

# ***I N D E P E N D E N T***

## ***A D V I S O R Y***

### **OMEGA CIVILS (PROPRIETARY) LIMITED (UNDER BUSINESS RESCUE)**

**REGISTRATION NUMBER: 1994/002671/07**

### **MINUTES OF THE FIRST MEETING OF CREDITORS AND EMPLOYEES IN TERMS OF SECTIONS 147 AND 148 OF THE COMPANIES ACT 71 OF 2008 ("THE ACT") HELD AT OMEGA CIVILS (PTY) LTD, 3 CARAVELLE STREET, WALMER, PORT ELIZABETH AT 11H00AM ON MONDAY THE 19TH DAY OF JUNE 2017**

#### **1. Present:**

- 1.1. J F (Hans) Klopper – Business Rescue Practitioner Chairman) ("BRP") - HK;
- 1.2. Piet Louw - Independent Advisory assisting the Business Rescue Practitioner - PL
- 1.3. The following creditors and affected persons as per the attendance register:
  - 1.3.1. Nathan Jacobs – Much Asphalt
  - 1.3.2. Russell Rutters – Afrimat
  - 1.3.3. Jeff Hoffman – Afrimat
  - 1.3.4. Ronel van Jaarsveld – Dajees
  - 1.3.5. Kayaletu Mvunge – Bruno Toilet Hire
  - 1.3.6. Allan Ings – Mass Hire
  - 1.3.7. Stuart Riddle – Director
  - 1.3.8. M L Manthe – Bay Blue Agencies t/a Toilet Hire EC
  - 1.3.9. L Hosking – Ilovu Plant Hire
  - 1.3.10. Keith Hutton – KJHFT
  - 1.3.11. Shannon Kockott – Staff representative
  - 1.3.12. Henk – Turner Morris
  - 1.3.13. Carol Minnie – BO's
  - 1.3.14. Dewaldt Fourie – Atlas Plant Hire
  - 1.3.15. Ian Riddle – Mastercrete
  - 1.3.16. Patrick Davidson – Stu Davidson & Sons
  - 1.3.17. Steve Brevis – Liston Brevis
  - 1.3.18. Onno Boodt – Odesa
  - 1.3.19. Meiring Ferreira – Marx Concrete Pipes
  - 1.3.20. Roy Fisher – Airport Motors
  - 1.3.21. Gerrie Du Preez – Plant Hire
  - 1.3.22. Pieter Rademeyer – Plant Hire
  - 1.3.23. Bennie Landman – Absa Bank
  - 1.3.24. Neels Van Niekerk – Absa Bank
  - 1.3.25. C Barnard – Glendore Sand and Stone
  - 1.3.26. L Du Plooy – Glendore Sand and Stone
  - 1.3.27. Bill Mouton - Risk Force Security

- 1.3.28. John Schwulst – Aloe Oil
- 1.3.29. Ansie Rautenbach – Kemach Equipment
- 1.3.30. Nici Large – Credit Guarantee
- 1.3.31. Thando Gebengana – Eastern Force Security
- 1.3.32. Ursula Zwiegelaar – Ready Mix Distributors; Scribante Construction & Supacrush Quarries
- 1.3.33. Susan Settle – Steel Pipes & Fillings
- 1.3.34. Gavin Dell
- 1.3.35. S A Pretorius – S A Timber
- 1.3.36. Igna Marais – RMS
- 1.3.37. Jenny Tait – SARS
- 1.3.38. Brad Hiles – Talisman
- 1.3.39. Charles – Crash Motors
- 1.3.40. Louis Dutton – Dumansi Trading

## **2. Apologies for non- attendance:**

- 2.1. None.

## **3. Introduction of BRP**

- 3.1. All parties present were requested to sign the attendance register
- 3.2. HK requested that all questions relating to the business rescue process and issues discussed at the meeting be dealt with under the “general” agenda item.

## **4. Welcome and apologies**

- 4.1. HK welcomed all present and recorded that there were no apologies tendered.

## **5. Background**

- 5.1. HK informed the meeting that Business Rescue (“BR”) proceedings commenced on 5 June 2017 when the Company’s Board of Directors resolved to place the company under BR and filed the resolution with CIPC
- 5.2. HK further informed the meeting that the company appointed the BRP on 5 June 2017 by completing and filing the necessary notice to with CIPC as is required in terms of Section 129 (3) (b) of the Act.
- 5.3. HK reported that the BRP gave notice in terms of the provisions of the Section 129(3)(a) of the Act to all affected persons on 9 June 2017 and convened the first meeting of creditors in compliance with Section 147 of the Act to be held together with a meeting of employees in terms of section 148 of the Act.

- 5.4. HK reported that the same notice also served as compliance with Section 129(4)(b) of the Act which requires that the company must give notice of the appointment of the BRP

## 6. THE BUSINESS RESCUE PROCESS

- 6.1. HK informed the meeting that the BR process was introduced by way of legislation that came into law during 2011.
- 6.2. HK mentioned that this emanated from other jurisdictions in the world such as the USA/ CANADA/Australia/UK.
- 6.3. He stated that the term “rescue” means a re-organisation of a company’s affairs in order to restore it to a profitable and sustainable business and thereby avoid liquidation.
- 6.4. HK reported that the first object of Business Rescue is to keep the distressed business going as a going concern by turning it around instead of shutting it down or putting it under liquidation with the consequent loss of jobs and with creditors and suppliers being left unpaid.
- 6.5. HK reported that the Act sets out that objectives of the Business Rescue Process in the following terms: **[Section 128(1)(b)]**
- “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 a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company “*
- 6.6. HK reported that it is submitted by the BRP that the circumstances necessary for the implementation of a proper restructuring in a BR process are in place and that there is, as a consequence, the reasonable prospects of rescuing the company’s business as defined in the Act.

- 6.7. He furthermore stated that companies are by implication in terms of the Act duty bound to file a resolution for BR when there are reasonable grounds to believe that the company is financially distressed and referred the meeting to Section 129 (7) of the Act. Directors who fail to act in terms of section 129 (7) of the Act might become personally liable for the company's debt.
- 6.8. HK reported that the Act provides for tight timelines but with the proviso that the timelines may be extended by creditors holding a majority voting interest.
- 6.9. HK further stated the directors of the company are not removed from office as a result of the BR Proceedings and that they continue to exercise their fiduciary duties and operational functions but that they are now subject to the authority and guidance of the BRP. They must act in accordance with their delegated duties and instructions of the BRP.
- 6.10. HK reported that in terms of Section 140 of the Act the BRP has inter alia the following duties and powers:
- 6.10.1. have full management control of the companies in substitution for its board and pre-existing management;
  - 6.10.2. may delegate any power or function to a person who was part of the board or pre-existing management of the company;
- 6.11. HK also stated that The BRP may also:
- 6.11.1. remove from office any person who forms part of the pre-existing management of the company; or
  - 6.11.2. appoint a person as part of the management of a company , whether to fill a vacancy or not, subject to Section 140 (2)
- 6.12. HK informed the meeting that the BRP are responsible to:
- 6.12.1. develop a business rescue plan to be considered by affected persons, in accordance with Section 150 of the Act; and
  - 6.12.2. implement a business rescue plan that has been adopted in accordance with the Act.

- 6.12.3. For this purpose, the Practitioner must engage with the creditors of the company, shareholders, the management of the company and other affected persons.
- 6.13. HK stated that in terms of Section 141 of the Act the BRP must investigate the company's affairs, business, property and financial situation to assess whether there is any reasonable prospect of the companies being rescued as contemplated in the Act. He did however express his reservations about the practical implementation of this provision in the Act as BRP do not have the powers to interrogate witnesses as provided for in terms of the Laws of Insolvency.
- 6.14. HK however reported that The BRP have an obligation to report any contravention of any law, reckless trading, fraud, misappropriation of assets or any criminal activity and are further obliged to rectify any contravention including recovering misappropriated assets.
- 6.15. HK reiterated that the BRP are given wide powers to manage the company's business and to deal with its assets in order to Rescue the company and that their prime function is to develop and implement a Business Rescue Plan.
- 6.16. Following upon that HK reported that a far reaching and controversial provision in the Act, which affects the sanctity of contracts (other than employment contracts), is that the BRP have the right to suspend, either partially or wholly, any provision of an agreement to which the company is a party at the commencement of BR Proceedings. HK stated that the wide scope of this provision entitles the BRP to cancel only those terms of contracts that are unfavourable to the company by way of an Order of Court or, of course, by mutual consent.
- 6.17. Returning to the issue of the Business Rescue Plan HK stated that the BRP must publish their business rescue plan within 25 days of their appointment or such longer period as may be allowed by the holders of the majority of the creditors' voting interests.
- 6.18. HK reported that the business rescue plan must comply with the provisions of Section 150 of the Act and must contain information such as:

- 6.18.1. a list of the company's assets;
- 6.18.2. a list of the creditors of the company;
- 6.18.3. the probable dividend that would be received by creditors in a liquidation;
- 6.18.4. a list of the company's shareholders;
- 6.18.5. a copy of the written agreement, concerning the practitioner's remuneration;
- 6.18.6. a statement whether the business rescue plan includes proposals informally made by creditors
- 6.18.7. The business rescue plan must furthermore contain details of the proposals, assumptions made and conditions contained in the plan.
- 6.19. HK mentioned that what may be contained in business rescue plan, save for the compliance with certain basic information, may contain a wide variety of "techniques" available to restructuring professionals worldwide, such as, inter alia:
  - 6.19.1. the sale of the business;
  - 6.19.2. the conversion of debt to equity;
  - 6.19.3. repayment of debt over a fixed term;
  - 6.19.4. a compromise between the company and its creditors;
  - 6.19.5. an informal winding down of the company's affairs which entails the sale of assets and the pro rata distribution of the proceeds to creditors.
- 6.20. HK stated that the effect of the adoption of a Business Rescue Plan is that once it has been adopted, the Business Rescue Plan becomes binding on the company, its creditors and the members. Even dissenting creditors will become bound by the Plan. When the Plan is substantially implemented, the Practitioner must file a notice of the substantial implementation thereof which then brings the proceedings to an end.
- 6.21. HK reported one of the most important consequences of the commencement of BR Proceedings is that there is an automatic moratorium on legal proceedings against the company. The rights of creditors may likewise not be exercised against the company. No legal proceedings, subject to a few limited exceptions, may be instituted or

continued unless the Practitioner has consented in writing or the Court has given leave to do so.

- 6.22. HK confirmed that afore going will obviously have significant implications for the company in regard to its relationships with its creditors and in particular its suppliers and banks and that the entire process will therefore have to be very carefully stage-managed in order to ensure that the company's reputation is not irretrievably damaged by the process which has been initiated.

## **7. PRESENT FINANCIAL POSITION AND PROSPECTS OF RESCUING THE COMPANY.**

- 7.1. HK reported informed the meeting that the reasons for the adoption of the business rescue resolution are contained in the sworn statement that accompanied the Notice.
- 7.2. HK informed the meeting that the aggregate liabilities of the company are, per the Sworn Statement filed with CIPC, in an amount of some R23m. This may however change depending on the extent of actual claims lodged and which we are in process of receiving.
- 7.3. HK then further informed the meeting that, per the sworn statement, the amount owing to the company by its debtors amount to some R35m. and that the other movable current assets are in the process of being valued.
- 7.4. HK reported that, per the director of the company financial position deteriorated because of governmental departments not paying outstanding accounts at crucial periods for the business which created tremendous cash flow pressure on the business. The end result was that the business became financially distressed and could not pay its creditors as and when payment became due.

## **8. PROOF OF CLAIMS**

- 8.1. HK stated that the Act states that the BRP may receive proof of claims by creditors.
- 8.2. HK however stated the BRP will require that the claims by creditors be submitted in the format that is ordinarily required for the proof of a claim under liquidation

circumstances in terms of the Laws of Insolvency in order to ensure that a complete “audit” of all claims against the company could simultaneously be achieved.

## **9. DETERMINATION AS TO WHETHER A CREDITORS COMMITTEE SHOULD BE APPOINTED**

- 9.1. HK opened the floor for discussion and quoted from the Act and explained that the creditors’ committee may engage with the BRP but may not “direct or instruct” the BRP. It was agreed that no creditors committee will be formed.

## **10. GENERAL**

- 10.1. A few questions were addressed to HK about the payment of post commencement invoices upon which HK explained that the Act provides protection in that such post commencement invoices rank ahead of pre- commencement debt.
- 10.2. A discussion ensued about the date by which the business rescue plan is to be published by the BRP and after some debate **31 August 2017** was proposed and accepted as the date by which the business rescue plan must be published and if then necessary a further extension will be sought then.



**J F KLOPPER**

**BUSINESS RESCUE PRACTITIONER**