



**THE NEW COMPANIES
ACT
71 OF 2008**

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INTRODUCTION

THE NEW COMPANIES ACT - INTRODUCTION

- The Companies Bill has now been promulgated as the Companies Act, 71 of 2008.
- The new Companies Act will come into operation on a date fixed by the President by proclamation in the Gazette, which date may not be earlier than one year following the date on which the President assented to the Act.
- Replaces the current Companies Act, 1973 almost in its entirety.
- The Close Corporations Act, 1984 continues indefinitely, but will be phased out on the basis that no new CCs may be formed, nor may companies be converted into CCs, after the Companies Act becomes effective. The Companies Act does, however, enable companies having characteristics very similar to CCs to be formed.

THE NEW COMPANIES ACT - INTRODUCTION

- Modernises our company law and brings it in line with best practices internationally, especially in relation to public companies, communications and corporate governance.
- Makes company law simpler – 450 down to 225 sections - and introduces simpler administrative and other procedures.
- Promotes transparency, high standards of corporate governance and accountability, particularly by directors and other officers, including minimum accounting standards for annual reports.
- Codifies the common law duties and liabilities of directors.
- Makes radical amendments to the take-over provisions of the Companies Act, 1973.

THE NEW COMPANIES ACT - INTRODUCTION

- The capital maintenance regime is changed from one based on a minimum amount of share capital to one based on solvency and liquidity.
- Advances shareholder and stakeholder activism by giving greater protection, powers and remedies to minority shareholders and other stakeholders (such as employees), including the ability to bring class actions.

THE NEW COMPANIES ACT - INTRODUCTION

- Reclassifies companies as being either:
 - Non-profit companies
 - Profit companies
 - State-owned companies
 - Personal liability companies
 - Private company
 - Public companies

THE NEW COMPANIES ACT – FOCUS FOR INSOLVENCY

- Winding Up provisions
- Reckless Trading
- Compromises with Creditors
- Business Rescue

WINDING UP

WINDING UP PROVISIONS

- Sections 343, 344, 346, 348 - 353 of the 1973 Act are replaced by sections 79 to 81 of the Companies Act.
- During the consultation process, the DTI was made aware of proposals within the Department of Justice and Constitutional Development to develop uniform insolvency legislation which, if brought to fruition, would overlap and may conflict with the regime set out in the 1973 Act for dealing with and winding-up insolvent companies. In order to avoid any future conflict, the Act provides for transitional arrangements that will retain the current regime, as set out in Chapter 14 of the 1973 Act without alteration, on an interim basis until such time as any new uniform insolvency law may be enacted and brought into operation.

WINDING UP PROVISIONS

- Item 9 (1) of Schedule 5 (Transitional arrangements) - despite the repeal of the 1973 Act, Chapter 14 of the 1973 Act (sections 337 to 426) continues to apply with respect to the winding-up and liquidation of companies under the new Companies Act but if there is a conflict, the new Companies Act prevails

- Item 9 (2) of Schedule 5 - Sections 343, 344, 346, 348 - 353 of the 1973 Act, [which have been replaced by sections 79 to 83 of the Act but which still apply as above] will not apply in respect of the winding-up of a solvent company.

- Item 9 (4) (a) - Item 9 continues to apply with respect to the winding up and liquidation of companies until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding up and liquidation of insolvent companies. Item 9 (4) (b) - the Minister may prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the 1973 Act, to the provisions of the alternative legislation contemplated in Item 9(4)(a).

WINDING UP PROVISIONS

- Section 79 (3) - if, at any time after a company has adopted a resolution for voluntary winding-up, or after an application has been made to a court as contemplated in S81 for its winding-up, it is determined that the company to be wound up is or may be insolvent, a court, on application by any “interested person” may order that the company be wound up as an insolvent company in terms of the laws referred to in Item 9 of Schedule 5.

WINDING UP PROVISIONS - Sections 79 to 81

- Section 79: a company can still be wound up by means of:
 - An application to court; or
 - Voluntary winding up
 - Member's voluntary
 - Creditors' voluntary

WINDING UP PROVISIONS - Sections 79 to 81

- Section 80: Voluntary winding up – substantially the same.
- Section 81: Court Applications for winding up of solvent companies:
 - S81(1) - a court may order a solvent company to be wound up in any one of the following circumstances –
 - 81 (1) (a) the company has resolved, by a special resolution, that it be wound up by the court or has applied to court to have its voluntary winding-up continued by the court [same as S344(a) of the 1973 Act];
 - 81 (1) (b) the company's practitioner appointed during Business Rescue proceedings has applied to court for liquidation on the grounds that there is no reasonable prospect of the company being rescued [this is new];

WINDING UP PROVISIONS – Sections 79 - 81

- 81 (1) (c) one or more of the company's creditors has applied to court on the grounds that –
 - the company's Business Rescue proceedings have ended due to rejection of a Business Rescue plan or the practitioner filing a notice of termination of Business Rescue proceedings or
 - it is otherwise just and equitable for the company to be wound up [similar to S344(h) of the 1973 Act];

WINDING UP PROVISIONS – section 79 – 81

- 81 (1) (d) the company, one or more directors or one or more shareholders have applied to court for an order to wind up the company on the grounds that –
 - “the directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock”, and either "irreparable injury" to the company is resulting, or may result, from the deadlock or the company’s business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock. [“deadlock” is not defined. This is new and reflects the common law position]; or
 - the shareholders are deadlocked in "voting power" [defined in Section 1 as “the voting rights that may be exercised in connection with that matter by a particular person, as a percentage of all such voting rights”] and have failed for at least two consecutive AGM dates to elect successors to directors whose terms have expired [this is also new]; or
 - “it is otherwise just and equitable for the company to be wound up”

WINDING UP PROVISIONS - sections 79 – 81

- 81 (1) (e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that either the directors, prescribed officers or “other persons in control of the company” are acting fraudulently or otherwise illegally or the company’s assets “are being misapplied or wasted”. [also new and also largely reflects the common law position under “just and equitable”]

- 81 (1) (f) the Commission or the Takeover Regulation Panel has applied, with leave of the court, for an order to wind up the company on the grounds that [new] -
 - the company, its directors, prescribed officers or “other persons in control of the company” are acting or have acted fraudulently or otherwise illegally, a compliance notice has been issued and such notice has not been complied with by the company; and

 - within the previous five years, enforcement procedures in terms of the Act or the CC Act, were taken against the company or any such persons for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.

WINDING UP PROVISIONS – section 79 - 81

- Section 81(3) is new - an order for a winding-up by a shareholder under section 81 (1) (e), or by the Commission or the TRP under section 81 (1) (f) on the grounds of fraud or other illegality may not be made by a court if, before conclusion of the court proceedings :
 - any director has resigned or has been removed, and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based; or
 - any shareholder has applied to court to have the directors, if any, responsible for the alleged misconduct declared delinquent, and the court is satisfied that the removal of those directors would bring the misconduct to an end.

WINDING UP PROVISIONS – section 79 - 81

- Section 81 (2) restricts the right of shareholder to apply to court. Very similar to section 346 (2) of the 1973 Act.
- The other procedural provisions of section 346 of the 1973 Act have been scrapped, but note that sections 346A (“Service of winding-up order”) and 347 (“Power of Court in hearing application”) of the 1973 Act remain in force for the time being.
- Section 81 (4) - a winding-up by a court begins when –
 - an application to court has been made in terms of 81 (1) (a) and (b) [same as S348 of the 1973 Act]
 - a court order has been made in terms of Section 81 (1)(c), (d), (e) or (f).

RECKLESS TRADING

RECKLESS TRADING

- Section 22 (1) - a company must not –
 - carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or
 - trade under insolvent circumstances.
- **New:** sections 22(2) and (3) - if the Commission has reasonable grounds to believe that a company is engaging in such conduct, it may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business or to trade. If the company fails, within 20 business days, to satisfy the Commission that it is not engaging in such conduct, the Commission may issue a compliance notice requiring it to cease carrying on its business or trading.
- Section 214 (1) (c) (i) – a person is guilty of an offence if the person was knowingly party to conduct prohibited by Section 22(1).

RECKLESS TRADING

- Section 77 (3) (b) and (c): a director is liable for “any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having”
 - “acquiesced” in the carrying on of the company’s business knowing that it was being conducted recklessly, with gross negligence or fraudulently or that it was trading under insolvent circumstances;
 - been a party to an act or omission by the company to defraud a creditor, employee or shareholder or had another fraudulent purpose; or
- Section 77 (3) must be read with sections 214 (1) and 216, which provide, inter alia, that most of the above actions or omissions are also offences, punishable by a fine or imprisonment not exceeding 10 years, or to both. Section 77 (7): proceedings to recover any damages, etc under section 77 may not be commenced more than 3 years after the act or omission that gave rise to that liability.
- Section 218 (2) – any person who contravenes any provision of the Companies Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

RECKLESS TRADING

- Item 9(1) of Schedule 5 (Transitional arrangements) – Section 424 of the 1973 Act continues to apply with respect to the winding-up and liquidation of insolvent companies under the new Companies Act.

COMPROMISES WITH CREDITORS

COMPROMISES

- Under 1973 Act, compromises fall under the scheme of arrangement provisions of section 311 – schemes of arrangement in relation to share restructuring as well as compromises with creditors.
- Under 2008 Act, schemes of arrangement (shares / creditors) are split and dealt with separately.
- Section 155 (2) - the board of a company, or the liquidator of a company that is being wound up [whether compulsorily or voluntarily, may propose an arrangement or a compromise of all of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of a meeting to consider the proposal, to the Commission and to every creditor, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company. Section 155(1) provides the compromise provisions apply irrespective whether it is “financially distressed”, unless it is engaged in Business Rescue proceedings. New – as section 311(1) of the 1973 Act allows a compromise to be proposed on application to court by the judicial manager of a company that is subject to a judicial management order.

COMPROMISES

- No need for court application for leave to convene meetings of creditors
- Section 155 (3) is new and codifies what is usually required under common law to be contained in the scheme document - such proposal must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal.
- Section 155 (6) - in order for a proposal to be adopted by creditors, or the members of a relevant class of creditors, it must “be supported by a majority in number, representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose”.

COMPROMISES

- Need for sanction by the Court?
 - Since it is also no longer necessary for the company to get court approval to propose a compromise, if sanction is not required, this means that, as long as a majority in number and value of creditors approve the proposed compromise, the compromise will become binding on all dissenting minority creditors without any court scrutiny to ensure that the proposal is fair and equitable
 - Section 155 (6) seems to suggest that the proposal is binding on all creditors if it is so “adopted”
 - Section 155 (7) provides that if a proposal is adopted, the company “may” apply to court for an order approving the proposal, and the court may sanction if the compromise is just and equitable.

COMPROMISES

- Need for sanction?
 - Section 155 (8) - a copy of an order of the court sanctioning a compromise
 - must be filed by the company at the Commission within five business days and
 - is final and binding on all of the company's creditors or all members of the relevant class of creditors, as the case may be, as of the date on which it is filed.
- Section 155 (9) - an arrangement or a compromise does not affect the liability of any person who is a surety of the company. Similar to section 311(3) of the 1973 Act.

BUSINESS RESCUE

Business Rescue: Comparable current examples of formal business rescue procedures

- South Africa: Judicial Management
- USA: Chapter 11 Bankruptcy
- United Kingdom: Administration
- Australia: Corporate Voluntary Administration

What are the building blocks of a Business Rescue proceeding?

- Moratorium/stay of enforcement against creditor proceedings to give the debtor a breathing space. When does the stay commence? What of secured creditors?
- Administrator appointed? Status of existing management /directors.
- Qualifications of an Administrator
- Invoking of Business Rescue proceedings. Approval of the courts? Costs.
- Onus of proof. On debtor to prove suitability of Business Rescue, or on creditor to allege abuse of the system.

What are the building blocks of a Business Rescue proceeding?

- Business Plan
- Creditor friendly or debtor friendly. Rights of shareholders / management. Extent of creditor involvement:
 - Choice of Administrator.
 - Instructions to Administrator
 - Approval of Business Plan

What are the building blocks of Business Rescue proceeding?

- Cutting of overheads:
 - Retrenchment of employees.
 - Termination of onerous contracts
 - Recovery of voidable dispositions
- Ongoing trading as a going concern:
 - Financing
 - Suppliers

The New Business Rescue Chapter

- Business rescue is defined as

“proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

- **The temporary supervision of the company and of the management of its affairs, business and property;**
- **A temporary moratorium on the rights of the claimants against the company or in respect of property in its possession; and**
- **The development and implementation, if approved, of a plan to rescue the company by restructuring 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’s not possible for the company to so continue..., results in a better return from the immediate liquidation of the company.**

The New Business Rescue Chapter

- “Financially distressed” is defined as
 - **“the company is unable to pay its debts as they fall due and payable, and its liabilities exceed its assets” or**
 - **“it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing 6 months” or**
 - **“it appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 months”**
- “Affected persons” – shareholders, creditors, employees/trade unions

The New Business Rescue Chapter

- Business Rescue can be invoked by:
 - an ordinary resolution of the board if the board has reasonable grounds to believe that the company is financially distressed AND “there appears to be a reasonable prospect of rescuing the company”. No prior notice to affected persons.
 - By an affected person (shareholder, creditor, employee or trade union) on application to the High Court on notice to the company, and other affected persons – must satisfy court that the company is financially distressed or the company has failed to pay over any amount in terms of employee related matters, or it is just and equitable to do so for “financial reasons”.
 - The court during an application for liquidation.

The New Business Rescue Chapter

- If the board has reasonable grounds to believe that the company is financially distressed but does not pass a resolution for Business Rescue, the board must deliver a written notice to all affected persons setting out if the company is “financially distressed” and the reasons why the board did not pursue a resolution for Business Rescue.
- If a creditor or interested party is unhappy with the registration of a resolution for Business Rescue, the creditor must apply to the High Court to set it aside.
- The effective date of Business Rescue is the registration of lodgment of resolution for Business Rescue, the issue of the papers if an affected person applies to the High Court for Business Rescue or the date the court makes an order if during other proceedings.

The New Business Rescue Chapter

- From the effective date of Business Rescue, moratorium on all claims including secured claims or claims “in relation to property lawfully in the possession of the company”, except with leave of supervisor in writing or High Court, or if the proceedings arise as a result of set-off or in criminal proceedings. Prescription is suspended during this time.
- The company appoints the practitioner. Board stays in office. Duplicates costs (directors remuneration and practitioner’s fees) and raises question mark over independence. The practitioner owes fiduciary duties to the company and not to creditors.

The New Business Rescue Chapter

- Effect on contracts/Property
 - During Business Rescue, employees remain on the same terms and conditions. If employees to be retrenched, the ordinary rules under the Labour Relations Act, 1995, will apply.
 - section 136 (2) which provides that a practitioner of a company in business rescue may

“cancel or suspend entirely, partially or conditionally, any provision of an agreement to which the company is a party at the commencement of the business rescue period.”

Does not apply to master ISDA contracts or contracts on an exchange, or employment contracts.

The New Business Rescue Chapter

- Effect on contracts/Property
 - During Business Rescue, the company cannot dispose of property other than in the ordinary course of business or with the prior written consent of the practitioner.
 - Post-Business Rescue financiers given preference over ordinary “secured and unsecured” creditors but not over employees and supervisor’s costs. Preference survives a subsequent liquidation if Business Rescue fails.

The New Business Rescue Chapter

- Practitioner must investigate company's affairs and financial situation. If there is any evidence of bad faith dealings before Business Rescue (impeachable transactions, reckless trading) the practitioner must direct the board to take action.

- Business Plans
 - Prepared by the practitioner in consultation with creditors and affected persons. Prescribed format.

 - Business Plan must be approved of by creditors (including employees) – 75% of creditors and 50% of 'independent creditors'. shareholders have limited rights to vote.

Befuddled? Inspired? Questions?

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