

Short notes on:

What is business rescue:

Introduction

As businesses frequently encounter more and more financial difficulties, business rescue has become an increasingly more frequent occurrence. However, it is essential to understand the nature of business rescue and the implications thereof. This article will attempt to give a brief and broad overview of business rescue.

What is Business Rescue?

Business rescue is regulated by chapter 6 of the Companies Act 71 of 2008 (hereinafter referred to as the "Act"). As the name would imply, business rescue is an attempt to save a company from what the Act defines as financial distress. Financial distress carries a particular meaning in the context of business rescue and is defined in the Act as follows:

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;

When a company is placed under business rescue, the aim is to restructure certain aspects in such a manner that it would result in the company being rehabilitated, as such, and by providing a better return to creditors as opposed to the company having been liquidated. Business rescue is, therefore, often the last resort to avoid liquidation.

How are business rescue proceedings initiated: Voluntary business rescue

Similarly, to liquidation proceedings, business rescue proceedings are commenced in one of two ways – namely by the company voluntarily in terms of section 129 of the Act or by means of a court order by a third party in terms of section 131 of the Act. In the case of voluntary proceedings, the board of the company must undertake a special resolution to commence business rescue proceedings. The board must have reasonable grounds to believe that:

- The company is in financial distress as contemplated in the Act, or
- That there is a reasonable possibility of saving the company

Thereafter, the board would in terms of section 129(3) of the Act, have to file the resolution with the Companies and Intellectual Property Commission (CIPC), along with a sworn statement of facts setting out the grounds for the resolution, and appoint a suitable business rescue practitioner in terms of section 138 Act. After the appointment of the practitioner, a notice to this effect must be filed with the CIPC and published to all affected persons in terms of section 129(4) of the Act.

How are business rescue proceedings initiated: Business rescue by way of a court order?

The alternative is that any affected person may apply to court to have a company placed under business rescue, provided the company has itself not applied in terms of section 129 Act. The criteria for such an application are that the court must satisfy itself as to the following:

- the company is financially distressed;
- 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;
- it is otherwise just and equitable to do so for financial reasons; and if
- there is a reasonable prospect for rescuing the company.

It is important to note that affected persons are defined in the Act and can include a wide variety of persons, namely: shareholders or creditors, employees either in their personal or representative capacity.

Conclusion

In conclusion, business rescue has, in many instances, successfully avoided liquidation. Companies should, therefore, consider all the options available to them, especially in tough economic times. Contact an expert at SchoemanLaw Inc today for all your commercial law needs.