

REPUBLIC OF SOUTH AFRICA

Department of Trade and Industry

COMPANIES BILL, 2007

Note: This document contains only Chapter 6: Business Rescue of the Companies Bill, 2007.

For more information, see:

[www.turnaround-sa.com/business rescue/business rescue.asp](http://www.turnaround-sa.com/business%20rescue/business%20rescue.asp)

Chapter 6 - Business Rescue

Part A – Business Rescue Proceedings

130. Definitions applicable only to this Chapter

- (1) In this Chapter –
- (a) “**affected person**”, in relation to a company, means -
 - (i) a shareholder or creditor of the company;
 - (ii) any registered trade union representing employees of the company; and
 - (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;
 - (b) “**business rescue**” means proceedings to facilitate the rehabilitation by its management of a company that is insolvent, or may imminently become insolvent, by providing for –
 - (i) the temporary supervision of the management of the affairs, business and property of the company;
 - (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 - (iii) the development and implementation, if approved, of a plan to rescue the company by re-structuring 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;

- (c) “**creditor**” means a person to whom a company owes money under any arrangement immediately before the beginning of the company’s business rescue proceedings, and for greater certainty, does not include a person who provides post-commencement finance to the company, as contemplated in section 138, except to the extent that such a person was a creditor of the company before providing that post-commencement finance;
 - (d) “**independent creditor**” means a creditor of the company, including an employee of the company who is a creditor in terms of section 147 (1), who is not related to the company, a director, or the supervisor;
 - (e) “**rescuing the company**” means achieving the goals set out in the definition of ‘business rescue’ in paragraph (b);
 - (f) “**supervision**” means the oversight imposed on the management of a company during its business rescue proceedings; and
 - (g) “**voting interest**” means an interest as recognised, appraised and valued in terms of section 148 (4) to (7).
- (2) For the purpose of paragraph (d), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds shares of the company.

131. Insolvency of a company

- (1) For the purposes of this Act, an insolvency event occurs with respect to a company if
 -
 - (a) an amount exceeding the minimum value prescribed in terms of subsection (3) is due and payable by the company to a creditor, by cession or otherwise, and that creditor –

- (i) has served on the company a demand requiring the company to pay the amount that is due and payable; and
 - (ii) the company has not paid the amount demanded, or otherwise satisfied the creditor, within 15 business days after the demand was served;
 - (b) any process issued on a judgment, decree or order of a court in favour of a creditor of the company has been returned by the sheriff or the messenger with an endorsement that there appears to be insufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy the judgment, decree or order; or
 - (c) a Court is satisfied that the company is unable to pay its debts.
- (2) In determining for the purpose of subsection (1)(c) whether a company is unable to pay its debts, the Court must take into account all current, contingent and prospective liabilities of the company.
- (3) From time to time, the Minister must prescribe a minimum value for the purpose of subsection (1)(a).

132. Company resolution to begin business rescue

- (1) Subject to subsection (2)(a), either the shareholders of a company by ordinary resolution, or the board of the company, may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if, in either case, -
- (a) an insolvency event has occurred, or the shareholders or directors, as the case may be, believe that the company is insolvent, or may imminently become insolvent; and
 - (b) there appears to be a reasonable prospect of rescuing the company.
- (2) A resolution contemplated in subsection (1) -

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- (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
 - (b) has no force or effect until it has been filed with the Commission.
- (3) A company that has adopted a resolution contemplated in subsection (1) must –
- (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person within 5 business days after the resolution has been filed with the Commission;
 - (b) appoint a supervisor who satisfies the requirements of section 141, and has consented in writing to accept the appointment, within 5 business days after the resolution has been filed with the Commission, or such longer time as the Commissioner, on application by the company, may allow;
 - (c) file a notice of the appointment of a supervisor with the Commission within 2 business days after making the appointment; and
 - (d) publish a copy of the notice of appointment to each affected person within 5 business days after the notice was filed with the Commission.
- (4) If a company fails to comply with subsection (3)(b) or (c) –
- (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
 - (b) the company may not adopt a further such resolution for a period of three months after the date on which the lapsed resolution was adopted, unless the Court, on good cause shown, gives prior consent for such a further resolution.
- (5) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, until the business rescue proceedings have ended as determined in accordance with section 135(2).

133. Objections to company resolution

- (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 132, until the adoption of a business rescue plan in terms of section 155, an affected person may apply to a court for an order setting aside -
 - (a) the resolution, on the grounds that there is no reasonable prospect for rescuing the company; or
 - (b) the appointment of the supervisor, on the grounds that the supervisor –
 - (i) does not satisfy the requirements of section 141;
 - (ii) is not independent of the company or its management; or
 - (iii) lacks the necessary skills, having regard to the company's circumstances.
- (2) An affected person who, as a shareholder or director of a company, voted in favour of a resolution contemplated in section 132 may not apply to the court in terms of subsection (1)(a) to set aside that resolution.
- (3) An applicant in terms of subsection (1) must –
 - (a) serve a copy of the application on the company and the Commission; and
 - (b) notify each affected person of the application in the prescribed manner.
- (4) Each affected person has a right to participate in the hearing of an application in terms of this section.
- (5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, –
 - (a) if there is overwhelming evidence supporting the applicant's position that there is no reasonable prospect of rescuing the company, the court must set aside the resolution; or
 - (b) in any other case, the court -

- (i) must afford the supervisor sufficient time to form an opinion whether or not there is a reasonable prospect of rescuing the company; and
- (ii) after receiving a report from the supervisor, may set aside the company's resolution only if there is overwhelming evidence that there is no reasonable prospect of rescuing the company,

and if it makes an order setting aside the resolution, may make any further necessary and appropriate order, including an order placing the company under liquidation.

- (6) If, after considering an application in terms of subsection (1)(b), the court makes an order setting aside the appointment of a supervisor -
 - (a) the court must appoint an alternate supervisor who satisfies the requirements of section 141, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests; and
 - (b) the provisions of subsection (5)(b)(i), if relevant, apply to the supervisor appointed in terms of paragraph (a).

134. Court order to begin business rescue proceedings

- (1) If an insolvency event has occurred with respect to a company, but the company has not adopted a resolution contemplated in section 132, an affected person may apply to the court for an order placing the company under supervision.
- (2) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –
 - (a) the court has adjudicated upon the application; or
 - (b) the business rescue proceedings end, if the court makes the order applied for.
- (3) An applicant in terms of subsection (1) must –
 - (a) serve a copy of the application on the company and the Commission; and

- (b) notify each affected person of the application in the prescribed manner.
- (4) Each affected person has a right to participate in the hearing of an application in terms of this section.
- (5) After considering an application in terms of subsection (1) –
 - (a) if there is overwhelming evidence that there is no reasonable prospect of rescuing the company, the court must dismiss the application, and may make any further necessary and appropriate order, including an order placing the company under liquidation; or
 - (b) in any other case, a court may make an order –
 - (i) placing the company under supervision; and
 - (ii) requiring the company to appoint a supervisor, ~~if~~ unless the company ~~has~~ does not have effective management.
- (6) If, at the time the court makes an order in terms of subsection (5)(b), the company does not have effective management, the court may make a further order appointing a supervisor who satisfies the requirements of section 141, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests.
- (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (5), or (6) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce security against the company.
- (8) A company that has been placed under supervision in terms of this section -
 - (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended;
 - (b) must notify each affected person of the order within 5 business days after the date of the order;

- (c) if required by the court order to appoint a supervisor, must appoint a person who satisfies the requirements of section 141 and has consented in writing to accept the appointment, within 5 business days, or such longer time as the court may allow, after the date of the order;
 - (d) must file with the Commission a notice of the appointment of a supervisor, whether by the company or by the court, within two business days after the appointment has been made; and
 - (e) must publish a copy of the notice of appointment to each affected person, within 5 business days after the notice was filed with the Commission.
- (9) If a company -
- (a) complies with subsection (8)(c), the provisions of section 133 (1)(b) apply with respect to that appointment; or
 - (b) fails to comply with subsection (8)(c), the court must appoint a supervisor recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests.

135. Duration of business rescue proceedings

- (1) Business rescue proceedings begin when -
- (a) the company files with the Commission a resolution to place itself under supervision in terms of section 132;
 - (b) a person applies to the court for an order placing the company under supervision in terms of section 134 (1); or
 - (c) during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 134 (6), a court makes an order placing the company under supervision.
- (2) Business rescue proceedings end when -

- (a) the court sets aside the resolution or order that began those proceedings;
 - (b) a business rescue plan has been proposed and rejected in terms of Part D, and no affected person has acted to extend the proceedings in any manner contemplated in section 156;
 - (c) a business rescue plan has been adopted in terms of Part D, and the supervisor has subsequently filed with the Commission a Notice of Substantial Implementation of that plan;
 - (d) the supervisor has filed with the Commission a Notice of the Termination of Business Rescue Proceedings; or
 - (e) the proceedings have been converted by court order to liquidation proceedings.
- (3) If a company's business rescue proceedings have not ended within three months after the start of those proceedings, the supervisor must –
- (a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
 - (b) deliver the report and each update in the prescribed manner to –
 - (i) each affected person; and
 - (ii) the court, if the proceedings arose as a result of a court order.

136. General moratorium on legal proceedings against company

- (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –
- (a) with the written consent of the supervisor;

- (b) with the leave of the court and in accordance with any terms the court considers suitable;
 - (c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
 - (d) criminal proceedings against the company or any of its directors or officers; or
 - (e) proceedings concerning any property or right over which the company exercises the powers of a trustee.
- (2) During business rescue proceedings, a guarantee or surety of a company may not be enforced against any person, except with leave of the court and in accordance with any terms the court considers suitable.
- (3) If any right to commence proceedings or otherwise assert a claim against a company, or against a person contemplated in subsection (2), is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

137. Protection of property interests

- (1) During business rescue proceedings -
- (a) the company may dispose, or agree to dispose, of property only -
 - (i) in the ordinary course of its business;
 - (ii) in a bona fide transaction at arm's length for fair value approved in advance and in writing by the supervisor; or
 - (iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 155; and

- (b) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property owned by, or in the lawful possession of, the company, except to the extent that -
 - (i) the supervisor approves in writing; or
 - (ii) the exercise of those rights is in accordance with -
 - (aa) an agreement made in the ordinary course of the company's business;
 - (bb) the implementation of the business rescue plan; or
 - (cc) an order of a court.
- (2) Subsection (1) does not extend to any property or right over which the company exercises the powers of a trustee.
- (3) If, during a company's business rescue proceedings, the company disposes of any property over which another person has any security or title interest, the company must promptly -
 - (a) pay to that person the sale proceeds attributable to that property; or
 - (b) provide security for the amount of those proceeds, reasonably satisfactory to that person.

138. Post-commencement finance

- (1) To the extent that any money becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee –
 - (a) the money is deemed to be post-commencement financing, irrespective whether it has been approved by other creditors; and
 - (b) will be paid in the order of preference set out in subsection (3)(a).

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- (2) Any amount of financing obtained by the company during its business rescue proceedings, other than as contemplated in subsection (1), will be paid in the order of preference set out in subsection (3)(b).
 - (3) After payment of the supervisor's remuneration and costs referred to in section 146, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated -
 - (a) in subsection (1) will have preference in the order in which they were incurred over -
 - (i) all claims contemplated in subsection (2); and
 - (ii) all secured and unsecured claims against the company; or
 - (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
 - (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force except to the extent of any claims arising out of the costs of liquidation.

139. Effect of business rescue on suppliers and employees

- (1) Despite any provision of an agreement to the contrary, during a company's business rescue proceedings –
 - (a) any person who, immediately before the beginning of those proceedings, was supplying or had contracted to supply to the company any goods, services or inputs that the management of the company regards as essential to the conduct of its business -
 - (i) must continue that supply to the company on the same terms and conditions, except to the extent that -
 - (aa) the supplier and the company agree terms and conditions that are more advantageous to the company;

- (bb) a court orders otherwise; or
 - (cc) an approved business rescue plan provides otherwise; and
 - (ii) must be paid by the company on a current basis for any such supply made after the business rescue proceedings began; and
- (b) employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that -
 - (i) changes occur in the ordinary course of attrition;
 - (ii) the employees and the company agree terms and conditions that are more advantageous to the company; or
 - (iii) an approved business rescue plan provides otherwise.
- (2) Despite any provision of an agreement to the contrary, during business rescue proceedings, the company may unilaterally abrogate or suspend entirely, partially or conditionally any provision of a contract to which it is a party, other than a contract of employment, and if it does so, any other party to that contract may assert a claim against the company only for damages.
- (3) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.

140. Effect on shareholders and directors

- (1) During business rescue proceedings -
 - (a) an alteration in the status of a shareholder or shareholders of a company, other than by way of a transfer of shares in the ordinary course of business, is invalid except to the extent –

- (i) the court otherwise directs; or
 - (ii) contemplated in an approved business rescue plan; and
 - (b) the board and directors of a company must continue to perform and exercise their functions and powers, subject to the authority of the supervisor.
- (2) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the supervisor, that action is void unless approved by the supervisor.

Part B – Supervisor’s functions and Terms of Appointment

141. Qualifications of supervisors

A person may be appointed as the supervisor of a company only if the person -

- (a) has the prescribed qualifications;
- (b) is not subject to an order of probation in terms of section 163; and
- (c) would not be disqualified from acting as a director of the company in terms of section 89 (5).

142. Removal and replacement of supervisor

- (1) If the appointment of the supervisor by the company has not been set aside in terms of section 133, the supervisor may be removed only as provided for in this section.
- (2) Upon request of an affected person, or on its own motion, the court may remove a supervisor from office on any of the following grounds:
 - (a) incompetence or failure to perform duties;
 - (b) failure to exercise the proper degree of care in the performance of their duties;
 - (c) engaging in illegal acts or conduct;
 - (d) the supervisor having become disqualified to serve in that capacity; or
 - (e) conflict of interest or lack of independence.
- (3) The company must appoint a new supervisor if -
 - (a) a supervisor dies, resigns or is removed from office; or
 - (b) serious illness or any other event causes the supervisor to be unable to perform the functions of that office,

subject to the right of an affected person to bring a fresh application to set aside that application in terms of section 133 (1)(b).

143. Powers and duties of supervisors

- (1) During a company’s business rescue proceedings, the supervisor -
 - (a) is responsible to supervise and advise the management of the company;
 - (b) may approve or veto any significant management decision taken by the board or the management of the company;
 - (c) may authorise the company to borrow in priority of existing obligations in order to fund ongoing business activities, subject to section 138;
 - (d) may -
 - (i) remove from office any person who forms part of the management of the company; or
 - (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and
 - (e) is responsible to supervise and assist the management of the company in developing a business rescue plan to be considered by affected persons, in accordance with Part D.
- (2) A supervisor may not appoint a person as part of the management of the company, or an advisor to the company or to the supervisor, unless, immediately before the appointment, that person is independent of the company and the supervisor.
- (3) During a company’s business rescue proceedings, the supervisor is an officer of the court for the purposes of this Chapter.

144. Investigation of the affairs of the company

- (1) As soon as practicable after being appointed, the supervisor must 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.
- (2) If, at any time during business rescue proceedings, the supervisor concludes that -
 - (a) there is no reasonable prospect for the company to be rescued, the supervisor must –
 - (i) so inform the court, the company, and all affected persons in the prescribed manner; and
 - (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;
 - (b) the company is not, or is no longer, insolvent, and there is no longer a reasonable probability of it imminently becoming insolvent, the supervisor must –
 - (i) so inform the court, the company, and all affected persons in the prescribed manner; and
 - (ii) file a notice of termination of the business rescue proceedings with the Commission; or
 - (c) there is evidence, in the dealings of the company before the business rescue proceedings began, of –
 - (i) reckless trading, voidable transactions, or breach of duty by the board, the supervisor must direct the management to take any necessary steps to rectify the matter;
 - (ii) fraud or other contravention of any law, the supervisor must -
 - (aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

- (bb) direct the management to take any necessary steps to recover any misappropriated assets of the company.
- (3) A court to which an application has been made in terms of subsection (2)(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances.

145. Directors of company to co-operate with and assist supervisor

- (1) As soon as practicable after business rescue proceedings begin, each director of a company must deliver to the supervisor all books and records that relate to the affairs of the company and are in the director’s possession.
- (2) Any director of a company who knows where other books and records relating to the company are being kept, must inform the supervisor as to the whereabouts of those books and records.
- (3) Within 5 business days after business rescue proceedings begin, or such longer period as the supervisor allows, the directors of a company must provide the supervisor with a statement of affairs containing, at a minimum, the following information:
 - (a) transactions occurring before the business rescue proceedings began that involved the company or the assets of the company;
 - (b) any court, arbitration or administrative proceedings, including enforcement proceedings, involving the company;
 - (c) assets, liabilities, income and disbursements of the company;
 - (d) employees, and any collective agreements or other employment contracts; or
 - (e) debtors and their obligations; and
 - (f) creditors and their claims.

- (4) A director of a company must attend to the requests of the supervisor at all times, and provide the supervisor with any information about the company's affairs as may reasonably be required.
- (5) No person is entitled, as against the supervisor of a company, to retain possession of any books or records of the company, or to claim or enforce a lien over any such books or records.

146. Remuneration of supervisor

- (1) As soon as practicable after the appointment of a supervisor, the company and the supervisor must conclude a written agreement setting out the supervisor's remuneration for services, and for expenses incurred in the business rescue proceedings.
- (2) The remuneration and expenses contemplated in subsection (1) –
 - (a) must not include any provision for compensation or benefits calculated on the basis of a contingency related to –
 - (i) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or
 - (ii) the attainment of any particular result or combination of results relating to the business rescue proceedings; and
 - (b) may be paid by the company as part of its operating costs; and
 - (c) to the extent that they are not fully paid, will rank in priority before the claims of all other secured and unsecured creditors.

Part C – Rights of Affected Persons During Business Rescue

147. Rights of employees

- (1) To the extent that any money became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a senior unsecured creditor of the company for the purposes of this Chapter.
- (2) During a company's business rescue proceedings -
 - (a) each employee of the company may elect to exercise any rights as a creditor either directly, or by proxy through their registered trade union or, if the employee is not represented by a registered trade union, another employee organisation or representative;
 - (b) the employees of the company, acting collectively through their registered trade union or, to the extent that there are employees who are not represented by a registered trade union, another employee organisation or representative, are entitled to -
 - (i) notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (ii) participate in any court proceedings arising during the business rescue proceedings;
 - (iii) form a committee of employees' representatives;
 - (iv) be consulted by the supervisor during the development of the business rescue plan, and to have an opportunity to review and consider any such plan before it is submitted to a meeting of creditors;

- (v) to be present and to make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan;
 - (vi) to vote with creditors on a motion to approve a proposed business plan, to the extent -
 - (aa) that the employee is a creditor, as contemplated in subsection (1); and
 - (bb) of any further voting interest contemplated in section 148 (5)(b); and
 - (vii) if the proposed business rescue plan is not adopted, to –
 - (aa) propose the development of an alternative plan, in the manner contemplated in section 156; or
 - (bb) present an offer to purchase the interests of any or all creditors.
- (3) A health and welfare scheme, or a pension scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of -
- (a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and
 - (b) in the case of a defined benefit pension scheme, any unfunded liability under that scheme.
- (4) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.

148. Participation by creditors

- (1) Each creditor is entitled to –
 - (a) notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings;
 - (c) formally participate in a company's business rescue proceedings to the extent provided for in this chapter; and
 - (d) informally participate in those proceedings by making proposals for a business rescue plan to the supervisor.
- (2) In addition to the rights set out in subsection (1), each creditor has -
 - (a) the right to vote to amend, approve or reject a proposed business rescue plan; and
 - (b) if the proposed business rescue plan is not adopted, a further right to -
 - (i) propose the development of an alternative plan, in the manner contemplated in section 156; or
 - (ii) present an offer to purchase the interests of any or all of the other creditors.
- (3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the supervisor during the development of the business rescue plan.
- (4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests –
 - (a) a senior unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company;

- (b) a secured creditor has a voting interest equal to the amount owed to that creditor by the company, minus the amount covered by their security, as appraised and valued by the supervisor; and
 - (c) a subordinated creditor, who would be subordinated in a liquidation, has a voting interest, as appraised and valued by the supervisor, equal to the amount, if any, that the subordinated creditor could reasonably expect to receive in such a liquidation of the company.
- (5) In any vote concerning a business rescue plan, in addition to the voting interests referred to in subsection (4) -
- (a) a contingent or prospective creditor affected by the proposed plan has a voting interest as appraised and valued by the supervisor; and
 - (b) in addition to any voting interest an employee may have as a creditor in terms of section 147, an employee of the company -
 - (i) who may be retrenched under the proposed plan has a voting interest equal to the value of the employee's remuneration and benefits for the greater of –
 - (aa) three months; or
 - (bb) any notice or retrenchment period determined in accordance with any collective agreement or other time-limited contract that was in force immediately before the business rescue proceedings began, to the extent the employee is subject to such an agreement or contract;
 - (ii) whose terms and conditions of employment may be adversely affected by the proposed plan has a voting interest as appraised and valued by the supervisor in consultation with the employee's representative, equal to the difference in value of the employee's terms and conditions of employment over the period -

- (aa) to the end of any collective agreement or other time-limited contract that was in force immediately before the business rescue proceedings began, to the extent the employee is subject to such an agreement or contract; or
 - (bb) of one year, in any other case.
- (6) The supervisor of a company may -
 - (a) determine whether a creditor is independent for the purposes of this Chapter; and
 - (b) appraise and value an interest contemplated in subsection (4) (b) or (c), (5)(a), or (5)(b)(ii).
- (7) A person may apply to the court to –
 - (a) review the supervisor’s determination that the person is, or is not, an independent creditor in terms of subsection (6)(a); or
 - (b) review, re-appraise and re-value that person’s voting interest, as determined by the supervisor in terms of subsection (6)(b).

149. Participation by shareholders

- (1) During a company’s business rescue proceedings, each shareholder of the company is entitled to –
 - (a) notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings, subject to section 133 (2);
 - (c) formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter;

- (d) vote to approve or reject a proposed business rescue plan, if the plan affects the class of shares held by that shareholder; and
- (e) if the holders of voting interests, or shareholders, fail to approve a proposed business rescue plan, to –
 - (i) propose the development of an alternative plan, in the manner contemplated in section 156; or
 - (ii) present an offer to purchase the interests of any or all of the creditors or other shareholders.

150. First meeting of creditors

- (1) Within 10 business days after being appointed, the supervisor must convene, and preside over, a first meeting of creditors, at which –
 - (a) the supervisor -
 - (i) must inform the creditors whether the supervisor believes that there is a reasonable prospect of rescuing the company; and
 - (ii) may receive proof of claims by creditors; and
 - (b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee.
- (2) The supervisor must give notice of the meeting to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the supervisor, setting out -
 - (a) the date, time and place of the meeting; and
 - (b) the agenda for the meeting.

- (3) At the meeting of creditors, a decision supported by the holders of a simple majority of the independent creditors voting interests voted on a matter, is the decision of the meeting on that matter.

151. First meeting of employees representatives

- (1) Within 10 business days after being appointed, the supervisor must convene, and preside over, a first meeting of employees' representatives, at which –
 - (a) the supervisor must inform the employees' representatives whether the supervisor believes that there is a reasonable prospect of rescuing the company; and
 - (b) the employees' representatives may determine whether or not an employees' committee should be appointed and, if so, may appoint the members of the committee.
- (2) The supervisor must give notice of the meeting to every registered trade union representing employees of the company, and if there are any employees who are not represented by such a registered trade union, to those employees, or their representatives, setting out -
 - (a) the date, time and place of the meeting; and
 - (b) the agenda for the meeting.

152. Functions, duties and membership of committees of affected persons

- (1) A committee of employees, or of creditors, appointed in terms of section 150 or 151, respectively -
 - (a) may consult with the supervisor about any matter relating to the business rescue proceedings, but may not direct or instruct the supervisor;
 - (b) may, on behalf of the general body of creditors or employees, receive and consider reports relating to the business rescue proceedings; and

- (c) must act independently of the supervisor to ensure fair and unbiased representation of creditors' or employees' interests.
- (2) A person may be a member of a committee of creditors or employees, respectively, only if the person is -
- (a) an independent creditor, or an employee, of the company;
 - (b) an agent, proxy or attorney of an independent creditor or employee, or other person acting under a general power of attorney; or
 - (c) authorised in writing by an independent creditor or employee to be a member.

Part D – Development and Approval of Business Rescue Plan

153. Proposal of a business rescue plan

- (1) Under the supervision and with the advice of the supervisor, the management of the company must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 154.
- (2) The business rescue plan must specify at least the following information, but may contain any additional information that will assist affected persons in deciding whether or not to accept or reject the plan:
 - (a) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;
 - (b) the nature and duration of any moratorium for which the business rescue plan makes provision;
 - (c) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
 - (d) the treatment of contracts and ongoing role of the company;
 - (e) the conditions, if any, for the business rescue plan to come into operation;
 - (f) the conditions, if any, for the business rescue plan to continue in operation;
 - (g) the circumstances in which the business rescue plan will end;
 - (h) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted; and
 - (i) the effect of the plan, if any on the number of employees, and their terms and conditions of employment.

- (3) A business rescue plan must be accompanied by a statement containing at least the following information:
- (a) a complete list of all the assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;
 - (b) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
 - (c) a complete list of the equity holders of the company, and the effect that the business rescue plan will have on them;
 - (d) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
 - (e) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation;
 - (f) whether the business rescue plan includes a proposal made informally by a creditor of the company;
 - (g) a copy of the written agreement concerning the supervisor's remuneration; and
 - (h) a projected -
 - (i) balance sheet for the company; and
 - (ii) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted.
- (4) The projected balance sheet and statement required by subsection (3)(h) –

- (a) must include a notice of any significant assumptions on which the projections are based; and
 - (b) may include alternative projections based on varying assumptions and contingencies.
- (5) The statement required by subsection (3) must conclude with a certificate by the company stating that -
- (a) any factual information provided is accurate, complete, and up to the date; and
 - (b) any projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.
- (6) The business rescue plan must be published by the company within 25 business days after the date on which the supervisor was appointed, or such longer time as may be allowed by –
- (a) the court, on application by the company; or
 - (b) the holders of a majority of the voting interests.

154. Meeting to determine future of company

- (1) The supervisor must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the proposed rescue plan within -
- (a) 10 business day after the publication of that plan in terms of section 153; or
 - (b) a shorter period as approved by –
 - (i) the court, on application by the supervisor; or
 - (ii) unanimous consent of -
 - (aa) the holders of a voting interest; and

- (bb) shareholders entitled to vote in term of section 155 (3)(b).
- (2) At least 5 business days before the meeting contemplated in subsection (1), the supervisor must deliver a notice of the meeting to all affected persons, setting out -
 - (a) the date, time and place of the meeting;
 - (b) the agenda of the meeting; and
 - (c) a summary of the rights of affected persons to participate in and vote at the meeting.
- (3) The meeting contemplated in this section may be adjourned from time to time, but may not be adjourned to a day that is more than 60 business days after the day on which the supervisor was appointed, even if no decision regarding the company's future has been taken at the meeting.

155. Consideration of the business rescue plan

- (1) At the meeting convened in terms of section 154, the supervisor must –
 - (a) introduce the proposed business plan for consideration by the creditors and any other holders of a voting interest;
 - (b) inform the meeting whether the supervisor continues to believe that there is a reasonable prospect of the company being rescued;
 - (c) provide an opportunity for the employees' representatives to address the meeting;
 - (d) invite discussion, and entertain and conduct a vote, on any motions to -
 - (i) amend the proposed plan, in any manner moved and seconded by holders of voting interests, and satisfactory to the supervisor; or
 - (ii) direct the supervisor to adjourn the meeting in order to revise the plan for further consideration, subject to section 154 (3); and

-
- (e) call for a vote for adoption of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).
- (2) If adoption of the proposed business plan was opposed -
- (a) by the holders of more than 50% of the voting interests that were voted in terms of subsection (1) (e), or
 - (b) by more than 25 % of the independent creditors' voting interests, if any, that were voted in terms of subsection (1) (e)
- the plan has failed to be adopted.
- (3) If the proposed business plan did not fail to be adopted, as contemplated in subsection (2), and
- (a) the plan does not affect the interests of any class of shareholders, the business rescue plan will have been adopted, subject to any conditions on which the plan is contingent; or
 - (b) the plan does affect the interests of any class of shareholders, the supervisor must immediately hold a meeting of the class, or classes of shareholders affected by the plan, and call for a vote by those shareholders to approve the adoption of the proposed business rescue plan.
- (4) If the holders of at least a majority of the shares that were voted in terms of subsection (3) (b) support approval of the proposed business plan, the plan will have been adopted, subject to any conditions on which the plan is contingent.
- (5) A business rescue plan that has been adopted is binding on the company, and on each of the creditors and shareholders of the company, whether or not -
- (a) they were present at the meeting;
 - (b) they voted in favour of adoption of the plan; or
 - (c) in the case of creditors, they proved their claims against the company.

- (6) The company, under the direction of the supervisor, must take all necessary steps to -
- (a) attempt to satisfy any conditions on which the business rescue plan is contingent; and
 - (b) implement the plan.
- (7) When the business rescue plan has been implemented, the supervisor must file with the Commission a Notice of the Substantial Implementation of the business rescue plan.

156. Failure to adopt business rescue plan

- (1) If a business rescue plan is not adopted as contemplated in section 155 -
- (a) the supervisor may -
 - (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
 - (ii) advise the meeting that the company will apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate or egregiously irrational; and
 - (b) if the supervisor does not take any action contemplated in paragraph (a) –
 - (i) any affected person present at the meeting may -
 - (aa) call for a vote of approval from the holders of voting interests requiring the supervisor to prepare and publish a revised plan; or
 - (bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate or egregiously irrational; or

- (ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of any person who opposed adoption of the business rescue plan, at a value that the supervisor determines to be the probable return to that person if the company were to be liquidated.
- (2) If a person makes an offer contemplated in subsection (1)(b)(ii), the supervisor must
 -
 - (a) adjourn the meeting until the transaction has been completed;
 - (b) make any necessary revisions to the business rescue plan to appropriately reflect the results of the transaction; and
 - (c) set a date for resumption of the meeting, at which the provisions of section 155 will apply afresh.
- (3) If no person takes any action contemplated in subsection (1) or (2), the supervisor must promptly file with the Commission a Notice of the Termination of Business Rescue Proceedings.
- (4) A holder of a voting interest, or a person offering to acquire that interest, may apply to the court to review, re-appraise and re-value a determination by the supervisor in terms of subsection (1)(b)(ii).

157. Discharge of debts and claims

- (1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to them will lose the right to enforce the relevant debt or part of it.
- (2) Creditors and other holders of voting interests who have not participated in the business rescue proceedings are not entitled to enforce any debt that arose before those proceedings began, unless the business rescue plan is not approved, or not implemented.