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Kaapstad,

## THE PRESIDENCY

No. 421 9 April 2009

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

**No. 71 of 2008: Companies Act, 2008.**

## DIE PRESIDENSIE

No. 421 9 April 2009

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

**No. 71 van 2008: Maatskappywet, 2008.**



**AIDS HELPLINE: 0800-0123-22 Prevention is the cure**

**CHAPTER 6**  
**BUSINESS RESCUE AND COMPROMISE WITH CREDITORS**

*Part*

*Business rescue proceedings*

**Application and definitions applicable to Chapter** 5

- 128.** (1) In this Chapter—
- (a) **“affected person”**, in relation to a company, means—
    - (i) a shareholder or creditor of the company;
    - (ii) any registered trade union representing employees of the company; and
    - (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives; 10
  - (b) **“business rescue”** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
    - (i) the temporary supervision of the company, and of the management of its affairs, business and property; 15
    - (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
    - (iii) the 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 maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company; 20
  - (c) **“business rescue plan”** means a plan contemplated in section 150; 25
  - (d) **“business rescue practitioner”** means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and ‘practitioner’ has a corresponding meaning; 30
  - (e) **“court”**, depending on the context, means either—
    - (i) the High Court that has jurisdiction over the matter; or
    - (ii) either—
      - (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or 35
      - (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3); 40
  - (f) **“financially distressed”**, in reference to a particular company at any particular time, means that—
    - (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or 45
    - (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;
  - (g) **“independent creditor”** means a person who—
    - (i) is a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2); and 50
    - (ii) is not related to the company, a director, or the practitioner, subject to subsection (2);
  - (h) **“rescuing the company”** means achieving the goals set out in the definition of **“business rescue”** in paragraph (b);
  - (i) **“supervision”** means the oversight imposed on a company during its business rescue proceedings; and 55

(j) “**voting interest**” means an interest as recognised, appraised and valued in terms of section 145(4) to (6).

(2) For the purpose of subsection (1)(f), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds shares of that company. 5

(3) For the purposes contemplated in subsection (1)(e) or in any other law, the Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.

### **Company resolution to begin business rescue proceedings** 10

**129.** (1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company. 15

(2) A resolution contemplated in subsection (1)—

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must— 20

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and 25

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)(b), a company must— 30

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

(5) If a company fails to comply with any provision of subsection (3) or (4)— 35

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

(b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution. 40

(6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2). 45

(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128(1)(e) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section. 50

### **Objections to company resolution**

**130.** (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

(a) setting aside the resolution, on the grounds that— 55

(i) there is no reasonable basis for believing that the company is financially distressed;

- (ii) there is no reasonable prospect for rescuing the company; or
  - (iii) the company has failed to satisfy the procedural requirements set out in section 129;
  - (b) setting aside the appointment of the practitioner, on the grounds that the practitioner—
    - (i) does not satisfy the requirements of section 138;
    - (ii) is not independent of the company or its management; or
    - (iii) lacks the necessary skills, having regard to the company's circumstances; or
  - (c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.
- (2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of—
- (a) subsection (1)(a) to set aside that resolution; or
  - (b) subsection (1)(b) to set aside the appointment of the practitioner appointed by the company,
- unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.
- (3) An applicant in terms of subsection (1) must—
- (a) serve a copy of the application on the company and the Commission; and
  - (b) notify each affected person of the application in the prescribed manner.
- (4) Each affected person has a right to participate in the hearing of an application in terms of this section.
- (5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may—
- (a) set aside the resolution—
    - (i) on any grounds set out in subsection (1); or
    - (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;
  - (b) afford the practitioner sufficient time to form an opinion whether or not—
    - (i) the company appears to be financially distressed; or
    - (ii) there is a reasonable prospect of rescuing the company,
 and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and
  - (c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including—
    - (i) an order placing the company under liquidation; or
    - (ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76(4) and (5).
- (6) If, after considering an application in terms of subsection (1)(b), the court makes an order setting aside the appointment of a practitioner—
- (a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and
  - (b) the provisions of subsection (5)(b), if relevant, apply to the practitioner appointed in terms of paragraph (a).

### **Court order to begin business rescue proceedings**

**131.** (1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

- (2) An applicant in terms of subsection (1) must—
- (a) serve a copy of the application on the company and the Commission; and
  - (b) notify each affected person of the application in the prescribed manner.
- (3) Each affected person has a right to participate in the hearing of an application in terms of this section. 5
- (4) After considering an application in terms of subsection (1), the court may—
- (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—
    - (i) the company is financially distressed;
    - (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
    - (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or
  - (b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation. 10 15
- (5) If the court makes an order in terms of subsection (4)(a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147. 20
- (6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until— 25
- (a) the court has adjudicated upon the application; or
  - (b) the business rescue proceedings end, if the court makes the order applied for.
- (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company. 30
- (8) A company that has been placed under supervision in terms of this section—
- (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132(2); and 35
  - (b) must notify each affected person of the order within five business days after the date of the order.

### **Duration of business rescue proceedings**

- 132.** (1) Business rescue proceedings begin when—
- (a) the company— 40
    - (i) files a resolution to place itself under supervision in terms of section 129(3); or
    - (ii) applies to the court for consent to file a resolution in terms of section 129(5)(b);
  - (b) a person applies to the court for an order placing the company under supervision in terms of section 131(1); or
  - (c) during the course of liquidation proceedings, or proceedings to enforce a security interest, a court makes an order placing the company under supervision. 45
- (2) Business rescue proceedings end when— 50
- (a) the court—
    - (i) sets aside the resolution or order that began those proceedings; or
    - (ii) has converted the proceedings to liquidation proceedings;
  - (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or 55
  - (c) a business rescue plan has been—
    - (i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or



- (ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.
- (3) 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— 5
  - (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— 10
    - (i) court, if the proceedings have been the subject of a court order; or
    - (ii) Commission, in any other case.

### General moratorium on legal proceedings against company

- 133.** (1) 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— 15
- (a) with the written consent of the practitioner;
  - (b) with the leave of the court and in accordance with any terms the court considers suitable; 20
  - (c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
  - (d) criminal proceedings against the company or any of its directors or officers; or
  - (e) proceedings concerning any property or right over which the company exercises the powers of a trustee. 25
- (2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances. 30
- (3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

### Protection of property interests

- 134.** Subject to subsections (2) and (3), during a company's business rescue proceedings— 35
- (a) the company may dispose, or agree to dispose, of property only—
    - (i) in the ordinary course of its business;
    - (ii) in a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the practitioner; or 40
    - (iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;
  - (b) any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and 45
  - (c) 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 whether the property is owned by the company, except to the extent that the practitioner consents in writing. 50
- (2) The practitioner may not unreasonably withhold consent in terms of subsection (1)(c), having regard to—
- (a) the purposes of this Chapter; 55
  - (b) the circumstances of the company; and

- (c) the nature of the property, and the rights claimed in respect of it.
- (3) 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 5
  - (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 10
    - (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.

### Post-commencement finance

- 135.** (1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee—
- (a) the money is regarded to be post-commencement financing; and
  - (b) will be paid in the order of preference set out in subsection (3)(a).
- (2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing—
- (a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
  - (b) will be paid in the order of preference set out in subsection (3)(b).
- (3) After payment of the practitioner's remuneration and costs referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—
- (a) in subsection (1) will be treated equally, but will have preference over—
    - (i) all claims contemplated in subsection (2), irrespective whether or not they are secured; and 30
    - (ii) all unsecured claims against the company; or
  - (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
- (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation. 35

### Effect of business rescue on employees and contracts

- 136.** (1) Despite any provision of an agreement to the contrary—
- (a) during a company's business rescue proceedings employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—
    - (i) changes occur in the ordinary course of attrition; or
    - (ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and
  - (b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act No. 66 of 1995), and other applicable employment related legislation. 45
- (2) Subject to sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may cancel or suspend entirely, partially or conditionally any provision of an agreement to which the company is a party at the commencement of the business rescue period, other than an agreement of employment. 50

(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.

(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began. 5

### **Effect on shareholders and directors**

**137.** (1) During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent— 10

- (a) that the court otherwise directs; or
- (b) contemplated in an approved business rescue plan.

(2) During a company's business rescue proceedings, each director of the company— 15

- (a) must continue to exercise the functions of director, subject to the authority of the practitioner;

- (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

- (c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and 20

- (d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)(a), (b) and (c).

(3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required. 25

(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner. 30

(5) At any time during the business rescue proceedings, the practitioner may apply to a court for an order removing a director from office on the grounds that the director has—

- (a) failed to comply with a requirement of this Chapter; or 35
- (b) by act or omission, has impeded, or is impeding—

- (i) the practitioner in the performance of the powers and functions of practitioner;

- (ii) the management of the company by the practitioner; or

- (iii) the development or implementation of a business rescue plan in accordance with this Chapter. 40

(6) Subsection (5) is in addition to any right of a person to apply to a court for an order contemplated in section 162.

## **Part B**

### ***Practitioner's functions and terms of appointment*** 45

#### **Qualifications of practitioners**

**138.** (1) A person may be appointed as the practitioner of a company only if the person—

- (a) is a member in good standing of a profession subject to regulation by a regulatory authority prescribed by the Minister in terms of subsection (2); 50

- (b) is not subject to an order of probation in terms of section 162(7);

- (c) would not be disqualified from acting as a director of the company in terms of section 69(8);



- (d) 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; and
  - (e) is not related to a person who has a relationship contemplated in paragraph (d). 5
- (2) The Minister may designate one person or association within the Republic to regulate the practice of persons as practitioners in terms of this Act, if that person or association—
- (a) is committed to achieving the purposes of this Chapter;
  - (b) functions predominantly to promote sound principles and good practice of business turnaround or rescue; and 10
  - (c) has sufficient human, financial and operational resources, and adequate administrative procedures and safeguards, to enable it to function efficiently and to effectively carry out its functions in terms of this Chapter, or presents to the Minister a credible plan to acquire or develop those resources. 15
- (3) The Minister may—
- (a) impose reasonable conditions upon a person or association designated by the Minister in terms of subsection (2) with respect to the carrying out of its functions and powers in terms of this Chapter; and
  - (b) make regulations prescribing— 20
    - (i) minimum qualifications for admission of a person to the practice of a business rescue practitioner; and
    - (ii) procedures to be followed by a person or association designated by the Minister in terms of subsection (2) in carrying out its functions and powers in terms of this Chapter. 25

### Removal and replacement of practitioner

- 139.** (1) A practitioner may be removed only—
- (a) by a court order in terms of section 130; or
  - (b) as provided for in this section.
- (2) 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: 30
- (a) Incompetence or failure to perform duties;
  - (b) failure to exercise the proper degree of care in the performance of the practitioner's functions;
  - (c) engaging in illegal acts or conduct; 35
  - (d) if the practitioner no longer satisfies the requirements set out in section 138(1);
  - (e) conflict of interest or lack of independence; or
  - (f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time. 40
- (3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130(1)(b) to set aside that new appointment.

### General powers and duties of practitioners 45

- 140.** (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—
- (a) has full management control of the company in substitution for its board and pre-existing management;
  - (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company; 50
  - (c) may—
    - (i) remove from office any person who forms part of the pre-existing management of the company; or
    - (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and 55

- (d) is responsible to—
  - (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and
  - (ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter. 5
- (2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person—
  - (a) has 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; or 10
  - (b) is related to a person who has a relationship contemplated in paragraph (a).
- (3) During a company’s business rescue proceedings, the practitioner—
  - (a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court; 15
  - (b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and
  - (c) other than as contemplated in paragraph (b)—
    - (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; 20
    - but
    - (ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner. 25
- (4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.

#### **Investigation of affairs of company**

- 141.** (1) As soon as practicable after being appointed, a practitioner must investigate the company’s affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued. 30
- (2) 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— 35
    - (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; 40
  - (b) there no longer are 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 in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or 45
    - (ii) otherwise, file a notice of termination of the business rescue proceedings; or
  - (c) there is evidence, in the dealings of the company before the business rescue proceedings began, of— 50
    - (i) voidable transactions, or a failure by the company or any director to perform any material obligation relating to the company, the practitioner must direct the management to take any necessary steps to rectify the matter; 55
    - (ii) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must—
      - (aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

(bb) direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.

(3) A court to which an application has been made in terms of subsection (2)(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances. 5

### **Directors of company to co-operate with and assist practitioner**

**142.** (1) As soon as practicable after business rescue proceedings begin, each director of a company must deliver to the practitioner all books and records that relate to the affairs of the company and are in the director's possession. 10

(2) Any director of a company who knows where other books and records relating to the company are being kept, must inform the practitioner as to the whereabouts of those books and records.

(3) Within five business days after business rescue proceedings begin, or such longer period as the practitioner allows, the directors of a company must provide the practitioner with a statement of affairs containing, at a minimum, particulars of the following: 15

- (a) Any material transactions involved the company or the assets of the company, and occurring within 12 months immediately before the business rescue proceedings began; 20
- (b) any court, arbitration or administrative proceedings, including enforcement proceedings, involving the company;
- (c) the assets and liabilities of the company, and its income and disbursements within the immediately preceding 12 months;
- (d) the number of employees, and any collective agreements or other agreements relating to the rights of employees; 25
- (e) any debtors and their obligations to the company; and
- (f) any creditors and their rights or claims against the company.

(4) No person is entitled, as against the practitioner of a company, to retain possession of any books or records of the company, or to claim or enforce a lien over any such books or records. 30

### **Remuneration of practitioner**

**143.** (1) The 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 subsection (6). 35

(2) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (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 40
- (b) the attainment of any particular result or combination of results relating to the business rescue proceedings.

(3) Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by—

- (a) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145(4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and 45
- (b) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement. 50

(4) A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that—

- (a) the agreement is not just and equitable; or 55

- (b) that the remuneration provided for in the agreement is egregiously unreasonable having regard to the financial circumstances of the company.
- (5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors. 5
- (6) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).

### *Part C*

#### *Rights of affected persons during business rescue proceedings*

- Rights of employees** 10
- 144.** (1) During a company's business rescue proceedings any employees of the company who are—
- (a) represented by a registered trade union may exercise any rights set out in this Chapter—
    - (i) collectively through their trade union; and 15
    - (ii) in accordance with applicable labour law; or
  - (b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.
- (2) 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 this Chapter. 20 25
- (3) During a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to—
- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings and such notice must be given to employees at their workplace and served at the head office of the relevant trade union; 30
  - (b) participate in any court proceedings arising during the business rescue proceedings;
  - (c) form a committee of employees' representatives; 35
  - (d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152(1)(c);
  - (e) be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152(1)(c); 40
  - (f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection (1); and
  - (g) if the proposed business rescue plan is rejected, to—
    - (i) propose the development of an alternative plan, in the manner contemplated in section 153; or 45
    - (ii) present an offer to acquire the interests of one or more affected persons, in the manner contemplated in section 153.
- (4) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of— 50
- (a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and 55

- (b) in the case of a defined benefit pension scheme, the present value at the commencement of the business rescue proceedings of any unfunded liability under that scheme.

(5) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order. 5

### Participation by creditors

**145.** (1) Each creditor is entitled to—

- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings; 10
- (b) participate in any court proceedings arising during the business rescue proceedings;
- (c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and
- (d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner. 15

(2) In addition to the rights set out in subsection (1), each creditor has—

- (a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and
- (b) if the proposed business rescue plan is rejected, a further right to— 20
- (i) propose the development of an alternative plan, in the manner contemplated in section 153; or
- (ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.

(3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan. 25

(4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests—

- (a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and 30
- (b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company. 35

(5) The practitioner of a company must—

- (a) determine whether a creditor is independent for the purposes of this Chapter;
- (b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4)(b); and
- (c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151. 40

(6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to—

- (a) review the practitioner's determination that the person is, or is not, an independent creditor; or 45
- (b) review, re-appraise and re-value that person's voting interest, as determined in terms of subsection (5)(b). 50

### Participation by holders of company's securities

**146.** During a company's business rescue proceedings, each holder of any issued security of the company is entitled to— 50

- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
- (b) participate in any court proceedings arising during the business rescue proceedings; 55



- (c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter;
- (d) vote to approve or reject a proposed business rescue plan in the manner contemplated in section 152, if the plan would alter the rights associated with the class of securities held by that person; and 5
- (e) if the business rescue plan is rejected, to—
  - (i) propose the development of an alternative plan, in the manner contemplated in section 153; or
  - (ii) present an offer to acquire the interests of any or all of the creditors or other holders of the company's securities in the manner contemplated in section 153. 10

### **First meeting of creditors**

- 147.** (1) Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of creditors, at which—
- (a) the practitioner— 15
    - (i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company; and
    - (ii) may receive proof of claims by creditors; and
  - (b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee. 20
- (2) The practitioner must give notice of the first meeting of creditors to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner, setting out the—
- (a) date, time and place of the meeting; and
  - (b) agenda for the meeting. 25
- (3) At any meeting of creditors, other than the meeting contemplated in section 151, a decision supported by the holders of a simple majority of the independent creditors' voting interests voted on a matter, is the decision of the meeting on that matter.

### **First meeting of employees' representatives**

- 148.** (1) Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of employees' representatives, at which— 30
- (a) the practitioner must inform the employees' representatives whether the practitioner believes that there is a reasonable prospect of rescuing the company; and
  - (b) the employees' representatives may determine whether or not an employees' committee should be appointed and, if so, may appoint the members of the committee. 35
- (2) The practitioner must give notice of the meeting to every registered trade union representing employees of the company and, if there are any employees who are not represented by such a registered trade union, to those employees, or their representatives, setting out the— 40
- (a) date, time and place of the meeting; and
  - (b) agenda for the meeting.

### **Functions, duties and membership of committees of affected persons**

- 149.** (1) A committee of employees, or of creditors, appointed in terms of section 147 or 148, respectively— 45
- (a) may consult with the practitioner about any matter relating to the business rescue proceedings, but may not direct or instruct the practitioner;
  - (b) may, on behalf of the general body of creditors or employees, respectively, receive and consider reports relating to the business rescue proceedings; and 50
  - (c) must act independently of the practitioner to ensure fair and unbiased representation of creditors' or employees' interests.

- (2) A person may be a member of a committee of creditors or employees, respectively, only if the person is—
- (a) an independent creditor, or an employee, of the company;
  - (b) an agent, proxy or attorney of an independent creditor or employee, or other person acting under a general power of attorney; or
  - (c) authorised in writing by an independent creditor or employee to be a member.

### *Part D*

#### *Development and approval of business rescue plan*

#### **Proposal of business rescue plan**

**150.** (1) The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151.

(2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts, as follows:

- (a) **Part A—Background**, which must include at least—
  - (i) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;
  - (ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
  - (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
  - (iv) a complete list of the holders of the company’s issued securities;
  - (v) a copy of the written agreement concerning the practitioner’s remuneration; and
  - (vi) a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.
- (b) **Part B—Proposals**, which must include at least—
  - (i) the nature and duration of any moratorium for which the business rescue plan makes provision;
  - (ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
  - (iii) the ongoing role of the company, and the treatment of any existing agreements;
  - (iv) the property of the company that is to be available to pay creditors’ claims in terms of the business rescue plan;
  - (v) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;
  - (vi) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and
  - (vii) the effect that the business rescue plan will have on the holders of each class of the company’s issued securities.
- (c) **Part C—Assumptions and conditions**, which must include at least—
  - (i) a statement of the conditions that must be satisfied, if any, for the business rescue plan to—
    - (aa) come into operation; and
    - (bb) be fully implemented;
  - (ii) the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;

- (iii) the circumstances in which the business rescue plan will end; and
- (iv) a projected—
  - (aa) balance sheet for the company; and
  - (bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted. 5
- (3) The projected balance sheet and statement required by subsection (2)(c)(iv)—
  - (a) must include a notice of any material assumptions on which the projections are based; and
  - (b) may include alternative projections based on varying assumptions and contingencies. 10
- (4) A proposed business rescue plan must conclude with a certificate by the practitioner stating that any—
  - (a) actual information provided appears to be accurate, complete, and up to date; and
  - (b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement. 15
- (5) 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—
  - (a) the court, on application by the company; or 20
  - (b) the holders of a majority of the creditors' voting interests.

#### **Meeting to determine future of company**

- 151.** (1) The practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the proposed rescue plan within 10 business days after the publication of that plan in terms of section 150. 25
- (2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out—
  - (a) the date, time and place of the meeting;
  - (b) the agenda of the meeting; and 30
  - (c) a summary of the rights of affected persons to participate in and vote at the meeting.
- (3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153. 35

#### **Consideration of business rescue plan**

- 152.** (1) At a meeting convened in terms of section 151, the practitioner must—
  - (a) introduce the proposed business rescue plan for consideration by the creditors, and if applicable, by the shareholders;
  - (b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued; 40
  - (c) provide an opportunity for the employees' representatives to address the meeting;
  - (d) invite discussion, and entertain and conduct a vote, on any motions to—
    - (i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or 45
    - (ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and
  - (e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii). 50
- (2) In a vote called in terms of subsection (1)(e), the proposed business rescue plan will be approved on a preliminary basis if—
  - (a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and 55

- (b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.
- (3) If a proposed business rescue plan—
- (a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153; 5
  - (b) does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or
  - (c) does alter the rights of any class of holders of the company's securities— 10
    - (i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities who rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and
    - (ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised— 15
      - (aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or
      - (bb) oppose adoption of the plan, the plan is rejected, and may be 20 considered further only in terms of section 153.
- (4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—
- (a) was present at the meeting; 25
  - (b) voted in favour of adoption of the plan; or
  - (c) in the case of creditors, had proven their claims against the company.
- (5) The company, under the direction of the practitioner, must take all necessary steps to—
- (a) attempt to satisfy any conditions on which the business rescue plan is 30 contingent; and
  - (b) implement the plan as adopted.
- (6) To the extent necessary to implement an adopted business rescue plan—
- (a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 35 40 to the contrary; and
  - (b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3)(c), the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not 40 otherwise authorised, but are contemplated to be issued in terms the business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.
- (7) Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as contemplated in section 39, does not apply with respect to an issue of shares by the company in terms of the business 45 rescue plan.
- (8) When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.

**Failure to adopt business rescue plan** 50

- 153.** (1) (a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may—
- (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

- (ii) 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 it was inappropriate.
- (b) If the practitioner does not take any action contemplated in paragraph (a)—
  - (i) any affected person present at the meeting may—
    - (aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or
    - (bb) 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; or
  - (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.
- (2) If the practitioner, acting in terms of subsection (1)(a)(ii), or an affected person, acting in terms of subsection (1)(b)(i)(bb), informs the meeting that an application will be made to the court as contemplated in those provisions, the practitioner must adjourn the meeting—
  - (a) for five business days, unless the contemplated application is made to the court during that time; or
  - (b) until the court has disposed of the contemplated application.
- (3) If, on the request of the practitioner in terms of subsection (1)(a)(i), or a call by an affected person in terms of subsection (1)(b)(i)(aa), the meeting directs the practitioner to prepare and publish a revised business rescue plan—
  - (a) the practitioner must—
    - (i) conclude the meeting after that vote; and
    - (ii) prepare and publish a new or revised business rescue plan within 10 business days; and
  - (b) the provisions of this Part apply afresh to the publishing and consideration of that new or revised plan.
- (4) If an affected person makes an offer contemplated in subsection (1)(b)(ii), the practitioner must—
  - (a) adjourn the meeting for no more than five business days, as necessary to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer; and
  - (b) set a date for resumption of the meeting, without further notice, at which the provisions of section 152 and this section will apply afresh.
- (5) If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings.
- (6) A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1)(b)(ii).

#### **Discharge of debts and claims**

**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.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.



*Part E**Compromise with creditors***Compromise between company and creditors**

**155.** (1) This section applies to a company, irrespective of whether or not it is financially distressed as defined in section 128(1)(f), unless it is engaged in business rescue proceedings in terms of this Chapter. 5

(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— 10

- (a) 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
- (b) the Commission.

(3) A proposal contemplated in subsection (2) must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal, and must be divided into three Parts, as follows: 15

- (a) **Part A—Background**, which must include at least—
  - (i) a complete list of all the material assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal; 20
  - (ii) a complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims; 25
  - (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
  - (iv) a complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and 30
  - (v) whether the proposal includes a proposal made informally by a creditor of the company.
- (b) **Part B—Proposals**, which must include at least—
  - (i) the nature and duration of any proposed debt moratorium;
  - (ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company; 35
  - (iii) the treatment of contracts and ongoing role of the company;
  - (iv) the property of the company that is proposed to be available to pay creditors' claims; 40
  - (v) the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and
  - (vi) the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation. 45
- (c) **Part C—Assumptions and conditions**, which must include at least—
  - (i) a statement of the conditions that must be satisfied, if any, for the proposal to—
    - (aa) come into operation; and
    - (bb) be fully implemented; 50
  - (ii) the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment; and
  - (iii) a projected—
    - (aa) balance sheet for the company; and
    - (bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposal is accepted. 55