

BUSINESS RESCUE IS BECOMING EFFECTIVE: IGNORE IT AT YOUR PERIL

The new Companies Act (“the Act”) became effective on 1 May 2011. One of its focus areas was to enhance protection to ailing businesses – to give them the opportunity to get back on their feet. This had become an internationally accepted practice and the old 1973 Companies Act did not adequately address this.

Owners and managers of businesses need to be aware of the duties imposed on them by the Act and should also know of the potential that the business rescue process offers. Few small and medium sized businesses (SMEs) have taken advantage of business rescue provisions.

Business Rescue – a quick overview

- A business which is already or is becoming financially stressed is obliged to seek business rescue or needs to explain to its stakeholders why it is not opting for business rescue. Alternatively, an affected person (creditor, employee, shareholder or trade union) may approach a court to put a business into business rescue.
 - o “Financially stressed” means that within the next six months, liabilities of the business will exceed its assets and/or it will not be able to pay its creditors.
- A notice is filed with the Companies and Intellectual Property Commission (CIPC) advising the business is opting for business rescue and requesting a business rescue practitioner (“BRP”) be appointed.
 - o If you have a BRP in mind, you may appoint that person, provided they are accredited with the CIPC. This is a critical decision as once appointed, the BRP takes effective control of the business.
- The BRP has 25 business days to consult with all relevant stakeholders and then present a business rescue plan to the stakeholders. The BRP needs to be convinced there is a reasonable chance of successfully turning the business around or obtaining a better deal for affected persons who include

creditors, employees and their union representatives and, if their rights are affected, shareholders. If 75% of the stakeholders approve the plan (including at least 50% of independent creditors), the BRP may then execute the plan.

- o Business rescue takes approximately six months and in this time, the rights of creditors are restricted as the BRP may suspend in part or whole their agreement with the business. In this period, creditors may only sue a business with the permission of the court. Employees still enjoy the protections of our labour law – for example, any retrenchments will need to be done in accordance with labour legislation.
- o In addition, the BRP effectively runs the business.
- Once the BRP has completed the rescue plan then business rescue proceedings end. Alternatively, the business may be purchased or go into liquidation.
- Business rescue is designed to be a cost-effective (as it is largely self-regulated) and a speedy way of saving a business.

Notice to affected persons

When a business chooses to carry on in business, it is obliged by the Companies Act (“the Act”) to send a notice to “affected persons” setting out the “financially distressed” facts and the reasons why it

believes it can carry on with its business activities.

Affected persons are creditors, banks, SARS, employees, trade unions (if they represent staff) and shareholders.

The unintended consequence

It doesn’t take much imagination to see how this notice is likely to be received by affected persons. We all have to deal with the credit departments of banks and know how conservative they are. It is quite probable the bank could reduce or freeze the entity’s facilities. Another “affected person” is SARS who would probably try and recover any back taxes owed. A business that is about to experience financial difficulties will, almost certainly, be starting to find it more difficult to obtain finance. Yet, trading your way out of liquidity problems and/or insolvency issues will require access to finance. Without liquidity a business can go into a downward spiral resulting in insolvency.

The impact of the notice, thus, could have the effect of denying the business access to money and stalling any attempts to successfully turn the business around. This is the unintended consequence – instead of reassuring stakeholders that the business is on a recovery path, the notice could have the opposite effect.

What can management do?

A seemingly obvious (but untenable) solution is to not send out the notice.

One of the key assumptions of the new Act is to move away from a capital adequacy model to a liquidity/solvency model. The Act imposes obligations on management to ensure it continually monitors liquidity and solvency. It also requires transparency and good governance principles – affected persons need to be made aware of any potential prejudice to them. Finally, it imposes criminal and civil liabilities on management in this critical area.

This means that not sending out a notice to affected persons is not a viable option.

The best strategy for management is to be always aware of any potential liquidity and insolvency issues. The sooner a problem is identified, the sooner positive action can be taken. Pro-active management will reduce the chances of facing liquidity and insolvency issues.

Business rescue is a powerful tool to assist struggling entities. As it is a relatively simple and cost-effective process, it is particularly suitable for SMEs. If you have any doubts, speak to your accountant and get advice – the earlier the better. Remember the potential liabilities you face by not acting.

Owners, directors and managers – your obligations

Decision makers in a business face potential criminal or personal liability if they fail to follow the provisions of the Act's Business Rescue section.

How has Business Rescue fared?

A market has emerged of local and foreign investors who seek to acquire assets at (as they perceive it) good prices. For example, a Chinese business acquired Top TV out of business rescue. This market looks set to grow as investors can purchase assets free of any debt the assets may have had. In terms of employees 25% have lost their jobs during business rescue – a very creditable statistic as 100% are likely to lose their jobs in the event of liquidation.

Figures released by the CIPC show that in 2012 only 20% of business rescue proceedings were successful. This is set to increase as businesses realise the earlier they begin business rescue proceedings, the more likely the process of business rescue succeeding will be.

POPI (THE PROTECTION OF PERSONAL INFORMATION ACT) – HOW WILL IT AFFECT YOU AND YOUR BUSINESS?

Technology has unleashed enormous power which has altered the way we live and do business. It brings with it concentration of data which is easily accessible. When this data affects private information, protections need to be built in.

POPI (which was gazetted in November) is aimed at codifying the use of and the safeguarding of such information. This has substantial implications for business, particularly in the area of staff records. The fact that the Act imposes penalties of up to a R10 million fine or ten years imprisonment should further focus business.

The Act in a nutshell

- Firstly, what is personal information? POPI defines this as including - a person's name (including a juristic person e.g. a company), contact details, religion, sexual orientation, personal views, private correspondence, health records, employment records, financial records, biometrics (DNA, fingerprints) etc.
- Eight self-explanatory principles govern the Act:
 1. Accountability
 2. Processing limitation
 3. Purpose
 4. Further processing limitation
 5. Information quality
 6. Openness
 7. Security
 8. Right of access
- Further restrictions apply for the use of "special personal information" like political affiliation or sexual orientation.

- A regulatory body known as the Information Regulator is to be established with the following powers and duties -:

- o Search and seizure powers
- o May impose administrative fines
- o May sue on behalf of the subject
- o Can decide if the law is being complied with
- o Receives and acts on complaints
- o May issue notices

Note that it is a criminal offence to make false statements to, or to not comply with notices from, the Regulator.

- POPI makes provision for cross-border uses of personal information
- In terms of direct marketing, there is a clause requiring opt-in. This is contrary to current laws where the norm is to require opt-out. This means permission must be sought from people whose information will be used, prior to direct marketing taking place. The only exception is in respect of existing customers/clients.
- Twelve month transition period – businesses have twelve months from commencement (whilst POPI has been passed into law, the President is still to determine a date from which it commences and becomes effective) to comply.

This transition period is going to be onerous on businesses. They need to determine what information falls into the Act, how it is used, protected, stored, who has access to it. Businesses will also need to get the relevant consents from staff and other stakeholders. What privacy statements do you need to make, what protocols do you need to put in place over your information and website?



As there are onerous penalties and these requirements concern the safety of your staff's (amongst other) information, it is well worth investing time and taking advice to get the right procedures in place now.

EXTENTION OF TRANSITIONAL PERIOD OF REVISED B-BBEE CODES

The Amended Codes of Good Practice were Gazetted in October 2013 with a 12 month transitional period during which the Industry Charters had to align their Codes. The transitional period will now be extended to 30 April 2015. This means that businesses will be able to apply the existing Codes up until 30 April 2015. Thereafter measurement will only be in terms of the Revised Codes.

The DTI will communicate officially in due course how the transitional period will apply.

Remember to renew your B-BBEE certificate before effective date!

Companies are advised to renew their B-BBEE certificate before the Amended Codes of Good Practice become effective. This will allow companies to maintain their current B-BBEE status for another year after effective date.

Companies should further consider implementing the priority elements sooner rather than later.

Your B-BBEE status level could be discounted by one level for non-compliance with sub-minimum targets set for priority elements.

Contact us now to book your renewal of your B-BBEE certificate!

BEWARE OF CYBER CRIME – IT'S GROWING RAPIDLY AND YOU ARE AT RISK!

"The infectiousness of crime is like that of

the plague" (Napoleon Bonaparte). Isn't it terrible how many dangers are lurking out there? One of them is cyber crime and small businesses (with less than 250 staff) are increasingly being targeted.

South Africa is particularly vulnerable as we are naive when it comes to protecting our assets, know-how and trade secrets.

What is cyber crime and how prevalent is it?

It is using technology (Internet, computers, software and smartphones) to steal data, property, IDs, passwords or money. It also includes the destruction of data or software via viruses. Phishing, corporate espionage, and stealing from your bank account are examples.

Cyber crime is illegal in South Africa and offenders contravening ECTA (the Electronic Communications and Transactions Act) are liable to up to five years imprisonment.

It is difficult to get actual facts as crime statistics do not separately isolate cyber crime. Experts are also convinced it is widely under-reported. A recent survey done in South Africa showed only 7% of businesses said their systems to prevent data leakage were working well. Police statistics show that white collar crime has risen 56% since 2006. South African banks reported that phishing increased by 61% in 2011.

England, not surprisingly as a first world economy, has more experience with cyber crime. In 2011, GBP27 billion was lost to cyber crime, of which GBP21 billion (almost 80%) is attributable to small businesses.

For an eye-opening look at the staggering levels of cybercrime globally (did you know for example that over 600,000 Facebook accounts are compromised daily?) see the Infographic at

<http://www.gogulf.com/blog/cyber-crime/>.

Why target small businesses?

Small businesses do not have the resources to actively combat cyber crime and thus are easier targets for perpetrators of cyber crime. They are vulnerable to phishing and bank fraud but, more significantly, they are also exposed to theft of intellectual property (IP) and industrial espionage.

In the above UK research, of the GBP21 billion losses attributable to small business, most of the cyber crime came from theft of IP and corporate espionage.

There is no doubt this is more prevalent locally. Apart from there being widespread ignorance, security experts are scarce and much of our IT security is outsourced to foreign companies. We have recently seen how the United States is eavesdropping around the globe and we need to ask just how secure are we? How much of our intellectual property and trade secrets end up in overseas companies and countries?

What can we do about it?

As a starting point, we should review our controls and security. Staff should be aware of phishing and similar practices and should be warned to be careful about what information they share on social media sites. Systems should be put in place to monitor and respond to such incidents.

In terms of losing our IP and being vulnerable to espionage, this requires substantial resources and needs the involvement of government security agencies. The Electronic Communications and Transactions Act of 2002 provided for the appointment of "cyber inspectors" with police-like powers to monitor for, and investigate, cyber crime, yet this is still to happen. A grassroots advocacy campaign from business to get this cyber crime force off the ground is a significant option to

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look at, and the recent appointment by government of a “National Cyber Security Advisory Council (NCAC)” is a positive step in this regard.

NEW ELECTRONIC AUDIT CONFIRMATION PROCESS

The Independent Regulatory Board for Auditors (IRBA) recently issued the new South African Audit Practice Statement 6 - *External Confirmations from Financial Institutions*. The new SAAPS 6 introduces a new format for auditors to follow when performing external audit confirmations. The new statement also brings to light the new method for an auditor to request and obtain an electronic external confirmation.

In light of this new SAAPS 6 and as a result of the current challenges faced by auditors and banks with the manual confirmation process, the major SA banks have indicated that they would like to start to move away from the current paper based process towards an electronic process called Confirmation.com. A number of SA banks have already started accepting electronic confirmations and have communicated that they will no longer accept manual paper based confirmations, only electronic confirmations as from the **1st April 2014**.

IRBA has expressed the view that such electronic confirmations provide greater assurance for this inter-active process, provides more reliable audit evidence, reduces auditors’ risk against fraud, reduces the audit clients’ risk against fraud and is in line with international best audit practices. There are other territories in the world which have enjoyed the proven benefits and advantages of this type of approach for several years already.

What is Confirmation.com?

Confirmation.com is a single secure web-based platform, which allows authenticated audit firms to effectively

manage and control the audit confirmation process, both internally and directly with authenticated financial institutions. This streamlines the process, improves efficiencies and reduces fraud risk for both auditors and audit clients.

Why has the audit and banking industry adopted this electronic confirmation process?

Currently auditors, banks and their shared clients are faced with a number of challenges when it comes to the manual paper based process.

Among the main challenges are:

1. Fraud Risk - The risk of an employee intentionally providing false information to an auditor as well as highly sensitive client information floating about on paper requests, in an unsecure environment between unauthenticated individuals and entities with a limited audit trail.
2. Management and Efficiency - Administrative effort for audit clients, audit firms and financial institutions to effectively manage and have full control over paper requests with the current segmented process flow.

How does Confirmation.com benefit both auditors and audit clients?

- Provides sound governance accompanied by a sound process and internationally proven systems and technology
- Reduces risk of fraud for both auditor and client, with security over client confidential information, as it is transferred between validated entities through a secure system
- Provides full control over the confirmation process from end to end

- Provides a full audit trail for each confirmation
- Provides an improved and easier workflow with direct channel of communication between auditor and bank
- With audit deadlines, provides increased efficiencies and time savings for auditors and client
- Paperless process

How an audit client now gives electronic authorisation to allow auditors to send electronic confirmations to a bank?

1. An auditor will set up the client profile and the relevant client authorised bank signatories for that profile within Confirmation.com.
2. A system generated email (system.administrator@confirmation.com) will be sent to the audit client authorised bank signatory, requesting authorisation. (It is recommended for the audit client to add this email address to their safe sender list, to prevent any spam/firewall filters.)
3. Client authorised bank signatory must click on acceptance link to give auditor electronic authorisation, so that auditor can initiate the request with the bank.

TAX CORNER

Tax Tips 2014

Recently, SARS has codified penalties for things such as late submissions or under-statements of income. More information flows to SARS from third parties about income you have earned – just look at how your tax return is already populated by retirement funding and your IRP5 information, for example.



As SARS are under pressure to maximise collections, you can expect more queries on your tax return. In view of the additional information SARS has and the potential penalties you could pay, it is necessary to approach your return in a new light.

What you should do

1. Plan your return. Familiarise yourself with the transactions which flowed through your bank statements. Make sure you know what you can claim and what is disallowed. Seek advice from your accountant / tax practitioner to clarify any uncertainties you may have.
2. Have a filing system and document all tax deductions. Remember you are required to keep your documentation for five years. It pays to be disciplined upfront. Doing a tax return is bad enough but don't compound it by trying to find documents when doing the return. You will probably miss potential tax deductions by not organising your documentation. Remember SARS are likely to ask for documentation.

When you download your tax return, it will already be populated with information from your IRP5, interest and dividends received, and retirement contributions or retirement income received. All of the relevant institutions will have sent you copies of the data submitted to SARS - check that this is the same as the information on your tax return. Any differences should be sorted out with the relevant institution prior to submitting your return.

You will also need:

- a. A log-book if you receive a car allowance or enjoyed the right of use of an employer-provided vehicle

- b. A section 18A certificate if you made a donation to a Public Benefit Organisation (PBO). You are allowed to claim up to 10% of your taxable income for donations made to approved PBOs
 - c. Invoices or other relevant documentation in respect of any other claims you intend making. For example, if you run a business to earn a second income, expenses attributable to that income can be claimed if you have the necessary documentation
 - d. All documents of any out-of-pocket medical expenses you incurred (see 3 below).
3. 2013 was the first year of the medical rebate. Previously tax deductions were allowed. These reduced your taxable income. Rebates reduce the tax you pay.
- In addition, you are entitled to deduct out-of-pocket medical expenses subject to criteria laid down. It is worth seeking professional advice to ensure you maximise the deduction allowed.
4. If you make use of a tax practitioner, check he/she is correctly registered with SARS.

Tax Clearance Certificates – Easier if you follow SARS' rules

We will all probably be required to get a Tax Clearance Certificate ("TCC") at least once in our lifetime, quite possibly on a regular basis as TCCs are only valid for 12 months.

When do you need a TCC?

TCCs are necessary –

- For obtaining a government or parastatal tender,
- Some suppliers require them,
- If we emigrate,
- If we want to invest funds abroad.

The Tax Administration Act of 2012 requires that SARS must respond to an application (it must be done on the prescribed form) for a TCC within 21 business days. SARS have responded to this by designing a new TCC process which they have begun implementing.

The Rules

Clearly, you need to have all taxes paid up (all taxes currently administered by SARS) and all necessary submissions up to date. In addition, all your tax reference numbers must be "active and correct".

On the prescribed form, your reason for requiring a TCC must be stated.

Please note SARS will only issue a TCC in the legal name of the entity. Trading names will not be used. This is to prevent fraud or abuse of the TCC.

It is also worth bearing in mind that in cases where a company has divisions and branches, SARS will issue a consolidated TCC. This means if any branches or divisions are not compliant, then no TCC will be issued – this will have consequences for compliant divisions/branches and the main company, as they will not get a TCC.

TCCs are vital to many businesses and individuals – SARS are now bringing some clarity and certainty to this process.

To speed up the process, comply with SARS' requirements when applying.

Philanthropy Is Taking Off: and the taxman has come to the party

In recent years we have seen a trend towards more active giving – Bill Gates and Warren Buffett have led the way globally and Mark Shuttleworth and Patrice Motsepe have started substantial philanthropic foundations in South Africa. Some local Private Banks have actively matched the causes their clients believe in to Public Benefit Organisations (PBOs). One

such Private Bank reported that 91% of its clients made donations in 2012.

It is almost counterintuitive that this should be happening. After all many of us feel burdened by the frequent requests for aid which seem to come at us from every angle. One theory advanced to explain this trend is that the democracy we currently have is threatened by things such as the high disparities of wealth, low levels of education and ongoing service delivery protests. Government alone cannot solve this myriad of problems, bearing in mind that international donors have dried up following the global financial crisis. Thus, part of the burden has shifted to South African corporate entities and individuals.

What does the taxman offer? A checklist for PBOs and donors

Donations to PBOs are tax deductible to the extent of 10% of taxable income. This applies to both individuals (in which case taxable income is before any deductions for medical expenses or donations) and corporates. The Minister of Finance announced in 2013 that from 2014 any amounts in excess of 10% may be carried forward to the next tax year.

PBOs must register with and be approved by SARS. In essence, they must be altruistic organisations. After a donation has been made, the PBO is to issue a certificate to the donor stating –

- Its PBO number,
- The name and address of the donor and the PBO,
- The date and amount of the donation,
- A declaration that the funds will be used only for the objective(s) of the PBO.

When you do your tax return, ensure you have the certificate available for inspection by SARS.

Individuals who are paid monthly can get PAYE relief for the donations made to PBOs (up to a maximum of 5% of balance of remuneration - the balance is claimed when the tax return is submitted).

These concessions are significant and support the growing trend towards philanthropy. If you are looking to reduce your tax liability, one way of doing this is to make a donation to an approved PBO.

Take Advantage Of The Generous Research and Development Allowances

Innovation is seen as one of the key drivers of economic growth and employment, and significant concessions are available to taxpayers that undertake defined research and development (“R&D”). Certain of these businesses are allowed to deduct 150% of specified capital cost (“prototypes or pilot plant” which will be used only in the R&D phase) and expenditures (excluding “administrative, financing, compliance and similar costs”). Other R&D entities are allowed to deduct 100% of all of their expenditure – including capital costs.

This compares to 100% of expenditure and 50% of the capital cost (depending on the industry) enjoyed by businesses not involved in R&D.

What is R&D?

It is “systematic investigative or systematic experimental activities” aimed at creating or developing an invention, functional design or computer program, or the discovery of “non-obvious scientific or technological knowledge”, or the discovery of knowledge “essential” to the above criteria. “Significant and innovative” improvements in the above areas also qualify.

The research must be done in South Africa by a taxpayer (or third party commissioned by the taxpayer).

In order to qualify for the additional 50% expenditure, **prior** approval is required from the Minister of Science and Technology (“MST”) and it must be incurred on or after the date of the application.

What is excluded?

The main categories of exclusion are:

- Marketing and sales promotions, including market research
- Ongoing routine costs such as quality control
- The development of internal systems unless these are associated with R&D
- Oil and gas exploration including prospecting but excluding R&D to develop technology in this sphere
- The development or creation of financial instruments
- “The creation or enhancements of trade marks or goodwill”.

Please note this is a summary of concessions and exclusions – consult your partner before making use of these provisions.

Medical Contributions Tax Relief Principles from March 2014

Tax relief on contributions to a medical scheme for 65 and older taxpayers will be replaced by the medical tax credit method. This will have an effect on monthly take home pay but there will be relief on assessment. Consult your partner should you require clarification.

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