

ACCEPTING A BUSINESS RESCUE appointment

Business rescue is often viewed with suspicion and has been tainted in the business sector due to many failed and drawn-out cases. It does however provide a vital lifeline for distressed businesses and all the affected persons. Success as a practitioner is enhanced through performing a detailed analysis of the distressed business before accepting an appointment, thus ensuring that the business qualifies for rescue and that you have the capacity and skills to rescue the distressed business

In a previous article (ASA April 2021) I discussed the factors to be considered when appointing a business rescue practitioner (BRP). In this article, I explore what factors the accredited practitioner should consider before accepting an appointment.

This article is written from the perspective that a person has been approached by the directors of the distressed company to accept the appointment as a BRP. The access to information and the process may differ if you have been approached in terms of a court application to enter business rescue but the principles that need to be considered remain the same as the nature of the assignment does not change.

When approached to accept an appointment, I believe you should request the following minimum information to enable a decision to be made:

- Latest signed annual financial statements (AFS)
- Management accounts post the period covered by the AFS
- Up-to-date trial balance
- Full creditor and other liability listing including details of any preference, security or subordination attached to these
- Details of any current legal action that has been taken against the company
- Employee organogram
- Trading and cash flow budgets and forecasts with the basis for underlying assumptions
- A brief summary outlining the company's business model
- Reasons for the company having become distressed and the rationale for considering business rescue as a solution

An analysis of the above information, together with Internet

research, will provide the practitioner with the ability to make an initial assessment on whether to pursue the appointment. If considered viable, this leads to a critical meeting with the distressed business' board of directors.

The analysis should provide answers to the following questions:

Am I qualified in terms of the Companies Act 71 of 2008 to accept the appointment?

Section 138(1) of the Act sets out the required qualifications for appointment as a BRP. For the purposes of this article, it is assumed that you meet the requirements, which require the person to be

- A member in good standing of a legal, accounting or business management profession accredited by the Companies and Intellectual Property Commission (CIPC)
- Licensed by the CIPC to act as a BRP
- Not under probation
- Not disqualified from acting as a director of a company
- Not related to a director of the company

From the information gathered you can determine whether your status as a junior, senior or experienced BRP allows you to accept the appointment based on the size of the company (see Regulation 127 as set out in the Companies Regulations 2011).

You must also be certain that the appointment will not present you (using the reasonable and informed third party test) with any conflict of interest. In this respect the SAICA Code of Professional Conduct, specifically the Conceptual Framework (section 120), provides a model for assessing and documenting your considerations in assessing your independence and possible conflicts of interest.

Does the distressed business qualify to enter business rescue?

The financial information you have received will enable

you to determine whether the company meets the Act's financially distressed definition in the ensuing six months through either being reasonably:

- Unlikely able to pay all of its debts as they become due, or
- Likely to become insolvent

Having determined that the company meets the definition of being financially distressed, you will need to now apply your mind to the far more objective test of determining whether there appears to be a reasonable prospect of developing a business rescue plan which would provide a reasonable prospect of saving the company.

It is at this point that you need to apply your professional judgement in testing the assumptions underlying the forecasts and budgets that the directors have provided.

Meeting with the board of directors in open and frank discussions will provide you with the best opportunity of truly understanding

- The business model
- The challenges the company has faced which have resulted in financial distress
- Whether their belief that the company can be rescued is based on desperate hope or fundamentally solid facts
- Whether the underlying reasons for entering business rescue are aligned with the Act or serve a purely personal agenda (such as avoiding personal liability)

Following this meeting, it is important to apply professional scepticism in evaluating the information gathered and to test it against knowledge required from other sources, such as discussions with the incumbent auditor, Internet research, etc.

Do I have the expertise required?

Having met with the directors (and where appropriate with senior employees and employee representatives) you should have a strong understanding of what will be required to both develop a successful business rescue plan and supervise the affairs of the company during the implementation phase of the plan.

You will need to ask yourself whether

- You have the required knowledge to manage the business on a day-to-day basis
- You can rely on and supervise the existing management team to implement your management plan whilst you develop the business rescue plan
- If you cannot rely on the existing structures, whether you have access to resources that can be utilised to assist you with operating the business during the supervision period
- Post-commencement finance will be critical to operating the business during the supervision period and whether are you likely to be able to source finance
- There are likely to be legal obstacles to implementing the plan and if so, whether you have the access to the correct resources to navigate these challenges
- You are likely to meet resistance to the plan from identified affected persons and if so, whether you have the skills required to get them on board with the plan

Important consideration

It is important that you consider all the above factors, not only from the perspective of the affected persons who may wish to see a successful business rescue, but also consider it from the perspective of one who may not wish to see the rescue succeed.

In doing so, ask yourself what the bases are on which they may be able to either set aside the process or your appointment.

You need to be reasonably certain that affected persons would not succeed in setting aside your appointment or indeed the entry into business rescue based on section 130 of the Act dealing with objections to the company resolution to begin business rescue proceedings. That is why it is critical that you apply your mind fully to all the above considerations before accepting an appointment which could be set aside based on various objections!

Do I wish to accept this appointment?

Having established that the company qualifies to enter business rescue and that you qualify to be appointed as the BRP, you should now be in a position to decide whether you wish to accept the appointment.

Ask yourself the following:

- Do you have the time available to dedicate to the appointment? Business rescue is an intensive process which requires ongoing and often immediate attention to matters which cannot be delegated. You must always remember that you will effectively be the managing director of the company and must apply your time, attention and skills as such.
- Do you have sufficient understanding and access to knowledge about the business model to both supervise the business and develop a successful long-term business plan?
- Are you passionate about rescuing the business?
- Is there sufficient access to post-commencement finance to both provide for the needs of the company during supervision and to implement the business rescue plan?
- Are you comfortable with the level of risk that you will be accepting through the appointment?

Finally, never forget that acting as a BRP is a professional service that you provide and that you must be competent to provide the service, as also required in the SAICA Code of Professional Conduct (section R113.4SA) as well as be comfortable that you will be adequately and fairly rewarded for your services.

CLOSING THOUGHTS

Never underestimate how critical your success is to the livelihoods of all the affected persons. You do them a great disservice by accepting an appointment for which either you or the company are not qualified. By applying professional judgement to detailed research before accepting the appointment you will increase your success rate and enhance your reputation as a BRP.

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