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Agenda

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- Introduction to B-BBEE in South Africa
- 10 tips for leading companies out of crisis
- Nolands Experience - two work outs
- What is business rescue?
- Case study - business rescue
- Current high profile Companies in SA

Broad-Based Black Economic Empowerment (B-BBEE)

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- Government has long been aware of the immense potential business has to shape our country's future stability. This is the crux of BEE.
- BEE is government asking business: “partner us in stabilising the future.”
- It is not a compulsory legislation but voluntary. However should you want to do business with the Government and large listed companies, you will require a BEE verification.
- Over the last 7 years government has tried to find the “right” mix of punishment and reward (“carrots and sticks”).

- To now, too much “stick” and business pushes back and resists change. Too much “carrot” and business doesn’t change because they don’t need to.
- The ultimate government objective is to partner business rather than dictate terms. That said, the new codes represent a hardening of government attitude to the SA business community.
- There is an attempt to foster a “team South Africa” spirit rather than every business in it for themselves.
- BEE is probably the only tool available to address the fact that South Africa has the highest GINI co-efficient (a measure of inequality) in the world

B-BBEE

- For the vast majority of white owned businesses, B-BBEE represents a massive mind-shift, a transformation of attitude.
- B-BBEE is one of the biggest and most important socio-economic strategies in our history.
- The pressure on businesses of all sizes to do more to empower black people is growing relentlessly.

B-BBEE

- For virtually every business in South Africa, B-BBEE will in time determine future prosperity and even survival. It is *that* important.
- The next 6 months is a crucial period in South Africa's business future. There is a final window of opportunity to put intelligent and sustainable strategies in place.
- Full participation in the economy is the final frontier of apartheid. 20 years after democracy, the real work has finally begun.

B-BBEE

- B-BBEE can't be a “handout”. It has to be built on the foundation of entrepreneurship and the fundamentals that drive business.
- The fundamental problem with B-BBEE is that transformation, initially, comes at a cost. It is therefore counter-intuitive to good managers. And also, therefore, difficult to sustain.
- The key question: how can transformation both increase business performance and contribute to society?

How does BEE work?

BEE consists of 7 pillars

1. Ownership
2. Management Control
3. Employment Equity
4. Skills Development
5. Preferential Procurement
6. Enterprise Development
7. Socio-Economic Development

Points are allocated based on a scoring matrix.

The total points scored determines your BEE scorecard.

A BEE level 1 = 100% Compliance

A BEE level 9 = 0% Non-Compliance

Government and Companies use these scores to allocate tenders and improve their own scores

Insight & Foresight

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Making the correct business decisions is never easy.

- When a company is in crisis often decisions are emotional rather than rational.

Ten Tips For Leading Companies Out Of Crisis

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Even good managers can miss signs of distress

1. Throw away your perception of a company in crisis
 - o The problem is seldom made up of just one or two things, rather a result of a number of them interacting together



Ten Tips For Leading Companies Out Of Crisis

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2. Force yourself to criticize your own plan
3. Expect more from your board
4. Focus on cash
 - Not just about money in the bank.
 - Forecast cash flow to ensure no surprises
5. Create a great change story
 - Yes we are profitable but the whole point of profitability is to generate enough cash to expand, grow and maintain operations
6. Treat every turnaround as a crisis
 - Crisis demands significant action, now
 - More willing to take calculated risks

Ten Tips For Leading Companies Out Of Crisis

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7. Build traction for change with quick wins
8. Throw out the old incentive plans
 - Old incentives : safety, financial, operational and personal development
 - Offer incentives that are tied specifically to what you want them to do
9. Replace a team member or two
 - Sends a signal to stakeholders that there will be changes and you are not afraid to make tough moves
10. Find and retain talented people

Nolands Experience

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- I have been professionally privileged to be involved in a number of work outs -
- Two examples
 1. Paper mill
 2. Biomass company

What Is Business Rescue?

- Introduced on promulgation of new Companies Act on 1 April 2011
- Similar to:
 - United States “debtor in possession” by United States Bankruptcy Code
 - United Kingdom - “pro creditor approach” by UK Insolvency Act
- Definition contains 3 provisions for the rehabilitation of a company:
 - **Temporary supervision** : business rescue practitioner, upon appointment, is immediately installed as CEO
 - **Temporary moratorium on rights of claimants against company** - to ‘buy’ practitioner time, usually 6 months. Risk that practitioner can exploit company for fees.
 - **Development and implementation of business rescue plan** - plan for company to either continue on a solvent basis (primary purpose) or maximize return to creditors on liquidation (secondary purpose).

What Is Business Rescue?

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- Process - 2 options - voluntary or by court application
 - Voluntary
 - Majority of directors believe company is financially distressed and reasonable prospect exists of rescuing company
 - Board appoints properly qualified business rescue practitioner within 5 days
 - By application
 - “Affected person” applies to court for an order placing the business in rescue
 - “Affected person” is
 - Shareholder
 - Creditor
 - Trade union representing employees
 - If no trade union then employees or respective representative
 - Court appoints interim business rescue practitioner
- Appointment ratified by independent creditors within 10 days.

What Is Business Rescue?

- Fundamental consequence
 - General moratorium on all proceedings against the company
 - Breathing space for practitioner to formulate and implement business rescue plan without concentrating and funding litigation
 - Companies Act provides vast power to practitioner which creates the possibility of abuse
 - Practitioner is entitled to incur expenses with no mechanism for stakeholders to challenge appropriateness
 - Opportunity to spend moratorium period charging excessive fees with no real prospect of business rescue

Case Study

- How do you decide between:
 - Business Rescue
 - Liquidation
- Supreme Court of Appeal - Bothasfontein Farm - Kyalami Racetrack
 - 2 Banks were major creditors and each 30% shareholder (combined 60%) in company
 - Company owned:
 - Racing circuit;
 - Exhibition and conference centre;
 - Workshops and other premises.
 - Company was in a position where they were unable to repay debt to bank of R31m.
 - Bank was in the process of arranging attachment of the properties for sale in execution.
 - Company entered into voluntary business rescue resulting in a moratorium on proceedings

Case Study

- Voluntary business rescue application was launched by 40% shareholder
- Bank therefore could not continue with application for sale of properties
- Bank launched counter application against business rescue as they would prefer that the company be liquidated
- The reasons for the bank’s counter application was that:
 - The business rescue plan was not focused on the rehabilitation and continued existence of the company (PRIMARY PURPOSE); but rather on
 - Getting the maximum return on the assets for the creditors (SECONDARY PURPOSE)
 - The bank felt that a liquidator could get at least the same or a better return on selling the property than a business rescue practitioner and therefore it did not make sense to still go through the business rescue process.
- The high court held in favour of the bank and placed the company into liquidation.

Case Study

- Supreme court of appeal held the following:
 - It is not necessary for the business rescue to provide for the return to solvency of a company, it can be focussed purely on the secondary goal of maximising return to creditors;
 - The business rescue plan does not have to be a detailed plan however it does need to show a reasonable prospect of the goal of the business plan;
 - The business rescue plan was merely an alternative process of winding up and therefore did not show a reasonable prospect of maximising return to the creditor
 - Appeal was dismissed and company was placed into liquidation.

- Lessons learnt
 - Business rescue is a lot broader than previous judicial management process
 - Companies need to decide on whichever course of action will give the best return to creditors:
 - Return company to solvency - Business Rescue Primary Goal
 - Winding up company but plan that would result in a better return to creditors than liquidation - Business Rescue Secondary Goal
 - Liquidation

Current

- African Bank - Business rescue
- Aurora Mines - Liquidations
- Marikana - Social and ethical

Thank you