

Are business rescue practitioners adequately regulated?

By Rezen Papaya

Tremendous strides have been made towards the regulation of business rescue practitioners. The Companies and Intellectual Property Commission (CIPC) currently issues conditional licences to business rescue practitioners and the experience of the applicant as well as the size of the company are factors taken into account. The CIPC's authority is conferred on it by the Companies Act 71 of 2008 (the Act) and the Companies Regulations, 2011. The present system is merely the foundation and requires perfecting if business rescue practitioners are to be adequately regulated. The need for better regulation stems from the complex task that a business rescue practitioner undertakes. Regulation of business rescue practitioners is two-fold, it involves –

- the appointment of suitably qualified practitioners in accordance with the qualifications set out in s 128 of the Act; and
- the monitoring of business rescue practitioners in their performance of business rescues.

Statutory role of a business rescue practitioner

Section 128(1)(d) of the Act defines a 'business rescue practitioner' as 'a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings ...'. Consequently business rescue is defined in s 128 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'.

Regulation of business rescue practitioners is a complex task due to the multi-faceted task of a business rescue practitioner. A business rescue practitioner is an officer of the court (s 140), a pseudo-director in whom all the management powers of a company are vested as well as the person who is supposed to safeguard the interest of all affected persons. As evidenced in s 128 a business rescue practitioner is supposed to act as an overseer, a facilitator, supervisor and manager during the business rescue period.

Selection and appointment of a business rescue practitioner

Section 138 of the Act states that in order to qualify for appointment as a business rescue practitioner, an individual or individuals have to be 'a member in good standing of a legal, accounting or business management profession accredited by the Commission'. The section presupposes membership to a pre-existing profession and thereafter adds the requirement of accreditation. The CIPC has been tasked with the accreditation of business rescue practitioners. Subsequently s 138(3)(a) and (b) empowers the Minister to promulgate regulations prescribing –

- '(a) standards and procedures to be followed by the Commission in carrying out its licensing functions and powers in terms of this section; and
- (b) minimum qualifications for a person to practise as a business rescue practitioner, including different minimum qualifications for different categories of companies'.

The provisions of the Act are highly prescriptive in relation to the category of individuals that may be appointed. The Act coupled with the regulations provides clear guidelines on the skill set required of business rescue practitioners.

Regulation 126(1)(a) (Companies Regulations, 2011) states that the Commission must, when considering an application for accreditation of a profession under s 138(1), 'have due regard to the qualifications and experience that are set as conditions for membership of any such profession, and the ability of such profession to discipline its members and the Commission may revoke any such accreditation if it has reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members.' This points to a heavy reliance on the manner in which these professions are able to adequately regulate their own affairs. Peradventure such professional bodies fail to regulate their professionals this will have a ripple effect on the efficacy of appointed business rescue practitioners. It therefore becomes relevant to analyse the professional bodies envisaged in the Companies Act.

Section 138(1)(a) explicitly states that practitioners are to be appointed from the legal, accounting and business management professionals. The legal profession is regulated by the four law societies while the accounting profession is regulated by the South African Institute of Chartered Accountants (SAICA) and to a certain extent business management professionals are governed by the Turnaround Management Association (Southern Africa). The Act makes the assumption that these professional bodies are adequately equipped to assist in regulating their members who in turn will be appointed as business rescue practitioners. The relationship between such bodies and the CIPC would have to be well-defined in order for the regulation of business rescue practitioners to be effective. The Act stipulates that the member of these professional bodies must be in good standing with their respective profession. This raises the question that in the event that such a member is no longer in good standing with the profession would the onus be on the professional body to report same to the CIPC. Conversely it is plausible that the impetus might lie on the CIPC to ascertain the standing of a practitioner within their professions before appointment. Alternatively periodic checks regarding a practitioner's standing may also be necessary.

It appears that the CIPC has taken cognisance of the potential incongruence that may arise if professional bodies act as middle-men in the regulation of business rescue practitioners. The CIPC has therefore mooted the idea of a Business Rescue Accreditation Model Liaison Committee. The chapter 6 provisions clearly intended to create an entirely new profession of business rescue practitioners. The next logical step would, therefore, be to create a separate professional body to regulate the members of the business rescue profession. The CIPC currently only issues conditional licences that are valid for the duration of a particular rescue. The licenses issued are therefore not transferable from one business rescue to another. As such no individual can claim to be a pre-licensed business rescue practitioner.

Presently business rescue practitioners are appointed according to experience and have been categorised into senior, experienced and junior business rescue practitioners. A junior business rescue practitioner may only be appointed as business rescue practitioner for a small company and may not be appointed as a practitioner of a medium or large company (Regulation 127(3)(a) and b). An experienced business rescue practitioner may be appointed as a practitioner of a medium company or a small company. In turn he or she may not be appointed as a practitioner for a large or state owned company (Regulation 127(4)(a) and (b)). Lastly a senior business rescue practitioner may be appointed as a practitioner over any company (Regulation 127).

Appointment of a liquidator as a Business Rescue Practitioner?

A liquidator could be appointed as a business rescue practitioner if he or she, as set out in s 138(1)(a) 'is a member in good standing of a legal, accounting or business management profession accredited by the Commission'. The Act does not preclude the appointment of a liquidator as a business rescue practitioner provided the individual meets the requirements set out in s 138 (1). Section 140(4), however, states that a liquidator who has been appointed as a business rescue practitioner cannot subsequently be appointed as a liquidator if the business rescue fails and the business goes into liquidation. Henoschberg notes that the fact that an individual is a liquidator does not automatically render them qualified to be appointed as a business rescue practitioner.

Underegulation

It is evident that although the regulation of business rescue practitioners has a solid legislative foundation. In the main, the legislative provisions have not translated into clear regulation. It is imperative that an accreditation body be set up for the licensing of business rescue practitioners. Professional bodies generally have professional examinations that its members have to undergo before they are appointed. Similarly business rescue practitioners may need a tailor-made set of examinations to be passed before appointment as business rescue practitioners. Support for such a notion can be found in the fact that at present no single profession possesses all the skills required to undertake business rescue proceedings. Several different individuals often have to be appointed from the legal, accounting and business management professionals before a

business can be successfully rescued. This incurs costs for a business that is already in distress. Therefore, it would be more efficient to devise examinations that ensure that business rescue practitioners have sound legal, business and commercial knowledge.

The ordinary meaning of regulate denotes 'control or maintain[ing] the rate or speed of (a machine or process) so that it operates properly'. The present mechanism comprising of the issuing of conditional licences by the CIPC is commendable but falls short of the creation of an entirely separate profession. A completely separate body regulating business rescue practitioners is advisable. Such a body will be responsible for the licensing of business rescue practitioners after they have undertaken some form of examination to determine suitability for appointment. Thereafter a code may be developed containing a code of conduct and perhaps the ethics expected from business rescue professionals. A significant number of business rescue practitioners are unaware of what their duties and obligations are. Professionals undertake the rescue of a company but are unaware of the legal obligations they have to the court and to various affected persons. (Amanda Lotheringen 'Do All Answers Lie in the Skill Set of the Business Rescue Practitioner?' (www.tma-sa.com/events/event-downloads/doc_details/55-presentation-by-amanda-lotheringen-of-cipc-june-2013-.html), accessed 30-10-2014)).

Conclusion

Regulation of business rescue practitioners has a solid legislative framework and genuine efforts are being made to regulate the profession. However additional progress can be made in order to adequately regulate business rescue practitioners.

Rezen Papaya *LLM (Commercial law) (UCT)* is a candidate attorney at Herold Gie Attorneys in Cape Town.