



# Voluntary business rescue proceeding as a rescue mechanism for businesses

May 2020

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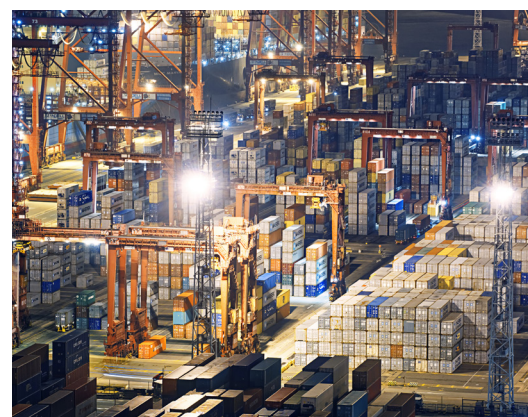
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**When faced with any crisis that impacts their operations, businesses should urgently undertake an assessment on their liquidity position through cashflow forecasting and, based on the outcome of this assessment, manage affected stakeholders proactively.**

The liquidity assessment through cashflow forecasting may reveal that the business will struggle to meet its obligations to creditors or breach covenants. In such a situation, businesses have various options for dealing with the creditors. They could renegotiate debts repayments with lenders by seeking a moratorium on debt service or restructure the debt, negotiate extended payments terms with suppliers, reduce their workforce, dispose idle or underutilized assets and/or cut operational costs.

On the other hand, depending on the severity of the distress and the extent of cooperation by creditors, businesses can consider other statutorily available remedies such as voluntary arrangements and business rescue proceedings which are intended to support the rescue of viable but financially distressed businesses. In Zambia, these remedies are codified in the Corporate Insolvency Act No. 9 of 2017 ("the Act"). The business rescue proceeding is a key remedy available to struggling businesses under the Act.

A common misconception of the business rescue proceeding is that it is only available when all else has failed, such as when a company is beyond the point of possible rescue. In fact, Section 21 of the Act provides



that the primary objective of a business rescue proceeding is to maintain the company as a going concern. It is only when this objective cannot be achieved that other actions such as realisation of assets are to be pursued. Several high-profile companies such as Comair Limited, South African Airways, British retailer Debenhams, Virgin Australia and Air Mauritius have voluntarily entered business rescue in recent weeks to pursue rescue after finding themselves in financial difficulties resulting from the COVID-19 pandemic and other operational factors.

A business rescue proceeding can provide an entity with a conducive environment to re-organise its affairs without the threat of

enforcement by creditors because a key provision of the Act is a moratorium which prohibits enforcement actions against a company by its creditors unless approved by the appointed business rescue administrator or the courts. This relief can enable a business to continue operating without threat of winding up proceedings which can distract management from their day-to-day functions.

Companies can also use the business rescue proceeding to overcome strained liquidity conditions. This is possible because of two features of the business rescue proceeding. First, when a company is placed under business rescue, there is a freeze on payment of its existing debts. This has the effect of easing the pressure on a company's strained cashflows. Second, funding provided to a company during the business rescue period, including payments to suppliers, are given priority when distributions are made by the appointed business rescue administrator. This makes it easier for the company to secure the necessary funding required to meet a company's working capital and other business obligations.

The business rescue proceeding is unique in that it can provide ample cover for implementing multiple options that are necessary for the survival of a business. From our experience, more than one solution is usually required to truly rescue a struggling business. This can include a mix of debt renegotiation, asset disposals, cutting costs, restructuring operations, etc. Once they are appointed, business rescue administrators are required by the Act to come up with a proposed business rescue plan for achieving the purpose of the business rescue. In coming up with these proposals, the business rescue administrator evaluates the best possible options for pursuing the objectives of the business rescue. These measures may be easier to implement in a business rescue scenario as creditors are more likely to engage with the appointed business rescue administrator given a business

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rescue administrator's expansive powers under the Act.

Business rescue can also maintain business continuity and stability which is essential when a business is in distress. This is because a business rescue administrator does not unnecessarily need to change a company's management team once appointed, especially where challenges facing a company are general to the economy or sector and are not a direct result of management incompetency. Therefore, business rescue administrators working collaboratively with management may have the best chance of helping a distressed business.

In considering the various options available to a company, directors should also be cognisant of their fiduciary duties and their obligations to other company stakeholders such as creditors. Directors should be aware that under the Companies of 2017 and the Corporate insolvency Act No. 9 of 2017, they can be personally held liable

for civil and criminal actions should they be found guilty of wrongful or fraudulent trading.

Wrongful trading is where a company continues to trade at a time when there is no reasonable prospect of avoiding an insolvent winding up. On the other hand, fraudulent trading arises where directors knowingly carry on a company's business with the intent to defraud creditors by incurring credit that a company cannot repay. It is critical for directors to consider these aspects in evaluating the various rescue options available to a distressed company.

To ensure the objectives of placing a company under business rescue are realised, it is important to (i) secure the cooperation of all major stakeholders (i.e., secured and unsecured creditors, directors, employees, etc.) and (ii) take action early in making the business rescue decision. From our experience, delayed action and conflicting stakeholders' interests are some of the common pitfalls bedevilling business rescue appointments in our jurisdiction.

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