

TOPIC 7

BUSINESS RESCUE, COMPROMISE WITH CREDITORS, WINDING-UP AND DEREGISTRATION OF COMPANIES

TOPIC OVERVIEW

Many factors may lead to a company's failure, for example, poor management, no demand for the products the company manufactures due to bad planning, and the inability to identify other products in demand, etc. These factors can sometimes lead to the liquidation or take-over of a company (in terms of the old Companies Act, 1973), which may have a huge impact on the employees of the company, group of companies, or the economy.

The Companies Act, 2008, now follows a new approach to financially stressed companies. This Act provides for business rescue proceedings with the aim of saving a business by following certain proceedings, even if the outcome is not always successful. If the business is rescued, it means that jobs may be saved and the company's creditors may receive a larger portion of the monies owed to them. Normally, there must at least be the prospect that the company can be rescued before these proceedings are undertaken. According to Cassim (2011:144), rescue means that the company is reorganised in order to restore it to a profitable entity and thereby avoid liquidation.

The Companies Act, 2008, also makes provision for voluntary winding up of solvent companies, but companies that failed and cannot be saved by business rescue proceedings will have to be liquidated.

Topic 7 is divided into the following learning units:

Learning unit	Title
7.1	Winding-up of solvent companies and deregistration of companies (sec 79–83)
7.1.1	Winding-up of solvent companies (sec 79)
7.1.2	Voluntary winding-up of solvent company (sec 80)
7.1.3	Winding-up solvent companies by court order (sec 81)
7.1.4	Dissolution of companies and removal from register (sec 82–83)
7.2	Business rescue
7.2.1	Business rescue (sec 128–155)
7.3	Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures
7.3.1	Protection for whistle-blowers (sec 159)
7.3.2	Application to declare a director delinquent or under probation (sec 162)
7.3.3	Relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company (sec 163)
7.3.4	Complaints to the commission or panel (sec 168–184)

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
7.1 Winding-up of solvent companies and deregistration of companies	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding the winding up of solvent companies and deregistration of companies. 	2
7.2 Business rescue	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements for business rescue. 	2
7.3 Protection for whistle-blowers, application to declare a director delinquent or un-	<ul style="list-style-type: none"> Gain basic knowledge of the requirements regarding <ul style="list-style-type: none"> the protection for whistle-blowers an application to declare a director 	1

<p>der probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures</p>	<p>delinquent or under probation</p> <ul style="list-style-type: none"> – relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company – complaints to the Commission or Panel – powers to support investigations and inspections – company and Tribunal adjudication procedures. 	
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LEARNING UNIT 7.1

WINDING-UP OF SOLVENT COMPANIES AND DEREGISTRATION OF COMPANIES

INTRODUCTION

The winding-up of solvent companies is regulated by Part G of Chapter 2 (sec 79–83) under the Companies Act, 2008. Insolvent companies will be wound up under the provisions of the Companies Act, 1973, item 9(1) of Schedule 5 until the proposed Bankruptcy Act is announced. This learning unit deals more specifically with the winding-up of solvent companies.

7.1.1 WINDING-UP OF SOLVENT COMPANIES (SEC 79)

Section 79 provides that a solvent company may be dissolved by

- **voluntary winding-up** initiated by the company as contemplated in section 80 of the Companies Act (section 7.1.2), and conducted either by the company or its creditors as determined by a special resolution adopted by the company
- **winding-up and liquidation by a court order**, as contemplated in section 81 of the Companies Act (section 7.1.3).

Where a company has adopted a resolution for the voluntary winding-up of a solvent company (sec 80), or after an application has been made to a court for winding-up (sec 81), and subsequently it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9(1) of Schedule 5.



STUDY

Study section 79 of the Companies Act.

7.1.2 VOLUNTARY WINDING-UP OF A SOLVENT COMPANY (SEC 80)

As indicated in 7.1.1, a solvent company may be wound up voluntarily if the company has adopted a special resolution to do so. The special resolution may provide for the company or its creditors to perform the winding-up.

Section 80 further provides that such resolution be filed with the Commission, together with the prescribed notice and filing fee. It also provides for arranging for security, satisfactory to the Master, for the payment of the company's debts within 12 months after the start of the winding-up of the company, or obtaining the Master's consent to dispense with security. Section 80(3)(b)(i) & (ii) indicates under which circumstances the Master would consent to dispense with security.

It is interesting to note [sec 80(8)] that the company remains a juristic person and retains all of its powers as such while it is being wound up voluntarily. However, when the company's winding-up starts, the company must stop carrying on its business, except to the extent required for the beneficial winding-up of the company. All the powers of the company's directors also ceases, except when specifically authorised in the case of the winding-up of the company, by the liquidator or the shareholders at a general meeting; or in the case of a winding-up by creditors, the liquidator or the creditors.

7.1.3 WINDING-UP SOLVENT COMPANIES BY COURT ORDER (SEC 81)

Section 81 provides that a court may order a solvent company to be wound up if

- the company has passed a special resolution to the effect that it be wound up by the court; or applied to the court to have its voluntary winding-up continued by the court
- the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141(2)(a), on the grounds that there is no reasonable prospect of the company being rescued
- one or more of the company's directors have applied to the court
- the company, one or more directors, or one or more shareholders have applied to the court
- a shareholder has applied, with leave from the court, for an order to wind up the company
- the Commission or Panel has applied to the court for an order to wind up the company

Section 81(2) stipulates the circumstances under which a shareholder may apply to a court, while section 81(3) provides that a court may not make an order applied for in terms of subsection 1, where certain actions have taken place before the conclusion of the court proceedings. Section 81(4) determines when the winding-up of a company begins.

The dissolution of companies, the removal from the register and the effect of the removal of a company from the register are dealt with in sections 82 and 83.



STUDY

Study sections 81 of the Companies Act.

7.1.4 DISSOLUTION OF COMPANIES AND REMOVAL FROM REGISTER (SEC 82 AND 83)

STUDY STUDY

Study sections 82 and 83 of the Companies Act.

SUMMARY

In this learning unit, we explained and applied the requirements regarding the winding-up of solvent companies and deregistration of companies in terms of the Companies Act. We have also dealt with the dissolution of companies and removal from register.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

Give advice, discuss concerns, and apply the requirements regarding the winding-up of solvent companies, deregistration of companies and dissolution of companies and removal from register

LEARNING UNIT 7.2

BUSINESS RESCUE

INTRODUCTION

Section 128 deals with the definitions used in Chapter 6 of the Companies Act. You should study this section; otherwise, you may find it difficult to understand the use of some of these phrases in the sections thereafter and in this learning unit.

What is business rescue?

Business rescue is defined as proceedings that facilitate the rehabilitation of a company, which is financially distressed (insolvent), by providing for

- the temporary supervision of the company and its management, and of its affairs, business and property
- a temporary moratorium (suspension or halt) on the rights of any parties claiming against the company or in respect of property in its possession
- 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 such a manner that
 - the company is given a better chance of continuing its existence in a solvent manner, or
 - if not possible, it will result in a better return for the company's creditors or shareholders, than in the case of immediate liquidation of the company

7.2.1 BUSINESS RESCUE (SEC 128–155)

According to section 129(1), the board of a company may resolve that the company voluntarily begin business rescue proceedings if the board has reasonable grounds to believe that

- the company is financially distressed [sec 128(1)(f)]
- there is a reasonable prospect that the company can be rescued

Section 129 also provides the further steps to be followed, including the appointment of a practitioner. The practitioner's functions and terms of appointment are included in sections 138 to 143.

Section 130 provides for objections (by an affected person) to a company's resolution regarding voluntary business rescue by applying to the court for an

order setting aside the resolution. It also provides for a period restriction and the grounds on which the application may be made.

Section 131 provides that an affected person may apply to the court for an order placing the company under supervision and commencing business rescue proceedings where the company itself has not adopted a resolution for voluntary business rescue.

The rights of affected persons during business rescue proceedings are included in sections 144 to 149.

After the practitioner has consulted with the creditors, other affected persons and the management of the company, he or she must prepare a business rescue plan (sec 150) for consideration and possible adoption at a meeting to determine the future of the company (sec 151). At that meeting, the practitioner must also inform the meeting, for example, whether there may be a reasonable prospect of the company being rescued (sec 152).

Section 153 deals with the steps that should be followed when the business rescue plan has been rejected as contemplated at the abovementioned meeting.

Section 155 provides that, irrespective of whether a company is financially distressed, or not, but is not engaged in business rescue proceedings, the board of the company or the liquidator of the company, if the company is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all the members of any class of its creditors, by delivering a copy of the proposal and notice of the meeting to consider the proposal to

- every creditor or every member of the relevant class of creditors whose name or address is known to or can reasonably be obtained by the company
- the Commission.



STUDY

Study sections 128 to 155 of the Companies Act.

SUMMARY

In this learning unit, we explained the requirements for business rescue in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

Give advice, discuss concerns, and apply the requirements for business rescue.

LEARNING UNIT 7.3

PROTECTION FOR WHISTLE-BLOWERS, APPLICATION TO DECLARE A DIRECTOR DELINQUENT OR UNDER PROBATION, RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT OR FROM ABUSE OF THE SEPARATE JURISTIC PERSONALITY OF THE COMPANY, COMPLAINTS TO THE COMMISSION OR PANEL, POWERS TO SUPPORT INVESTIGATIONS AND INSPECTIONS, AND COMPANIES' TRIBUNAL ADJUDICATION PROCEDURES

INTRODUCTION

This learning unit is presented on knowledge level 1, and you are therefore only required to have a basic understanding of the sections discussed in the learning unit.

7.3.1 PROTECTION FOR WHISTLE-BLOWERS (SEC 159)

Whistle-blowers, who disclose information about a company or its directors, must be provided with protection against dismissal, demotion or legal action.

The explanation below indicates that a whistle-blower must make any disclosures in **good faith** and to the effect that the information disclosed shows or tends to show that the company or a director (or prescribed officer) has contravened an act or legislation, failed to comply with a legal obligation or engaged in certain conduct, etc.

A company cannot override this section of the Companies Act in its Memorandum of Incorporation or in its rules.

Section 159 applies to whistle-blowers who disclose in good faith that the company or director has

- contravened the Companies Act or another act enforced by the Commission
- failed (or is failing) to comply with any legal obligation to which the company is subject
- engaged in conduct that poses a health or safety risk to any individual, or a risk of environmental damage
- discriminated unfairly against any person
- contravened any legislation that could expose the company to risk/liability

[sec 159(3)(b)]

by offering

- qualified privilege in respect of the disclosure
- immunity from civil, criminal or administrative liability with regard to the disclosure [**sec 159(4)**]

to the following whistle-blowers with regard to the company:

- Shareholders
- Directors
- Company secretary
- Prescribed officers
- Employees
- Trade unions
- Other representatives of employees
- Suppliers of goods or services
- Employees of such suppliers



STUDY

Study section 159 of the Companies Act.

7.3.2 APPLICATION TO DECLARE A DIRECTOR DELINQUENT OR UNDER PROBATION (SEC 162)

Some of the parties, who may apply to a court for an order declaring a person delinquent or under probation, are set out in section 162(2). They include the company, shareholders, directors, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company, or another representative of the employees of a company. The prerequisites for taking this action are included in section 162(2)(a) and (b). Other parties that may apply to the court include the Commission or the Panel and any organ of state responsible for the administration of any legislation [sec 162(3) & (4)].

You should be able to list the instances in which the court must make an order declaring a person a delinquent director [sec 162(5)] and the court may make an order placing a person under probation [sec 162(7)].

Note that a declaration of delinquency is unconditional and subsists for the lifetime of the person declared delinquent, if so declared in terms of subsection 5(a) or (b) – for example, where a director acted as a director while he or she was ineligible or disqualified in terms of section 69.

Where a person was declared delinquent under subsection 5(c) to (f), it may be made subject to any conditions that the court considers appropriate and will subsist for seven years from the date of the order, or such longer period as determined by the court. Examples of the latter would be where a director grossly abused the position of director or took personal advantage of information or an opportunity, contrary to section 76(2)(a).



STUDY

Study section 162 of the Companies Act.

ACTIVITY 1

The shareholders of your company has recently appointed a friend of yours, Maria Bueno, as a director of GPS Limited, an electronics company specialising in the development and manufacturing of global positioning systems (GPSs) for vehicles and motorcycles. The company is not listed. Maria is considered a valuable individual with regard to the future of the company, particularly concerning its research and development programmes.

Maria has never filled the position of a company director before and although she is excited about her promotion, she is concerned about her responsibilities as a director, particularly those arising from the Companies Act. She has heard that the Companies Act contains sections dealing with standards of directors' conduct and that if she does not perform, she can be removed from the board and dismissed from the company. She has also heard that the chairperson of the board can put her on probation as a director or declare her delinquent.

She has put the following questions to you:

Can the chairperson or any other party put me on probation? What requirements must be met in this regard in terms of the Companies Act? (4½)

FEEDBACK ACTIVITY 1

Reference: Section 162 of the Companies Act,

Can the chairperson or any other party put me on probation?

No, in terms of section 162, **only the court** can put you as director on probation; the chairperson cannot make this decision. (1½)

However, the **company, a shareholder, a director, company secretary, a trade union representative (or similar representative) can apply to the court to have you declared "on probation"**. (1½)

Certain **company regulatory bodies**, such as the **Companies and Intellectual Property Commission** (the **Commissioner**) can also make **an application to the court** if, for example, a director **grossly abused the position of director** or took **personal advantage of information or an opportunity** contrary to the standards of directors' conduct (sec 76). (1½)

(4½)

7.3.3 RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT OR FROM ABUSE OF THE SEPARATE JURISTIC PERSONALITY OF THE COMPANY (SEC 163)

This section enables a shareholder or a director of a company to apply to a court for relief if any of the circumstances are present [subsection 1(a)–(c)]. You should be able to list the various interim or final orders that a court considers fit [subsection (2)(a) to (l)]

7.3.4 COMPLAINTS TO THE COMMISSION OR PANEL (SEC 168–184)

You should be aware of complaints to the Commission or Panel (awareness level) by carefully reading the relevant sections in the prescribed book.

SUMMARY

In this learning unit, we explained and applied the requirements regarding protection for whistle-blowers, application to declare a director delinquent or on probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and Companies' tribunal adjudication procedures in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should:

Have a basic understanding of the requirements regarding protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and Companies' tribunal adjudication procedures.

CONCLUSION

In this topic about **compromise with creditors, winding-up and deregistration of companies, business rescue and protection for whistle-blowers, application to declare a director delinquent or on probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures**, we explained and applied the Companies Act requirements. In the following topic we will be dealing with regulatory agencies, offences and penalties.