

# From DISTRESS to SUCCESS



## Appointing the right BUSINESS RESCUE PRACTITIONER

Business rescue provides the opportunity for a business to return from a point of distress to a flourishing going concern. Critical to success is allowing sufficient time to appoint the right business rescue practitioner (BRP), someone who meets the statutory qualification requirements and enjoys acceptance by all affected persons (creditors, employees and shareholders). They are empathic, well resourced, experienced and with the right knowledge and passion to return the business to solvency – ultimately the person you are comfortable with trusting with the future of your business

After making the tough decision to enter your company into business rescue protection, you are faced with making the most important decision for the business' future success – who do I appoint as my business rescue practitioner (BRP)?

### PLANNING TO ENTER BUSINESS RESCUE

It is well documented that the key to success in the business rescue process is entering business rescue at the opportune moment – too early and it may not be necessary, too late and the chances of success are critically compromised.

The recurring theme in this article is that you need sufficient time to appoint the right BRP.

Effectively, you are appointing the person who will manage your business from distress to success! No business should ever consider rushing the appointment of a key role-player. In business rescue you are appointing someone who will have virtually unfettered control over the daily operations of the business (including being your line boss during supervision) while developing a plan for its future structure and survival – a plan on which the future security of your employees, your suppliers and the shareholders rests.

Enter business rescue as a last resort to stave off creditor action in an act of desperation with minimal planning, and you risk being left with no more than three days in which to appoint the BRP.

Your consequent desperation, lack of time and preparation is likely to result in nominating an inappropriate BRP in

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terms of the requirements for running the business, with terms of appointment not negotiated in the business' best interests. This may also possibly expose you to attack by the other affected parties, leading to either their nominee being appointed, or the process being terminated and the company entering liquidation.

The investigation into business rescue should include identifying your potential BRP. As with any key appointment, I believe you should:

- List the deliverables
- Identify the competencies required in the appointee
- Consider the Companies Act 71 of 2008 rules surrounding the appointment of a BRP
- Identify and secure the person to be appointed

I will explore general considerations under each of these topics but am aware that no two matters are the same and you would need to add or remove considerations under each of the first two points based on your specific circumstance. Importantly, you need to decide which considerations are critical, which are important and which are merely a 'nice to have' – this will ensure that you identify the best match to the business' needs and circumstances.

### WHAT ARE THE BRP'S DELIVERABLES?

On the surface this may seem obvious, but you have to consider and be prepared for all eventualities.

Below is an abbreviated listing of generic deliverables in what I believe should be the company's order of priority:

- 1 Return the company to solvency!
- 2 Develop a plan that ensures the company's future as a going concern.
- 3 Ensure that they have the support of sufficient affected persons to pass the business rescue plan.
- 4 Manage the business throughout the business rescue process.
- 5 Implement the business rescue plan and exit this in as short a time as is possible.
- 6 Ensure employees and creditors commit to the business rescue plan through open consultation.
- 7 Implement the business rescue plan in a manner that creates harmonious relationships with all affected persons.
- 8 Protect and build the company's brand.
- 9 If a business rescue plan cannot be devised achieving 1 and 2 above, then manage the process of closing down the business to the maximum benefit of all affected persons.

Below are three considerations which, while of concern to directors, I do not believe should influence the choice of BRP:

- 1 Can the business afford the BRP? The fee structure will be an aspect of the initial discussions with the BRP and play an important role in their deciding whether or not the business can be rescued through their management and consequently considering remuneration options.
- 2 Will the directors continue to have a job?
- 3 Will the directors be protected from third parties and potential reckless trading actions?

In respect of the latter two points, I believe the BRP can only commit to carrying out their statutory duties to the benefit of all affected parties, which may well include reporting the directors' actions. If these matters are raised by the directors, it should serve as a red flag concerning the directors' intentions and potential co-operation during the business rescue process to the BRP.

### WHAT SKILLS SET SHOULD YOUR BRP POSSESS?

This is a very difficult question to answer generically – below is my view on a potential order of priority. It is important to note that this list excludes the statutory minimum requirements detailed later as they are non-negotiable – the below considerations are used to choose from amongst a pool of qualified practitioners:

- 1 A proven track record as BRP or as a turnaround consultant
- 2 Experience of operating a business and preferably expertise within your company's niche
- 3 Knowledgeable of the legal requirements surrounding a business rescue and due to the sector becoming increasingly litigious, aligned to specialist lawyers
- 4 The time available to dedicate to the business rescue process and if they will be delegating duties to employees, you need to be as comfortable with their expertise as you will be working with the BRP!
- 5 Strong negotiating skills
- 6 Emotional intelligence and the ability to deal with the affected persons with empathy

- 7 A history of low conflict successful rescues helping in terms of their credibility with institutions such as banks and SARS
- 8 No history of big conflicts with these same institutions. Historical conflict and bad blood can lead the rescue down a conflictual path endangering success from the commencement
- 9 A history of being selective in accepting appointments – this is a strong indicator that they only take on assignments in which they believe they will succeed
- 10 Is highly flexible, adaptable, and able to make decisions and act on them in the absence of extensive information and data

In researching the BRP, the following will provide guidance:

- 1 Ask the BRP for their business rescue statistics:
  - Number of business rescues commenced
  - How many are still in process and the average period since commencement
  - How many have resulted in the company being rescued and the average duration of the intervention
  - How many have resulted in the company being either liquidated or traded to closure
- 2 Have any of their cases been the subject of litigation resulting in removal as the BRP?
- 3 Do they have access to post-commencement finance and, if so, from whom and the typical terms on which this has been advanced?
- 4 Ask to review, redacted if necessary, business rescue documentation to ensure that they have the ability to communicate in a clear and concise manner.
- 5 Have they had success in rallying stakeholders behind their business rescue plan? Ask for examples and references.
- 6 Do they have a team with sufficient gravitas and qualifications to manage your business?

The above will guide you as to whether the person being assessed is able to devise and implement a successful business rescue plan, restoring your company to solvency and giving it a future as a going concern. This information will only be apparent though talking to the BRP, researching them within the market and talking to directors of companies to which they have been appointed.

Your research should leave you with a feeling that if you were hiring a successor, this is a person you would happily consider for that position.

## WHAT ARE THE STATUTORY REQUIREMENTS TO ACT AS A BRP?

The industry has matured and is now more regulated. In terms of section 138 of the Act, a person may be appointed as the BRP of a company if the person is a member in good standing of a legal, accounting or business management profession who is accredited by the Companies and Intellectual Property Commission (CIPC) and has been licenced as such by the CIPC.

All BRPs are required to be licenced by the CIPC and belong to a professional body such as SAICA which regulates their activities.

All licenced practitioners are listed on the CIPC website, including their contact details, professional body affiliation and category of licence (senior, experienced or junior). This categorisation determines their ability to be appointed, based on the undertaking's size, their capacity and the maximum hourly and daily charge rates.

Section 130(1)(b) of the Act defines the basis on which the appointment of the BRP may be set aside, namely:

- Not qualified to be appointed in terms of section 138 (mostly met by virtue of their registration with a professional body and licencing through the CIPC), but also includes having any other relationship with the company which might compromise their impartiality, or related to a person who has such a relationship
- If the BRP is not independent of the company or its management
- If the BRP lacks the necessary skills when viewed against the company's circumstances

If the company's nomination is set aside in terms of this section, then the court will appoint an alternate BRP acceptable to the majority of independent creditors who brought about the application.

This would negate all the groundwork involved in identifying the original BRP and as such, extreme caution should be applied in assessing whether the potential for removal exists.

## CLOSING THOUGHTS

Identifying a BRP to appoint is not an easy task. Allow sufficient time to do a thorough evaluation, thereby avoiding appointing someone out of convenience or as an after-thought. The assessment and ultimate appointment need to be undertaken with reference to the resources available. Start by identifying those BRP with appropriate seniority based in your business' region from the CIPC website.

Consider the size of your business and whether or not a joint mandate of two BRPs is more appropriate.

The Internet will provide a wealth of information on your targets and should assist in quickly narrowing your search. From there, talk to the people on your shortlist and be satisfied that they can meet the deliverables of the process, are qualified to accept an appointment in terms of the Act and have the required skillset and personality traits to successfully rescue the company.

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