BUSINESS RESCUE PROVISIONS

The proposed Bill, like all other Bills, is divided into several chapters which deals with various aspects,

However of critical importance to SAPOA and its constituent members is Chapter 6 of the Act which deals with the business rescue provisions and or regime which the Bill seeks to introduce,

The Bill defines business rescue as “proceedings to facilitate rehabilitation by its management of a company that is insolvent, or may imminently become insolvent”,

The effect of the Chapter is that, according to Notice 166/2007 published in the Government Gazette of the 12th February 2007, item 3 (e) under the heading CORPORATE EFFICIENCY, : The judicial management system for dealing with failing companies should be replaced by a more efficient business rescue system",

The net effect of the introduction of the Chapter on Business rescue is that it will repeal and replace in its entirety CHAPTER XIV of the Companies Act 61 of 1973 which deals with judicial management,

Effect on Property Owners, Developers and Property Managers

The business rescue provisions generally provides for:-

1. the temporary supervision of the management of affairs, business and property of the company,

2. the temporary moratorium on the rights of claimants (landlords and property managers included against the company or in respect of property in its possession, and,
3. the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities as well as equity, if the plan is approved.

The effect the business rescue provisions will have on SAPOA constituent members will most certainly arise in one of the following circumstances:-

a. where a business that is a tenant to a member’s property is subject to business rescue process,

b. where a property management manages and or administers property on behalf of a property owning company that is subject to business rescue,

The implications thereof is that for the period in which the business in question will be subject to business rescue claims for the payment of rental and or professional management fees will be frozen and the member company may be saddled with a situation where it has a tenant who could not only pay its rental or a client who cannot pay professional management fees but cannot be evicted or sued due to the fact that a moratorium is placed on all claims against the client company until the business rescue process is finalized,

Clearly the above will be economically destructive to members, who find themselves settled with such tenants and or clients.

Furthermore the business rescue provisions are at odds with the law of contract in that the lease contract or professional services that would have been concluded between members and the tenant in distress is completely disregarded,

What is also problematic is the ranking of claims by the different creditors of the business in distress, in that the proposed Act ranks the claims in the following order:-

i. employees,

ii. secured creditors for any supply made after the business rescue proceedings began,

iii. unsecured creditors for any supply made after the business rescue proceedings began,
iv. secured creditors for any supply made before the business proceedings began,

v. unsecured creditors for any supply made before the business rescue proceedings began,

vi. shareholders of the company,

Clearly the landlord’s hypothec and other common law as well as contractual rights are relegated to almost the bottom of the pile and there is a risk that in the event that the rescue process fails, a member may be left with a huge bill of unpaid rental or professional fees that may not be recovered at all on the eventual liquidation of the distressed company.

In order to succeed with the landlord’s hypothec, the following requirements have to be met:-

a. the goods must be kept at the premises, indefinitely and at the time that the rental is in arrears,

b. the goods must be used on the premises,

c. goods belonging to a third party (e.g. goods under installment sale agreement) must be kept at the premises with the knowledge of such third party, and,

d. the landlord must not be reasonably aware that the goods belong to a third party.

The protection that is granted in terms of the landlord’s hypothec is against a misrepresentation being created that whatever goods are kept on the premises, belong to the tenant. If the aforementioned elements are complied with, a landlord can succeed in attaching the tenant’s goods, and is selling same in execution as security against arrears rentals incurred by the tenant.

In terms of the Bill no creditor will be awarded preference once the Business Rescue proceedings are instituted. For the duration of the Business Rescue process, there will also be a moratorium on legal proceedings against the tenant company. Effectively this means that the landlord will not be able to rely on the landlord’s hypothec.

Possible steps to overcome the effect of the Bill include the following:
a. **REGISTRATION OF A SPECIAL NOTARIAL BOND OVER THE MOVABLE GOODS OF THE TENANT**- A special notarial bond may be registered over all movable assets of the tenant that are capable of being identified, e.g. an asset with a serial or registration number. As soon as the tenant goes into arrears, a summons is issued. Based on the summons proceedings which are commenced, and provided that a special notarial bond was already registered prior in time / at the commencement of the lease, the sheriff can immediately be approached in order for the special notarial bond to be perfected.

b. **CASH DEPOSITS**- instead of getting bank guarantees (which would be frozen as soon as the business rescue process starts), the landlord should take cash deposits. The landlord would however then have to make arrangements for the deposits to be invested to earn interest (interest to be paid over to tenants on expiry of the lease), as required in terms of the Estate Agency Affairs Act.

c. **REGISTERING A SECOND BOND OVER THE IMMOVABLE OF SURETIES/DIRECTORS**- The landlord could register a second bond over the immovable property of sureties. The causa for the bond will be surety ship. The bond amount could be capped at an amount equal to 6 months rent.

d. **EARLIER DETECTION OF ARREARS**- the landlord should take action as soon as the tenant rental is in arrears, i.e. rentals should not be allowed to go into arrears for longer than 1 (one month). The landlord must then take quick decision to either, cancel the lease and realize security or participate in possible business rescue proceedings.

e. **DIFFERENT APPROACH TO RISK MANAGEMENT**- The landlord’s approach to credit/debt collection and risk management should be similar to that of a bank/financial institution. At the stage when the lease is approved, a proper financial investigation/ risk assessment must be done. The landlord must re-assess the tenant’s financial position on a regular/annual basis and a scorecard must be developed that focuses on risk analysis.