

## **BUSINESS RESCUE S.A.**

*A concept to assist cash strapped companies recover*

(A discussion document)

**Note: The unique feature of this proposal lies in the fact that the business cash flow becomes entirely controlled by the business rescue unit, and that the flow of cash arising is distributed by the rescuer, in terms of specific written agreements, giving confidence to creditors and credibility to the business rescuer itself.**

### **Reason for this paper**

A workshop meeting was called for on 4 November 2003 by Enver Daniels, Chief State Law Advisor, in the Law Commission's offices in Pretoria, attended by the leaders of South Africa's Liquidations Industry, attorneys, academics and representatives of the Banking Council.

### **Highlights of the meeting**

The two main issues on the agenda were:

1. Corruption in the Master's Office. There is nothing the Banking Council or its personnel can do about this matter. They will have to deal with these problems in their own way.
2. Company Rescue. This matter has been on our minds, within the Council, for some time, and a tentative paper was prepared in this respect some months ago. Copy either attached hereto, or emailed with this document.

### **Business Rescue**

In his opening address Mr Daniels stated that insolvencies were now costing South Africa R80 Billion each year! – With the numbers of companies being liquidated each year escalating alarmingly, resulting in jobs being lost by the thousand to the detriment of our country.

Mr Daniels went on to say that he and the government were looking for help in the interim while legislation took its course in being promulgated.

As the comments supporting the concept of business rescue were being developed it became clear that not everyone was happy about this concept because the very livelihood of some attorneys and liquidators was being threatened.

Certain task groups were proposed/formed to investigate aspects of this matter who will, no doubt report back later.

This matter is on Nedlac's table and they will be discussing this matter on 4 December 2003.

As it happens the Debtor Financing Committee has a vital interest in these matters, because insolvencies in our industry are very common, and the banks and liquidators often lock horns regarding collection of the insolvent's debtors and the different claims that arise.

The Debtor Financing Committee is capable of tabling a business plan that can be considered together with all the other proposals that Mr Daniels will receive.

This business plan has many advantages, however, we will highlight the principal ones:

- ⇒ The lead-time from conception, approval and implementation can be short.
- ⇒ The plan gives time for the government to get all its legislation right and in place.
- ⇒ The plan does not threaten the attorneys and liquidators engaged in this industry. In fact it gives them time to continue with their existing business and creatively transfers skills from being just liquidators to becoming business rescuers in the appropriate circumstances.
- ⇒ The plan removes suspicion and distrust. It fosters co-operation rather than the destructive competition one can witness from time to time in the liquidations industry.
- ⇒ The plan not only saves businesses, it will save jobs, by the thousand.

### How 'The Plan' Works

The plan works in the same way as the casualty ward of a hospital operates:

- The patient is taken in, admitted before or on Judicial Management.
- The emergency team does the initial diagnosis
- The emergency team removes the immediate objects causing the distress. Could be a dishonest entrepreneur, owner or shareholder. However, the problem can also be a faulty accounting system or the wrong financial products being used that cause an obstruction to successful business operations. Could be personnel or labour that needs to be removed initially.

- Once the patient is stabilised, it is moved in the wards, where the specialist surgeons, doctors and nursing procedures are provided.
- Vital support lines are attached to the patient, firstly air (moderate cash to continue operations). The life giving drips are set up (knowledge and expertise).
- The family members are called in, one by one. Family being the shareholders and directors, the personnel, labour, The Receiver of Revenue, the bankers, other financiers, and the creditors. Their visiting rights and obligations are explained to each one. Consequences of what might happen and how they, the visitor, will be affected, are spelled out to each one in private.
- Formal written agreements are then concluded with each family member.
- The needed blood gets ordered, i.e. the way the future cash flow will linked to the patient to help him recover, and pay back all the creditors. (this is a specialist operation taking great care. This aspect will be developed fully if this plan gains credence).
- The patient will quickly recover, be monitored in the wards, and ultimately be released from the commercial hospital feeling well ready to face life again.

### **The “Special Powers” required by the commercial hospital**

For the recovery unit to be successful it will have to have special powers:

- Ownership of the business entity will need to move into a ‘trust’ mode controlled by the business rescue unit while the necessary specialists do the initial investigation and while the business is being monitored, and the necessary financial re-engineering takes place.
- Once the business is on its feet again the shares/memberships are taken out of trust with ownership passing to the appropriate parties in terms of the recommendations of the business rescue unit.
- The business rescue unit will need the right and ability to remove shareholders, directors or troublesome personnel, and labour off the business premises in need.
- The rescue unit will need the ability to enter into contracts with specialist accountants, lawyers, bankers and cash flow managers (including the rescue unit itself) in its discretion.
- The special recovery unit should have the ability to suspend interest charges in certain cases, and in others to halt interest charges entirely, in its discretion.
- Similarly the business recovery unit will need the ability to suspend all service provider charges in some cases and halt provider service charges in the severe cases, in its discretion.

- The business recovery unit should be able to guarantee payment for the continued supply of goods and services that the business being monitored requires, in the discretion of the business recovery unit.
- The business recovery unit will need the power to negotiate with administrative personnel and factory labour, and hold the right to hire and fire personnel in its discretion.
- The business recovery unit will need the power to enter into agreements with personnel and labour while the business is recovering. Once the business has been declared fit to operate again all the State's laws become appropriate again.
- Similarly the business unit should have the ability to enter into agreements with the municipal providers of water, light and other services pertaining to arrear accounts and the continuation of services while the recovery takes place.
- The business recovery unit will need to have the ability to negotiate with the Receiver of Revenue regarding unpaid VAT and taxes and structure plans for the repayment of arrears.
- The business recovery unit will need to have the power to negotiate with the quasi state bodies regarding the levies etc., in arrears, and negotiate future payment patterns.
- The business recovery unit will need to have the ability to negotiate with all the finance providers and come to written terms of repayment.
- The business recovery unit will need the ability to negotiate with trade creditors as a body or individually in the recovery unit's discretion, and arrange written terms of repayment.
- The business recovery unit should be capable of suing, and being sued in respect of contracts entered into, or repayment arrangements concluded in the recovery proposition agreements.

### **The Founding of BUSINESS RESCUE S.A.**

A formal legal persona should be considered. A Section 21 company could be a possibility. This entity should not be taxable.

The objective of this organisation would not be to make profits, but to evaluate ailing businesses, and get them on their feet again, and to move them back into normal commercial life. To tax such an entity would be counter productive.

## The Funding of BUSINESS RESCUE S.A.

This concept would have to be designed in a way that it would be able to attract considerable sums of money:

- This could be done in a partnership arrangement between the Government and the private sector.

## Control of BUSINESS RESCUE S.A.

A **national** guiding panel consisting of the prominent players in the liquidation industry would need to be set up made up by:

State officials (Principal Master's Office and Law Commission)  
IPPSA  
Academics  
Etc.

**Regional** panels will need to be established wherever there is a Master's Office made up by:

The Local Master  
Representatives from the liquidators' office  
Representatives from the attorneys' offices  
Representatives from the financiers' offices  
Representatives from applicable labour unions  
Representatives from applicable creditor bodies

## The Two Critical Features:

### Critical Feature No.1:

All the parties concerned, the banks, creditors, liquidators, accountants and attorneys could be given the ability to apply for a business to go into the casualty section of the commercial hospital.

However, this hospital will need to reserve the right to whom it admits. It is pointless to admit a business that should go to the mortuary!

### Critical Feature No. 2

This aspect needs to be explained in more detail. At this stage suffice it to say that all cash flow control **must** vest in the business rescue unit. The concept is that the formal business rescue unit controls the cash flow, in terms of all the

specific agreements that have been made. This function, effectively run will create confidence, remove suspicion and bring credibility to the business rescue unit.

### **Financial Engineering**

While these processes are being handled the business rescue operators work to ensure that the business becomes adequately financed. To do this successfully it would help if there is a fund to turn to, controlled by BUSINESS RESCUE S.A. not by the normal commercial interests, e.g. the banks. An alternative could be that the business recovery unit could apply to the banks for funding that could be guaranteed by the sponsors of the program.

### **The Benefits of this Proposal:**

1. The Liquidators and Attorneys no longer have their livelihood threatened. They continue under all existing legislation.
2. The financiers, liquidators and attorneys have a place to apply for assistance with their ailing companies. If Business Rescue S.A. cannot assist in their own right, they give a recommendation to the applicant, who is free to accept or reject the business advice. Financiers who see this formal advice should be encouraged to act on it.
3. A whole new industry will arise, not competing with the liquidators and attorneys but working in co-operation with them in the national interest.
4. Many businesses will be saved, sometimes, after treatment, the businesses will go back to the original owners.
5. Jobs will be saved by the thousand!
6. There will be plenty of opportunity for liquidators and other parties engaged in the industry to earn fees in the reconstruction processes that will be in addition to the fees they fight for as businesses go insolvent today.
7. South Africa wins in the end!

Roger Herbert

Banking Council – Debtor Financing Committee – 10 November 2003

