business rescue process and are able to challenge the plan on a legal and commercial basis, this may result in an increased benefit for creditors.

Business rescue will certainly form part of the new normal as the COVID-19 lockdown is relaxed and we prepare for life after lockdown. Creditors need to actively participate in this process and should not be intimidated by perceived complexity. Creditors need to be vigilant and are encouraged to seek professional advice on all aspects of the business rescue process.

Knowles Husain Lindsay Inc have various skilled practitioners who are well placed to assist and advise creditors in relation to the business rescue process, as well as insolvency related matters.

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