

02 February 2022

## CIRCULAR 08

THIS DOCUMENT IS A CIRCULAR TO THE AFFECTED PERSONS RELATING TO THE BUSINESS RESCUE PROCESS OF **UPAHLA CONSTRUCTION** IN TERMS OF THE COMPANIES ACT, 71 OF 2008 AS AMENDED (THE ACT).

### OUTCOME OF THE 3RD MEETING OF CREDITORS AND EMPLOYEE REPRESENTATIVES

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The practitioner wishes to inform all affected persons of the outcome of the 3<sup>rd</sup> meeting of creditors and affected persons for Uphla Construction. The practitioner started the meeting with a brief introduction and a brief overview of what the meeting would entail in the form of an agenda.

#### **BR Cost to date:**

It was confirmed that a business rescue practitioner's<sup>1</sup> fees are governed<sup>2</sup> and have set maximum values based on the experience of the practitioner and the size of the business.

Mr. Masterton's fees for December 2021 was R12 065.22 and Mr. Pattinson's fees for December 2021 was R69 457.82. This was during the month of December and therefore not many hours were billed for, it is then prudent to note that the cost of the business rescue process will substantially increase based on hours worked in January 2022. The practitioners had a meeting with Mr. Luan Schutte on the 31<sup>st</sup> of January 2022 to discuss the hours worked and timesheets for same.

It was at this same meeting where it was agreed that instead of the practitioners charging their hourly rate, which would cost the business a substantially more, the fee structure would be altered, with approval of the creditors during this meeting, and the fees be reduced to a monthly retainer of R85 000 for Mr Pattinson and R25 000 for Mr Masterton, thus saving the business a great amount of money. By way of example, the practitioners' fees, if calculated per the Companies Act<sup>3</sup> would have amounted to more than for January 2022.

There were multiple questions asked regarding these retainers, and the practitioner clarified that the hourly rate per practitioner would be done away with and replaced with the retainers. The retainers are not an extra cost to the business. The practitioner prefers this method of retainer because it allows for more clarity in the business rescue process and also allows for

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1 Mr Quinton Pattinson, Senior Business Rescue Practitioner and Mr David Masterton, Experienced Business Rescue Practitioner

2 Regulation 128 of the Companies Act

3 Regulation 128 of the Companies Act

transparency with the creditors and limiting the fees that the practitioners may charge in the matter.

A question was raised at this time regarding some of the on-going projects and concerns that had come up regarding a specific project. The practitioner mentioned that at this time they were specifically discussing the BR costs. However, the practitioner did mention that the department of higher education has still not paid the money to Upahla Construction and the site mentioned is still closed. The practitioner again confirmed that Upahla has not received monies from the department and as such is not in a position to make payments, they are not withholding funds from creditors or utilising the funds for other expenses.

The practitioner confirmed that any of the creditors are welcome to contact him directly outside of these creditors meetings and that his contact details are provided in all correspondence.

The creditors had no objection to the change of fee structure, and it is therefore recorded that the practitioners will be remunerated as set out above. This has no effect on the original contingencies proposed and accepted, the only change here is that the practitioners will no longer charge hourly rates and instead will charge for the abovementioned retainers.

The next agenda point was the PI cover for the business rescue process. This is the cover that is compulsory for a practitioner to take out for the duration of the business rescue process.

It is for protection should the practitioner err in his duties as a practitioner so that the business does not end up being responsible for the legal fees of the practitioner. The cost of this PI cover is R17 091, and the cost is for the duration of the business rescue, meaning that this is not a monthly cost but rather a once off cost. The covered amount is for R30 000 000.

#### **Collection of Loans:**

The practitioner has engaged Mr Paul Bester, who is a practicing attorney in Port Elizabeth. He will be assisting the practitioner and the business in collecting various outstanding debtors of the business, including but not limited to the directors' loan accounts.

It has been decided that Section 129 letters of demand will be issued in terms of the National Credit Act<sup>4</sup>. This will be in an effort to get a clearer picture of the total monies owed to the business, by the debtors, and will hopefully encourage those debtors, including the directors who are in arrears with the business to pay what is due. It is estimated at this point in time that the loan accounts due by directors are approximately R1 000 000. The practitioner did note at this point that there are certain expenses (post BR) that are not being paid, this topic will be discussed more in detail when the topic of the bank is discussed.

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<sup>4</sup> Section 129 of the National Credit Act

### **Creditors:**

To date, the practitioner has received approximately 96 proof of claim documents. Out of the 96, only about 22 of them agree with the accounting records of the business. Simply, some creditors claims do not align with the actual value of the debt owed. Certain creditors have also added interest which is not in line with the National Credit Act. We will be looking into all these proofs of claims and will confirm and scrutinise all the claims. We are expecting at least 9 more proof of claim documents from creditors who have not yet submitted.

The total debt to both concurrent and secured creditors of the business is at this time approximately R21 000 000 this value is inclusive of the inflated amounts as received from the creditors. However, after a high-level look at the values, our rough determination at this point is that the total debt to creditors is closer to R16 500 000, this will however be carefully scrutinised and evaluated.

The practitioner made a request that should you not have submitted a proof of claim, please do so as soon as possible, on the prescribed form. This form will be attached to this circular.

### **Questions:**

A question was raised as to why there is a need for legal action and the cost associated with the legal action, with regards to the collection of the directors' loans, seeing as the practitioner has a direct line of contact to the directors.

The reality of the situation is that there is a lot of information outstanding and the issuing of a letter of demand will ensure that all the information is provided to the practitioner timeously. It was also confirmed that although the directors appoint the practitioner, the practitioner does not work for the directors.

The practitioner is appointed to act in the best interests of the business and balance the rights of all affected persons as per the Act<sup>5</sup>. It is the opinion of the practitioner that the cost involved with the issuing of these letters of demands, shadows in comparison related to the cost in time should this form of action not be taken.

The practitioner provided an estimate, based on previous experience, of about R 250.00 (plus VAT) for each letter and only two will be required, thus the equivalent of about half an hour of fees in relation to the practitioner hourly rate.

The next question raised was regarding the interest calculations that the practitioner mentioned with regards to the creditors who had added interest to their claims. The question from the creditor was specified that if the NCA is not applicable, then the agreed to amount of interest will be applied.

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<sup>5</sup> Section 7(k) of the Companies Act

The practitioner confirmed that there was no agreement in place (with the claims with which he has concern) and the creditors took it on themselves to add interest and back date the same. Some of the interest calculations were calculated as high as 10% per month, which is excessive, and this will not be entertained. The practitioner confirmed that any claims that contained valid interest agreements would be considered, the practitioner cannot guarantee the inclusion of this interest at this point in time.

Another creditor confirmed that he believes the business rescue practitioner must act independent from the directors of the business. Therefore, he believes that the action taken by the practitioner to collect information via the letters of demand is the correct process to follow in order to timeously collect the necessary information.

The practitioner confirmed after a question from a creditor, that he will, in due time provide a circular with a final reminder for submission of proof of claims. This circular contain a list of all the claims received to date. This document will not necessarily contain values of these claims because they may not be confirmed at that point in time.

When publishing the business rescue plan, we will give a detailed breakdown of the amounts due to individual creditors, whether they are secured or concurrent and how we intend on paying these creditors back.<sup>6</sup>

#### **Ongoing projects:**

These will be detailed specifically at the next meeting. Currently however, there are 3 ongoing projects. The business has stopped working on 2 of these sites as a result of non-payment by the client. Negotiations are underway to regain access to these sites and the practitioner confirmed that these sites have not been “abandoned” and that due process was followed.

Some of these projects are near completion and as soon as the payments are received for work completed, the business should be in a position to cover the post business rescue debt and begin to service the historic debt.

The practitioner again confirmed, he has not had much interaction with the ongoing projects of the business as the main focus currently has been on the financials of the business and scrutinising same. The practitioner asked that should the creditors have any questions regarding this, that they please hold their questions for the next meeting where the practitioner will invite Mr Schutte to join the meeting so that he may answer some questions relating to these project.

**Bank:**

It was confirmed that the bank (ABSA) does have a full cession of book debt and that this means the bank would be able to retain any monies collected by the business and perfect their security.

The bank has been extremely gracious in this matter and have confirmed that they will not be perfecting these securities and will make the funds collected from the debtors of the business available to the business in order to continue operating.

The bank will also release the bank account as there was a hold on the bank account. It is believed that by the time of publication of this circular that the business should have access to the bank account again.

It must however be stated that the bank has provided certain conditions for the above and that the practitioner will endeavour to abide by these conditions at all times.

**Publication Date:**

We have made substantial progress in this business rescue. However, at this point in time the practitioner does not believe that he has sufficient information to publish a full and comprehensive business rescue plan. Therefore, in accordance with what was agreed at the first meeting of creditors, the practitioner is asking for an extension for the publication of the business rescue plan for a further month.

A meeting, similar to this meeting will be held on the 28<sup>th</sup> of February 2022 where all topics will be discussed again. Should the practitioner at that meeting require further extension, it will be voted on. Should the practitioner not receive the extension at the meeting of the 28<sup>th</sup>, the business rescue plan will be published no more than 10 days after the 28<sup>th</sup> of February 2022.

Similarly, the practitioner noted that in this meeting, a vote needs to be taken for the extension of the publication of the business rescue plan and should that vote fail, a plan will be published within 10 days.

There was much debate regarding the extension of the publication date. The practitioner however did explain that other than most business rescue practitioners who request extensions for months at a time, that he prefers to have monthly meetings to give feedback to creditors and provide transparency with regards to his fees and the cost of the business rescue process as well as the update on the business rescue process itself.

A question was raised regarding whether or not a creditors committee was formed. The practitioner explained that at the first meeting of creditors opportunity was given for the

formation of such a committee, however the creditors voted against the formation of a committee and therefore will communicate directly with the practitioner.

An alternative publication date was at this time suggested by one of the creditors and although the practitioner is not against such a suggestion, he requested that the creditors first vote on the proposal for publication as set out above and should that proposal not be accepted, we would then consider the suggestion that the creditor has made.

A vote was then taken on the extension of the publication date of the business rescue plan as set out above, with a meeting to be held on the 28<sup>th</sup> of February 2022 where another vote will take place, failing which the publication will be within 10 days after the 28<sup>th</sup> of February.

There was only a single creditor who voted against the proposal and based on all the creditors in attendance who exercised their right to vote; a vote of 72.4% in favour of the above proposal was recorded. Therefore, the next meeting will take place on the 28<sup>th</sup> of February 2022 where further extension will be sought, if needed.

**Questions:**

A creditor did ask whether there have been any staff changes since the beginning of business rescue. The practitioner confirmed that since the commencement of business rescue, there have been no retrenchments of any kind and all senior management positions have been retained.

Kind Regards

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