Introduction

Business Rescue has long been debated in South Africa and has been a hot topic for discussion for a number of years at many seminars and forums involving liquidators, lawyers, members of the Judiciary, the Department of Trade and Industry and representatives from the Ministry of Justice.

For many years practitioners in South Africa have taken note of the manner in which Chapter 11 filings work in the United States, and the various administration proceedings which operate in Australia and the United Kingdom.

The question has often been asked... What similar procedures have we had to fall back on in South Africa? Judicial management has always been the fall back position.

For many years legal practitioners and liquidators have accepted the fact that judicial management did not work in the South African scenario. Quite simply, judicial management was a precursor for liquidation proceedings. The reason for this was clearly that there was no obligation on the part of creditors or financiers to be placed in a position where they would be bound to a judicial management process by way of a court order. Once a judicial manager was appointed, any creditor would be entitled to place the company into liquidation. Looking through the various reported cases over the years, there have been a handful of judicial management matters, many of which have resulted in liquidation proceedings.

Certainly there has been a need for new Business Rescue provisions and the new Companies Bill certainly makes great efforts at introducing these principles into our law. We are expecting the new Companies Bill to come into law in 2010.

The recent Lehman Brothers collapse is a case in point. Immediately after the Chapter 11 filing, the receivers appointed in the United States were able to sell off portions of the company's business to parties such as Barclays. This simply is a reflection of the Chapter 11 process at work! In South Africa, this would be a very unlikely scenario. The company would go into liquidation and a liquidator would be forced to either sell off assets piecemeal at liquidation realisation prices or attempt to sell off portions of the business of the companies as a “going concern” which is in itself a very difficult process, particularly when one is attempting to sell at enhanced values for the benefit of creditors.

Rising fuel prices, a global shortage of food, rising interest rates, loss of asset and property values, coupled with rampant inflation will continue to place pressure on companies abroad and in South Africa. There is no doubt that sound companies will fail as a result of market and credit pressures.

So never before has “Business Rescue” been as topical as it is in the world economies of today, and particularly in South Africa.

Chapter 6, new Companies Bill, 2008

Chapter 6 of the Companies Bill, 2008 introduces principles relating to corporate rescues which brings us into line with international principles of turnarounds and corporate rescue as they exist in foreign jurisdictions.

Many overseas jurisdictions have referred to business turnarounds as “corporate recycling”.

Chapter 6 of the new Companies Bill, provides South Africa with a new mechanism in which companies can recover from a financially distressed situation.

A “financially distressed situation” would be when:

- 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
- it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
Various “Affected Persons” are in a position to bring Business Rescue proceedings in terms of the new provisions of the Companies Bill. These include shareholders, creditors, any registered trade union or any employee of the company or their respective representatives.

In terms of Chapter 6, Business Rescue encompasses proceedings which would facilitate the rehabilitation of a company which is financially distressed by providing for:

- the temporary supervision of the company, and of the management of its affairs, business and property;

- a temporary moratorium on the rights of claimants against the company in respect of property in its possession; and

- 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.

Therefore when one considers the prospect of a Business Rescue in terms of the new legislation, one would have to consider whether or not the Business Rescue would maximise returns for creditors and for the company itself and which would exceed expectations which might be achieved in a liquidation.

The company itself, or affected persons, can apply to court for Business Rescue proceedings.

Once applied for and obtained from a court, the whole process would be driven by the appointment of what is termed a “Business Rescue Practitioner”.

What is important is that the Companies Bill introduces the concept of “Post Commencement Finance” which entails a situation where, during its business rescue proceedings, a company may obtain financing which:

- may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

- will be paid in the order of preference as set out in the Bill.

Once Post Commencement Finance is obtained by the company, all claims from Post Commencement financiers would be paid in preference and in the order in which they were incurred over all other claims, including secured claims.

During a company’s Business Rescue proceedings, employees of the company, immediately before the commencement of these proceedings, would continue to be so employed by the company on the same terms and conditions, except to the extent that:

- changes occur in the ordinary course of attrition; or

- the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and

- any retrenchment of any such employees contemplated in the company’s Business Rescue plan will be subject to the relevant provisions of the Labour Relations Act, 1995.

During the company’s Business Rescue proceedings, each director of the company would continue to exercise the functions of a director subject to the authority of the Practitioner duly appointed.

The Practitioner is expected to operate the company and to continue to run its business with the assistance of the previous directors.

A Practitioner duly appointed:

- would have full management control of the company in substitution for its board and pre-existing management;

- may delegate any power or function of the Practitioner to a person who is part of the Board or pre-existing management of the company;

- may:
  - remove from office any person who forms part of the pre-existing management of the company; or

  - appoint a person as part of the management of a company whether to fill a vacancy or not; and

  - is responsible to:
    - develop a Business Rescue plan to be considered by all affected persons; and

    - implement any Business Rescue plan that has been adopted.

A Practitioner is also obligated to 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. The creditors are entitled to participate in any court proceedings in regard to the appointment of a Practitioner and the conduct by the Practitioner of the company’s business. The Practitioner, after consulting creditors and other affected persons and the management of the company must prepare a Business Rescue plan for consideration and possible adoption of meetings held with creditors.

The proposal for the Business Rescue plan would be considered by creditors and if applicable by shareholders and employees.

The proposed Business Rescue plan would be approved if:

- it was supported by the holders of more than 75% of the creditors’ voting interests that were voted; and

- the votes in support of the proposed plan included at least 50% of the independent creditors’ voting interests, if any, that were voted.

Once a Business Rescue plan has been adopted it is binding on the company and on each of the creditors of the company and every holder of the company’s securities.

The company is obligated under the direction of the Practitioner to take all necessary steps to attempt to satisfy any conditions on which the Business Rescue plan is contingent and implement the plan as adopted.

Once the Business Rescue plan has been substantially implemented, the Practitioner must file a notice of the substantial implementation of the Business Rescue plan.

It should be noted that if the Business Rescue plan has been rejected, the Practitioner is obligated to apply for the company’s liquidation.

Lastly, once a Business Rescue plan is implemented, in accordance with its terms and conditions, a creditor who has acceded to a part or the whole or part of the debt owing to that creditor, will lose the right to enforce the relevant debt or part of it.
Conclusion

Business Rescue brings us into line with the Chapter 11 processes in the United States as well as the administration procedures available in the United Kingdom and Australia.

The key will be an ability on the part of the Practitioner to work with existing management and directors and to ultimately be successful in the turnaround of a financially distressed company.

Cohesive vision shared by the Practitioner, the directors and management is essential and a level of trust will have to be established by the Practitioner at the commencement of the Business Recovery process.

Creditors and debtors representatives will have to be managed very carefully and the interplay between these parties, as affected persons, and the directors and management of the company will have to be carefully assessed and dealt with by the Practitioner.

All in all, this new legislation leapfrogs South Africa into a new Turnaround/Business Rescue dispensation which, once implemented (once the Companies Bill becomes an Act) will certainly assist corporate South Africa in rescuing not only the company itself, but the jobs that might be lost in the event of a liquidation.

Time will tell whether or not the actual sections of the Companies Bill are in fact workable, both within the context of corporate South Africa, and the skills available to implement what are challenging and often difficult processes.

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Widely experienced in litigation in banking, finance, insolvency, company restructuring and technology and intellectual property, Eric makes a point of keeping his knowledge current. After researching the then National Credit Bill in 2005, he was invited to provide submissions to the Parliamentary hearings on the Bill. Eric has given many presentations on the provision of reckless credit and regularly writes media articles on the topic. He is named as a recommended lawyer in restructuring and insolvency by PLC Which Lawyer and the PLC Cross Border Handbook, and is a member of the Association of Insolvency Practitioners of South Africa and of INSOL, a worldwide group of insolvency practitioners. Eric has BCom and LLB degrees, Higher Diplomas in Company Law and Tax and a Diploma in Insolvency Law.