



# **INSTITUTE OF ACCOUNTING AND COMMERCE OF SOUTH AFRICA**

**Business Rescue Practitioner Guide**

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## Important Definitions

**“Affected person”**: a shareholder, a creditor, an employee (or their representative), a registered trade union representing employees of the company (if any).

**“Business rescue practitioner”**: a person appointed (or two or more appointed jointly) to oversee a company during business rescue proceedings.

**“Financially distressed”**: in reference to a particular company at any particular time that appears to be reasonably unlikely to be able to pay all of its debts as they become due and payable within the immediately ensuing six months, or the company appears to be reasonably likely to become insolvent within the immediately ensuing six months.

## BUSINESS RESCUE: INTRODUCTION

One of the purposes of the Companies Act 71 of 2008 (“the Act”) is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.

Business rescue is defined in section 128 of the Act as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

- (i) The temporary supervision of the company, and of the management of its affairs, business and property.
- (ii) A temporary moratorium on the rights of claimants against the company or in respect of property in its possession.
- (iii) 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 maximises 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.

The two prerequisites for business rescue are that the company must be **financially distressed** and there must be **a reasonable prospect of rescuing the company**. For the ‘reasonable prospect’ aspect, it is a requirement to indicate the reasons for the company’s failure and to offer a remedy for such failure that is likely to be reasonable and sustainable.

## Commencement of Business Rescue Proceedings

In terms of section 132 of the Act, business rescue proceedings may be initiated in the following ways:

- (i) The company (board of directors) files a resolution to voluntarily begin business rescue proceedings, or applies to the court for consent to file a resolution.
- (ii) An affected person applies to the court for an order placing the company under supervision and commencing business rescue proceedings.



- (iii) A court issues an order to place the company under business rescue during the course of liquidation proceedings, or proceedings to enforce a security interest.

## Commencement by Voluntary Resolution

Section 129 of the Act provides that the board of directors of a company may pass a resolution by simple majority, and that the company voluntarily begins business rescue proceedings including that it is to be placed under supervision, where the board of directors believe that the company is **financially distressed** but there is a **reasonable prospect of rescuing the company** whereby “rescuing” means achieving the goals of business rescue.

There are important restrictions on the board resolution to commence business rescue, namely, that no such resolution may be adopted if liquidation proceedings have been initiated by or against the company. A resolution to commence business rescue also has no force or effect until it has been filed with the Companies and Intellectual Property Commission (“CIPC”).

Voluntary business rescue commences when a company files the resolution with the CIPC together with a sworn statement. **[See Appendix A – Form COR123.1]**

### *Objections to the Business Rescue Resolution*

At any time after the adoption of the resolution to commence business rescue proceedings, and until the adoption of a business rescue plan, an affected person may apply to the court for an order to set aside the resolution on the grounds that:

- (i) There is no reasonable basis for believing that the company is financially distressed.
- (ii) There is no reasonable prospect for rescuing the company.
- (iii) The company has failed to satisfy procedural requirements.

A court may set aside the resolution on any of these grounds, or if it considers that it is just and equitable to do so. A court may also give a **business rescue practitioner** sufficient time to form an opinion on whether the company appears to be financially distressed, or whether or not there is a reasonable prospect of rescuing the company. A court may also issue an order placing the company under liquidation.

Objection may also be lodged by an affected person against the appointment of a business rescue practitioner on the grounds that the practitioner:

- (i) Does not satisfy the requirements of section 138 of the Act (i.e., is not properly qualified).
- (ii) Is not independent of the company or its management.
- (iii) Lacks the necessary skills, given the company’s circumstances.

An affected person may also apply to the court for an order that requires the business rescue practitioner to provide security in an amount and on terms that the court considers necessary to secure the interests of the company and any affected persons.

A copy of an application to set aside the resolution or the appointment of the business rescue practitioner must be served on the company and the CIPC.

The voluntary business rescue process includes:

- (i) A sworn statement and board resolution, as according to Form COR123.1, that the voluntary business rescue commences when the company files the resolution with the CIPC:
  - a. Within five business days, or within an extended time granted by the CIPC
    - Appoint a business rescue practitioner.
    - Publish notice of resolution with sworn statement to affected persons.
  - b. Two days after the appointment of the business rescue practitioner
    - File notice of appointment with the CIPC. **[See Appendix B – Form COR123.2]**
  - c. Five days after the notice is filed with the CIPC
    - Publish notice of appointment of the business rescue practitioner to affected persons.

Failure to comply with these procedural requirements means that the resolution lapses and is a nullity, and that the board cannot file another resolution for a period of three months from the date of the lapsed resolution.

## Commencement by Order of Court (Compulsory)

Any affected person may, in terms of section 131 of the Act, apply to the court at any time for an order to place the company under supervision and to commence business rescue proceedings.

The applicant must serve a copy of the application to the company and the CIPC and notify each affected person of the application.

There are three grounds on which a court may issue an order to place a company under supervision and to commence business rescue. The court must be satisfied that:

- (i) The company is financially distressed.
- (ii) The company has failed to pay over any amount in terms of an obligation under a public regulation or contract in respect of employment related matters.
- (iii) The company is otherwise just and equitable to do so for financial reasons.

An application for commencement of business rescue suspends any liquidation proceedings until the court has decided upon the business rescue application. Once an order is made, a company cannot pass a resolution to liquidate the company.

## DURATION OF BUSINESS RESCUE PROCEEDINGS

If business rescue proceedings have not ended within three months, or such longer time as a court permits, the business rescue practitioner must prepare a report on the progress of the proceedings and follow it up with updates at the end of each subsequent month, until the termination of the business rescue proceedings. The report and each update must be delivered to each affected person and the CIPC, and to the court if the proceedings were subject of a Court Order. **[See Appendix C – Form 125.1 – Status Report]**

## Actions Prescribed by the Act

Once a company commences business rescue proceedings, either voluntarily or by an order of court, the following actions are prescribed by the Act:

- The business rescue practitioner must investigate the affairs of the company **as soon as possible after the commencement** of business rescue (section 141 of the Act).
- **Within ten business days after being appointed**, the business rescue practitioner must convene a meeting of the creditors and a meeting of the employees and advise the meeting, among other things, of the prospects of rescuing the company and whether a creditors' and employees' committee is to be formed (section 147 and 148 of the Act).
- The business rescue plan must be published by the company within **twenty-five days after the date on which the business rescue practitioner was appointed** (section 150 of the Act).
- The business rescue practitioner must convene a meeting of creditors and any other holders of a voting interest for the purpose of considering the proposed plan within **ten business days of the publication of the business rescue plan** (section 151 of the Act).

Business rescue proceedings terminate when the court sets aside the resolution or order that began those proceedings, or the court converts the business rescue proceedings into a liquidation. It also ends when the business rescue practitioner has filed with the CIPC a notice of termination of business rescue proceedings [See Appendix D – Form 125.2]. Additionally, it ends where a business rescue plan has been proposed and rejected, but no affected person has sought to extend the proceedings, or where a business rescue practitioner has filed a notice of 'substantial implementation' of that plan [See Appendix E – Form 125.3].

## LEGAL CONSEQUENCES OF BUSINESS RESCUE

### Effect on shareholders and directors

In terms of section 137 of the Act, no alteration in the classification or status of any issued securities of a company is permitted during business rescue proceedings unless a court directs otherwise, or if this is done in accordance with an approved business rescue plan. However, the transfer of securities is permitted if it is done in the ordinary course of business.

Directors of the company are not removed from office. They continue to exercise their functions as directors, but they are now subject to the authority of the business rescue practitioner. They are required to exercise any management function in accordance with the express instructions or directions of the business rescue practitioner. Directors are not relieved from all their statutory and fiduciary duties, they must still disclose personal financial interest. They are not relieved from incurring liability in terms of section 22 of the Act or party to an act or omission calculated to defraud a creditor, employee or shareholder of the company, or knowingly acts on behalf of the company without authority to do so.

## Effect on employees

Employees who were immediately prior to the institution of business rescue employed by the company will remain employed by the company on the same terms and conditions on which they were employed prior to the commencement of business rescue proceedings, except to the extent that changes occur in the ordinary course of attrition, or if different terms and conditions are agreed between the employee and the company in accordance with labour laws.

Any retrenchment of employees of the company contemplated in the business rescue plan is subject to section 189 and section 189A of the Labour Relations Act 66 of 1995.

## Effect on contracts

Section 136 of the Act provides that the business rescue practitioner may, during business rescue proceedings, and despite any provision to the contrary in an agreement, entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of business rescue proceedings and would otherwise become due during the proceedings. A business rescue practitioner may apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated above. This does not apply to an employment contract.

## The Moratorium

In terms of section 133 of the Act, during business rescue proceedings no legal proceedings (legal or arbitration proceedings) including enforcement action (execution of a court or other order) against the company or in relation to its property that belongs to it or which is lawfully in its possession may be commenced or proceeded within any forum (court or arbitral forum).

There are certain instances in which one would be able to commence or proceed with any legal proceedings or enforcement action against the company, such as with the written consent of the practitioner or with the leave of a court.

## Post Commencement Finance

Post commencement finance is one of the most important aspects of the business rescue proceedings as it is critical to the survival and the turnaround of the company's business. Section 135(1) of the Act provides that any remuneration, reimbursement for expenses or other amount of money relating to employment that becomes due and payable by a company to an employee during business rescue, is considered to be post commencement finance.

During business rescue proceedings, the company may obtain financing that is unrelated to employment which may be secured to the lender by utilising any unencumbered asset of the company.



# THE BUSINESS RESCUE PRACTITIONER

The business rescue practitioner is the person appointed, or two or more persons appointed jointly, to oversee a company during business rescue proceedings. They are responsible for supervising and managing the company whilst it is under business rescue, and have the pivotal task of turning the company around by developing a suitable business rescue plan.

## Appointment of Business Rescue Practitioners

- Section 129(3):** The board of directors of the company must, within five business days after the company has adopted and filed the resolution with the CIPC (or such longer time as the CIPC may allow on application), appoint a business rescue practitioner.
- Section 130(6):** If the court, after considering an application brought by an affected person, sets aside the appointment of a business rescue practitioner, the court must appoint an alternate practitioner recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court.
- Section 131(5):** If a court, on application to it by an affected person, grants an order placing a company under business rescue, the court may issue a further order appointing an interim practitioner who satisfies the requirements for appointment and who has been nominated by the affected person who applied to the court. However, this appointment will be subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors.
- Section 139(3):** The company, or an affected person who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application to object to the appointment of such new practitioner and set aside the new appointment.

## Qualification of the Business Rescue Practitioner

The qualification of the business rescue practitioner is laid down in section 138 of the Act. In terms of this section, a person may be appointed as a business rescue practitioner only if that person:

- Is a member in good standing of a profession subject to regulation by a regulatory authority prescribed by the minister.
- Is not subject to an order of probation.
- Would not be disqualified from acting as a director.
- Does not have any other relationship with the company that would reasonably lead to the conclusion that the person's integrity, impartiality or objectivity is compromised by that relationship, and is not related to a person who has such a relationship.

[See Appendix F – Form COR 126.1 – Application for Practitioner's Licence]

[See Appendix G – Form COR 126.2 – Registration Certificate]

## Powers and Duties of the Business Rescue Practitioner – Section 140 of the Act

The business rescue practitioner has full managerial control of the company in substitution of the board of directors and pre-existing management. However, board and individual members of the board are obligated to continue to perform their duties and functions, subject to the approval in each instance of the business rescue practitioner.

### **Section 140:**

*During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—*

- (1)
  - (a) *has full management control of the company in substitution for its board and pre-existing management;*
  - (b) *may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;*
  - (c) *may—*
    - (i) *remove from office any person who forms part of the pre-existing management of the company; or*
    - (ii) *appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection 2; and*
  - (d) *is responsible to—*
    - (i) *develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and*
    - (ii) *implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.*
- (1A) *The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.*
- (2) *Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person—*
  - (a) *has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or*
  - (b) *is related to a person who has a relationship contemplated in paragraph (a).*
- (3) *During a company's business rescue proceedings, the practitioner—*
  - (a) *is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;*
  - (b) *has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and*
  - (c) *other than as contemplated in paragraph (b) —*
    - (i) *is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but*

- (ii) *may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.*
- (4) *If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.*

Directors of the company are required to co-operate with and assist the business rescue practitioner. As soon as is practicable after business rescue proceedings begin, each director of a company must deliver to the practitioner all books and records that relate to the affairs of the company and are in the director's possession. Any director of a company who knows where other books and records relating to the company are kept must inform the practitioner as to the whereabouts of those books and records.

Within five business days after business rescue proceedings begin, or such longer period as the practitioner allows, the directors of a company must provide the practitioner with a statement of affairs containing, at a minimum, particulars of the following:

- (a) Any material transactions involving the company or the assets of the company that occurred within 12 months immediately before the business rescue proceedings began.
- (b) Any court, arbitration or administrative proceedings, including pending enforcement proceedings involving the company.
- (c) The assets and liabilities of the company plus its income and disbursements within the immediately preceding 12 months.
- (d) The number of employees and any collective agreements or other agreements relating to the rights of employees.
- (e) Any debtors and their obligations to the company.
- (f) Any creditors and their rights or claims against the company.

## Removal and Replacement of the Business Rescue Practitioner

In accordance with section 139 of the Act, a business rescue practitioner may only be removed by a court order in terms of section 130 of the Act (i.e., as a result of an objection to the appointment of the practitioner pursuant to a business rescue resolution on the grounds that he or she is not qualified in terms of section 138 as discussed above or lacks the necessary skills) or by order of the court on the following grounds:

- Incompetence or failure to perform the duties of a business rescue practitioner of the particular company.
- Failure to exercise the proper degree of care in the performance of the practitioner's functions.
- Engaging in illegal acts or conduct.
- No longer satisfies the requirements set out in section 138 (1).
- Has a conflict of interest or lack of independence.
- Incapacitated and unable to perform the functions of that office and is unlikely to regain that capacity within a reasonable time.

## Categories of Business Rescue Practitioners – Regulation 127(2)

JUNIOR	EXPERIENCED	SENIOR
<p>A person who immediately before being appointed as a practitioner either:</p> <ul style="list-style-type: none"> <li>• Has not previously engaged in business turnaround before the effective date of the Companies Act or acted as a business rescue practitioner in terms of the Companies Act.</li> <li>• Has actively engaged in business turnaround practice before the effective date of the Companies Act or as a business rescue practitioner in terms of the Companies Act for a combined period of <b>less than five years</b>.</li> </ul>	<p>A person who immediately before being appointed as a practitioner actively engaged in business turnaround practice before the effective date of the Companies Act or as a business rescue practitioner in terms of the Companies Act, for a combined period of <b>at least five years</b>.</p>	<p>A person who immediately before being appointed as a practitioner actively engaged in business turnaround practice before the effective date of the Companies Act, or as a business rescue practitioner in terms of the Companies Act, for a combined period of <b>at least ten years</b>.</p>
<p>A junior practitioner can take appointment for <b>small companies</b> (companies with a <b>public interest score of less than 100</b>) or as an assistant to an experienced or senior practitioner.</p>	<p>An experienced practitioner can take appointment for <b>small companies</b> (companies with a <b>public interest score of less than 100</b>) or for <b>medium companies</b> (companies with a <b>public interest score of between 100 and 500</b>).</p>	<p>A senior practitioner can take appointment for <b>medium companies</b> (companies with a <b>public interest score of between 100 and 500</b>) or for <b>large companies</b> (companies with a <b>public interest score of 500 or more</b>).</p>



## Public Interest Score

Regulation 26(2) of the Companies Act sets out the manner in which the public interest is calculated. It provides that, at the end of each financial year, the public interest score is calculated as the sum of the following:

- A number of points equal to the average number of employees of the company during the financial year.
- One point for every R1 million (or portion thereof) in third-party liability of the company, at the financial year-end.
- One point for every R1 million (or portion thereof) in turnover during the financial year.
- One point for every individual who, at the end of the financial year, is known by the company, in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities or, in the case of a non-profit company, to be a member of the company, or a member of an association, that is a member of the company.

## Remuneration of the Business Rescue Practitioner

Section 143 of the Act states that the business rescue practitioner is entitled to charge an amount to the company for their remuneration and expenses in accordance with a tariff.

### **Tariff of fees for business rescue practitioners— Regulation 128**

- (1) *The basic remuneration of a business rescue practitioner, as contemplated in section 143 (1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed—*
  - (a) *R 1250 per hour, to a maximum of R 15 625 per day, (inclusive of VAT) in the case of a small company.*
  - (b) *R 1500 per hour, to a maximum of R 18 750 per day, (inclusive of VAT) in the case of a medium company; or*
  - (c) *R 2000 per hour, to a maximum of R 25 000 per day, (inclusive of VAT) in the case of a large company, or a state-owned company.*
- (2) *Sub regulation 1 does not apply to, limit or restrict any 'further remuneration' for a business rescue practitioner, as contemplated in section 143 (2) to (4).*
- (3) *In addition to the remuneration determined in accordance with section 143 (1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.*

### **Contingency Fee – Section 143 (2)**

- (2) *The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection 1, to be calculated on the basis of a contingency related to—*
  - (a) *the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or*

- (b) *the attainment of any particular result or combination of results relating to the business rescue proceedings.*

A contingency agreement will only be binding if it's approved by the holders of a majority of the creditors' voting interests, present and voting at a meeting called to consider the agreement, plus the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.

### **Expenses – Regulation 128 (3)**

In addition to the remuneration determined in accordance with section 143 (1) to (4), and this regulation, a practitioner is entitled to be **reimbursed** for the **actual cost** of any disbursement made by the practitioner, **or expenses** incurred by the practitioner to the extent **reasonably necessary** to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.

## **THE BUSINESS RESCUE PLAN**

An important function of the business rescue practitioner is to prepare and implement a business rescue plan for the company. The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting.

### **Proposal of Business Rescue Plan – Section 150 of the Act**

#### **Section 150:**

*2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three parts, as follows:*

#### **Part A—Background, which must include at least—**

- (i) *a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;*
- (ii) *a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;*
- (iii) *the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;*
- (iv) *a complete list of the holders of the company's issued securities;*
- (v) *a copy of the written agreement concerning the practitioner's remuneration; and*
- (vi) *a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.*

**Part B—Proposals, which must include at least—**

- (i) *the nature and duration of any moratorium for which the business rescue plan makes provision;*
- (ii) *the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;*
- (iii) *the ongoing role of the company, and the treatment of any existing agreements;*
- (iv) *the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;*
- (v) *the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;*
- (vi) *the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and*
- (vii) *the effect that the business rescue plan will have on the holders of each class of the company's issued securities.*

**Part C—Assumptions and conditions, which must include at least—**

- (i) *a statement of the conditions that must be satisfied, if any, for the business rescue plan to—*
  - (aa) come into operation; and*
  - (bb) be fully implemented;*
- (ii) *the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;*
- (iii) *the circumstances in which the business rescue plan will end; and*
- (iv) *a projected—*
  - (aa) balance sheet for the company; and*
  - (bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted.*
- (v) *The projected balance sheet and statement must include a notice of any material assumptions on which the projections are based; and may include alternative projections based on varying assumptions and contingencies.*
- (vi) *A proposed business rescue plan must conclude with a certificate by the practitioner stating that any—*
  - *actual information provided appears to be accurate, complete, and up to date; and*
  - *projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.*
- (vii) *The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by—*
  - *the court, on application by the company; or*
  - *the holders of a majority of the creditors' voting interests.*

## Meeting to Determine Future of the Company

Within **10 business days after publishing a business rescue plan**, in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest called for the purpose of considering the plan. **At least five business days before the meeting**, the practitioner must deliver a notice of the meeting to all affected persons setting out the date, time

and place of the meeting; the agenda of the meeting; and a summary of the rights of affected persons to participate in and vote at the meeting. The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken.

## Voting on the Business Rescue Plan

### Section 152:

- (1) *At a meeting convened in terms of section 151 of the Act (discussed above) the practitioner must:*
  - (a) *Introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders.*
  - (b) *Inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued.*
  - (c) *Provide an opportunity for the employees' representatives to address the meeting.*
  - (d) *Invite discussion, and entertain and conduct a vote, on any motions to—*
    - (i) *amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or*
    - (ii) *direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and*
  - (e) *call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).*
- (2) *In a vote called in terms of subsection (1) (e) above, the proposed business rescue plan will be approved on a preliminary basis if—*
  - (a) *it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and*
  - (b) *the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.*
- (3) *If a proposed business rescue plan—*
  - (a) *is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153;*
  - (b) *does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or*
  - (c) *does alter the rights of any class of holders of the company's securities—*
    - (i) *the practitioner must immediately hold a meeting of holders of the class, or classes of securities who rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and*
    - (ii) *if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised—*
      - (aa) *support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or*
      - (bb) *oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153.*
- (4) *A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—*



- (a) *was present at the meeting;*
  - (b) *voted in favour of adoption of the plan; or*
  - (c) *in the case of creditors, had proven their claims against the company.*
- (5) *The company, under the direction of the practitioner, must take all necessary steps to—*
  - (a) *attempt to satisfy any conditions on which the business rescue plan is contingent; and*
  - (b) *implement the plan as adopted.*
- (6) *To the extent necessary to implement an adopted business rescue plan—*
  - (a) *the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 40 to the contrary; and*
  - (b) *if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3) (c), the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms of the business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.*
- (7) *Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as contemplated in section 39, does not apply with respect to an issue of shares by the company in terms of the business rescue plan.*
- (8) *When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.*

## TERMINATION OF BUSINESS RESCUE

Business rescue proceedings terminate when the court sets aside the resolution or order that began those proceedings, or the court converts the business rescue proceedings into a liquidation. It also ends when the business rescue practitioner has filed with the CIPC a notice of termination of business rescue proceedings. **[See Appendix D – Form 125.2]**

## BRP CHECKLIST – OVERVIEW OF TIMING

<b>Start of BR due to</b>	<ul style="list-style-type: none"> <li>• Resolution in terms of section 129, or</li> <li>• Court order in terms of section 131, or</li> <li>• Court order during the course of liquidation proceedings or proceedings to enforce a security interest</li> </ul>
<b>As soon as practicable after commencement</b>	<ul style="list-style-type: none"> <li>• Directors are to provide business rescue practitioner with all books and records of the company and the practitioner is to investigate the company's financial affairs</li> </ul>
<b>5 business days (or longer as allowed by the practitioner)</b>	<ul style="list-style-type: none"> <li>• Directors to provide the practitioner with a statement of affairs</li> </ul>
<b>10 business days after practitioner appointment</b>	<ul style="list-style-type: none"> <li>• First meeting of creditors</li> <li>• First meeting of employee representatives</li> </ul>
<b>25 days after practitioner appointment (or such longer time as granted)</b>	<ul style="list-style-type: none"> <li>• Practitioner to prepare business rescue plan and the plan is to be published by the company</li> </ul>
<b>10 business days</b>	<ul style="list-style-type: none"> <li>• Meeting to consider and vote on the adoption of the business rescue plan (notice of the meeting must be given 5 days prior)</li> </ul>
<b>Business rescue plan approved/rejected</b>	<ul style="list-style-type: none"> <li>• If approved: When substantially implemented, practitioner to file notice of the substantial implementation.</li> <li>• If rejected: Practitioner may seek a vote of approval requiring the preparation of a revised plan, or advise the meeting that the company will apply to a court to set aside the result of the vote on the basis that it was inappropriate. If a practitioner fails to take any of the aforementioned steps, any affected person may call for a vote approving the preparation of a revised plan, or apply to a court to set aside the result of the vote on the basis that it was inappropriate, or offer to purchase the voting interests of the person/s who voted against the adoption of the business rescue plan</li> </ul>
<b>End of business rescue due to</b>	<ul style="list-style-type: none"> <li>• Court order setting aside resolution/order that began BRP; or</li> <li>• Court orders conversion of BRP into a liquidation; and</li> <li>• Notice of termination of BRP filed with the commission; or</li> <li>• Business rescue plan proposed and rejected (and proceedings not extended); or</li> <li>• Business rescue plan adopted and notice of substantial implementation filed by the practitioner</li> </ul>

# THE WINDING-UP OF COMPANIES

NB:

- 1) The 1973 Companies Act continues to apply to winding-up and liquidation. Sections 343, 344, 356 and 348–353, however, do not apply to the winding-up of solvent companies (See Item 9 (1) and (2) of Schedule 5), because these sections are substituted by, inter alia, s 81.
- 2) **Please see Appendix I – Extract from Companies Act, 1973 - containing legal requirements relating to the duties, functions and obligations of a liquidator in the liquidation of a company**

## Methods

There are only two permissible ways in which a company may be wound up:

- either by the court (compulsory); or
- voluntarily

Companies may be liquidated by the court for a number of reasons. It is important to distinguish between actual insolvency and commercial insolvency. In liquidation applications one has to establish commercial insolvency, which means an inability to pay debts as and when they become due in the ordinary course of business. Actual insolvency is where the company's liabilities exceed its assets.

## Winding-up by the Court

Only the High Court is competent to entertain an application for liquidation. The application can be made by -

- the company
- by special resolution

## Circumstances in Which Company May Be Liquidated by Court

A company may be wound up by the court if—

- (a) The company has by special resolution resolved that it be wound up by the court.
- (b) The company commenced business before the registrar certified that it was entitled to commence business.
- (c) The company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year.
- (d) In the case of a public company, the number of members has been reduced below seven.
- (e) Seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company.
- (f) The company is unable to pay its debts as described in section 345.
- (g) In the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding-up its affairs.
- (h) It appears to the court that it is just and equitable that the company should be wound up.

## When is the Company Deemed Unable to Pay Its Debts?

Section 344(f) must be read with section 345(1), which provides that a company will be deemed to be unable to pay its debts in the following circumstances:

- A creditor who has a claim of not less than R100,00, which is then due, has served on the company, by leaving at its registered office a demand requiring the company to pay the sum and the company has for three weeks thereafter neglected to pay the sum (or to secure for it to the satisfaction of the creditor).
- Any process issued on a judgment in favour of a creditor of the company is returned by the sheriff with an endorsement that he has not found any disposable property or that any property found did not upon the sale satisfy such process (i.e., a nulla bona return).
- It is proved to the satisfaction of the court that the company is unable to pay its debts.

In determining for the purposes of section 345(1) whether a company is unable to pay its debt, the court shall also take into account the contingent or prospective liabilities of the company (section 345(2)). These include, for example, liabilities on suretyships.

## Commencement of Liquidation

According to Section 348 of the Companies Act, 1973, a winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up.

### Consequences of Liquidation:

- Transfer of shares after commencement of winding-up is void.
- Every disposition of property after commencement of winding-up is void.
- All civil proceedings against company are suspended as from date of court order until appointment of a final liquidator.
- Any attachment/execution put in force against company after commencement of winding-up is void.
- Directors cease to be in charge of the company after the company has been liquidated, however, they are still entitled to oppose the granting of a final order.
- The property of a company/CC upon its winding-up is to be deemed to be in the custody and under the control of the master until a provisional liquidator is appointed and has assumed office.

**Legal Proceedings** - Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.



## Winding-up of Solvent Companies (Section 79 – 81 of the Companies Act, 2008)

### Section 79:

- (1) A solvent company may be dissolved by—
  - (a) voluntary winding-up initiated by the company as contemplated in section 80, and conducted either—
    - (i) by the company; or
    - (ii) by the company's creditors (It is not clear how a company can be wound up voluntarily by the company's creditors if it solvent, or why there would even be a need to do so. The very fact that the company is solvent means that creditors have no interest in the winding-up of the company), as determined by the resolution of the company; or
  - (b) winding-up and liquidation by court order, as contemplated in section 81.
- (2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.
- (3) If, at any time after a company has adopted a resolution contemplated in section 80, or after an application has been made to a court as contemplated in section 81, 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 of Schedule 5.

### Voluntary winding-up of a solvent company - Section 80

**NB** - The requirements for a voluntary winding-up of a solvent company by resolution of shareholders are a special resolution, a notice of the resolution to the Companies and Intellectual Property Commission on Form CoR 40.1 together with the prescribed fee of R250 and a certificate that security to the satisfaction of the master has been furnished for payment of all the debt within no more than 12 months after commencement of the winding-up and a certified copy of the identity document of the director who signed Form CoR 40.1). [See Appendix H – Form COR 40.1]

- (1) A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors.
- (2) A resolution providing for the voluntary winding-up of a company must be filed, together with the prescribed notice and filing fee.
- (3) If a resolution contemplated in this section provides for winding-up by the company, before the resolution and notice are filed the company must—
  - (a) arrange for security, satisfactory to the master, for the payment of the company's debts within no more than 12 months after the start of the winding-up of the company; or
  - (b) obtain the consent of the master to dispense with security, which the master may do only if the company has submitted to the master—
    - (i) a sworn statement by a director authorised by the board of the company, stating that the company has no debts; and

- (ii) a certificate by the company's auditor, or if it does not have an auditor, a person who meets the requirements for appointment as an auditor, and appointed for the purpose, stating that to the best of the auditor's knowledge and belief and according to the financial records of the company, the company appears to have no debts.
- (4) Any costs incurred in furnishing the security referred to in subsection (3) may be paid by the company.
- (5) A liquidator appointed in a voluntary winding-up may exercise all powers given by this Act, or a law contemplated in item 9 of Schedule 5, to a liquidator in a winding-up by the court—
  - (a) without requiring specific order or sanction of the court; and
  - (b) subject to any directions given by—
    - (i) the shareholders of the company in a general meeting, in the case of a winding-up by the company; or
    - (ii) the creditors, in the case of a winding-up by creditors.
- (6) A voluntary winding-up of a company begins when the resolution of the company has been filed in terms of subsection (2).
- (7) When a resolution has been filed in terms of subsection (2), the Commission must promptly deliver a copy of it to the Master.
- (8) Despite any provision to the contrary in a company's Memorandum of Incorporation—
  - (a) the company remains a juristic person and retains all of its powers as such while it is being wound up voluntarily; but
  - (b) from the beginning of the company's winding-up—
    - (i) it must stop carrying on its business except to the extent required for the beneficial winding-up of the company; and
    - (ii) all of the powers of the company's directors cease, except to the extent specifically authorised—
      - (aa) in the case of a winding-up by the company, by the liquidator or the shareholders in a general meeting; or
      - (bb) in the case of a winding-up by creditors, the liquidator or the creditors.

### **Winding-up of solvent companies by court order — Section 81**

- (1) A court may order a solvent company to be wound up if—
  - (a) the company has—
    - (i) resolved, by special resolution, that it be wound up by the court; or
    - (ii) applied to the court to have its voluntary winding-up continued by the court;
  - (b) 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; or
  - (c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that—
    - (i) the company's business rescue proceedings have ended in the manner contemplated in section 132 (2) (b) or (c) (i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up;

- (d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that—
    - (i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and—
      - (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or
      - (bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;
    - (ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or
    - (iii) it is otherwise just and equitable for the company to be wound up;
  - (e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that—
    - (i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or
    - (ii) the company's assets are being misapplied or wasted; or
  - (f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that—
    - (i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and
    - (ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act No. 69 of 1984), were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.
- (2) A shareholder may not apply to a court as contemplated in subsection (1) (d) or (e) unless the shareholder—
- (a) has been a shareholder continuously for at least six months immediately before the date of the application; or
  - (b) became a shareholder as a result of—
    - (i) acquiring another shareholder; or
    - (ii) the distribution of the estate of a former shareholder, and the present shareholder, and other or former shareholder, in aggregate, satisfied the requirements of paragraph (a).
- (3) A court may not make an order applied for in terms of subsection (1) (e) or (f) if, before the conclusion of the court proceedings—
- (a) any of the directors have resigned, or have been removed in terms of section 71, and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based; or

- (b) one or more shareholders have applied to the court for a declaration in terms of section 162 to declare delinquent the directors, if any, responsible for the alleged misconduct, and the court is satisfied that the removal of those directors would bring the misconduct to an end.
- (4) A winding-up of a company by a court begins when—
  - (a) an application has been made to the court in terms of subsection (1) (a) or (b); or
  - (b) the court has made an order applied for in terms of subsection (1) (c), (d), (e) or (f).

The main difference between a shareholders' voluntary winding-up and a creditors' winding-up is that, in the former, the liquidator exercises his powers subject to directions of the company in a general meeting, whereas in the latter he does so subject to the directions of the creditors.

It is also not competent to have a section 417 enquiry (of the Companies Act, 1973) in the case of a creditors' voluntary winding-up, unless the master or a creditor applies to court to have the company wound up by the Court.

## The Applicability of the Insolvency Law to Winding-up (Liquidation)

Companies may be liquidated due to their inability to pay their debts (commercial insolvency) or for other reasons, for example where a resolution to this effect has been taken. In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall (the Insolvency Act), in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by the Companies Act.

Certain procedures provided for the liquidation of a company, are being dealt with by the Companies Act exclusively, whilst the Insolvency Act and common law will apply in the absence of separate provisions in the Companies Act. It is to determine whether the provision is capable of application to a company and if the Companies Act provides specially and exhaustively for a specific instance in which case that particular provision of the Companies Act will apply.

## APPENDIX A

### Notice of Beginning of Business Rescue Proceedings

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 123.1</b>	<b>Notice of Beginning of Business Rescue Proceedings</b>
<b>About this Form</b>	<b>Date:</b> _____ <b>Customer Code:</b> _____
<ul style="list-style-type: none"><li>This form is issued in terms of Sections 129 and 131 of the Companies Act, 2008 and Regulation 123 of the Companies Regulations, 2011.</li><li>A company resolution to commence business rescue proceedings has no force or effect until it has been filed with this notice.</li><li>This notice must be published to every affected person within 5 days after—<ul style="list-style-type: none"><li>(a) it has been filed, in the case of a resolution; or</li><li>(b) the date of the court order, in such a case.</li></ul></li><li>If this Notice is issued following a board resolution—<ul style="list-style-type: none"><li>(a) the company must appoint a business rescue practitioner with 5 days after filing this notice; and</li><li>(b) any affected person may apply to a court in terms of section 130 for an order setting aside the resolution.</li></ul></li><li>The fee for filing this Notice is R0.</li></ul>	<b>Concerning:</b> <small>(Name and Registration Number of Company)</small> Name: _____ Registration No.: _____
	The above named company advises that business rescue proceedings have commenced in terms of Chapter 6 of the Companies Act, as a result of:
	<input type="checkbox"/> The Board of the company having adopted the attached resolution in terms of section 129, on _____.
	<input type="checkbox"/> A Court having made the attached order in terms of section 131, on _____.
	In terms of section 132 (1)(a), the company's business rescue proceedings commenced on _____, being the date on which:
	<input type="checkbox"/> This notice was filed with the commission.
	<input type="checkbox"/> The court issued the attached order.
	<small>(Only in the case of a company resolution)</small> In support of this Notice, the company has attached a sworn statement of the relevant facts upon which the resolution was founded by a director representing the Board.
<b>Contacting the Commission</b> <small>The Companies and Intellectual Property Commission of South Africa</small>  Postal Address: PO Box 429 Pretoria 0001 Republic of South Africa tel: 0861 843 384 www.cipc.co.za	<b>Name and Title of person signing on behalf of the Company:</b> _____  <b>Authorised Signature:</b> _____

This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)



## APPENDIX B

### Notice of Appointment of Business Rescue Practitioner

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 123.2</b>	<b>Notice of Appointment of Business Rescue Practitioner</b>
<b>About this Form</b>	Date: _____ Customer Code: _____
<ul style="list-style-type: none"><li>This form is issued in terms of Sections 129 and 131 of the Companies Act, 2008 and Regulation 123 of the Companies Regulations, 2011.</li><li>This notice must be published to every affected person within—<ul style="list-style-type: none"><li>(a) 2 days after it has been filed, if the company appointed the practitioner; or</li><li>(b) 5 days after the court order, in such a case.</li></ul></li><li>If this Notice is issued following a company appointment, any affected person may apply to a court in terms of section 130 for an order setting aside the appointment, or requiring the practitioner to provide security.</li><li>The fee for filing this Notice is R0.</li></ul>	<b>Concerning:</b> <small>(Name and Registration Number of Company)</small> Name: _____ Registration No.: _____
	The above named company commenced business rescue proceedings on _____.
	The following person has been appointed as the business rescue practitioner: _____
	<input type="checkbox"/> By the company, in terms of section 129 (3)(b).
	<input type="checkbox"/> By the court, in terms of section 131 (5).
<b>Contacting the Commission</b>	<b>Name and Title of person signing on behalf of the Company:</b> _____
The Companies and Intellectual Property Commission of South Africa  Postal Address: PO Box 429 Pretoria 0001 Republic of South Africa tel: 0861 843 384 www.cipc.co.za	<b>Authorised Signature:</b> _____
This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)	

## APPENDIX C

### Business Rescue Status Report

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 125.1</b>	<b>Business Rescue Status Report</b>
<b>About this Form</b>	Date: _____ Customer Code: _____
<ul style="list-style-type: none"><li>This form is issued in terms of Sections 132 and 141 of the Companies Act, 2008 and Regulation 125 of the Companies Regulations, 2011.</li><li>This notice and the attached report must be published to every affected person, and to—<ul style="list-style-type: none"><li>(a) the Commission, if the business rescue proceedings were started by the company; or</li><li>(b) the court, if the proceedings were ordered by the court.</li></ul></li><li>A report and Notice must be issued at the end of the first three months of the business rescue proceedings, and at regular monthly intervals after that.</li></ul>	<b>Concerning:</b> <small>(Name and Registration Number of Company)</small> Name: _____ Registration No.: _____
	The above named company commenced business rescue proceedings on _____.
	Because the business rescue proceedings have not concluded within three months, the appointed business rescue practitioner provides the attached report in terms of section 132 (3).
<b>Contacting the Commission</b> The Companies and Intellectual Property Commission of South Africa  Postal Address: PO Box 429 Pretoria 0001 Republic of South Africa tel: 0861 843 384  www.cipc.co.za	<b>Name and Title of person signing on behalf of the Practitioner:</b> _____ <b>Authorised Signature:</b> _____
This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)	

## APPENDIX D

### Notice of Termination of Business Rescue Proceedings

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 125.2</b>	<b>Notice of Termination of Business Rescue Proceedings</b>
<b>About this Form</b>	<b>Date:</b> _____ <b>Customer Code:</b> _____
<ul style="list-style-type: none"><li>This form is issued in terms of Sections 141 of the Companies Act, 2008 and Regulation 125 (4) of the Companies Regulations, 2011.</li><li>This notice must be filed and published to every affected person.</li></ul>	<b>Concerning:</b> <div><i>(Name and Registration Number of Company)</i> Name: _____ Registration No.: _____</div>
	The above named company commenced business rescue proceedings by resolution on _____.
	In terms of section 141(2)(b), the business rescue practitioner has concluded that there are no longer reasonable grounds to believe that the company is financially distressed. Accordingly, the proceedings are terminated upon the filing of this Notice, in the manner contemplated in sections 132 (2)(b), read with 141 (2)(b)(ii).
<b>Contacting the Commission</b>	
The Companies and Intellectual Property Commission of South Africa  Postal Address: PO Box 429 Pretoria 0001 Republic of South Africa tel: 0861 843 384 www.cipc.co.za	<b>Name and Title of person signing on behalf of the Practitioner:</b> _____  <b>Authorised Signature:</b> _____
This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)	

## APPENDIX E

### Notice of Substantial Implementation of Business Rescue Plan

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 125.3</b>	<b>Notice of Substantial Implementation of Business Rescue Plan</b>
<b>About this Form</b> <ul style="list-style-type: none"><li>This form is issued in terms of Sections 152(8) of the Companies Act, 2008 and Regulation 125 (5) of the Companies Regulations, 2011.</li><li>This notice must be filed.</li></ul>	<b>Date:</b> _____ <b>Customer Code:</b> _____ <b>Concerning:</b> <small>(Name and Registration Number of Company)</small> <b>Name:</b> _____ <b>Registration No.:</b> _____  The above named company commenced business rescue proceedings by resolution on _____.  In terms of section 152, a business rescue plan was adopted on _____.  The terms of that plan have now been substantially carried out, as contemplated in section 152 (8). Accordingly, the business rescue proceedings end upon the filing of this Notice, in the manner contemplated in sections 132 (2)(c)(ii).
<b>Contacting the Commission</b> <small>The Companies and Intellectual Property Commission of South Africa</small>  Postal Address: PO Box Pretoria 0001 Republic of South Africa tel: 0861 843 384 www.cipc.co.za	<b>Name and Title of person signing on behalf of the Practitioner:</b> _____  <b>Authorised Signature:</b> _____
<small>This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)</small>	

## APPENDIX F

### Application for Practitioner's Licence

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 126.1</b>	<b>Application for Practitioner's Licence</b>
<b>About this Certificate</b>	<b>Date:</b> _____
<ul style="list-style-type: none"><li>This Certificate is issued in terms of Section 138 of the Companies Act, 2008 and Regulation 126 of the Companies Regulations, 2011.</li><li>The filing fee for this Application is R 500.</li></ul>	<b>To:</b> The Commission
	<b>From:</b> _____ <small>(Name, Identity Number, address and contact details of Applicant)</small>
	Name: _____
	Identity No.: _____
	Address: _____
	Telephone No.: _____ Email: _____
	The above named person applies to the Commission in terms of section 138 (1)(b) of the Companies Act, 2008, for a licence to serve as a business rescue practitioner, in terms of the Companies Act, 2008.
	In support of this application, I have attached—
	<ol style="list-style-type: none"><li>A resume of my history and experience engaging in business turnaround practice, as defined in Regulation 127 (2), before the effective date of the Act, if any.</li><li>A resume of my relevant education, experience and professional affiliations.</li></ol>
	In further support of this application, I declare that I am not disqualified from serving as a business rescue practitioner on any grounds contemplated in section 138 (1) (c) or (d) of the Companies Act, 2008.
<b>Contacting the Commission</b>	<b>Name and Title of person signing on behalf of the Applicant:</b> _____
The Companies and Intellectual Property Commission of South Africa	
Postal Address: PO Box 429 Pretoria 0001 Republic of South Africa tel: 0861 843 384 www.cipc.co.za	<b>Authorised Signature:</b> _____
This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)	

## APPENDIX G

### Registration Certificate

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 126.2</b>	<b>Registration Certificate</b>
<b>About this Certificate</b>	<b>Date:</b> _____
<ul style="list-style-type: none"><li>This Certificate is issued in terms of Section 138 of the Companies Act, 2008 and Regulation 126 of the Companies Regulations, 2011.</li></ul>	<b>Concerning:</b> <div style="border: 1px solid black; padding: 2px;"><i>(Name and South African Registration Number of Accredited Entity)</i> Name: _____ Identity No.: _____</div>
	The above named person has been licenced by the Commission in terms of section 138 of the Companies Act, 2008, to serve as a business rescue practitioner, with effect from the date of this Certificate.
	The licensee has— <div><input type="checkbox"/> not engaged in business turnaround practice, as defined in Regulation 127 (2), before the effective date of the Act.</div> <div><input type="checkbox"/> satisfied the Commission that it has engaged in business turnaround practice, as defined in Regulation 127 (2), for a period of _____ years immediately before the effective date of the Act; and</div>
	is for purposes of Regulation 127 classified as - <div><input type="checkbox"/> a Junior Business Rescue Practitioner</div> <div><input type="checkbox"/> an Experienced Business Rescue Practitioner</div> <div><input type="checkbox"/> a Senior Business Rescue Practitioner</div>
<b>Contacting the Commission</b> The Companies and Intellectual Property Commission of South Africa  Postal Address: PO Box 429 Pretoria 0001 Republic of South Africa tel: 0861 843 384 www.cipc.co.za	<b>Name and Title of person signing on behalf of the Commission:</b> _____  <b>Authorised Signature:</b> _____ <div style="text-align: right; border: 1px solid black; border-radius: 50%; width: 150px; height: 40px; display: flex; align-items: center; justify-content: center; margin: 0 auto;">Commission seal</div>
This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)	



## APPENDIX H

### Resolution to Wind up Solvent Company

Companies and Intellectual Property Commission Republic of South Africa	
<b>Form CoR 40.1</b>	<b>Notice of Resolution to Wind-up Solvent Company</b>
<b>About this Notice</b> <ul style="list-style-type: none"><li>This notice is issued in terms of Section 80 of the Companies Act, 2008 and Regulation 40 (1) of the Companies Regulations, 2011.</li><li>The fee for filing this Notice is R 250.</li></ul>	<p>Date: _____ Customer code: _____</p> <p><b>Concerning:</b> <i>(Name and Registration Number of Company)</i></p> <div><p>Name: _____</p><p>Registration No.: _____</p></div> <p>On _____, <i>(insert date)</i> the shareholders of the above named company adopted a special resolution to voluntarily wind up the company in terms of section 80 of the Companies Act, 2008.</p> <p>In terms of section 80 (1), the winding up of the company is to be carried out by—</p> <p><input type="checkbox"/> The company.</p> <p><input type="checkbox"/> The creditors of the company.</p> <p>If the winding up is to be carried out by the company, in support of this Notice, the company has attached a copy of the consent of the master, as required by section 80 (3).</p> <p><b>Name and Title of person signing on behalf of the Company:</b></p> <p>_____</p> <p><b>Authorised Signature:</b></p> <p>_____</p>
<b>Contacting the Commission</b> <p>The Companies and Intellectual Property Commission of South Africa</p> <p>Postal Address: PO Box 420 Pretoria 0001 Republic of South Africa tel: 0861 843 384 www.cipc.co.za</p>	
This form is prescribed by the Minister of Trade and Industry in terms of section 223 of the Companies Act, 2008 (Act No. 71 of 2008)	

## APPENDIX I

### Select Legislation – Functions and Duties of the Liquidator

**367. Appointment of liquidator.**-For the purpose of conducting the proceedings in a winding-up of a company the Master shall appoint a liquidator or liquidators as hereinafter provided.

**368. Appointment of provisional liquidator.**-As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master may, in accordance with policy determined by the Minister, appoint any suitable person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.

[S. 368 substituted by s. 28 of Act No. 83 of 1981 and by s. 16 of Act No. 16 of 2003.]

#### Wording of Sections

**369. Determination of person to be appointed liquidator.-**

(1) In the case of a members' voluntary winding-up of a company, the Master shall, subject to the provisions of section 370, appoint the persons nominated by the company in the resolution referred to in section 356 (2) (a) (i) as liquidator or liquidators of the company concerned.

[Sub-s. (1) amended by s. 29 (a) of Act No. 83 of 1981.]

#### Wording of Sections

(2) (a) In the case of a creditors' voluntary winding-up and a winding-up by the Court of a company, the Master shall, subject to the provisions of section 370, appoint the persons or persons nominated by any meetings referred to in section 364 as liquidator or liquidators of the company concerned, if the same person or persons have been nominated by the said meetings.

[Para. (a) amended by s. 29 (b) of Act No. 83 of 1981.]

#### Wording of Sections

(b) If the said meetings have nominated different persons, the Master shall, subject to the provisions of section 370, decide the difference and appoint all or any of the persons so nominated, as he thinks fit, as liquidator or liquidators of the company concerned.

**370. Master may decline to appoint nominated person as liquidator.-**

(1) If a person who has been nominated as liquidator by meetings of creditors and members or contributories of a company was not properly nominated or is disqualified from being nominated or appointed as liquidator under section 372 or 373 or has failed to give within a period of seven days as from the date upon which he was notified that the Master had accepted his nomination or within such further period as the Master may allow, the security mentioned in section 375 (1) or, if in the opinion of the Master the person nominated as liquidator should not be appointed as liquidator of the company concerned, the Master shall give notice in writing to the person so nominated that he declines to accept his nomination or to appoint him as liquidator and shall in that notice state his reason for declining to accept his nomination or to appoint him: Provided that

if the Master declines to accept the nomination for appointment as liquidator because he is of the opinion that the person nominated should not be appointed as liquidator, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person nominated should not be appointed as liquidator of the company concerned.

(2) (a) When the Master has so declined to accept the nomination of any person or to appoint him as liquidator or the Minister has under section 371 (3) set aside the appointment of a liquidator, the Master shall convene meetings of creditors and members or contributories of the company concerned for the purpose of nominating another person for appointment as liquidator in the place of the person whose nomination as liquidator the Master has declined to accept or whom the Master has declined to appoint or whose appointment has been so set aside.

(b) In the notice convening the said meetings the Master shall state that he has declined to accept the nomination for appointment as liquidator of the person previously nominated or to appoint the person so nominated and the reasons therefor, subject to the proviso to subsection (1), or that the appointment of the person previously appointed as liquidator has been set aside by the Minister, as the case may be, and that meetings are convened for the purpose of nominating another person for appointment as liquidator.

(c) The Master shall post a copy of such notice to every creditor whose claim against the company was previously proved and admitted.

(d) The meetings referred to in paragraph (a) shall be deemed to be continuations of the first meetings of creditors, members or contributories or of the meetings referred to in sections 350 and 364.

(3) If the Master again declines for any reason mentioned in subsection (1) to accept the nomination for appointment as liquidator by the meetings mentioned in subsection (2), or to appoint a person so nominated, he shall-

(a) act in accordance with the provisions of subsection (1); and

(b) if the person so nominated was nominated as sole liquidator or if all the persons so nominated have not been appointed by him or her, appoint, in accordance with the policy determined by the Minister, as liquidator or liquidators of the company concerned any other person or persons not disqualified from being liquidator of that company.

[Para. (b) substituted by s. 4 of Act No. 22 of 2005.]

#### Wording of Sections

### **371. Remedy of aggrieved persons.-**

(1) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister.

(2) The Master shall within seven days of the receipt by him of the request referred to in subsection (1) submit to the Minister, in writing, his reasons for such appointment or refusal together with any relevant documents, information or objections received by him.

(3) The Minister may, after consideration of the reasons referred to in subsection (2) and any representations made in writing by the person who made the request referred to in subsection (1) and of all relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and, in the event of the refusal by the Master being set aside, direct the Master to accept the

nomination of the liquidator concerned and to appoint him as liquidator of the company concerned.

(4) . . . . .

[Sub-s. (4) deleted by s. 49 of Act No. 88 of 1996.]

Wording of Sections

**372. Persons disqualified from appointment as liquidator.**-No person shall be qualified for nomination or appointment as the liquidator of a company, if he is-

- (a) an insolvent;
- (b) a minor or any other person under legal disability;
- (c) a person declared under section 373 to be incapable of being appointed as a liquidator, while he remains so incapable;
- (d) a person removed from an office of trust by the Court on account of misconduct or a person who is the subject of any order under this Act disqualifying him from being a director;
- (e) a corporate body;
- (f) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document or perjury and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding twenty rand;
- (g) any person who has by means of any misrepresentation or any reward, whether directly or indirectly induced or attempted to induce any person to vote for him in the nomination of a liquidator or to effect or assist in effecting his nomination or appointment as liquidator of any company;
- (h) a person who does not reside in the Republic;
- (i) any person who at any time during a period of twelve months immediately preceding the winding-up of a company acted as a director, officer or auditor of that company; and
- (j) any agent authorized specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the company concerned and acting or purporting to act under such special authority or general power of attorney:

Provided that the provisions of paragraph (j) shall not apply to an auditor in the case of the voluntary winding-up of the company concerned by the members as contemplated in section 350.

[S. 372 amended by s. 28 of Act No. 64 of 1977.]

Wording of Sections

**373. Persons disqualified by Court from being appointed or acting as liquidators.**-The Court may, on the application of any interested person, declare any person proposed to be appointed or appointed as liquidator, to be disqualified from holding office, and, if he has been appointed, may remove him from office, and may, if it thinks fit, declare him incapable for life or for such period as it may determine of being appointed as a liquidator under this Act-

- (a) if he has accepted or offered or agreed to accept or solicited from any auctioneer, agent or other person employed on behalf of a company in liquidation, any share of the commission or remuneration of such auctioneer, agent or person or any other benefit; or

- (b) if he has, in order to obtain or in return for the vote of any creditor, member or contributory, or in order to exercise any influence upon his nomination or appointment as liquidator-
- (i) procured or been privy to the wrongful insertion or omission of the name of any person in or from any list or schedule required by this Act; or
  - (ii) directly or indirectly given or agreed to give any consideration to any person; or
  - (iii) offered or agreed with any person to abstain from investigating any transactions of or relating to the company or of any of its directors or officers; or
  - (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

**374. Master may appoint co-liquidator at any time.**-Whenever the Master considers it desirable he or she may, in accordance with policy determined by the Minister, appoint any person not disqualified from holding the office of liquidator and who has given security to his or her satisfaction, as a co-liquidator with the liquidator or liquidators of the company concerned.

[S. 374 substituted by s. 17 of Act No. 16 of 2003.]

Wording of Sections

**375. Appointment, commencement of office and validity of acts of liquidator.-**

- (1) When the person to be appointed to the office of liquidator of a company has been determined and when such person has given security to the satisfaction of the Master for the proper performance of his duties as liquidator, except where in the case of a members' voluntary winding-up the company concerned has resolved that no security shall be required, the Master shall appoint him as liquidator of the company by issuing to him a certificate of appointment.
- (2) The said certificate of appointment shall be valid throughout the Republic.
- (3) A liquidator shall be entitled to act as such from the date of his certificate of appointment.
- (4) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.
- (5) Upon receipt of such certificate of appointment the liquidator shall-
  - (a) within seven days after receipt thereof send a copy thereof to the Registrar under cover of the prescribed form; and
  - (b) give notice of his appointment in the *Gazette*.

**376. Title of liquidator.**-A liquidator shall be described as the liquidator of the particular company in respect of which he has been appointed, and not by his individual name.

**377. Filling of vacancies.-**

- (1) When a vacancy occurs in the office of liquidator, the Master shall-
  - (a) in the case of a winding-up by the Court or a creditors' voluntary winding-up, convene meetings of creditors and members or contributories of the company concerned; and
  - (b) in the case of a members' voluntary winding-up convene or direct the company concerned to convene a meeting of members; or
  - (c) if there is a remaining liquidator or liquidators, direct him or them to convene the

meetings referred to in paragraph (a) or (b),

for the purpose of nominating a person or persons for appointment as liquidator to fill the vacancy: Provided that if the Master is of the opinion that the remaining liquidator or liquidators will be able to complete the winding-up, he may dispense with the appointment of a liquidator to fill the vacancy and may direct the remaining liquidator or liquidators to complete the winding-up.

(2) All the provisions of this Act relating to the convening and conduct of the said meetings and the nomination and appointment of a liquidator shall apply to the filling of a vacancy in the office of liquidator.

(3) Subject to the proviso to subsection (1), if for any reason a vacancy is not filled as provided in this section, the Master may, in accordance with policy determined by the Minister, appoint any person as provisional liquidator or as liquidator to fill such vacancy.

[Sub-s. (3) substituted by s. 18 of Act No. 16 of 2003.]

Wording of Sections

**378. Leave of absence or resignation of liquidator.-**

(1) A liquidator shall not be absent from the Republic for a period exceeding 60 days unless-

- (a) the Master has before his departure from the Republic granted him permission in writing to be absent; and
- (b) he complies with such conditions as the Master may think fit to impose. [Sub-s. (1) substituted by s. 13 (a) of Act No. 70 of 1984.]

Wording of Sections

(2) At the request of a liquidator the Master may relieve him of his office or direct him to resign, upon such conditions as the Master may think fit.

(3) Every liquidator who is permitted to absent himself from the Republic for a period exceeding 60 days or who is relieved of his office by the Master or so resigns therefrom, shall give notice thereof in the *Gazette*.

[Sub-s. (3) substituted by s. 13 (b) of Act No. 70 of 1984.]

Wording of Sections

**379. Removal of liquidator by Master and by the Court.-**

(1) The Master may remove a liquidator from his office on the ground-

- (a) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorized, specially or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney; or
- (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or
- (c) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator; or



- (d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or
- (e) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.

(2) The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.

**380. Notice of removal of liquidator.**—The Master shall give notice in the *Gazette* of the removal of any liquidator.

**381. Control of Master over liquidators.**—

- (1) The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.
- (2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.
- (3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator.
- (4) The Court may, upon the application of the Master, order that any costs reasonably incurred by him in performing his duties under this section be paid out of the assets of the company or by the liquidator *de bonis propriis*.
- (5) Any expenses incurred by the Master in carrying out any provision of this section shall, unless the Court otherwise orders, be regarded as part of the costs of the winding-up of that company.

**382. Plurality of liquidators, liability and disagreement.**—

- (1) When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.
- (2) Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to the Master who may thereupon determine the question in issue or give directions as to the procedure to be followed for the determination thereof.

**383. Cost and reduction of security by liquidator.**—

- (1) The cost of giving security by a person appointed as liquidator to an amount which the Master considers reasonable shall, subject to the provisions of section 89 (1) of the Insolvency Act, 1936 (Act No. 24 of 1936), be paid out of the assets of the company concerned as part of the costs of liquidation thereof.

(2) When a liquidator has in the course of the winding-up of a company accounted to the satisfaction of the Master for any property belonging to the company, he may in writing apply for the consent of the Master to a reduction of the security given by him and the Master, if he is satisfied that the reduced security will suffice to indemnify the company and the creditors and contributories thereof against any maladministration on the part of the liquidator in respect of the remaining property belonging to the company, may consent wholly or in part to such reduction.

**384. Remuneration of liquidator.-**

(1) In any winding-up a liquidator shall be entitled to reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration: Provided that, in the case of a members' voluntary winding-up, the liquidator's remuneration may be determined by the company in general meeting.

(2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.

(3) No person who employs or is a fellow employee or in the ordinary employment of the liquidator, shall be entitled to receive any remuneration out of the assets of the company concerned for services rendered in the winding-up thereof and no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled under this Act.

**385. Certificate of completion of duties by liquidator and cancellation of security.-**

(1) When a liquidator of a company has performed all the duties prescribed by this Act and complied with all the requirements of the Master, he may apply in writing to the Master for a certificate to that effect.

(2) The Master shall, when he issues the said certificate, additionally state therein that he consents to the reduction of the security by the liquidator to a stated amount or to its cancellation.

*Powers of Liquidators*

**386. General powers.-**

(1) The liquidator in any winding-up shall have power-

- (a) to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;
- (b) to prove a claim in the estate of any debtor or contributory of the company and receive payment in full or a dividend in respect thereof;
- (c) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company: Provided that no liquidator shall, except with the leave of the Court or the authority referred to in subsection (3) or (4), or for the purposes of carrying on the business of the company in terms of subsection (4) (f) have power to impose any additional liabilities upon the company;
- (d) to summon any general meeting of the company or the creditors or contributories of the company for the purpose of obtaining its or their authority or sanction with respect to any matter or for such other purposes as he may consider necessary;

- (e) subject to the provisions of subsection (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.

(2) Subject to the consent of the Master, a liquidator may, at any time before a general meeting contemplated in subsection (1) (d) is convened for the first time, terminate any lease in terms of which the company is the lessee of movable or immovable property.

[Sub-s. (2) substituted by s. 9 (a) of Act No. 84 of 1980.]

#### Wording of Sections

(2A) At any time before a general meeting contemplated in subsection (1) (d) is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.

[Sub-s. (2A) inserted by s. 9 (b) of Act No. 84 of 1980.]

(2B) The Master may thereupon authorize the sale of such property or any portion thereof on such conditions and in such manner as he may determine: Provided that if such property or a portion thereof is subject to a preferential right, the Master shall not authorize the sale of such property or portion unless the person entitled to such preferential right has given his consent thereto in writing.

[Sub-s. (2B) inserted by s. 9 (b) of Act No. 84 of 1980.]

(3) The liquidator of a company-

- (a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;
- (b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and
- (c) in a members' voluntary winding-up, with the authority granted by a meeting of members, shall have the powers mentioned in subsection (4).

(4) The powers referred to in subsection (3) are-

- (a) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorize, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;
- (b) to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;
- (c) to compromise or admit any claim or demand against the company, including an unliquidated claim;
- (d) except where the company being wound up is unable to pay its debts, to make any arrangement with creditors, including creditors in respect of unliquidated claims;
- (e) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

- (f) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;
- (g) to exercise *mutatis mutandis* the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act No. 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;
- (h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;
- (i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.

(5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding-up the affairs of the company and distributing its assets.

(6) The Master may restrict the powers of a provisional liquidator.

### **387. Exercise of liquidator's powers in winding-up by Court.-**

- (1) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court, shall, in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting.
- (2) In regard to any matter which has been submitted by the liquidator for the directions of creditors and members or contributories in general meeting, but as to which no directions have been given or as to which there is a difference between the directions of creditors and members or contributories, the liquidator may apply to the Master for directions and the Master may give or refuse to give directions as he may deem fit.
- (3) Where the Master has refused to give directions as aforesaid or in regard to any other particular matter arising under the winding-up, the liquidator may apply to the Court for directions.
- (4) Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.

### **388. Court may determine questions in voluntary winding-up.-**

- (1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit.

**389. Exercise of power to make arrangement and the binding of dissentient creditors.-**

(1) Any arrangement entered into between a company able to pay its debts and about to be or in the course of being wound up and its creditors shall, subject to the provisions of subsection (2), be binding on the company if sanctioned by a special resolution of members and on the creditors of the company if acceded to by three-fourths in number and value of such creditors.

(2) Any such creditor or member may, within three weeks from the completion of the arrangement, bring the same under review by the Court, and the Court may amend, vary, set aside or confirm the arrangement as it thinks just.

**390. Exercise of power of liquidator in voluntary winding-up to accept shares for assets of company.-**

(1) Where a company is proposed to be or is being wound up voluntarily and the whole or part of its business or property is proposed to be transferred or sold to another company, whether registered under this Act or not (in this section called the transferee company), the liquidator of the first-mentioned company (in this section called the transferor company) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in receipt of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement, whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company: Provided that, in the case of a creditors' voluntary winding-up, the powers of the liquidator conferred by this section shall not be exercised save with the consent of three-fourths in number and value of the creditors present or represented at a meeting called by him for that purpose and of which not less than fourteen days' notice has been given, or with the sanction of the Court.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transfer company who did not vote in favour of the special resolution, expresses his dissent therefrom in writing addressed and delivered to the liquidator or left at the registered office of the company within seven days after the passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by this section.

(4) If the liquidator elects to purchase such member's interest, the purchase money shall be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution of the company concerned.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for winding-up the company or for nominating liquidators, but if an order is made within a year of such resolution for winding-up the company by the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) For the purposes of an arbitration under this section, the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), shall apply.

### *Duties of Liquidators*

**391. General duties.**-A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.

**392. Liquidator's duty to give information to Master.**-Every liquidator shall give the Master such information and such access to and facilities for inspecting the books and documents of the company and generally such aid as may be requisite for enabling that officer to perform his duties under this Act.

**393. Liquidator's duty to keep records and inspection thereof.**-

(1) Immediately after his appointment a liquidator shall open a book or other record wherein he shall enter from time to time a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the company.

(2) The Master may at any time in writing require the liquidator to produce any such book or record for inspection.

(3) Any creditor or contributory may, subject to the control of the Master, at all reasonable times personally or by his agent inspect any such book or record.

**394. Banking accounts and investments.**-

(1) The liquidator of a company-

- (a) shall open a current account from which amounts are withdrawable by cheque in the name of the company in liquidation with a banking institution registered under the Banks Act, 1965 (Act No. 23 of 1965), within the Republic, and shall from time to time deposit therein to the credit of the company all moneys received by him on its behalf;
- (b) may open a savings account in the name of such company with such a banking institution, a mutual building society registered under the Mutual Building Societies Act, 1965 (Act No. 24 of 1965), or a building society registered under the Building Societies Act, 1986 (Act No. 82 of 1986), within the Republic, and may transfer thereto moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company;
- (c) may place moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company, on interest-bearing deposit with such banking institution, mutual building society or building society within the Republic;
- (d) shall not withdraw any money from any account referred to in paragraph (b) or (c) otherwise than by way of a transfer to the said current account.

[Sub-s. (1) substituted by s. 6 of Act No. 63 of 1988.]

### Wording of Sections

(2) Whenever required by the Master to do so, the liquidator shall in writing notify the Master of



the banking institution or building society and the office, branch office or agency thereof with which he has opened an account referred to in subsection (1), and furnish the Master with a bank statement or other sufficient evidence of the state of the account.

(3) A liquidator shall not transfer any such account from any such office, branch office or agency to any other such office, branch office or agency except after written notice to the Master.

(4) All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by the liquidator or his duly authorized agent.

(5) The Master and any surety for the liquidator or any person authorized by such surety shall have the same right to information in regard to that account as the liquidator himself possesses, and may examine all vouchers in relation thereto, whether in the possession of the banking institution or building society or of the liquidator.

(6) The Master may, after notice to the liquidator, in writing direct the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, to pay over into the Guardians' Fund all moneys standing to the credit of that account at the time of the receipt, by the said manager, of that direction, and all moneys which may thereafter be paid into that account, and the said manager shall carry out that direction.

(7) (a) Any liquidator who without lawful excuse, retains or knowingly permits his co-liquidator to retain any sum of money exceeding forty rand belonging to the company concerned longer than the earliest day after its receipt on which it was possible for him or his co-liquidator to pay the money into the bank, or uses or knowingly permits his co-liquidator to use any assets of the company except for its benefit, shall, in addition to any other penalty to which he may be liable, be liable to pay to the company an amount not exceeding double the sum so retained or double the value of the assets so used.

(b) The amount which the liquidator is so liable to pay, may be recovered by action in any competent court at the instance of the co-liquidator, the Master or any creditor or contributory.

### **395. Liquidator's duties as to contributories.-**

(1) In the case of a winding-up by the Court or of a creditors' voluntary winding-up of a company, the liquidator shall, if necessary, settle a list of contributories.

(2) A past member of a company limited by guarantee shall not be liable to contribute to its assets unless-

(a) at the commencement of the winding-up there is unsatisfied debt or liability of the company contracted before he ceased to be a member; and

(b) it appears to the liquidator that the present members are unable to satisfy the contributions required to be made by him in pursuance of this Act.

### **396. Notices to contributories and objections.-**

(1) As soon as the liquidator has settled the list of contributories, he shall send a notice to every person included in the list, stating that fact and the extent of the liability of that person.

(2) Any person who objects to his inclusion in the list, shall be entitled within fourteen days from the date of the notice to file an objection with the liquidator in the form of an affidavit giving full reasons why he should not be included in the list.

(3) The liquidator may accept the objection and amend the list of contributories or he may reject

such objection and shall, if the objection is rejected, notify the person concerned accordingly by registered post.

(4) A person whose objection has been rejected, shall be entitled, within fourteen days from the date of the notice provided for in subsection (3), to apply to the Master for a ruling as to whether his name should be included in the list, and the Master shall direct the liquidator to include his name in or to exclude it from the said list.

**397. Recovery of contributions and nature of liability.-**

- (1) (a) A liquidator shall proceed to recover from the contributories a proportion of or the full amount of their liability as may be required from time to time, taking into consideration the probability that some of the contributories may partly or wholly fail to pay the amount demanded from them.
- (b) In the event of the death of any contributory or the insolvency of his estate, the liquidator may recover the contribution from the estate concerned.
- (2) (a) The liability for the payment of any amount by a contributory to the company shall be a debt due by him to the company as from the date on which the amount was demanded from him by the liquidator.
- (b) A contributory shall not be entitled to set off against his liability any amount due to him by the company in respect of dividends, profits or directors' remuneration.

**398. Adjustment of rights of contributories *inter se*.**-The liquidator shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

**399. Evidence as to contributions and contributories.-**

- (1) A letter of demand by the liquidator to a contributory for the payment of a contribution shall be *prima facie* evidence that the amount thereby appearing to be due, is due.
- (2) All books and papers of the company and of the liquidator shall, as between the contributories and the company, be *prima facie* evidence of the truth of all matters therein recorded.

**400. Liquidator's duty to expose offences and to report thereon.-**

- (1) A liquidator shall examine the affairs and transactions of the company before its winding-up in order to ascertain-
  - (a) whether any of the directors and officers or past directors and officers of the company have contravened or appear to have contravened any provision of this Act or have committed or appear to have committed any other offence; and
  - (b) in respect of any of the persons referred to in paragraph (a), whether there are or appear to be any grounds for an order by the Court under section 219 disqualifying a director from office as such.
- (2) A liquidator shall, before lodging his final account with the Master, submit to him a report containing full particulars of any such contraventions or offences, suspected contraventions or offences and any such ground which he has ascertained.
- (3) (a) Any report submitted to the Master under subsection (2) shall be confidential and shall not be available for inspection by any person.

- (b) If any such report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the said grounds, the Master shall forthwith transmit a copy thereof to the Director of Public Prosecutions concerned.

[Sub-s. (3) amended by s. 5 (a) of Act No. 20 of 2004.]

Wording of Sections

- (4) A liquidator shall conduct such further investigation and shall render such assistance in connection with any prosecution or contemplated prosecution as the Master or the Director of Public Prosecutions may require.

[Sub-s. (4) amended by s. 5 (a) of Act No. 20 of 2004.]

Wording of Sections

**401. Director of Public Prosecutions may make application to Court for disqualification of**

**director.**-When a Director of Public Prosecutions, upon receipt of the report referred to in section 400 (3) (b) and after such further enquiry as he may deem fit, is satisfied that there are grounds for an application to the Court for an order in terms of section 219, he may make such application to the Court.

[S. 401 amended by s. 5 (a) of Act No. 20 of 2004.]

Wording of Sections

**402. Liquidator's duty to present report to creditors and contributories.**-Except in the case of a members' voluntary winding-up, a liquidator shall, as soon as practicable and, except with the consent of the Master, not later than three months after the date of his appointment, submit to a general meeting of creditors and contributories of the company concerned a report as to the following matters:

- (a) the amount of capital issued by the company and the estimated amount of its assets and liabilities;
- (b) if the company has failed, the causes of the failure;
- (c) whether or not he has submitted or intends to submit to the Master a report under section 400 (2);
- (d) whether or not any director or officer or former director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company as provided in this Act;
- (e) any legal proceedings by or against the company which may have been pending at the date of the commencement of winding-up or which may have been or may be instituted;
- (f) whether or not further enquiry is in his opinion desirable in regard to any matter relating to the promotion, formation or failure of the company or the conduct of its business;
- (g) whether or not the company has kept the accounting records required by section 284, and, if not, in what respects the requirements of that section have not been complied with;
- (h) the progress and prospects of the winding-up; and
- (i) any other matter which he may think fit or in regard to which he may desire the directions of the creditors or the contributories.

**403. Liquidator's duty to file liquidation and distribution account.-**

- (1) (a) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors and contributories to contribute towards the costs of the winding-up, a plan of contribution apportioning their liability.
  - (b) If the final account lodged under paragraph (a) is not a final account, the liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution: Provided that the Master may at any time and in any case where the liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied towards the payment of debts, direct the liquidator in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified.
- (2) Any account shall be lodged in duplicate in the prescribed form, shall be fully supported by vouchers, including liquidator's bank statements or certified extracts from his bank and building society accounts showing all deposits and withdrawals, and shall be verified by an affidavit in the prescribed form.

**404. Master may grant extension of time for lodging account.-**

- (1) If any liquidator is unable to lodge an account with the Master under section 403 he shall before the expiration of any relevant period prescribed under that section-
  - (a) make and lodge with the Master an affidavit stating the reasons why he is not able to lodge an account, the amount of funds in hand available for distribution, a summary of the position in respect of the winding-up, and whether he has applied for an extension of time, and shall send a copy thereof to each creditor of the company; and
  - (b) lodge with the Master written reasons for his inability to lodge the account in question together with a statement of the grounds, if any, upon which he claims an extension of time within which to lodge such account, and the Master may thereupon grant such an extension of time as he may in the circumstances think necessary.
- (2) If any liquidator fails to lodge an account with the Master as required by section 403 and to comply with paragraphs (a) and (b) of subsection (1) of this section, the Master or any person having an interest in the company may serve a notice on the liquidator requiring him within two weeks after the date of the notice-
  - (a) to lodge the account in question with the Master; or
  - (b) to comply with the requirements of the said paragraphs (a) and (b) of the said subsection, and the Master may, if the account has not been lodged but paragraphs (a) and (b) of the said subsection have been complied with, grant such an extension of time as he may in the circumstances think necessary.
- (3) Any liquidator who fails to satisfy the Master that he ought to receive an extension of time for the lodging of any account, may, after notice to the Master and to the person referred to in subsection (2), apply to the Court for an order granting such an extension of time within which to lodge that account.

**405. Failure of liquidator to lodge account or to perform duties.-**

- (1) If any liquidator fails to lodge an account with the Master as and when required by or under this Chapter or to lodge any vouchers in support of such account or to perform any other duty imposed upon him by this Chapter or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation of the company, the Master or any person having an interest in the company may, after giving the liquidator not less than two weeks' notice, apply to the Court for an order directing the liquidator to lodge such account or vouchers in support thereof or to perform such duty or to comply with such demand.
- (2) The costs adjudged to the Master or to such person shall, unless ordered otherwise by the Court, be paid by the liquidator *de bonis propriis*.

**406. Places for and periods of inspection of account.-**

- (1) Every liquidator's account shall lie open for inspection for such period, not being less than fourteen days, as the Master may determine-
- (a) at the office of the Master; and
  - (b) if the office of the Master and the registered office of the company are not situated in the same district-
    - (i) at the office of the magistrate of the district in which such registered office is situated; or
    - (ii) if such registered office is situated in a portion of such district in respect of which an additional or assistant magistrate permanently performs the functions of the magistrate of the district at a place other than the seat of magistracy of that district, at the office of such additional or assistant magistrate; and
  - (c) if the company also carried on business at any other place, then also at the office of the magistrate (including any additional or assistant magistrate) of the district or the portion thereof in which any such other place is situated, as may be determined by the liquidator with the approval of the Master.
- (2) The liquidator shall lodge a copy of the account with every magistrate, additional magistrate or assistant magistrate in whose offices the account is to lie open for inspection.
- (3) The liquidator shall give due notice in the *Gazette* of the places at which any such account will lie open for inspection and shall in that notice state the period during which the account will lie open for inspection and shall transmit by post or deliver a similar notice to every creditor who has proved a claim against the company.
- (4) The magistrate shall cause to be affixed in some public place in or about his office a list of all such accounts as have been lodged in his office, showing the respective periods during which they will lie open for inspection, and shall upon the expiry of any such period endorse on the account in question his certificate that the account has lain open at his office for inspection in terms of this section and transmit the account to the Master.

**407. Objections to account.-**

- (1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.
- (2) If the Master is of opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit.

(3) If in respect of any account the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged with him, direct the liquidator to amend the account, or he may give such other directions as he may think fit.

(4) (a) The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit.

(b) If any such direction given by the Minister under this section affects the interests of a person who has not lodged an objection with the Master, such account as amended shall again lie open for inspection in the manner and with the notice as prescribed in section 406, unless the person affected consents in writing to the immediate confirmation of the account.

**408. Confirmation of account.-**When an account has lain open for inspection as prescribed in section 406 and-

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again lain open for inspection, if necessary, as in section 407 (4) (b) prescribed, and no application has been made to the Court within the prescribed time to set aside the Master's decision; or
- (c) an objection has been lodged but has been withdrawn or has not been sustained and the objector has not applied to the Court within the prescribed time, the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.

**409. Distribution of estate.-**

(1) Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith or to collect from the creditors and contributories liable to contribute thereunder the amounts for which they may respectively be liable.

(2) The liquidator shall give notice of the confirmation of the account in the *Gazette* and shall in such notice state, according to the circumstances, that a dividend is being paid or that a contribution is to be collected and that every creditor and contributory liable to contribute is required to pay to the liquidator the amount for which he is liable and the address at which the contribution is to be paid.

**410. Liquidator's duty as to receipts and unpaid dividends.-**

(1) The liquidator shall without delay lodge with the Master the receipts for any dividends paid or other proof of payment thereof.

(2) If any dividend remains unpaid for a period of two months (or such longer period as the Master may approve) after the confirmation of the relevant account, the liquidator shall immediately pay the amount to the Master for deposit in the Guardians' Fund for the account of the creditor or member concerned.



- (3) (a) Any failure by a liquidator to furnish the Master within the said period of two months with a proper receipt or other proof of payment in respect of any dividend which has not been deposited as aforesaid, shall be *prima facie* evidence that such dividend has been retained by him and has not been dealt with as prescribed in this section, and the Master may thereafter institute proceedings against the liquidator under section 405.
- (b) The Court may at the hearing of such proceedings order the liquidator to pay any such dividend which has not been paid or deposited and in addition to pay to the Master for the benefit of the Consolidated Revenue Fund an amount equal to the amount of such dividend.
- (4) Any creditor or member of a company entitled to any dividend may, if payment thereof is delayed, after notice to the liquidator, apply to the Court for an order compelling the liquidator to pay that dividend to such creditor or member.

**411. Payment of money deposited with Master.**-Any person claiming to be entitled to any money deposited with the Master by a liquidator under the provisions of this Act may apply to the Master for payment thereof, and the Master may, on a certificate by the liquidator or on other sufficient evidence that the person claiming such payment is entitled thereto, pay the amount in question to the person concerned.

*Provisions as to Meetings in Winding-up*

**412. Meetings of creditors and members and voting at meetings of creditors.-**

(1) In any winding-up of a company, meetings of creditors and members or contributories shall, save as otherwise provided in this Act, be convened and held in the following manner:

- (a) in the case of meetings of creditors, as nearly as may be in the manner prescribed for the holding of meetings of creditors under the law relating to insolvency; and
- (b) in the case of meetings of members or contributories, in the manner prescribed by regulation.

(2) The provisions of section 52 of the Insolvency Act, 1936 (Act No. 24 of 1936), shall *mutatis mutandis* apply to the right of any creditor to vote at a meeting of creditors in a winding-up of a company.

**413. Meetings to ascertain wishes of creditors and others.**-Where by this Act the Court is authorized, in relation to a winding-up, to have regard to the wishes of creditors, members or contributories-

- (a) the value of the respective creditors' claims and the voting rights of the various members or contributories of the company in terms of its memorandum or articles shall also be taken into consideration; and
- (b) the Court may, if it thinks fit, for the purpose of ascertaining the wishes of such creditors, members or contributories direct meetings of the creditors, members or contributories to be called, held and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

**414. Duty of directors and officers to attend meetings.-**

(1) In any winding-up of a company unable to pay its debts, every director and officer of the company shall-

- (a) attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorized him in writing to absent himself from that meeting;
- (b) attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.

(2) The Master or officer who is to preside at any meeting of creditors, may subpoena any person-

- (a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting which has been adjourned, for the purpose of being interrogated; or
- (b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.

(3) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.



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