Taking the easy way out of business rescue proceedings

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It's an open secret that the commendable goals envisaged by the legislature with the introduction of the business rescue proceedings in Chapter 6 of our Companies Act are being hampered as a result of poorly drafted statutory provisions that govern the business rescue process.

Section 141(2)(a)(ii) is however not one of these vague provisions. It provides as follows:

> "(2) If, at any time during business rescue proceedings, the practitioner concludes that -
>
> (a) there is no reasonable prospect for the company to be rescued, the practitioner must -
>
> (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation..."

The insertion of the word "must" makes this provision peremptory and not merely a directory and places a statutory obligation on a business rescue practitioner to apply to court for the liquidation of the company as soon has he/she concludes that there is no reasonable prospect of the company being rescued.

With this unequivocal provision in mind, can a business rescue practitioner merely file a notice for the termination of the business rescue proceedings without applying to court to liquidate the company? In the matter of *Western Crown Properties 61 (Pty) Ltd vs Able Walling Solutions (Pty) Ltd & Others/ 8073/16*, the Western Cape High Court touched on this question.

The relevant facts in this case were as follows. During May 2016 Western Crown Properties 61 Pty Ltd (Western Crown) launched an application seeking an order for the setting aside of the resolution to commence business rescue proceedings taken by the directors of Able Walling Solutions Pty Ltd (Able) and for Able to be placed in liquidation.

At a meeting held on 31 August 2017, the business rescue practitioner informed the affected persons that he had concluded that there was no longer a reasonable prospect of Able being rescued as contemplated in section 141(2)(a) of the Companies Act and filed a notice with CIPC

stating that "business rescue proceedings are terminated upon the filing of this Notice, in the manner contemplated in section 132(2)(a)(ii)". The business rescue practitioner further elected to abide by the court's decision in the liquidation application launched by Western Crown.

The court considered the wording of the section 141(2)(a)(ii) of the Companies Act and placed emphasis on the wording "during the business rescue proceedings". The court also considered the provisions of section 132(2)(a) and 132(2)(b) of the Companies Act, which provide as follows:

> "(2) Business rescue proceedings end when –
>
> (a) the court -
>
> (i) sets aside the resolution or order that began those proceedings; or
> (ii) has converted the proceedings to liquidation proceedings;
>
> (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings..."

In its judgment, the Western Cape High Court held that since the business rescue proceedings was already terminated by filing the notice of termination of the business rescue proceedings, the business rescue practitioner had no legal standing and was under no obligation to seek the liquidation of Able, since the business rescue proceedings no longer subsist.

We agree with the judgment to the extent that the court confirmed that a business rescue practitioner becomes *functus officio* once the business rescue proceedings end. However, we do not agree with the perceived endorsement that it is permissible for a business rescue practitioner to merely file for the termination of the business rescue proceedings after concluding that there is no reasonable prospect of the company being rescued.

The legislature's intention was made abundantly clear by the insertion of the word "must" in section 141(2)(a).The language of this provision is unambiguous and, when considered in light of general principles of interpretation, no other interpretation can be given to this provision than one where a statutory obligation is placed on a business rescue practitioner to bring an application to liquidate a company once he/she concludes that the company cannot be rescued. A notice of termination can only be lawfully filed on the date that the court has converted business rescue proceedings into liquidation proceedings or if the practitioner concludes that the company is no longer financially distressed.

We are of the view that a business rescue practitioner may be in breach of his statutory obligation should he/she fails to apply to court for the liquidation of the company after concluding that there is no reasonable prospect of the company being rescued, which breach may have severe consequences.

We are not blind to the onerous consequences for practitioners of this statutory obligation,

especially in light of the recent SCA judgment in *Diener NO vs Minister of Justice & Others* in which the court held (among other things) that the effective date of liquidation proceedings subsequent to a failed business rescue is the date the liquidation application was issued at court, and that the business rescue practitioner's claim for outstanding remuneration and expenses holds no more than a preference against the free residue after costs of liquidation and does not rank preferent to secured creditors. Although we remain of the view that the SCA incorrectly found on these two issues, the case law cannot be ignored.

The hard truth of the above is that section 141(2)(a) of the Companies Act places a statutory obligation on a business rescue practitioner to liquidate the company after concluding that there is no prospect of it being rescued, but the remaining provisions of Chapter 6 of the Companies Act read with the *Diener* judgment do not encourage a business rescue practitioner to adhere to this obligation or protect him if he does so. As the adage goes, no good deed goes unpunished - many business rescue practitioners are likely to be left out of pocket for doing the right thing in terms of section 141(2)(a).

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