

APPOINTING BUSINESS RESCUE PRACTITIONERS

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KEY CHANGES TO THE APPOINTMENT PROCESS OF BUSINESS RESCUE PRACTITIONERS IN TERMS OF NOTICE 49 OF 2017

Business rescue was introduced in Chapter 6 of the Companies Act 71 of 2008 (the Act) as a new corporate rescue mechanism to assist companies in South Africa who find themselves suffering from financial difficulty. Business rescue provides distressed companies with temporary relief to allow for their rehabilitation. The successful rescue of companies is key in South Africa considering the high unemployment rate and the large number of businesses that are still being liquidated. The effective rescue of companies is therefore critical to the wellbeing of the communities that they operate in and our economy as a whole.

A company can be placed into business rescue in either of the following two ways: a resolution adopted by a companies' board of directors in terms of s129 of the Act; or a court application by an affected person in terms of s131 of the Act. Once a company is placed into business rescue, an independent person will be appointed as a business rescue practitioner, either by the board of directors of the company or by a court, to oversee and manage the process. One of the main duties of a business rescue practitioner is to develop and implement a sound business rescue plan that will either result in the company continuing to exist on a solvent basis or will provide a better return for the creditors or shareholders of the company than liquidation proceedings would.

The Act and the Companies Regulations 2011 (the

Regulations) regulate business rescue practitioners and the qualifications required for a person to be appointed as a business rescue practitioner. For a person to be eligible for appointment (bearing in mind s138(1)(c) to (f) of the Act which prohibits certain people from appointment as a business rescue practitioner) s138(1) of the Act requires prospective business rescue practitioners to be members in good standing of a legal, accounting, or business management professional body that is subject to regulation by a regulatory authority, and that is accredited by the Companies and Intellectual Property Commission (CIPC). In addition to this, CIPC on application, is also empowered to issue licenses to individual persons to practice as business rescue practitioners.

The Regulations require CIPC to consider the qualifications and experience that are required for a person to be a member of a specific professional body, as well as that professional body's ability to discipline its members. From the above it is evident that there is a certain degree of regulatory control over the appointment process to ensure that suitably qualified people are appointed to assist ailing companies.

It is important to note that in May 2017, CIPC introduced changes to the appointment process which appears to further regulate the appointment of business rescue practitioners. This new method was first introduced by CIPC in Notice 30 of 2017 on 2 May 2017 which was later withdrawn and replaced with Notice 49 of 2017 (Notice 49) on 19 September 2017.

In terms of Notice 49, all practitioners as well as aspiring practitioners must belong to either a legal, accounting or business management profession recognised by the South African Qualifications Authority (SAQA) or a juristic person created by an Act of Parliament.

Only those professional bodies, as well as juristic persons created by an Act of Parliament, would be accredited by CIPC to have their members licensed as business rescue practitioners. A deadline of 1 October 2017 was given for those professional bodies recognised by SAQA and juristic persons to apply to CIPC for accreditation. In such applications, professional bodies and juristic persons had to show compliance with their professional rules and disciplines to be able to accredit their own members.

Therefore, in terms of this new process, people will be now be licensed to act as business rescue practitioners through their membership to their recognised and accredited professional bodies or their accredited juristic persons, provided that they comply with the requirements to be set down by their professional bodies or juristic persons for accreditation as a member. This shows that being a member in good standing of a profession subject to regulatory authority of either a professional body or juristic person is still key to prospective business rescue practitioners being licensed.

However, it is important to take note that Notice 49 still makes provision for people who did not belong to a recognised professional body or juristic person before 1 October 2017, to still act as business rescue practitioners. This provision is made by allowing people to still bring individual applications to CIPC for conditional licenses to act in the capacity as a business rescue practitioner.

This new regulatory method is in its beginning phase, with work still to be done by CIPC in terms of accrediting professional bodies and juristic persons, and thereafter by the accredited professional bodies and juristic persons, in terms of ensuring that their members are in good standing and adhere to their



Reception at Cox Yeats Attorneys

rules and disciplines to be able to license them. This new procedure is an attempt by CIPC to exercise tighter control over who can be appointed to carry out the enormous and burdensome task of rescuing companies. CIPC, together with the accredited professional bodies and juristic persons will therefore play an integral role in ensuring that business rescue practitioners maintain the integrity of business rescue proceedings and that, where possible, fewer companies are liquidated.

INSOLVENCY & BUSINESS RESCUE TEAM

The Cox Yeats Insolvency & Business Rescue Team has extensive experience in insolvency, business rescue, schemes of arrangement and debt recovery and has represented individuals, SMEs and large corporates in this regard.

The team applies their commercial and legal expertise to provide assistance with: liquidations and sequestrations; cross-border insolvencies; business rescue; insolvency interrogations;

perfecting securities; offers of compromise, schemes of arrangement and matters relating to the prevention of organised crime.

Head of the Team, Thys Scheepers says, "The Cox Yeats Insolvency & Business Rescue Team carries out its work in keeping with the firm's mission and ethos, which is to give the best service to our clients. We always view our relationships with our clients as being long term and we invest time in understanding their various businesses challenges to determine the most effective strategies to reduce adversity and to allow for recovery."

The Insolvency & Business Rescue Team consists of Partners Thys Scheepers (Head of the Team), Callyn Wilkinson, David Vlcek, and Nkosinathi Gobhozi; Associate Tasmiya Patel, and Candidate Attorney Craig Berrange. ■

Should you require assistance or advice Insolvency & Business Rescue matters, contact us on 031-5368500 or email tscheepers@coxyeats.co.za; cwilkinson@coxyeats.co.za; dvlcek@coxyeats.co.za; ngobhozi@coxyeats.co.za; tpatel@coxyeats.co.za; or cberrange@coxyeats.co.za.

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