

POWERS OF PRACTITIONERS, SHAREHOLDER AND BOARD

BUSINESS RESCUE PROCEEDINGS

Powers of BR Practitioners ('practitioners')

The practitioners have the following powers (section 140):

- (a) Full management control of the company in substitution for its Board and pre-existing management.
- (b) May delegate any powers to the Board and pre-existing management.
- (c) May appoint or remove from office any person forming part of the pre-existing management.
- (d) Develop a business rescue plan.
- (e) Implement business rescue plan

The practitioners are officers of Court and must report to the Court during the business rescue process. They also have responsibilities, duties and liabilities of a director of a company. (Section 140 (3))

Duties of Directors

Section 137 (2) of the Companies Act provides that during business rescue, the directors of the company:

- (a) must continue to exercise their functions subject to the authority of the practitioner,
- (b) have a duty to exercise management control of the company in accordance with the express instructions and direction of the practitioners, to the extent that it is reasonable to do so.

Furthermore, the directors must attend to the requests of the practitioner at all times and provide the practitioner with any information about the company's affairs.

The directors must also co-operate and assist the practitioners.

Removal of Directors

Section 137 (5) empowers the practitioners to apply to court for removal of a directors for the following grounds:

- (a) Failure to comply with Chapter 6 of the Act.
- (b) Impending the practitioner
 - In the performance of the powers and function of the practitioner.
 - Management of the company by the practitioner.
 - Development or implementation of a business rescue plan.

Powers of Shareholders

The shareholders are entitled to (Section 146):

- (a) **Notice** of each court proceeding, **decision**, meeting or other relevant event concerning the business rescue.
- (b) Participate in any court proceeding arising during business rescue.
- (c) Formally participate in a company's business rescue proceedings
- (d) Vote or reject a proposed business rescue plan, if the plan would alter the rights associated with the class of securities (shares)
- (e) If the rescue plan is rejected:
 - propose the development of an alternative plan
 - present an offer to acquire the interests of any or all creditors or other shares.

Section 137 (1) provides that an alteration in the classification and status of shares of a company other than by transfer in the ordinary course of business, is invalid unless the court directs otherwise or the business rescue plan provides so.

POWERS OF PRACTITIONERS, SHAREHOLDER AND BOARD

The shareholders rights still stands even in business rescue. Therefore, the Minister is still the executive authority and provisions of PFMA still applies unless the Minister grants exemption.

Adoption of Business Rescue Plan (section 150-153)

The practitioners after consulting the creditors, other affected persons (shareholder, creditor, trade union, employees or representatives) and management of the company, prepare a business rescue plan for consideration at a meeting.

The plan must be published and within 10 days of publishing the plan convene a meeting of creditors to consider the plan. The notice of the meeting must be delivered to affected persons (including shareholder) including a summary of rights of affected persons to participate in and vote at the meeting.

The practitioners will then introduce the plan, indicate that there are reasonable prospect of rescuing the company, give opportunity for employees' representatives to address the meeting. Furthermore, the practitioners will invite discussion and entertain and conduct a vote on any motions to:

- (a) Amend the proposed plan in a manner moved and seconded by holders of creditors' interest.
- (b) Direct the practitioner to adjourn the meeting in order to adjourn the meeting in order to revise the plan for further consideration

The practitioners will then call for a preliminary approval of the proposed plan (or as amended). The plan can be approved on a preliminary basis if:

- (a) it is supported by 75% of voting creditors.
- (b) 50 % of independent creditors.

If the plan alter the rights of holders of securities (shares) the practitioners must immediately hold a meeting of shareholders and call for a vote to approve the adoption of the plan. The shareholders can approve or reject the plan.

If the plan is rejected by creditors or shareholders (where it alters shareholding), the practitioners must seek a vote of approval from holders of voting interests to prepare and publish a revised plan or advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interest or shareholders on the ground that it was inappropriate. If the practitioners does not take this action, any affected person can do so.

The revised plan will then undergo a voting process.

Removal of practitioners

A practitioner may be removed only:

- (a) By a court order on the basis that:
 - he is not independent of the company or management; or
 - lacks the necessary skills, having regard to the Companies' circumstances.Furthermore, if the practitioner is disqualified to be a practitioner. (Section 130).
- (b) In accordance with section 139 (2) for the following reasons:
 - incompetence or failure to perform duties of a practitioner.
 - failure to exercise proper degree of care in the performance of the functions.
 - engaging in illegal acts or conduct.
 - conflict of interest or lack of independence.
 - incapacitated and unable to perform functions

POWERS OF PRACTITIONERS, SHAREHOLDER AND BOARD

End of Business Rescue Plan

Business rescue proceedings end when:

- (a) The court sets aside:
 - the resolution or order that began business rescue, or
 - has converted the proceedings to liquidation.
- (b) the practitioner has filed with the CIPC a notice of termination of business rescue proceedings.
- (c) Business rescue plan has been
 - Proposed and rejected and no affected person has acted to extend the proceeding in accordance with section 153.
 - Adopted and the practitioner has subsequently filed a notice of substantial implementation of that plan.

If the business rescue proceedings have not ended within 3 months after the start of the proceedings, the practitioner must:

- (a) Prepare a report on the progress of the business rescue proceedings and update at the end of each subsequent month.
- (b) Deliver the report and each update to each affected persons (including the shareholder) and to the Court (if the proceedings is by way of Court order) or CIPC.