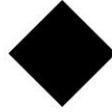


# SCHINDLERS



attorneys - conveyancers - notaries

---

## Compromise is another tool before going into Business Rescue

Done by Ian Fleming Director at Engaged & Adam Craker, CEO at IQ Business and Celeste Frank, Candidate Attorney

Date: 23 April 2020

---

### INTRODUCTION

On **23 March 2020**, the President of South Africa, Cyril Ramaphosa, declared a national lockdown in response to the COVID-19 outbreak. This critical decision has the potential to place both small and large businesses under financial distress.

As a result, affected businesses are likely to initiate Business Rescue proceedings in an attempt to salvage the business operation. However, they should be aware that compromise is an alternative to Business Rescue. It is a less expensive and a less time-consuming tool provided by the Companies Act 71 of 2008 ("the Act"), which can be utilized instead of Business Rescue proceedings. According to section 155 of the Act, the business may be permitted to enter into a compromise or arrangement *i.e.* a restructuring agreement between the company and its creditors.

### PROCEDURE IN TERMS OF SECTION 155 OF THE COMPANIES ACT 71 OF 2008

The business must deliver its proposal and the notice for when the meeting for creditors of the company to vote will be held. This should be provided to all creditors, its members of the relevant class of creditors and the Companies & Intellectual Property Commission (CIPC). The proposal is divided into three parts, encompassing all pertinent material in terms of which the creditors will decide whether or not to accept the proposal.

Seventy-five percent of the company's creditors or relevant class of creditors must vote in favour of the company's proposal for it to be approved. Once approved, the company may make an application to Court for the proposal to be made an Order of Court. If 75% or more of the creditors or relevant class of creditors vote in favour of the proposal, the remaining minority will receive a notice indicating when the application will be heard at Court and, thus, may oppose the application. If there is only one class of creditors



affected, then only that class would need to vote in favour of the proposal.

The Court must first satisfy itself that the proposal is just and equitable and may only then authorize it. The Court looks at the number of creditors of any affected class of creditors, who were present or represented at the meeting and who voted in favour of the proposal and, in the case of a compromise in respect of a company being wound up, the report of the Master required in terms of the law. After approved, the copy of the Court Order is filed by the company within 5 (five) business days and attached to the Companies Memorandum of Incorporation at the company's registered office. Thereafter, it becomes final and binding on all of the company's (then) creditors and its members of the relevant class of creditors.

### **DIFFERENCES BETWEEN COMPROMISE AND BUSINESS RESCUE**

A compromise can only be implemented if the company is not under business rescue. A company may engage in a compromise process in any financial state (*i.e.* irrespective of whether it is financially distressed or able to pay its debts). However, a company may only institute Business Rescue proceedings where it is financially distressed.

Business Rescue is not advisable (as the first step) for smaller companies, because its far more costly than compromise. The company would have to invest in the Business Rescue Practitioner's fee and administration costs. These could be rendered wasteful in circumstances

where compromise could have been reached if explored as an option.

When a business decides to conclude a compromise with its creditors, the creditors are normally involved in the negotiations from the outset, as opposed to Business Rescue, where they are often only notified after the resolution was passed or the Court application was made.

Reaching a compromise is also less time-consuming than Business Rescue proceedings. Business Rescue proceedings can take months or years to complete, involving the appointment of a Business Rescue Practitioner, creditors meetings, voting and business rescue plan implementation. The implementation of the Business Rescue plan is usually the most time-consuming part of the process, whereas activities in a compromise usually end once it is made an order of Court.

### **THE BENEFITS OF COMPROMISE FOR COMPANIES ESPECIALLY DURING COVID 19**

Because of the COVID-19 pandemic, global shares have taken a hit, central banks in many countries have cut interest rates, travel bans and restrictions are implemented worldwide, customers are buying less and factories are slowing down production. Small and medium sized businesses will be impacted the most. Fortunately, there is the option of compromise as opposed to going into Business Rescue.

The benefits of compromise in this unprecedented and unavoidable situation are (among others) as follows: -



1. It allows for restructuring of the company's debts.
2. There is no need for an appointment of a Business Rescue Practitioner, which can potentially be expensive.
3. An arrangement can be achieved with the creditors of the company in a relatively quick timeframe.
4. At this time during the pandemic, creditors are likely to be more sympathetic.

### **CONCLUSION**

A compromise in this time of the COVID-19 pandemic could allow many businesses to remain viable during this period and eventually to recover.



#### **ADAM CRAKER**

Chief Executive Officer at IQ Business

Director at COBRA

Tel: 0 11 259 4298

Email: [acraker@iqbusiness.net](mailto:acraker@iqbusiness.net)



#### **IAN FLEMING**

Director at Engaged Business Turnaround

Director at COBRA

Tel: 011 593 3255

Email: [ian@engagedbt.co.za](mailto:ian@engagedbt.co.za)



#### **CELESTE FRANK**

Candidate Attorney at Schindlers Attorneys

Tel: 011 448 9709

Email: [frank@schindlers.co.za](mailto:frank@schindlers.co.za)

