



Companies and Intellectual
Property Commission

a member of **the dti** group

BUSINESS RESCUE

POSSIBLE OPTION TO SAVING YOUR BUSINESS



EFFECT OF COVID-19 PANDEMIC ON SA BUSINESSES

We have all seen and felt the effect of the global COVID-19 pandemic on our country and personal lives. Many businesses, from large corporations (such as EDCON) to small mom and pop shops could not continue meeting their obligations without consistent income. Once a company finds itself in financial difficulties, the responsible thing to do would be to seek help sooner rather than later.

Once the financial position of an entity is assessed, the decision needs to be made whether to liquidate the entity (commercially – unable to pay debts and factually insolvent – liabilities exceed assets) or place the entity in voluntary business rescue (financially distressed).

Liquidation - process of bringing a business to an end and distributing its assets to creditors and shareholders. It is an event that usually occurs when a company is [insolvent](#), meaning it cannot pay its obligations when they are due.

Business Rescue – proceedings to facilitate the rehabilitation of a company that is financially distressed, by providing for temporary supervision, temporary moratorium on enforcement action and development of a plan by restructuring the company in a way that maximises the likelihood of the company continuing on a [solvent](#) basis.

MANDATE AND PURPOSE OF CIPC

Chapter 1, Part B states:-

“The purpose of this Act are to –

*(k) provide for the efficient and responsible rescue and recovery of financially distressed companies, **in a manner that balances the rights and interests of all relevant stakeholders;** “*

Chapter 6 of the Act 2008 introduces principles relating to corporate rescues which **brings us into line with international principles of turnarounds** and corporate rescue as they exist in foreign jurisdictions.

FUNCTIONS OF CIPC RELATING TO BUSINESS RESCUE

Manage and record the filing of relevant notices:-

- The accreditation of professional bodies;
- Licensing of individuals that meet the criteria of the Act;
- Monitor patterns of compliance;
- Promotion of business rescue provisions of the Act; and
- Advisory role and raise awareness



BUSINESS RESCUE PROCEEDINGS LIFE CYCLE



DEFINITIONS

Affected person:

Any person that is affected by the company and includes:

- Shareholder
- Creditor
- Registered trade union representing employees
- Employees representatives (if no union)

Business Rescue:

Proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for

—

- Temporary supervision of company, its affairs, business and property
- Temporary moratorium on the rights of claimants
- Development and implementation of a plan to either (1) rescue the company by restructuring or (2) result in a better return for company's creditors or shareholders than would result from liquidation

DEFINITIONS

Financially distressed:

It appears to be reasonably unlikely that the company will be able to pay its debts as they become due and payable within the immediately ensuing six months

MAIN PURPOSE OF BUSINESS RESCUE PROCEEDINGS

The main purpose of the business rescue process is to restructure the company in order for it to continue in existence (on a solvent basis) OR to provide a better return for the company's creditors or shareholders (members) than in liquidation.

Companies Act, provides for 2 ways in which business rescue can be initiated:

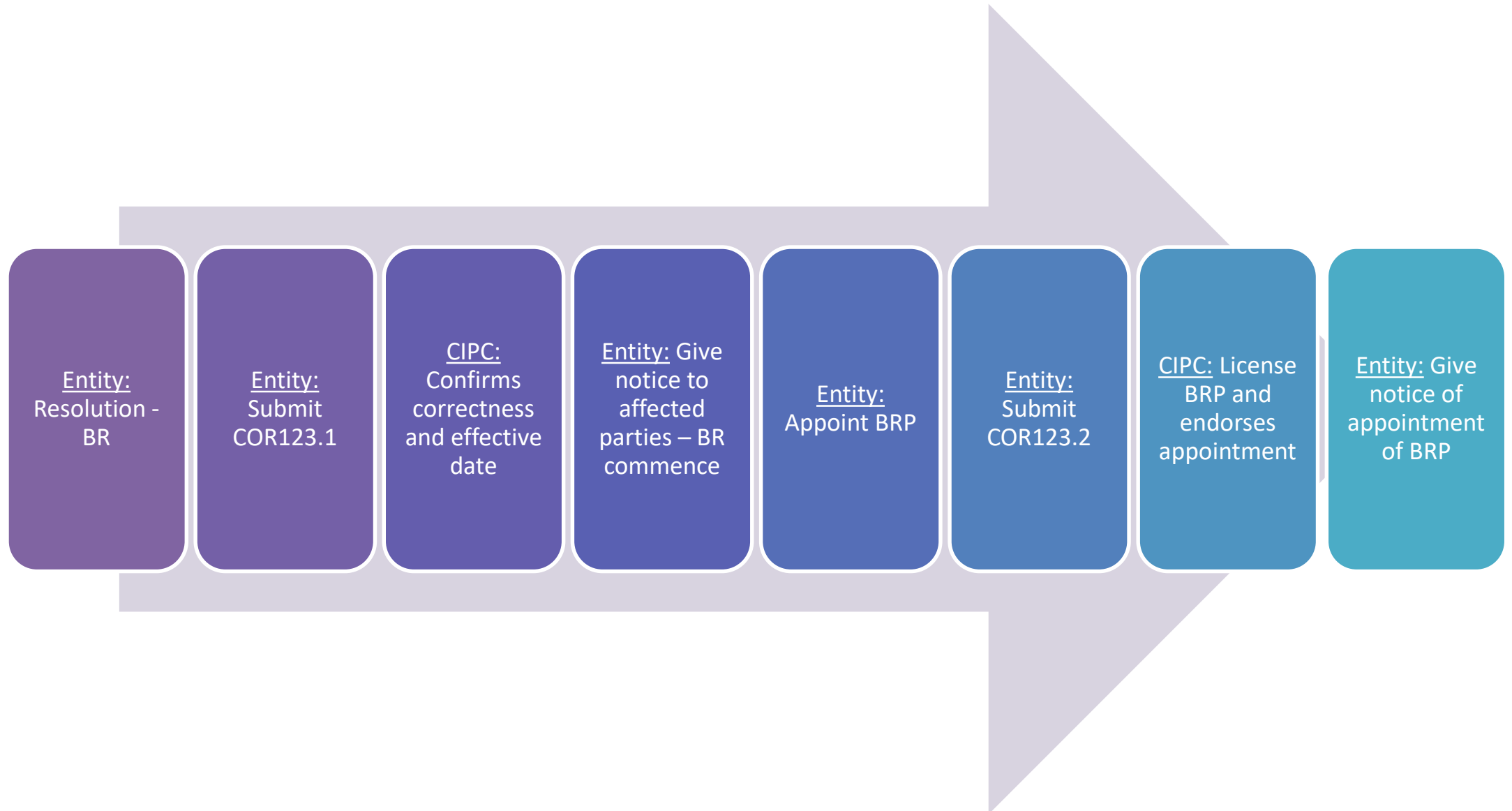
1. Company or close corporation resolves (decision) to commence business rescue (section 129 of Companies Act; or
2. Court order to begin business rescue proceedings (section 131 of Companies Act).

STARTING BUSINESS RESCUE PROCEEDINGS

Business rescue proceedings begin when:-

- (1) the Board passes a resolution that the company voluntarily begin Business rescue proceedings (section 129); OR
- (2) an affected person (shareholder, creditor, employee or organised labour), applies to court for business rescue proceedings (section 131)

BUSINESS RESCUE PROCESS FILING



BUSINESS RESCUE PROCESS

Legal and administrative requirements:

1. Duly completed and signed COR123.1;
2. Affidavit / sworn statement;
3. Special resolution - must state:
 - (i) Entity is financially distressed; and
 - (ii) Resolve to commence business rescue proceedings.
4. Certified ID copy of customer code owner (submitter);
5. Certified ID copy of director / member undertaking the affidavit / sworn statement;
6. Letter from the company stating the PI Score, primary business activities and nomination of business rescue practitioner ([appointed by entity, not CIPC](#));
7. Letter from business rescue practitioner declaring his/her capacity to accept nomination, independence from the entity and that the practitioner is not disqualified.

Lodge in full (one attachment) via businessrescue@cipc.co.za

Practice 1 of 2020

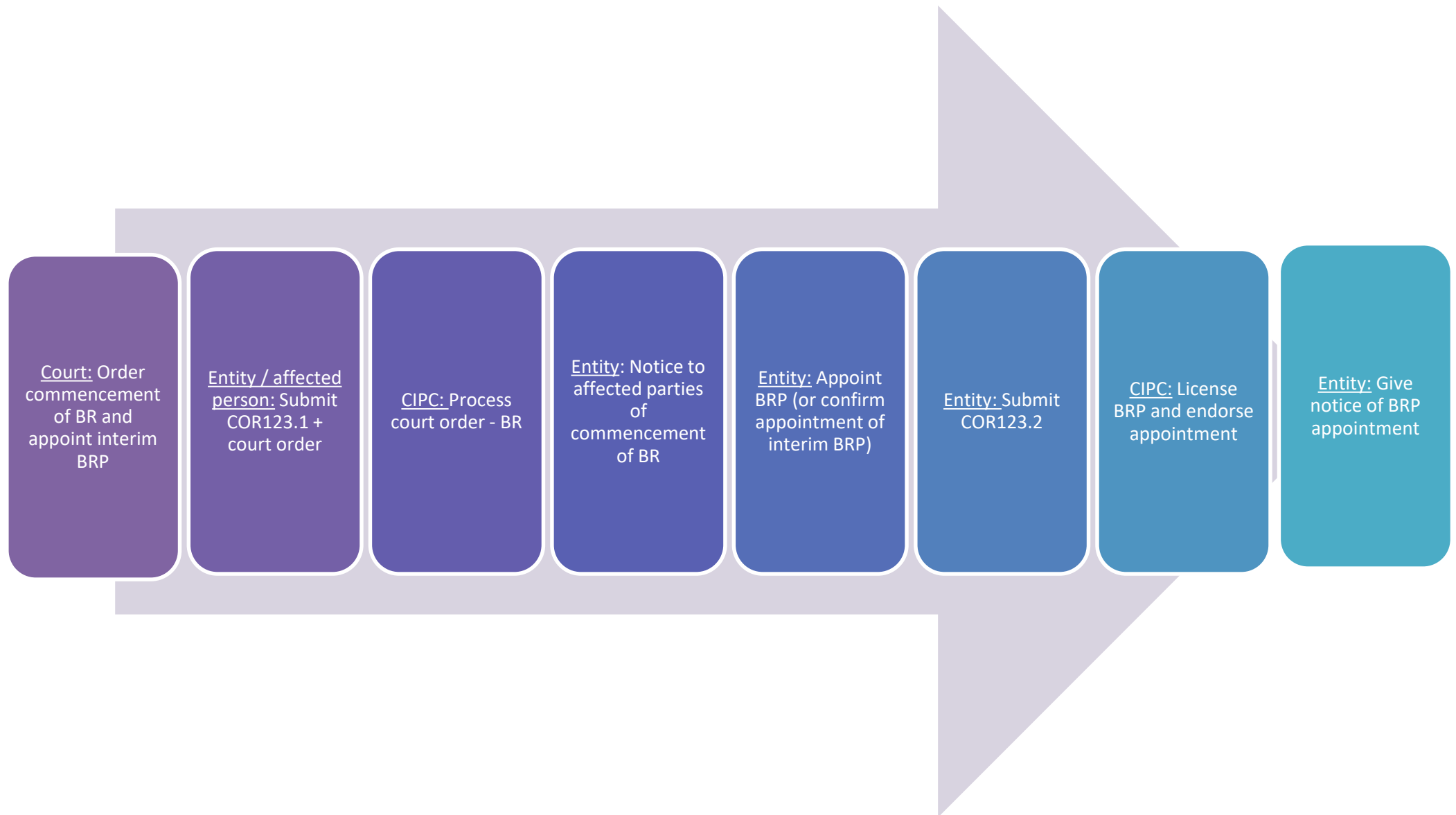
BUSINESS RESCUE - AFFIDAVIT

Affidavit / Sworn Statement must contain the following information:

- Full name, surname and ID number of deponent of affidavit / sworn statement;
- Reasons for resolution to start business rescue proceedings (e.g. what caused the financial distress);
- How the entity aim to rescue the company;
- Physical address (registered address) where most of the business activities in the current financial year were undertaken;
- All legal proceedings the company is involved in as at date of resolution, the nature of such proceedings and the status thereof.

A company may not resolve to begin business rescue proceedings if liquidation proceedings have been initiated by or against the company – this information must also be declared (Section 129(2)(a) of the Companies Act, 2008)

BUSINESS RESCUE – COURT ORDER



CONDITIONS FOR COURT ORDER

- Cannot approach court of entity has already resolved to commence BR – [section 131\(1\)](#)
- No application should have been made to a court for the liquidation of the company

BUSINESS RESCUE – EFFECT

- General moratorium on legal proceedings against the entity, including enforcement action - [section 133](#);
- Protection of property rights - [section 134](#);
- Employees of entity at the time of BR continue to be so employed with exceptions – [section 136\(1\)](#);
- BRP may suspend any obligation of the entity for the duration of the BR with exceptions – [section 136\(2\) & \(2A\)](#);
- Effect on shareholders and directors – [section 137](#)
 - [Alteration in the status of issued securities is invalid \(with exceptions\)](#);
 - [Each director must continue to function as director subject to the authority of the BRP.](#)

BUSINESS RESCUE – BRP TASKS

- Full management of the entity - [section 140](#);
- Responsible for development of business rescue plan and implementation of approved plan - [section 140\(d\)](#);
- Officer of the court and same responsibilities, duties and liabilities of a director of the company – [section 140\(3\)](#);
- As soon as practicable - BRP must investigate the entity affairs and decide whether there exist a reasonable prospect of the entity being rescued - [section 141](#);
- Outcome of assessment:
 - No reasonable prospect of success (hopelessly insolvent) – apply to court for discontinuing BR and placing company in liquidation; or
 - No longer financially distressed – File COR125.2 to terminate BR proceedings; or
 - Financially distressed and prospect of rescue exist – proceed with meetings and development of BR-plan.

BUSINESS RESCUE – LEGAL CONSEQUENCES

- BR commence on date of application submitted (filed) with CIPC, provided that minimum required information / documents submitted – [section 129\(2\)\(b\)](#);
- If preceding liquidation proceedings, then the resolution to commence BR is void ab initio (void to begin with) – [section 129\(2\)\(a\)](#);
- If resolution and effective date not published within stated period, then proceedings become a nullity – [section 129\(3\)\(a\)](#);
- If no BRP is appointed and /or the notice thereof not filed and published within the prescribed period, then the proceedings become a nullity – [section 129\(3\)\(b\) & 129\(4\)](#);
- If the BR proceedings become a nullity due to any of the above, then the entity may not file a further resolution to begin BR proceedings for a period of 3 months, unless the court decides otherwise – [section 129\(5\)\(b\)](#).

NULLITY

If proceedings became a nullity – letter from BRP stating the reasons for the nullity

Possible reasons for nullity:

- BRP not appointed with required or extended time period
- Publication and notification of starting of BR or appointment of BRP did not occur in time
- Not all known affected parties were notified of BR or appointment of BRP
- At time of resolution, liquidation proceedings has already initiated

Consequences:

- Resolution to commence BR and placing under supervision lapses and is null and void
- Cannot file another resolution within 3 months after date on which resolution was adapted
- **Section 129(5)**

ASSESSMENT OF BUSINESS AFFAIRS

As soon as appointed the BRP must investigate the affairs of the entity.

- If entity not distressed – CoR125.2
- If entity too distressed – apply to court for discontinuing BR proceedings
- If entity distressed and reasonable prospect to rescue – prepare BR plan and have it approved

BUSINESS RESCUE – BR PLAN

- The BRP, after consulting with creditors and all affected parties, must prepare a business rescue plan that maximizes the likelihood of the business continuing in existence on a solvent basis - [section 150](#);
- Content of Business Rescue plan - [section 150](#)
 - Part A – background (lists of assets, liabilities and security holders, etc);
 - Part B – proposals (plan surrounding duration of moratorium, property available for creditor distribution, etc);
 - Part C – assumptions and conditions (statement of conditions to be satisfied for implementation, etc)
- Consideration of BR plan by creditors and if applicable by shareholders (or members) – [section 152](#)
- If the business rescue plan is not adopted and no steps are taken to have the plan approved (make offers, approach the court, etc) then the BRP MUST file a notice of termination with CIPC (COR125.2) – [section 153\(5\)](#)

TERMINATION OF PROCEEDINGS

If BRP is going to apply for discontinuation of BR proceedings and placing entity into liquidation, **it is not advisable** for the BRP to submit CoR125.2 (notice of termination)

- As soon as CoR125.2 is submitted and processed by CIPC the BR proceedings terminate and the BRP has no authority to approach the court to finalise the discontinuation of the proceedings.

Court order - businessrescue@cipc.co.za

BUSINESS RESCUE PLAN - IMPLEMENTATION

If the business rescue plan is accepted and approved, the company must (under direction of BRP) attempt to satisfy conditions on which the plan is contingent AND must implement such plan – [section 152\(5\)](#)

If the business rescue plan has been substantially implemented a notice of substantial implementation (COR125.3) must be filed with the CIPC - [section 152\(8\)](#)

If an entity's business rescue proceedings have not ended within 3 months (or such longer time as allowed by the court) the BRP must prepare a report on the progress of the BR proceedings and update same each subsequent month that the proceedings continue by filing a CoR125.1 – [section 132\(3\)\(a\)](#)

The report and each monthly update must be delivered to every affected person, the court (if proceedings subject to court order) AND the CIPC – [section 132\(3\)\(b\)](#)

SUBSTANTIAL IMPLEMENTATION

- Once BRP has been substantially implemented the BR Plan, CoR125.3 must be submitted.
- CoR125.3 must be accompanied by the latest PI Score of the entity at the time of resolving that plan was substantially implemented.



Companies and Intellectual
Property Commission

a member of **the dti** group



THANK YOU

The dti Campus (Block F - Entfufukweni), 77 Meintjies Street, Sunnyside, Pretoria, P O Box 429, Pretoria, 0001

Tel: +27 12 394 5423 | Fax: +27 12 394 6423 | Call Centre: 086 100 2472

Email: LLesejane@cipc.co.za | Website: www.cipc.co.za



CIPC



@theCIPC



CIPC Companies and Intellectual
Property Commission