

LAW MATTERS



CONSTRUCTION IN THE FACE OF BUSINESS RESCUE: ARE YOU OFF THE HOOK?

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WITH even the largest construction companies collapsing regularly, many construction sites are coming to a grinding halt. Parties are left wondering where they stand, and what is to become of their contracts while they wait for a business rescue practitioner (“BRP”) to be appointed. The attractive option for the BRP may be to abide by the contract, but what happens when this is not financially viable?

The general position is that business rescue does not automatically terminate a contract to which the company is a party. Once a BRP is appointed the validity of the contracts may however be affected.

When business rescue proceedings are instituted the BRP effectively takes control of the business from the directors, and a moratorium is created which means that no legal proceedings may be instituted against the contractor for the duration of business rescue except with the consent of the BRP or with the leave of a court.

In terms the Companies Act the BRP has the right of election for the duration of the business rescue proceedings to either abide by the contract, suspend the contract (either in whole or in part) or to apply to court for the cancellation of the contract.

In the wake of business rescue proceedings, employee morale tends to diminish which in turn leads to contractors under-performing. Therefore, it is not surprising that in these situations, the more favorable option often is to suspend the contract.

In the event that the BRP elects to proceed in this manner, the contracting party usually has the following remedies available to it:

1. Cancel the suspended contract by alleging that the party in business rescue breached a provision of the contract prior to the commencement of business rescue proceedings;
2. Withhold performance of its reciprocal obligations under the suspended contract; or
3. Claim damages from the party in business rescue by way of a court order, alternatively consent of the BRP.

If the BRP chooses to apply for cancellation of the contract, the contracting party has the right to claim damages, but it is not able to claim specific performance.

In the absence of the BRP’s express election, it will be assumed that he has elected to abide by the terms of the contract.

Therefore, business rescue does not excuse a company from performing its obligations as the BRP has a wide discretion when administering the contractor’s affairs. As such, it is important for the contracting party to have a firm grasp on its rights and the effect that business rescue has on the validity of contracts.

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