When Is A Business Rescue Successful?

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Business rescue is a process designed to achieve a specific goal, where the goal is ill-defined and the expected outcome is poorly understood.

Numerous articles have been published making sweeping statements about the business rescue process, and its success rate or lack thereof. However, none of these articles establish the criteria they deem necessary for a business rescue to be classified as successful.

There is an old management adage – if you can't measure it, you can't manage it. So how do you manage an opinion on a subject matter without explaining what you are measuring?

Right to information and participation by affected parties

So, let us investigate the possible criteria to determine what constitutes a successful business rescue. In their book, Business Rescue and Compromise Offers (2015), Gribnitz and Appelbaum argue that there are two cornerstones on which business rescue rests, being:

- the right of affected parties to information; and
- right to participate in all business rescue proceedings and any other related court proceedings pertaining to the Company.

If the affected parties received the necessary and adequate information and had access to all the proceedings during the business rescue, then, according to the Act, the purpose of a business rescue has been fulfilled.

It is the job of the business rescue practitioner to publish a business rescue plan and chair a meeting of creditors, which may be attended by other affected parties, to make a decision to adopt, reject or amend the plan within the prescribed periods set out in the Act.

The Act also indicates that the Company must be returned to solvency and liquidity after the implementation of the plan. However, in the event that the business rescue practitioner is not able to save the business, he may present a plan that would result in a better return for creditors and shareholders than would result in the immediate liquidation of the Company.

Alternatively, the practitioner may terminate the business rescue and file for liquidation. Currently, if a practitioner files for liquidation within 25 working days from his appointment, he may be considered prudent, but if he fails to publish a plan and simply waits for three months or longer before filing for liquidation, his actions should be deemed reckless. Timing of what happens, and when is crucial in measuring the compliance competency of the business rescue practitioner.

Business rescue is the process of balancing the rights of the affected parties with the needs of the Company

A business rescue plan can only be adopted by the creditors (and shareholders in certain cases) of the Company. The practitioner provides a framework (being the business rescue plan), for what the best return for creditors could be, while balancing this against the needs of the Company.

If the Company is to remain in business, it will require staff, working capital, and assets to continue operating. This implies that the Company must be solvent to continue with its operations, which in turn, implies that there should be more assets than liabilities in the Company post-adoption of the plan. Unless the creditors are paid 100 cents in the Rand, in the case where assets exceed the liabilities, a plan to continue trading means that the creditors must agree that what they recover in the plan, must be balanced with the needs of the Company.

A competent practitioner will know when:

- a capital injection is required to restore the equity of the Company, or
- it is possible to shrink the business within its capital limitations from where it can grow, or

- it is best to propose a structured wind-down.

After measuring if a business rescue practitioner has complied with the requirements of the Act, the next test that should be performed is to measure how many of the practitioner's plans have been approved by creditors.

The success of the implementation of the plan

Once the plan has been adopted by the creditors (and shareholders where required), such a plan should be implemented. In either a structured wind-down or the finding of an investor, implementation of the plan may last 6 to 12 weeks, while a trade-out may take up to 18 months to complete.

Therefore, measuring the duration of business rescue is very specific to what is contained in the plan. If you want to measure the duration of a plan's implementation, it should be measured against what is contained in the plan and then be evaluated. It is impossible to simply create an average across every business rescue and make a pronouncement of it being a success or not, based on the duration of the business rescue.

A business plan is based on assumptions of what outcomes will be realised in the future and cannot take all possible variables into account.

Accordingly, a competent practitioner must be able to manage the implementation of the plan to the best of his ability, and should he fail to implement the plan or part thereof, he should come back to the creditors and other affected parties and find a manner to implement the plan. Merely promising creditors that the Company will pay them at some future date may result in the plan being adopted, but the Company remaining insolvent and illiquid and continuing to trade in insolvent circumstances means that the plan cannot actually be implemented.

The competency and skill of the practitioner is key

To be a competent business rescue practitioner requires:

- in-depth knowledge on how business works;
- expert financial literacy;
- the skill to envision an entrepreneurial and implementable plan;
- negotiation and deal-making skills;
- understanding human emotions;
- understanding the 364 obligations as set out in Chapter 6 of Companies Act; and
- being able to project manage multiple work streams to ensure that the various elements in the plan are properly presented and implemented.

In my opinion, the profession best suited for competent business rescue practitioners is that of the professional accountant but this needs to be combined with extensive business experience.

A competent professional account is capable of being taught the provisions of the Act in a relatively short time while teaching any other professional the intricacies of and to become an expert in financial literacy skills will take years. The practitioner must be able to create a plan that becomes a sales document encapsulating a strategy for the business and how it will be implemented. A business rescue practitioner cannot have someone else do the work and not understand intimately all the implications of the strategy, as he needs this knowledge to present the plan to creditors and convince them to adopt the plan.

There are simply too many tasks for a single individual to complete, which implies that a competent practitioner should be working with a team of multi-disciplinary experts to ensure that all the measures of success as set out above take place.

Summary

If your Company is in financial distress, in other words, you cannot pay your creditors as they fall due in the next six months, you have to place your business in business rescue – that is the law according to Chapter 6 of the Companies Act. If your sole measure of success is that you want your Company to return to solvency and liquidity after business rescue, you have to appoint a competent practitioner.

As at the end of February 2020, there were 463 registered practitioners of which 103 are professional accountants.

My advice is to find yourself a professional accountant who operates with a multi-disciplinary team to become the practitioner for your business and when you ask the questions as set out below, it will give you an indication of whether they are sufficiently skilled and experienced to act as a business rescue practitioner.

It is the only way you, as the director, can ensure that your business will continue after the business rescue process has been implemented.

How to evaluate a business rescue practitioner?

1. How many business rescues have you undertaken as a practitioner?
2. In how many of these were the plans published within 25 days?
3. What is the average length of extensions sought to publish business plans?
4. Were all the notices for the process sent out within the prescribed time periods?
5. How many plans were adopted at the Section 152 meeting of creditors?
6. How many plans were adopted at the Section 153 meeting of creditors?
7. How many business rescues were converted into liquidation and after what period of time?
8. Were you appointed as a practitioner before the Company was placed in liquidation?
9. Have any of your actions during business rescue proceedings been challenged in court?
10. How many of your plans :
    1. were structured wind-downs,
    2. were trade-outs, and
    3. attracted new investments?
11. How many adopted plans have you successfully implemented?
12. How many notices of substantial implementation have you filed with CIPC?
13. What are your qualifications to be a business rescue practitioner?
14. What training have you undergone to become a business rescue practitioner?
15. What general business experience did you have prior to becoming a practitioner?
16. Do you work with a multi-disciplinary team? If so:
    1. who are they, and
    2. what roles do they fulfil?

These questions are guidelines and designed to give you an overview of the practitioner's history. I suggest that you interview more than one professional accountant. The manner and the type of answers they provide will very quickly indicate whether you are dealing with competent people or not.