



DOES THE S 155 COMPROMISE FURTHER THE OBJECTIVES OF BUSINESS RESCUE?

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The Companies Act 2008 provides in sections 128-155 (Chapter 6) for 'business rescue and compromise with creditors', which deals primarily with the 'business rescue' of companies. The compromise mechanism, contained in section 155, is distinct from the sections dealing with business rescue, which provide for a fairly comprehensive procedure for ultimately developing and implementing a plan to rescue the company from its financial distress under the supervision of a business rescue practitioner. Section 155, on the other hand, provides for the restructuring of the financial affairs of a company without the involvement of a business rescue practitioner, allowing a company to propose a compromise or arrangement to its creditors in a form that is almost identical to a business rescue plan.

Unlike business rescue, the idea of entering into a compromise or arrangement with creditors is not new to South African company law. The Companies Act 1973 provided for two mechanisms for this kind of informal restructuring – a 'compromise' and an 'arrangement'. Although the former process had a narrower meaning than the latter technically speaking, the distinction was often blurred when the two were combined in a so-called 'scheme of arrangement'. To properly understand the utility of the new section 155 compromise, one must consider the historical background to the concept of compromise in this context, and the way in which both of these two mechanisms were applied under the previous legislation. Although the Companies Act 2008 does not distinguish the concepts 'compromise' and 'arrangement', it should not be assumed that the Act intended to change the mechanisms entirely – particularly where they still have practical utility – and furthermore, the objects of the Act require that the new versions of these two creatures be interpreted in a way that achieves 'the efficient rescue and recovery of financially distressed companies' (see s 7(k) in particular).

Under section 311 of the Companies Act 1973, it was possible for a company to restructure its financial affairs by way of a compromise or scheme of arrangement with either its creditors or members. Where a compromise was entered into with creditors, there were numerous applications to court require, and the process thus become both costly and cumbersome in practice. Since there was no automatic moratorium available under the Companies Act 1973, a moratorium against enforcement of claims would have to have been achieved by obtaining an order of provisional liquidation to hold the creditors at bay while renegotiating contractual obligations.

The Companies Act 2008 still allows for both compromises and 'arrangements', but the latter are only possible between the company and holders of any class of securities, and only where the company in question is neither under business rescue or liquidation. Where a company finds itself in financial distress, therefore, it would seem that it will have only two options: filing for business rescue and appointing a business rescue practitioner, or entering into a restructuring agreement by way of the section 155 compromise with creditors.

The compromise mechanism envisaged provides for what is in substance a business rescue plan to be proposed without by the company itself rather than a business rescue practitioner (as would be the case in ordinary 'business rescue'). As a more streamlined procedure that allows the debtor to remain entirely in possessions and not comply with fairly onerous formalities relating to notice periods and calling of meetings, it shows promise in principle, but lacks in certain material respects.

Although it is submitted that separate meetings must be held in respect of each class of creditors when approving the plan, section 155 does not make it clear whether approval must be obtained at a single meeting of creditors, or by separate meetings of each class. Furthermore, where it is not certain that a 75% majority will support the proposal, it would not be advisable to pursue a section 155 compromise instead of filing for business rescue; this high threshold may obstruct the compromise from achieving the object of successfully rescuing financially distressed companies where relatively few creditors are uncooperative. A financially distressed company may also prefer to make use of business rescue (rather than enter into a compromise with creditors) would be the fact that section 155 does not provide for a moratorium to protect the company from claims of creditors during the period of renegotiation, and – like under the Companies Act 1973 – the compromise procedure is also available to a company under liquidation.

For a more comprehensive treatment of this topic, see Hans Klopper & Richard S Bradstreet 'Averting Liquidations With Business Rescue: Does Section 155 Place The Bar Too High?' 2014 (3) Stellenbosch Law Review.

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