

# APPOINTING THE BEST BRP

*The fiduciary duties of the BRP (business rescue practitioner) are defined by legislation and by the many roles the BRP plays in the business rescue proceedings. These duties include acting with the utmost trust, loyalty, good faith and confidence, to the benefit of all stakeholders in the business rescue process. It is accepted that the BRP is held to a standard of conduct and trust higher than that expected from the casual business person.*



Section 128(1)(d) of the Companies Act provides a definition of the business rescue practitioner:

*"a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings ...".*

Section 128 also defines a business rescue as: "proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

*(i) the temporary supervision of the company, and of the management of its affairs, business and property; [and]*

*(ii) ...*

*(iii) 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 is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."*

In terms of s140 the duties of the business rescue practitioner are:

*"(1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—*

*(a) has full management control of the company in substitution for its board and pre-existing management;*

*(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;*

*(c) may:*

*(i) remove from office any person who forms part of the pre-existing management of the company; or*

*(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and*

*(d) is responsible to:*

*(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and*

*(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.*

*(1A) The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.*

*(2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person— (a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or (b) is related to a person who has a relationship contemplated in paragraph (a).*

*(3) During a company's business rescue proceedings, the practitioner—*

*(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;*

*(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75, 76 and 77; and*

*(c) other than as contemplated in paragraph (b)—*

*i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but (ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.*

*(4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company."*

From this it is evident that the BRP's role and duties in the business rescue process are multidimensional. In terms of s140, the BRP is an officer of the court, a pseudo-director in whom all the management powers of a company are vested, and the person who is supposed to safeguard the interests of all affected persons. The BRP is expected to act as an overseer, a facilitator, supervisor and manager during the business rescue period.

It is imperative that a company appoints a BRP who possesses the necessary skills and expertise. Failure to do so can result in a BRP not discharging his or her fiduciary duties and an aggrieved party may bring an application to set aside the appointment in terms of s130, as well as the possible setting aside of the business rescue plan. This could have far reaching and devastating implications for the relevant stakeholders.

From a legal perspective, the BRP must have an in-depth knowledge of Chapter 6, and the necessary expertise to apply the Regulations. Understanding the law of insolvency in order to assess each creditor's claim is imperative. The BRP has a duty to have a reasonable level of financial knowledge and must be able to understand, interpret and analyse financial documents and books. Where this is not the case, the BRP has a duty to ensure that a financial consultant is appointed and to inform the stakeholders of the cost implications of such an appointment.

Finally, the BRP must have sufficient management skills, bearing in mind that the BRP adopts the duties of the directors to the company as embodied in s140. The BRP must act in good faith and in the best interests of the company. The BRP must be able to manage the company with the existing management team. The business rescue plan compiled by the BRP must be accepted by all the role players, that is, the creditors, company management, employees and where applicable trade unions.

The courts stringently scrutinise the fiduciary relationships the BRP owes to all stakeholders in the process to ensure that there is no undue influence, and no prejudice suffered. They have issued a number of judgements where the duties of

the BRP's are discussed. In the case of *Ex parte: Target Shelf 284 CC; Commissioner, South African Revenue Service and Another v Cawood N.O. and Others*, the court took "cognisance of the speed at which the practitioners completed the business rescue plan and the punctuality at which the meetings of creditors were adhered to."

The court was scathing in its criticism of the BRP's actions in the case of *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others*. It was noted that the resolution to commence the business rescue and the plan were based on financial statements that were more than five-years old. This made a proper assessment of the prospects of business rescue fundamentally difficult. The court found that the resolution taken to proceed with the process had no proper basis and was set aside.

It was also found that the BRP did not appreciate the responsibilities placed on him under the Act. A BRP must be held to a high professional and ethical standard. Other than the duties embodied in terms of Chapter 6 of the Act, he has the additional duties held by officers of the court, and all the responsibilities, duties and liabilities of a director as set out in ss75 to 77 (s140 (3) (b)). The BRP never attempted to obtain an objective assessment of facts upon which to make a proper assessment of prospects of success. The BRP did not act independently and rather appeared to be an agent for Kariba. He failed to act objectively and impartially in the conduct of the business rescue proceedings. His apparent lack of appreciation of the seriousness of the office he held was found to be unacceptable. In addition, the BRP did not act impartially when legal proceedings were instituted, and actively engaged in the court process as an attorney, representing himself and Kariba. The court found the practitioner's grossly improper conduct was deliberate and he had to carry the costs jointly and severally with the other respondents.

It is evident that there are harsh penalties for the BRP who fails to discharge his fiduciary duties towards all stakeholders. Although the financial rewards for acting as a BRP are lucrative, it must be born in mind that the financial implications where a BRP has fallen short of his duties can be extreme. Ultimately it is the stakeholders in the BRP who are most negatively affected. It is evident that an argument can be made for clear legislative guidelines to assess the qualifications and expertise of practitioners. At present a BRP must be registered as such and comply with the terms of s138. There is also the recent concept of a Certified Turnaround Professional (CTP). This is a professional with extensive knowledge and expertise in the fields of "turn around management, accountancy and law". An applicant must meet the standards that have been introduced by the Turnaround Management Association (TMA). In order for the concept of business rescue to succeed and produce the effective and speedy results it was created for, it is important that the most ethical and best qualified BRPs be appointed. With productive regulation, effective implementation of the judicial process and the help of the courts it is to be hoped that this will be achieved.

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