

# UNDERSTANDING BUSINESS RESCUE PROCEEDINGS AS PER THE CORPORATE INSOLVENCY OF 2017



**PRESENTED BY:**

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# GENESIS

The main reason for introducing Business Rescue proceedings was that at the time, the existing choices for dealing with companies in distress were limited to either receivership or liquidation.

These two processes of insolvency proceedings impacted significantly on the performance of the lenders, suppliers of goods and services and the economy at large.


Companies in financial distress needed to be granted breathing space free from creditor enforcement steps and court proceedings.

Hence mechanism to develop business rescue proceedings in the UK, South Africa, Australia, India in the latter part of 1900's.

In Zambia this led to the enactment of the corporate insolvency **Act No. 9 of 2017** and more particularly **PART III** of Business Rescue Proceedings.

# OBJECTS OF BUSINESS RESCUE PROCEEDINGS

These include:

- underpin the credit system and cope with its casualties
  - diagnose and treat an imminent insolvency at an early, rather than a late, stage
  - Prevent conflicts between individual creditors and maximise the collective return to creditors
  - Investigate causes of insolvent's failure and, if conduct merits criticism or punishment and what measures to take
  - preserve viable commercial enterprises capable of contributing to usefully to the economy
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# DEFINITIONS

**Affected person-** includes a regulator, shareholder, creditor, former employee etc

**Business Rescue Proceedings** -The process of facilitating the rehabilitation of a company that is financially distressed by providing for;

- Temporary supervision of the company, and management of its affairs, business, and property.
- Temporary moratorium on the rights of claimants against the company or in respect of property in its possession or;
- Development and implementation of a business rescue plan by restructuring its affairs

**Financially Distressed** -Means a company is likely to be insolvent within the immediately ensuing 6 months

**Insolvency Practitioner** -Means the official receiver or a person who is qualified to be;

- Receiver, Liquidator, Business Rescue Administrator

# DEFINITIONS CONTD

**Insolvent** -means

- having liabilities that exceed the value of its assets (Balance sheet test) – (Factually Insolvent)
- Having stopped paying debts in the ordinary course of business or being unable to pay its debts as they fall due to (cash flow test)- (Commercial Insolvency)

**Moratorium** - a freeze or stay on any legal proceedings or executions against the company or in relation to any property belonging to the company or lawfully in its possession.

# DEFINITIONS CONTD

**Solvency Test** - a test to determine that:-

- A company is able to pay its debts as they become due in the normal course of the business; and
- The value of the company's assets is greater or less than the value of liabilities, including contingent and prospective liabilities of the company

**Supervision** - oversight imposed on a company during that company's business rescue proceedings

**Voting interest**- interest the secured creditor or unsecured has which is equal to the value of the amount owed to that creditor by the company



# COMMENCEMENT OF BUSINESS PROCEEDINGS

- Commencement may be in two ways:
- a) Voluntary initiation by members passing a Special Resolution - S. 21 (1) of CIA
- The company is financially distressed
- Appears to be reasonable prospect of rescuing the company ; and
- Maintain the company as a going concern
- In Re: Imperial Motors (UK) Ltd (1989) 5 BCC214, ***the Court was prepared to find that the company was unable to pay its debts even though it appeared solvent on a balance sheet basis.***
- In Gormley v West City Precinct Properties(Pty) Ltd and others , the Court **that a company is already insolvent, even if able to pay the debts over an extended period, is not financially distressed as defined by the Act**







# REASONABLE PROSPECT

*In Southern palace investments 265 (Pty) Ltd  
V Midnight Storm Investments 386 (Pty) Ltd.,  
the held that it is difficult to conceive of a  
rescue plan in a given case that will have  
reasonable prospect of success of the  
company concerned on a solvent basis  
unless it addresses the cause of the demise  
of the company, offers a remedy therefore,  
that has a reasonable prospect of being  
sustainable.*


**NB.** Almost all the companies that are under business rescue proceedings in Zambia are insolvent but not financially distressed

Failure to  
comply with  
notice and  
publication  
of business  
rescue  
proceedings

In *Stanbic Bank Zambia Ltd Vs Olympic Milling Stock Feeds Ltd 2021/HPC/0211*, the court held that **the failure by the respondent to adhere to mandatory procedure under section 21(5) rendered the voluntary BRP a nullity.**

**OBJECTIONS TO COMPANY RESOLUTION AT ANY TIME BETWEEN ADOPTION OF THE RESOLUTION AND ADOPTION OF THE BUSINESS PLAN-**

*Griffin SGB Mauritius and others v Wanzana Processing Ltd and others 2019/HPC/0098* the court held that the documentation before it does not prima facie show that the mandatory threshold criteria under s.21 was satisfied by respondent

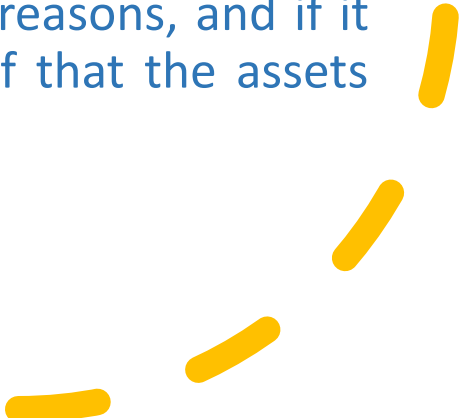



# Court order to commence Business Rescue Proceedings – s. 23

An affected person may apply to court at any time for an order placing the company under business rescue proceedings;

- The applicant must serve a copy of the application on the company, registrar, and official receiver and notify each affected person
- Liquidation proceedings will be suspended

The Court will determine if

- The company is financially distressed
  - The company has failed to pay any amount in terms of a contract related to employees or
  - It is just and equitable to do so for financial reasons, and if it reasonable to rescue the company e.g. proof that the assets are less than the liabilities
- 



## Duration of business rescue proceedings

### When the Court –

- Sets aside the resolution or court order
- Administrator files with the Registrar and official receiver notice of termination of business rescue proceedings
- Business rescue plan is rejected and no affected person applies to revise the plan
- Administrator files a notice of substantial implementation of the **plan**

# Effect of business rescue on employees and contracts

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Company to notify each affected of the order effect of business rescue on employees and contracts

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Conditions of employment shall continue unless changes occur in the ordinary course downsizing or they consent

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administrator has the right to suspend with leave of the court onerous contracts preventing successful implementation of business rescue

# Powers of Business Rescue Administrator

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Full management control of the company

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Delegate any power to the management and the board

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Power to remove any person from office who was part of management

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Shall have responsibilities, duties, and liabilities of the director of the company


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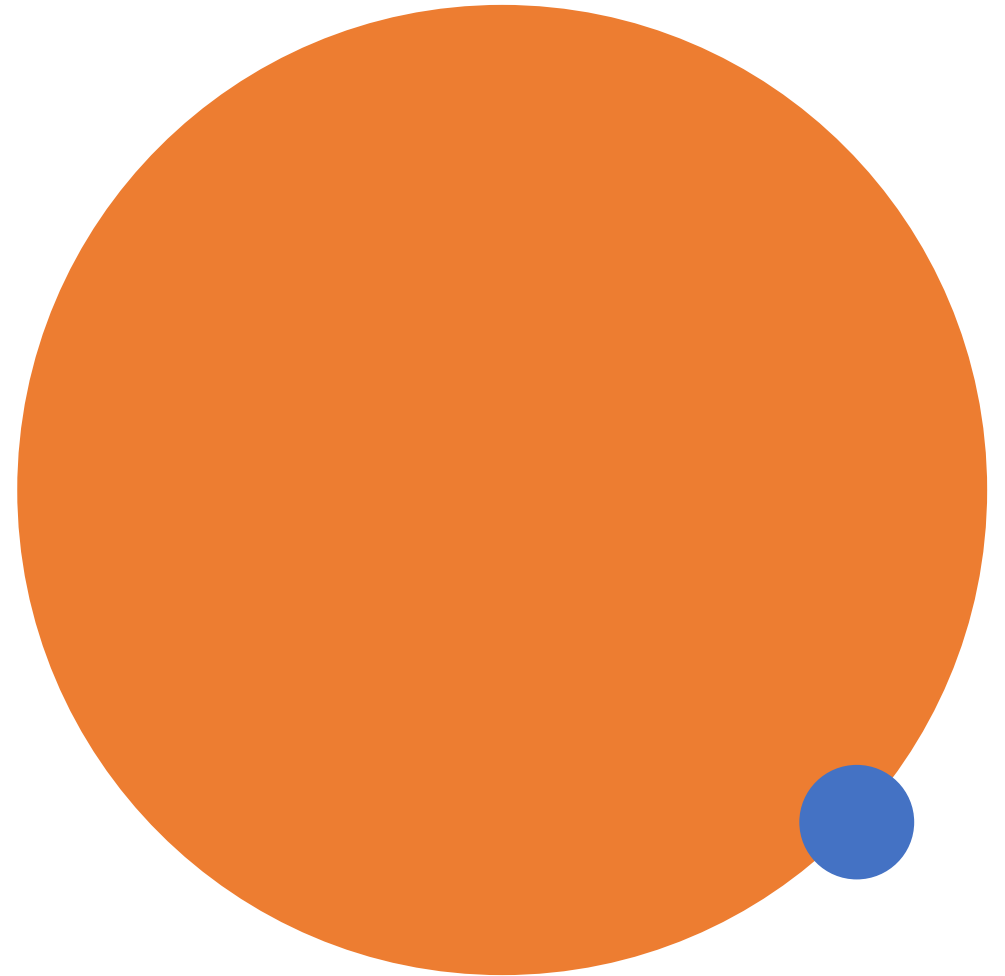
Directors to cooperate with and assist the Business Rescue Administrator with all the financial records development of business rescue plan.



# Investigation of the affairs of the company

- Investigate the affairs of the business, property and financial situation of the company, and consider whether
- there is any reasonable prospect of the company being rescued;
- inform the Court, the company and all affected persons;
- Forward evidence to investigative agencies for further investigation if there are any voidable ,reckless trading, fraud etc

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- This is a general provision and affords the company protection against legal action on claims in general except inter alia with the consent of the administrator
  - It gives breathing space in order to allow the company to restructure its affairs for the company that is financially distressed
  - **In Grofin SGB Manritus and another V Wanzana Processing Ltd and others 2019/HPC/0098**
  - *The Court stated that “ the moratorium under S. 25(1) of CIA is couched to cover post BRP suits without retrospective application to Pre-existing legal proceedings*





# Post Commencement Finance



Funding made available to company after the commencement of business rescue proceedings for the purpose of enabling it to continue operating.



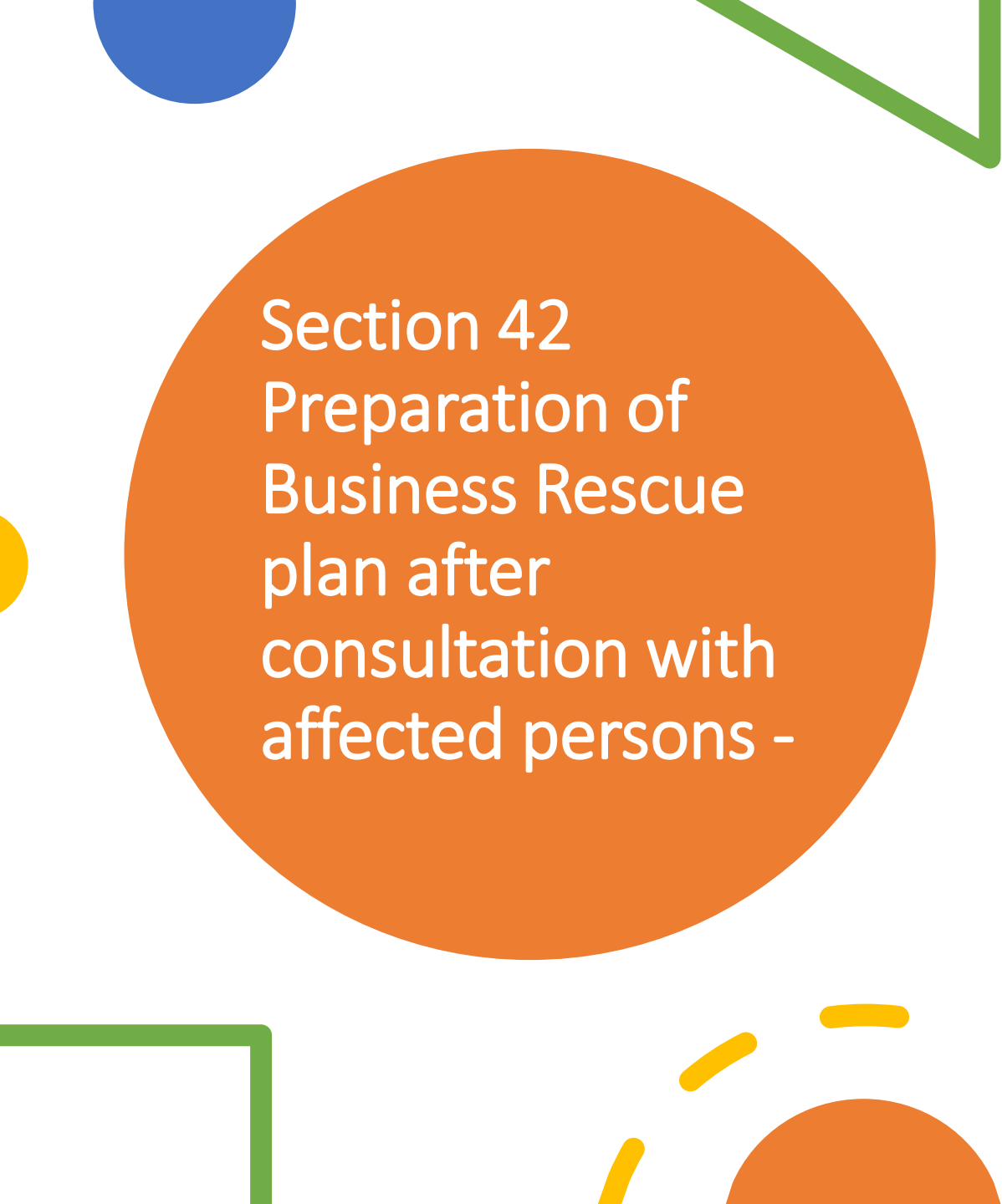
The lenders are given preferential status.

# Protection of Property Interests

The purpose is to allow disposal of company property only in circumstances where it is required for the normal operations

## **Participation of creditors, shareholders**


- These are entitled to notice of every court hearing decision, meeting etc. relating to business rescue.
- The creditors have a right to form a creditors committee.





## Section 42 Preparation of Business Rescue plan after consultation with affected persons -

- The plan is in 3 parts which will have to be considered the affected persons in making a decision to either accept or reject the plan
- Part A – background information and the current financial condition of the company
- Part B- deals with relevant proposals stages on how the company will be rescued
- Part C- sets out the assumptions and conditions that must be fulfilled for the plan to be implemented

# Meeting to determine future of the company section 42

- Administrator required to publish the business rescue plan and convene a meeting of affected persons
  - Notice of meeting and publication to all affected persons as follows-
    - -Date, time and meeting
    - -The agenda
    - -Summary of rights of affected persons to participate in and vote at the meeting
- 



## SECTION 43 APPROVAL OF THE BUSINESS RESCUE PLAN

- This should be supported
- by holders of more 75% of the affected persons with voting interests; and
- at least 50% of independent creditors voting interests
- A plan that has been approved is binding on all creditors and on every affected person whether one attended the meeting or not

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Thank you

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