[CA/B-20/2010]

Attention : Ms J Fubbs

Companies Amendment Bill

Date : 26 November 2010

Ms J Fubbs

Chairperson: PC on Trade and Industry

Attention: Mr A Hermans

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26 November 2010

Dear sir

COMPANIES AMENDMENT BILL

1 INTRODUCTION

1.1 The Payments Association of South Africa (PASA) is the national payment system (NPS) management body recognised by the SA Reserve Bank in terms of the National Payment System Act, 78 of 1998, (the NPS Act). PASA has the responsibility to organise, manage and regulate its member banks in the NPS. PASA has considered the Companies Amendment Bill [B40 - 2010] ("**CAB**") and has identified some concerns which will have an impact on banks, operators and their participation in the NPS.

1.2 The concerns are discussed as set out in paragraph 2 below.

2 THE IMPACT OF THE COMPANIES AMENDMENT ACT

3

3.1 Business Rescue Practitioner

Although the purpose and spirit of the CPB is supported, it is submitted that the clauses dealing with business rescue may have unintended negative consequences for the NPS.

Clause 136 deals with the issue of a business rescue practitioner having the right to cancel or suspend an agreement to which a company (including a bank) was a party.

The PASA Member banks have all entered into agreements with each other, as well as with the South African Reserve Bank, PCH system operators and system operators, with regards to clearing and settlement.

The NPS Act (section 8) makes provision for the appointment of a curator or similar official, but states that the curator or similar official is bound by the rules and agreements to which any bank involved in clearing and settlement, is a party. It is suggested that business rescue practitioners should similarly be bound to the rules and agreements. However, the Companies Act does not provide for a scenario where a provision of the CAB is in conflict with the NPS Act.

Although the NPS Act states that the provisions pertaining to curatorship will apply despite anything to the contrary in the Companies Act, no recognition is given to this position in the CAB.

It is our view that there is an inconsistency between the provisions of the NPS Act and the provisions of the Companies Act (and the CAB), to the extent that it is not possible to apply and comply with one of the inconsistent provisions without contravening the second.

3.2 Criteria for names of companies

Section 10 (See also clause clause 6 of the CAB) of the Companies Act allows company names to comprise words of any language together with any letters, numbers or punctuation marks, as well as the following symbols: +, &, #, %, + and ".

This entitles bank customers to the use of their registered company names comprising such language, letters, numbers, punctuation marks and symbols, inter alia to require banks to reflect such on their bank statements.

The Act does not place any obligation on banks directly, but indirectly through banks' customers, banks may have to oblige.

Section 10 of the Act thus forces banks to consider the impact from:

1. A bank-customer perspective; and an
2. Interbank clearing and settlement perspective.

Banks have been clearing and settling transactions between each other for years and have been able to deal with unrecognized letters, marks and symbols not allowed by their systems. However, the impact of the right to use words of any language together with any letters, numbers or punctuation marks, as well as the following symbols: +, &, #, %, + and ",on banks, consumers, operators, the SARB and the NPS, is not clearly understood at this stage. This issue may have to be revisited in future by the industry, which could involve major changes to systems at huge cost.

More empirical evidence is required to justify any change at this point in time, however.

3.3

4 RECOMMENDATION

4.1 Based on that set forth above, we are of the view that the CAB be amended by adding reference to the NPS Act as a new clause 7(4)(hh) to address the potential inconsistency between the two pieces of legislation.

Your kind consideration of the above comments would be appreciated.

Yours sincerely,

Coetzee.

Pierre Coetzee

Executive: payments Regulation

[LC.A/B-21/2010]

Comments on Chapter 6 of the Companies Act 71 of 2008 as amended by Companies Amendment Bill B40—2010

1. **Definition of business rescue practitioner in section 1(d)**

1.1. There is no provision in Chapter 6 for a joint appointment. How will this happen?

1.2. **Proposed amendment:**

(d) "business rescue practitioner" means a person appointed in terms of this Chapter to oversee a company during business rescue proceedings and 'practitioner' has a corresponding meaning;

2. **Definition of court in section 1(e)**

2.1. The definition of "court" does not differ much from the common provision that a high court or a judge of the high court has jurisdiction (see for example section 2 of the Insolvency Act 24 of 1936, section 1 of the Administration of Estates Act 66 of 1965 and section 1 of the Land Survey Act 8 of 1997). The material difference is that provision is made for the designation of a judge "generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue" for the purposes contemplated in the definition of court for Chapter 6 "or in any other law". The existing practice is sufficient to achieve the purpose of the special provision (section 128(3)) in consultation with the Judge President of the appropriate court. Paragraph 2.2 of the Memorandum on the objects of the Superior Courts Bill, 2010 refers to a provision that draft legislation dealing with the establishment or functioning of courts may only be introduced into Parliament after consultation with the Minister of Justice and Constitutional Development. The creation of a specialised commercial court should be dealt with holistically and not in passing.

2.2. **Proposed amendment**

2.2.1. Amend the definition in 1(e) as follows:

"court", depending on the context, means

the High Court that has jurisdiction over the matter; a judge of that Court

2.2.2. Delete subsection 1(3)

3. **Section 129 (3)**

3.1. How will the debtor know about the extension within the five business days and how long will it take to apply and get an extension.

3.2. It is proposed that provision for extension should be omitted.

3.3. The following amendment is proposed:

(3) Within .five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), the company must—

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

4. Section 129(4)(b) and 129(7)

4.1. Should be ""in the prescribed manner" as elsewhere. See section 129(3)(a).

4.2. It is proposed that the provisions should be amended as follows:

(b) publish a copy of the notice of appointment in the prescribed manner to each affected person within five business days after the notice was filed.

...

(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person in the prescribed manner, setting out the criteria referred to in section 128(1)(f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.

5. Section 130

5.1. Section 129 sets a low hurdle to initiate business rescue. By contrast, the hurdle to have the proceeding set aside is high. It requires a court application with the attendant risk and costs. It is proposed that application may also be made to the Companies Tribunal established in terms of section 193 of the

Companies Act and that the matter may be decided by a single member of the Tribunal as contemplated in section 195(2)(a).

5.2. Section 130(3) provides that an applicant to set aside the business rescue should give notice to each affected person (defined in section 128(1)(a) to mean all shareholders, creditors, registered trade unions representing employees and employees not represented by unions or their representatives). This is onerous. How will a creditor obtain the information to give notice to all shareholders, other creditors, and the appropriate trade unions or employees or representatives of employees? It is proposed that notice be given to the Commission and to the business rescue practitioner who must give notice to affected persons.

5.3. It is proposed that section 130 should be amended as follows:

130. (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court or a single member of the Companies Tribunal established in terms of section 193 of the Companies Act for an order—

...

(c) requiring the practitioner to provide security in an amount and on terms and conditions that the court or Companies Tribunal considers necessary to secure the interests of the company and any affected persons.

...

(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 the business rescue practitioner appointed in the matter of the application in the prescribed manner.

(4) The business rescue practitioner must notify each affected person of the application in the prescribed manner and 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, the court or Companies Tribunal may—

(a) set aside the resolution—

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court or Companies Tribunal considers that it is otherwise just and equitable to do so;

(b) afford the practitioner sufficient time to form an opinion whether or not—

(i) the company appears to be financially distressed; or

(ii) there is a reasonable prospect of rescuing the company,

and after receiving a report from the practitioner, may set aside the company's resolution if the court or Companies Tribunal concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and

(c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including—

(i) if the order is made by the court, an order placing the company under liquidation; or

(ii) if the court or Companies Tribunal has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court or tribunal is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76(4) and (5).

(6) If, after considering an application in terms of subsection (1)(b), the court or Companies Tribunal makes an order setting aside the appointment of a practitioner—

(a) the court or tribunal must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and

...

5.4. If it is acceptable for the tribunal to hear this type of matter, similar amendment to section 131 could be considered.

6. **Section 131(4)(a)(ii)**

6.1. This section makes it a ground for business rescue proceedings if a company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters. There is nothing similar in sections 129 or 130. What is the justification for this ground?

6.2. In the absence of justification it is proposed that the section 131(4)(a) should be amended as follows:

(4) After considering an application in terms of subsection (1), the court may—

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—

(i) the company is financially distressed; or

(ii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

7. **Section 133**

7.1. Section 133(1) provides for legal proceedings to be commenced with the written consent of the practitioner or the leave of the court. Section 133(2) provides that a guarantee may not be enforced without the leave of court. It is proposed that the consent of the practitioner should likewise be a possibility in this case.

7.2. Section 133(3) refers to time limit. Reference should be made to prescription rather than the foreign notion of time limit. See section 13(1) of the Prescription Act 68 of 1969.

7.3. It is proposed that the subsections (2) and (3) should be amended as follows:

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with the written consent of the practitioner or with leave of the court and in accordance with any terms the practitioner or court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to prescription the completion of prescription is delayed until a year has elapsed after the day when the the company's business rescue proceedings end.

8. **Section 134(3)(b)(i)**

8.1. The subsection provides that the proceeds of property subject to a security interest must be paid to the person with the security interest. The person with the security interest should surely be held liable for the costs of realising the property.

8.2. It is proposed that the provisions should be amended as follows:

(i) after the deduction of the cost to dispose of the property pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

9. **Section 136**

9.1. Subsection (2) provides for the application of rules subject to sections 35A and 35B of the Insolvency Act. But sections 35A and 35B apply in the case of sequestration or winding-up and not during business rescue proceedings. It should be provided that sections 35A and 35B apply as if the company had been wound-up by the court as insolvent.

9.2. It is unacceptable to allow a practitioner to selectively cancel or suspend any provision of an agreement – "cherry picking". For instance, cancel or suspend the provision in a lease which makes provision for payment of rental by the debtor. The practitioner should either accept a contract or reject it as a whole as is the case in insolvency. This should not be subject to a court order as proposed in the Companies Amendment Bill.

9.3. It is unfair to regard a liquidator as a creditor for remuneration and expenses. The liquidator should have the same preference as the practitioner for remuneration and costs. Subsection (4) should be deleted and a new section 135(5) is proposed.

9.4. It is submitted that the subsection (2) and the following of the Companies Act 71 of 2008 should be amended as follows:

(2) Subject to application of the rules in sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936) as if the company had been wound up by the court as insolvent, and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may cancel or suspend entirely an agreement to which the

company is a party at the commencement of the business rescue period, other than an agreement of employment.

(3) Any party to an agreement that has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.

9.5. It is proposed that the following subsection (5) be added to section 135:

(5) If liquidation proceedings have been converted into business rescue proceedings, any outstanding claim by the liquidator for remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began is regarded as claims arising out of the business rescue proceeding in terms of subsection (3).

10. **Section 141: investigate voidable transactions**

10.1. Section 141(2)(c) provides that if there is evidence of voidable transactions, the practitioner must direct the management of the debtor to take the necessary steps to rectify the matter.

10.2. The management could be involved in many cases of voidable transactions, failure to perform an obligation, reckless trading, fraud or other contraventions, or breach of duty. It is proposed that the supervisor should deal with these matters and the management should not be directed to take the necessary steps.

10.3. It is not clear how steps can be taken to rectify voidable transactions unless transactions which are voidable or constitute voidable preferences in the case of insolvency are voidable in the event of business rescue proceedings. The actio Pauliana would apply, but it is difficult to prove fraudulent conduct by both parties. It is proposed that the insolvency provisions should apply (proposed subsections (4) and (5)).

10.4. The following amendments are proposed:

...

141(2)(c) there is evidence, in the dealings of the company before the business rescue proceedings began, of—

(i) voidable transactions, undue preferences, or a failure by the company or any director to perform any material obligation relating to the company, the practitioner must take any necessary steps to rectify the matter;

(ii) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must—

(aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

(bb) take any necessary steps to rectify the matter, including recovering 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.

(4) Every disposition by a company of the company's property which could for any reason be set aside in the event of the company's insolvency, may be set aside in the event of business rescue proceedings and the provisions of the law relating to insolvency with the changes required by the context shall be applied to any such disposition.

(5) For the purpose of subsection (4) the event which shall be deemed to correspond with the sequestration order in the case of an individual is -

(a) in the case of a resolution to begin business rescue the date of the filing of the resolution in terms of section 129;

(b) in the case of a court order to begin business rescue the date of the presentation of the application in terms of section 131.

11. **Section 143(4)(b)**

11.1. The uncommon word "egregiously" was removed from sections 153(1)(a)(ii) and (b)(i)(bb) of the Companies Act 71 of 2008 during the Parliamentary process. It is proposed that "egregiously" must be removed from this provision as well.

11.2. The following amendment is proposed:

(b) that the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company.

12. **Section 144(2)**

12.1. The preference in this subsection is for any remuneration, reimbursement for expenses or other amount of money relating to employment which became due and payable to an employee before the business rescue proceedings.

12.2. There are limitations on both the amounts and periods of preferent claims of employees in the case of insolvency or the winding up of companies.

12.3. Claims by directors of the company or members of a close corporation which is the insolvent debtor, do not enjoy any preference.

12.4. The limitations can be justified because it avoids a preference for persons involved with the debtor before insolvency and avoids a preference for large creditors at the expense of smaller creditors.

12.5. Although unlimited preferences would on the face of it favour employees, it would hamper business rescue and the advantage which such rescue bring about for employees. It will create anomalies and opportunities for abuse if different rules apply to business rescue. The insolvency preferences should apply.

12.6. Section 150(2)(a)(ii) provides that the plan must set out the statutory preferences in terms of the laws of insolvency. If the insolvency preferences for employees are not sufficient it must be reviewed.

12.7. It is recommended that section 144(2) should be amended as follows:

(2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment 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 preferred unsecured creditor of the company for the purposes of this Chapter to the extent that the employee would have been a preferred creditor in the event of the winding up of the company immediately before the beginning of the business rescue proceedings.

13. **Section 145(4)(b)**

13.1. This subsection provides for the appraisal of the voting interest of a **concurrent** creditor who would be subordinated in a liquidation. It is submitted that the voting interest of any creditor who would be subordinated should be appraised and not only the voting interest of a concurrent creditor.

13.2. The following amendment is proposed:

(b) a creditor who would be subordinated to other creditors in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.

14. **Section 147(a)(ii)**

14.1. This section provides that the practitioner may receive proof of claims by creditors.

14.2. It should be stated clearly that the practitioner may admit or reject proof of claims so that creditors must prove claims to the satisfaction of the practitioner.

14.3. It is recommended that section 147(a) should be amended as follows:

(a) the practitioner—

(i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company; and

(ii) may receive and admit or reject proof of claims by creditors

15. **Section 153**

15.1. Section 153(2) provides that if the practitioner or an affected person informs the meeting that an application will be made to the court to set aside the vote the practitioner must adjourn the meeting for five business days unless the application is made to the court during that time.

15.1.1. This implies that notice of the application must be given at the meeting. It may be difficult or impossible to decide immediately after the vote has been

completed whether an application should be made to set aside the vote as inappropriate. The provisions of section 132(c)(i) implies a determinable time when no affected person has acted.

15.1.2. The five business days can only be five business days after the date of the vote at the meeting. How will the practitioner know whether the application will be made during that time in the future so that the meeting can be adjourned for five business days? It seems that the intention is as follows:

- The company or affected person must give notice at the meeting if an application will be made to set aside the vote.
- The meeting must be adjourned for five business days if such notice is given.
- The applicant is given five business days to make the application. If the application is made the matter is adjourned further until the court has disposed of the application (which may be a long time). If the application is not made within the five business days the meeting is closed.

15.1.3. The position should be stated clearly.

15.2. The following amendments are proposed:

153. (1) (a) If a business rescue plan has been rejected as contemplated in section 152(3) the practitioner 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 a court within five business days after the vote rejecting the rescue plan 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.

(b) If the practitioner 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 practitioner to prepare and publish a revised plan; or

(bb) advise the meeting that an application will be made within five business days after the vote rejecting the rescue plan to

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

(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

(2) If the practitioner, acting in terms of subsection (1)(a)(ii), or an affected person, acting in terms of subsection (1)(b)(i)(bb), informs the meeting that an application will be made to the court as contemplated in those provisions, the practitioner must adjourn the meeting for five business days for an opportunity to make such an application and if the contemplated application is made to the court during that time; the meeting must be adjourned further until the court has disposed of the contemplated application.

16. **Personal views**

The views contained in this document are my own and do not represent the views of the South African Law Reform Commission or the Department of Justice and Constitutional Development.

Martinus (Tienie) Cronje
Researcher: South African Law Reform Commission
25 November 2010