

# BUSINESS RESCUE, LIQUIDATION OR S155 COMPROMISE OF CREDITORS?



Every company has its own unique circumstances and therefore stakeholders need to carefully consider what options are available to them in order to mitigate their losses in the event that the company is financially distressed or insolvent.

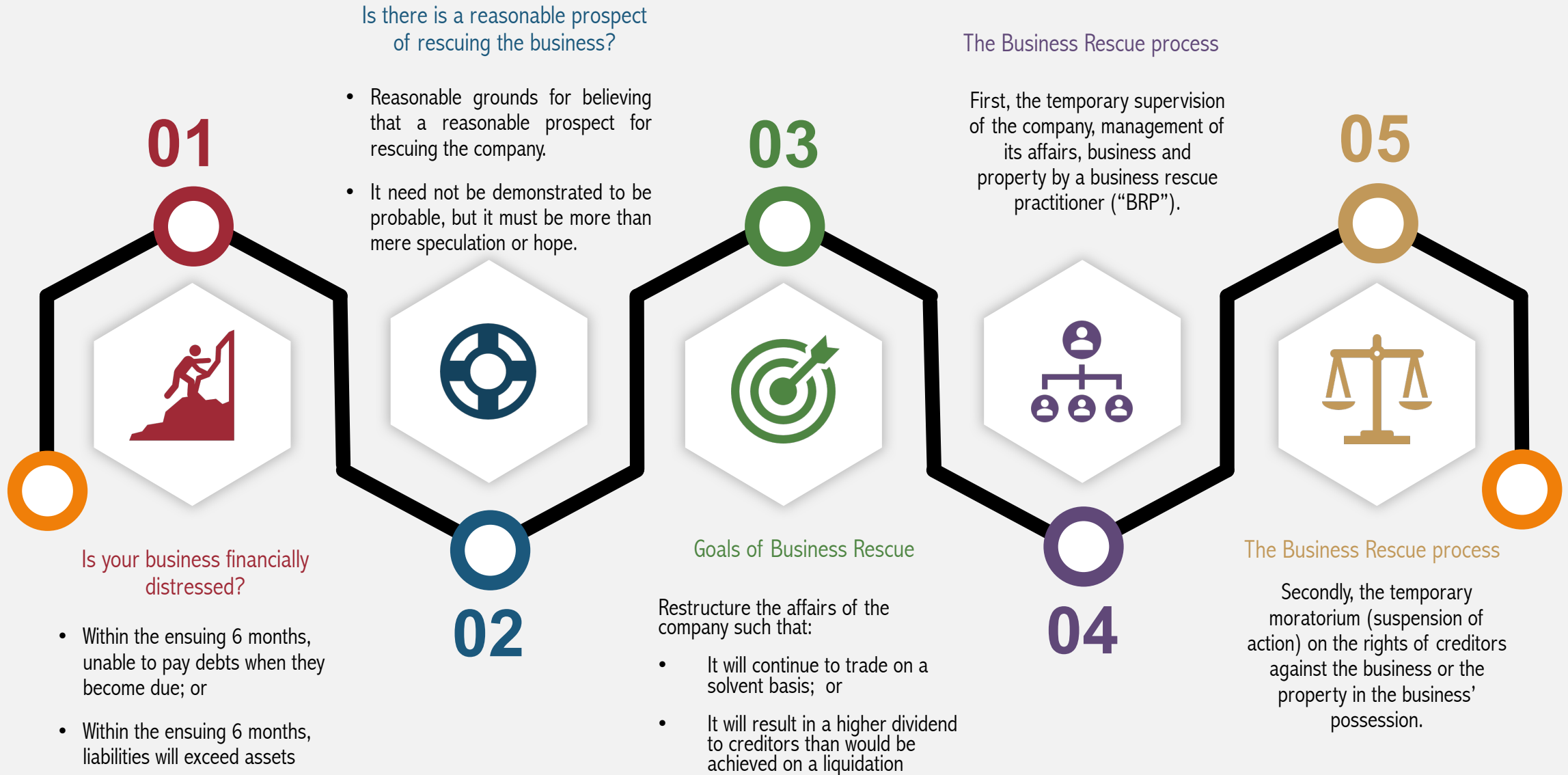


It is not always the company itself that takes proactive steps in the event of financial distress or insolvency, but often creditors who take the necessary steps to place the company under the control of an independent third party, with a view to restructuring the affairs of the company or winding-up the business for the benefit of the company's creditors.



Other than an informal restructure or turnaround strategy, there are three formal mechanisms available in our law that could be considered namely: (i) Business Rescue; (ii) Liquidation; and (iii) a Section 155 Compromise of Creditors.

# Business Rescue procedure in South Africa 1/2



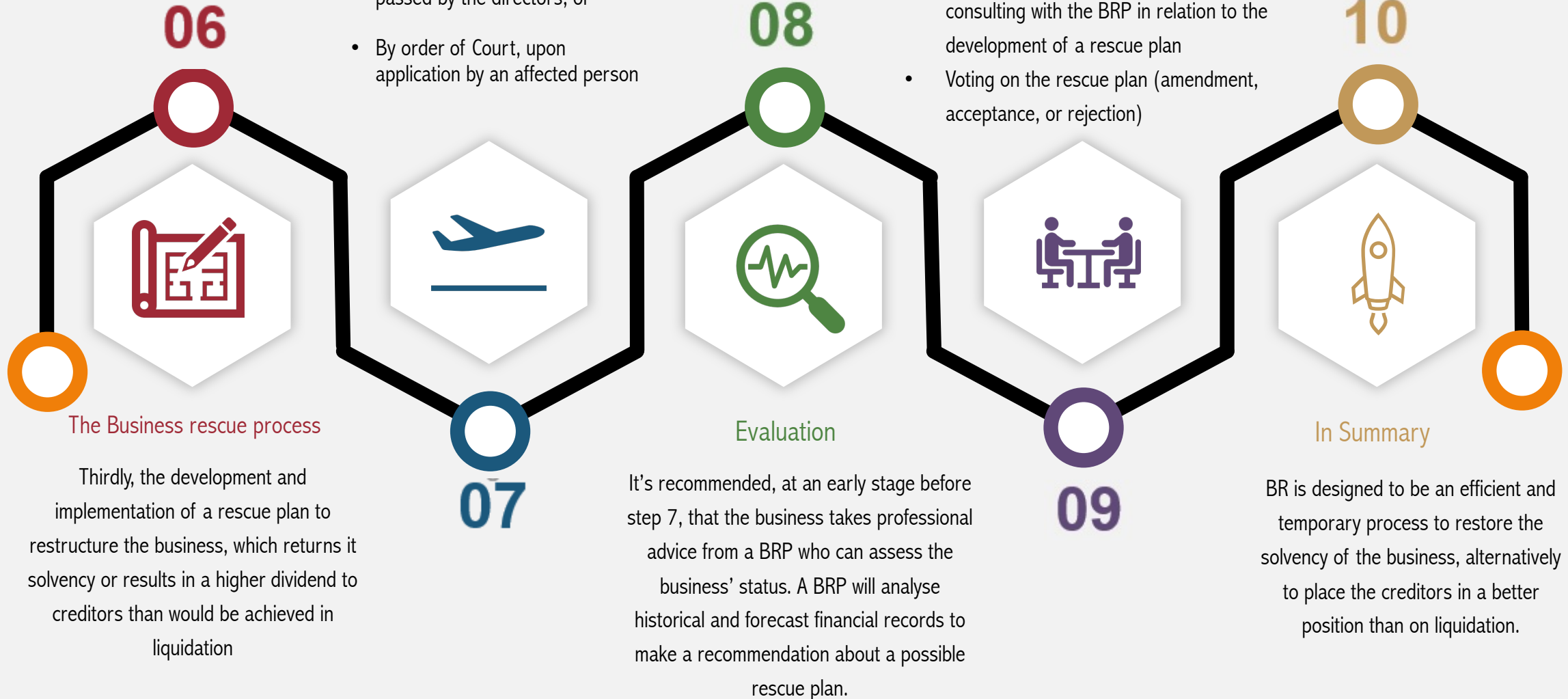
# Business Rescue procedure in South Africa 2/2

## How to commence Business Rescue proceedings?

- Voluntary special resolution passed by the directors; or
- By order of Court, upon application by an affected person

## Creditor's role during Business Rescue

- Lodging claims against the business with the BRP
- Participating at meetings of creditors and consulting with the BRP in relation to the development of a rescue plan
- Voting on the rescue plan (amendment, acceptance, or rejection)



# Liquidation (Winding Up) 1/2

## Company Insolvent

- Factually Insolvent in that its liabilities exceed its assets
- Commercially Insolvent in that it is unable to pay its debt as and when they fall due for payment



### Court Application

Brought by company, creditor or business rescue practitioner (if applicable)

### Creditors' Voluntary Winding Up

Resolution filed by company and lodged with CIPC

## Company Solvent

The company has no liabilities or has provided security to the satisfaction of the Master for payment of its liabilities within a period of twelve months from the date of commencement of the winding-up

### Court Application

Brought by company, creditor or business rescue practitioner (if applicable)

### Voluntary Winding Up

Resolution filed by company and lodged with CIPC

# Liquidation (Winding Up) 2/2

## Effect of Liquidation on Creditors

- Institution of the concursus creditorum, resulting in the “crystallization” of the claims of creditors
- Creditors must prove claims

## CLASS / RANKING OF CREDITORS

### SECURED CREDITORS

- Creditors who have a preferent right by virtue of any special mortgage, landlord’s legal hypothec, pledge or right of retention
- Entitled to net proceeds from realisation of the asset which form the subject of its security

### PREFERENT CREDITORS

- Creditors entitled to receive dividends out of free residue (after payment of the costs of administration) ahead of concurrent creditors

#### PREFERENCE RANKING

1. Employees in respect of certain categories of claims (subject to statutory limitations)
2. Certain specified statutory claims
3. General notarial bondholders

### CONCURRENT CREDITORS

- Creditors whose claims are unsecured and do not enjoy any preference.
- The balance of the free residue, following payment to the preferent creditors, is distributed amongst the concurrent creditors on a pro rata basis according to the quantum of their claims

# S155 OF THE COMPANIES ACT: COMPROMISE BETWEEN A COMPANY AND ITS CREDITORS

## OVERVIEW

A mechanism created by the 2008 Companies Act which allows either the board of a company or a liquidator ("the Proposer") to propose an arrangement or a compromise of its financial obligations to:

- all of its creditors; alternatively
- the members of a class of creditors.

A compromise under this section can provide *inter alia* for a restructure of the company's affairs as an alternative means of winding-up the company or for the take-over of a company by a third party and consequent termination of the liquidation process.

A compromise is not available to a company in business rescue

## PROCEDURE

The Proposer must prepare and deliver a written proposal, together with notice of a meeting to consider such proposal, to every creditor of the company, alternatively, every member of the relevant class of creditors; and CIPC.

Such written proposal must contain all of the information reasonably required to facilitate a decision by the creditors as to whether or not to accept or reject the proposal.

Section 155(3) of the 2008 Companies Act details the minimum information to be reflected in a proposal. Any further information included in the proposal will be dependent on the circumstances of each business and the nature of the compromise.

Within a reasonable time period after delivery of the proposal (normally ten business days), a meeting must be convened for the purposes of considering the proposal.

## VOTING REQUIREMENTS:

A proposal will have been adopted if it is supported by a majority in number of creditors or class of creditors. If there are different classes of creditors who are affected, it is suggested that separate meetings be held for each class. Such creditors must also represent at least 75% in value of the creditors or class of creditors. Furthermore, such creditors must be present and voting in person or by proxy at the meeting convened to consider such proposal.

## SANCTION BY THE COURTS

If a proposal is adopted by creditors, the Proposer must apply to court for an order sanctioning such proposal.

If a court order is granted, sanctioning such proposal, same is final and binding on all of the company's creditors or all of the members of the relevant class of creditors, as the case may be, from the date that the court order is filed with CIPC.

# CONCLUSION

The appropriate mechanism to adopt would be informed by the unique facts and circumstances of the relevant company.

Of course, if the company simply requires a breathing space within which to restructure its affairs such that it can continue to trade on a solvent basis, alternatively afford its creditors a better dividend than they would receive on a liquidation, business rescue would be an appropriate option. The company or affected person initiating the business rescue proceedings must have reasonable grounds to believe that there is a reasonable prospect of rescuing the company.

If however it is not envisaged that the company would be able to restructure its affairs, a liquidation would be appropriate. As set out above, a compromise under section 155 of the Companies Act could still be pursued on a liquidation.

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