

When things go bad. Business liquidation or business rescue?

By [Faith Ngwenya](#)

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South African companies in financial trouble are opting for business rescue rather than shutting their doors. While many believe that a business rescue process is only implemented to stall a liquidation, thereby also frustrating the creditors of a company, this is not the case.



Faith Ngwenya of Saipa

Business rescue, which is a process of rehabilitating a business that is in financial distress by providing temporary supervision and management by a business rescue practitioner, should not be used as means to stall the liquidation process. The process aims to provide the business entity an opportunity to reorganise and restructure its affairs, while having the protection of the law against any legal proceedings.

It is possible that at the time of applying for business rescue it seemed as the best solution to address the financial distress of the entity; however, in many instances, after initiating the rescue, it can become obvious that the prospects of a successful rescue are slim. The business rescue practitioner then moves to terminate the rescue and applies for liquidation. This way it will save the assets of the entity from further being depleted.

Business rescue step by step

Once a company commences business rescue proceedings either voluntarily (section 129) or by an order of court (on application by an affected person) the following actions are prescribed by the Act:

- The registered business rescue practitioner must be approached to investigate the affairs of the company as soon as possible after the start of business rescue.
- Within 10 business days after being appointed, the practitioner must convene a meeting of the creditors and a meeting of the employees and advise them of the prospects of rescuing the company.
- The business rescue plan, as proposed by the practitioner, must be published by the company within 25 days after the date on which the business rescue practitioner was appointed. The business rescue practitioner must then convene a meeting of the creditors and any other holders of a voting interest, for considering the proposed plan, within ten business days of the publication of the business rescue plan.

Last year, the Companies and Intellectual Property Commission (CIPC) accredited the South African Institute of Professional Accountants (Saipa) to regulate its members that are eligible to be business rescue practitioners in line with Companies Act. This forms part of a broader plan to regulate the business rescue sector and only Saipa members in good standing can be licensed as business rescue practitioners as from the beginning of 2017.

How does it affect creditors?

Under the supervision of the business rescue practitioner, creditors need to comply with their obligations to supply goods or services to the company in the same way they did prior to the commencement of business rescue proceedings, unless the agreement between the company and the creditor regulates the relationship between the parties in the event of an insolvency or business rescue.

However, it is understandable that unsecured creditors and lenders during business rescue would be wary of continuing to service or supply goods to the company on the same basis on which they did prior to a business rescue as their claims will be satisfied last in accordance with the order of preference for the payment of claims prescribed by the act.

Going, going, gone

Liquidation, which is the dissolving of a business entity by realising its assets and liabilities and distributing the net proceeds if any to the shareholders, can be set about by a voluntary application. The trigger for a liquidation is the moment liabilities of the business exceed its assets, the business is insolvent and must stop trading. The first step is to decide on a date for the last day of trading. Any income derived after this date will be for the benefit of the insolvent estate and thus the creditors.

The application is submitted to the High Court of South Africa and the court supplies a case number, which is delivered to the business' registered address. The provisional application court date is set and the application is brought by the applicant on a semi-urgent basis. The application entails immediate relief granted by the court, which means that the creditors don't receive notice of the application first. The court grants the provisional order and postpones the matter to ensure that creditors receive notification, with the exception of the South African Revenue Service, which receives notification of the application before the set court date.

The provisional order is important, as once it has been granted, no creditor can take any steps to recover debt from the business. The matter is postponed for a period of 30 days and during this period, notice is sent to all relevant parties, giving them time to oppose the liquidation application before the court return date. If no opposition is lodged during this period, the court grants the final liquidation order and the business entity is liquidated. If there is opposition, the relevant party must submit an affidavit detailing the reasons for opposing the application and a trial may follow.

ABOUT THE AUTHOR

Faith Ngwenya is the spokesperson of the South African Institute of Professional Accountants (Saipa)

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