

Short notes on:

WAYS IN WHICH BUSINESSES CAN APPROACH THE UNCERTAINTY OF DIFFERENT MAJORITIES REQUIRED IN ORDER TO AMEND A BUSINESS RESCUE PLAN ('BRP'), OR TO ADJOURN A MEETING CONCERNING A BRP:

Introduction

Section 151 of the Companies Act 71 of 2008 requires a business rescue practitioner to convene and preside over a meeting of creditors within 10 days after publication of the proposed BRP - in order to adequately consider the BRP.

However, the Companies Act then explicitly states that a proposed BRP will be approved on a preliminary basis if, firstly, it was supported by the holders of more than 75% of the creditors' voting interest that were voted and, secondly, the votes of the proposed plan includes at least 50% of the independent creditors' voting interests that were voted.

There is no direct indication in the Companies Act as to what majority is required to amend the BRP or to adjourn the meeting where the BRP was put to a vote. This omission creates uncertainty, which runs the risk of resulting in future disputes due to legislation often being interpreted by parties with view of it being advantageous towards them.

There are three potential interpretations parties could rely on to amend the BRP or to adjourn the meeting:

1. 75% of the creditors' voting interest that were voted and at least 50% of the independent creditors' voting interests that were voted;
2. A simple majority of the independent creditors' voting interests; and
3. A simple majority of the creditors' voting interest.

75% of the creditors' voting interests and 50% of the independent creditors' voting interest

There are a number of interpretational difficulties when relying on 75% of all creditors' voting interests and 50% of the independent creditors' voting interest being required to amend the BRP or adjourn the meeting. For example;

- Section 152(1)(d)(i) of the Companies Act specifically refers to "holders of creditors' voting interests", which is similar to the wording of section 152(2), but does not mention the second stage of the two-stage approach of the adoption of a BRP as evident section 152(2) of the Companies Act (namely,

the 50% independent creditors' voting interest that were voted.) As such, relying on this section is proven difficult.

- In terms of this interpretation, in order to amend a proposed BRP or to force a BRP to publish a revised BRP (in terms of section 153(1)(b)(i)(aa) of the Companies Act), you will require the same majority that is required in order to ultimately approve the plan. This will make it unnecessarily difficult for creditors to get a proposed BRP amended.

A Simple Majority of The Independent Creditors' Voting Interests

The flaw in this potential interpretation lies in section 147(3) of the Companies Act, which explicitly states that a simple majority of the independent creditors' voting interests will only be required to pass motions at meetings of creditors other than section 151 meetings (where the BRP is put to a vote). The legislature's intention here is to clearly exclude the independent creditors' voting interest for amending the BRP or adjourning the meeting.

A Simple Majority of The Holders Of Creditors' Voting Interest

This approach is often followed by business rescue practitioners, in terms of section 152(1)(d) of the Companies Act. In practice, this means that the same creditors who could vote in terms of the first stage of the two-stage approach, would be able to vote to amend the BRP or to adjourn the meeting. The only difference would be that instead of requiring a 75% majority (as per section 152(2) of the Companies Act), a simple majority will be sufficient to pass these motions.

In order to benefit from following this approach, it is advised that the following occurs:

1. Proposal of the motion by one of the holders of creditors' voting interest, regardless of the percentage of interest they hold;
2. A further holder of creditors' voting interest seconding the motion; and
3. The business rescue practitioner is satisfied with the proposed amendment.

Conclusion

The drafting of the Companies Act provides no clarity regarding the majority required in order to amend a BRP or to adjourn a meeting where the BRP is put to a vote. Within the current sensitive economic climate, and before this legal uncertainty is dealt with by the South African courts, it is advised that parties interpret the legislation in a holistic manner and approach this issue with caution.

For legal advice regarding business rescue and the interpretation of legislation such as the Companies Act, contact SchoemanLaw today.