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BUSINESS RESCUE

TIME LINES AND POTENTIAL LIABILITY TO PRACTITIONERS

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One of the inhibitors practitioners face during business rescue proceedings are the stringent timelines as set out in The Companies Act. For simplicity lets only consider two of these timelines.

Section 147(1) 1st Meeting of Creditors

"Within 10 business days after being appointed, the practitioner **MUST** convene, and preside over, a first meeting of creditors"

Section 153 (5) Publication of the proposed business rescue plan

"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 outcome of not adhering to these timelines is then stated in Section 129(5)(a) "a) its resolution to begin business rescue proceedings and place the company under supervision **lapses and is a nullity**".

The confusion is then created by the SCA judgement of:

"Panamo Properties (Pty) Ltd v Nel and Another NNO (35/2014) 2015 ZASCA 76 (27 May 2015)" which basically states that there is no such thing as an automatic nullity, and that business rescue is only terminated when the court sets that resolution aside in terms of section 130.

Now let's set the scene for the debate.

I am aware of first creditors meetings being held more than 3 months after a practitioner was appointed, with no condonation or any communications to the affected persons.

I am further aware of Business Rescue Plans not being published for up to a year after the first creditors meeting or after the original due date as agreed to in terms of Section 150(5) of The Companies Act, again without any condonation or extension being granted.

In some of these instances the practitioner does not publish a plan at all, but simply converts to a liquidation after a several months of no communication to creditors.

We now know that there is no such thing as an automatic nullity, but does it not remain a contravention of the act not to adhere to the prescribed timelines.

Let's now consider Section 218(2) of the companies act.

Section 218(2) provides that any person who contravenes any provision of the Act **is liable to any other person for any loss or damage** suffered by that person as a result of that contravention.

Surely, not adhering to these timelines remains a contravention and if a creditor suffers a loss as a result of this non-compliance, does he have a potential claim against the practitioner.

In motivation of this point,

Should the practitioner have stuck to the timelines, the creditors could have voted against a plan, resulting in a liquidation and thus stopping the ongoing cost of the business, such as practitioners fees, rent, salaries and in some cases it would have

stopped the sale of the assets of the business thus providing a much better return to affected persons.

Even if the sale of assets was in the ordinary course of business and the income used for legitimate business expenses, the income of the sale of assets could have gone to the creditors, if the business was liquidated in due course.

The companies act is after all not open to a practitioners interpretation, nor is it subject to a practitioners needs, should he require more time to publish a proposed business rescue plan he must follow the steps as set out in Section 150(5).

The simple question for this debate is whether or not a practitioner could be held liable in terms of section 218(2) if he did not adhere to the timelines as set out in the Act as it, at least in my mind, remains a contravention of the act.