Five weaknesses of the business rescue procedure in South Africa

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SYNOPSIS

The business rescue procedure in Chapter 6 of the Companies Act 71 of 2008 has been on the statute for several years. Five legislative weaknesses regarding the implementation of this procedure are identified and critically discussed with reference to the Companies Act 71 of 2008 as well as the decided case law. It was found that most of the weaknesses revolve around how business rescue practitioners are trained, paid, and sanctioned when they act against the spirit of the Act. It was also observed that regulation on post commencement finance required greater legislative support and that legislation needs to provide clarity on the exact event that triggers the commencement of formal business rescue proceedings. The opportunities of abusing the procedure are highlighted and recommendations to repair them from a legislative standpoint are detailed.

1 *Introduction*

There is no doubt that business rescue is here to stay in South Africa. The option to rescue as opposed to liquidate a going concern is welcomed by all affected persons, especially creditors and employees. However, the business rescue regime is not functioning like a well-oiled machine that it aspires to be. This article critically analyses five key weaknesses, corroborated by case law and factual evidence. Recommendations are then made on legislative changes required to negate these weaknesses.

2 *The weakness of outdated fees structure for business rescue practitioners*

In South Africa business rescue proceedings for financially distressed companies (private, public, and state-owned), is covered in Chapter 6 of the Companies Act No. 71 of 2008 ("Companies Act"). Business rescue practitioners (BRPs) facilitate the rehabilitation of these companies to maximise the likelihood of them existing on a solvent basis. They do this by taking over the functional tasks of the existing board of directors and management. In return for their service, inter alia ascertaining reasonable prospect of being rescued supported by a business rescue plan and other analyses, they are entitled to be paid a fee by the company undergoing business rescue.

Section 143(1) of the Companies Act read in conjunction with the Companies Regulation (2011), specifically Regulation 128(1), delineates the fee structure as:

> *"(1) The basic remuneration of a business rescue practitioner, as contemplated in section 143 (1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed-*
>
> - *(a) R 1250 per hour, to a maximum of R 15 625 per day, (inclusive of VAT) in the case of a small company.*
> - *(b) R 1500 per hour, to a maximum of R 18 750 per day, (inclusive of VAT) in the case of a medium company; or*
> - *(c) R 2000 per hour, to a maximum of R 25 000 per day, (inclusive of VAT) in the case of a large company, or a state-owned company.*
>
> *(2) Sub-regulation (1) does not apply to, limit, or restrict any 'further remuneration' for a business rescue practitioner, as contemplated in section 143 (2) to (4).*

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(3) In addition to the remuneration determined in accordance with section 143 (1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings."

There is no quibble about the prioritisation of BRP costs once fresh capital is made available via post commencement financing procedures. If there is no guarantee of payment, top quality BRPs are unlikely to be interested to take on the business rescue challenge. However, an unattractive fee structure can be equally discouraging. The current fee structure is criticised for:

a. Being outdated, in that it has not been adjusted by inflation since 2011.
b. Being silent about BRP upfront fees when ascertaining the company's reasonable prospect of being rescued (*Diener NO v Minister of Justice and Others*[2], referred to as the "Diener judgement").
c. Leaving special fees (success fees) by BRP's open ended (*Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*[3], referred to as the "Caratco judgment").
d. Not adequately attending to the reversal of BRP fees when misconduct is identified (*Werner Cawood N.O. and Cloete Murray N.O. & Others*[4], referred to as the "Cawood judgment").

Inflation data extracted from Stats SA website[5] indicate that the average inflation from 2011 to 2022 is approximately 5%, with a low variance. If the BRP rates as per Regulation 128(1) are corrected by 5% year-on-year up to 2022, the renewed rates differ significantly as illustrated in Table 1.

	Current Rate (Rands, excluding VAT)		**Inflation Linked Rate (Rands, excluding VAT)**	
	per hour	*per day (maximum)*	*per hour*	*per day (maximum)*
Small Company	1 250	15 625	2 138	26 724
Medium Company	1 500	18 750	2 566	32 069
Large or State-owned Company	2 000	25 000	3 421	42 758

Table 1. BRP rates corrected for inflation (2022)

Given, the lack of updated fee guidelines from the Department of Trade and Industry (DTI), BRPs have been setting their own fees, and in many instances, these are not aligned with inflation (Table 1). EDCON's BRP's [6] proposed R4500 per hour (in 2020) for their services which may be perceived as exorbitant. However, they cite the complexity of the EDCON business rescue as a further reason (apart from inflation) for their high fees in their business rescue plan. Similarly, Group 5's BRP[7], in 2019, proposed a rate of R3650 per hour in their remuneration agreement, which is also greater than the expected rate corrected for inflation.

BRP's also juxtapose the high cost of liquidation, expressed as a percentage of turnover, to the cost of business rescue. BRP fees, as per Regulation 128(1), when viewed this way appears unfairly low. In the absence of a regulated rate schedule, and transparency on how it is calculated, BRP's justify what they perceive as a fair rate for their services. This has the benefit of keeping the business rescue industry active, with BRPs incentivised by their own construct of fair remuneration. The disadvantage is that the absence of independent and regulated guidelines for BRP fees, the leeway to charge high and unfair rates goes unabated.

The Caratco judgement, hailed by BRPs as a step forward, unfortunately promotes open-ended BRP fee structures, in the guise of success fees. The downside is that most

[2] https://www.concourt.org.za/index.php/judgement/295-diener-no-v-minister-of-justice-and-others-cct03-18
[3] https://www.supremecourtofappeal.org.za/images/judgments/2020/sca2020-017ms.pdf
[4] http://www.saflii.org/za/cases/ZAFSHC/2021/317.html
[5] https://www.statssa.gov.za/
[6] https://matusonassociates.co.za/wp-content/uploads/2020/05/Business-Rescue-Plan-Edcon-Limited-1.pdf
[7] http://www.g5.co.za/pdfs/business-rescuse/group-five-construction-pty-ltd-business-rescue-plan.pdf

companies already in financial distress, can only afford these fees via post commencement finance. The likelihood of not receiving post commencement finance may discourage directors from voluntarily applying for business rescue due to the perceived high rates of BRPs.

The writer is of the opinion that the increased supply of trained and experienced BRPs will usher in the dynamics of free market economics. Demand for BRP services will, over time, find equilibrium at a fee that the market (distressed companies and creditors) deem as equitable. Until then, fees will be dictated by the small number of, in-demand, and senior BRPs that enjoy monopolistic power. Government intervention, via the Companies Act and the Regulations, is required to break these monopolistic tendencies by updating the current fee schedule and including the recommendations that follow.

The Diener judgement settles that the BRP fees do not enjoy "super preference" over liquidation costs when a business rescue converts to liquidation. This judgement should dissuade a BRP from taking on a business rescue case when there is clearly no reasonable prospect. However, the costs of the BRP's time and effort to ascertain reasonable prospect should be remunerated as an upfront consultation fee. The Companies Act is silent on BRP upfront fees, and it is recommended that Reg 128 should recognise, define, and regulate these fees. Finally, it should be legislated that abusive actions by BRPs should lead to punitive actions when misconduct is identified. Learning from the Cawood judgement when the courts were disempowered from reversing BRP fees, the writer recommends that the Companies Act allow for punitive measures in the BRP fee schedule when misconduct is evident and proven.

3 *The weakness of inconsistent knowledge and competency criteria for BRPs*

An aspiring BRP must meet the requirements as set out in section 138(1), (2) and (3) of the Companies Act to qualify for appointment. Furthermore, Section 138(1)(a), (2) and (3) must be read in conjunction with Companies Regulations 126, 127 and 128[8]. Pretorius correctly deduces after analysing Section 138(1) that there are *"…no specific knowledge, skill, ability, or competency requirements except for those implied in the licensing requirements. These are left to the interpretation of the Regulator (CIPC)[9]."* [10] While the knowledge base of a BRP must include legal, financial, and business management, these need to be tailored for business rescue. An MBA graduate too may not necessarily possess the business knowledge to handle business rescue as these matters are more complex than the cases studies that these graduates encounter at business school.

Without a framework of the knowledge requirements, academic institutes associated with professional turnaround management bodies are left at their own devices to develop course content. The same applies to the relevant competencies that are required. Pretorius concludes that the competencies required for a successful BRP to complete a task punctually and of high quality is that of "sense-making, decision-making and integration".[11]

However, this is the view of Pretorius and hence forms the basis of the knowledge and competencies disseminated by the University of Pretoria where he lectures management in the Certified Rescue Analyst program, in partnership with the Turnaround Management Association of South Africa. The course content for that program is far deeper and more complex in content than the equivalent course offered by the University of South Africa, in association with the Law Society of South Africa. The inconsistency is due to the unfortunate lack of a knowledge and competency framework issued by a central Regulator. This results in

[8] https://www.gov.za/sites/default/files/gcis_document/201409/34239rg9526gon351.pdf

[9] Companies and Intellectual Property Commission (CIPC)

[10],[9] Pretorius, M., 2014, 'A competency framework for the business rescue practitioner profession', Acta Commercia 14(2), 1-15. https://doi.org/10.4102/ac.v14i2.227

a wide variance in quality of practicing BRPs and poses as a risk to the reputation and performance of the BRP professional.

Consider the resolution that set aside business rescue by the courts in the case of *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others*[12]. The financial statements upon which the BRP made the decision to go in business rescue was more than five years old. The courts found that the BRP did not take seriously his responsibilities as set out by the Companies Act. However, one can infer that the lack of a consistent knowledge and competency framework by the Regulator is a probable root cause of the BRPs actions. The inconsistency of high quality BRPs arguably also blurs the line between ethical practices and sheer incompetence, begging the question: "Was this decision consciously done to insult the courts, or for some ulterior motive, or was it due to sheer incompetence?". If anything, the reputation of BRP professionals in the mind of creditors and other affected persons is left tarnished.

Rajaram[13] writes with concern that the BRP has "… been cited as a cause for failure to attract post rescue funding." This negative observation is also competency related and further builds the case for a consistent framework of criteria to be developed by the Regulator. It should detail the minimum knowledge, qualifications and competency criteria required by BRPs. It can thus be argued that distinguishing between, junior, experienced, and senior BRP's by the Companies Act and Regulations, and restricting their trade (from small to medium, to large companies in that order) and subsequent fees, is somewhat of a farce. When a consistent framework of knowledge and competencies by the Regulator is lacking, the only factor that separates a junior professional from a senior one is time. Adopting potentially incorrect practices over many years, borne from an inadequate and inconsistent knowledge and competency base, implies that many senior BRPs may unwittingly not be performing at the standards expected from seasoned business rescue professionals who are also officers of the court.

The lack of regulated minimum competency and knowledge criteria is identified as a weakness of the business rescue process in South Africa. It is recommended that the DTI create a workgroup consisting of academics, associations leaders, respectable business rescue practitioners and academics actively involved in business rescue to develop this set of criteria. These knowledge and competency criteria should then be included into the respective regulations. This will ensure a consistency in high quality BRP graduating into practice.

4 *The weakness of post commencement finance policies and procedures*

Post Commencement Finance (PCF) is a special type of company credit. It is regulated by section 135 of the Companies Act and offered to companies during Business Rescue as an injection of new capital with a hope of resurrection. It is fair to state and a commonly agreed fact, that with no post commencement finance there is a strong probability that business rescue will fail. An instant when this is not the case, is when cash flow is managed in such a way that new creditors are not needed to rescue the business.

PCF financiers (secured and unsecured) have preference over pre-commencement financiers and may use unencumbered assets of the debtor company as security. This pecking order is followed after judgement was handed down in *Merchant West Working Capital Solutions (Proprietary) Limited v. Advanced Technologies & Engineering Company*

[12] http://www.saflii.org/za/cases/ZASCA/2015/69.html

[13] RAJARAM, Rajendra and SINGH, Anesh M.. Competencies for the effective management of legislated business rehabilitations. S. Afr. j. econ. manag. sci. [online]. 2018, vol.21, n.1 [cited 2022-05-09], pp.1-9. Available from: <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2222-34362018000100023&lng=en&nrm=iso>. ISSN 2222-3436. http://dx.doi.org/10.4102/sajems.v21i1.1978

(Proprietary) Limited & Gainsford[14]. This order of payment preference provides an apparent advantage to PCF financiers, so that they are more likely to invest in companies and help them regain their fiscal stability. The advantage to PCF creditors is dulled somewhat by judgement handed down in *Kritzinger v Standard Bank of South Africa Ltd*[15] according to Stoop and Hutchison[16], when the court observed:

> *"The respondent is still a secured creditor post commencement of business rescue proceedings in much the same way as it was prior to the commencement of such proceedings. The commencement of such proceedings did not and could not demote the respondent from its rightful position as a creditor with a secured rank."*

The priority of secured (encumbered) post commencement creditors over secured pre commencement creditors is aligned with international practice such as Chapter 11 of the Bankruptcy Code in the USA. Legislation in South Africa is ambivalent on this matter and needs to put it to rest via a revision of section 135 of the Companies Act.

What happens when there are no unencumbered assets available to use as security to raise PCF? Unlike Chapter 11 of the Bankruptcy Code in the USA, which provides options such as seeking orders from the courts for the debtor company to make regular cash payments to the PCF creditor, Chapter 6 of the Companies Act has no such provisions. The estimation of an "equity cushion" (equity beyond the secured and unsecured pre commencement obligations) is not discussed in the South African legislation to the same level of detail that it is covered in the USA. Given that Chapter 6 of the Companies Act was inspired by Chapter 11 of the Bankruptcy Code, it is disconcerting that one of the most important areas of business rescue, post commencement finance, was not covered to the same level of detail. Osode[17] criticises the gaps in legislative framework and blames it on poor quality drafting of Chapter 6, a view that case law makes more evident.

It is difficult not to consider Stoop and Hutchison's idea about cross-collateralisation[18] to be utilised as a motivation for lenders to further secure its position in relation to a company's assets, as a recommendation to incentivise creditors to provide PCF. Cross-collateralisation occurs when pre commencement creditors offer secured loans post commencement with the condition that security extends to pre commencement. This could in a practical sense lead to taking as security all unencumbered property of the debtor company such that its value equals or exceeds the post commencement loan. This idea needs further testing and approved by the relevant courts or precedence needs to be set by case law, whichever comes first.

As it stands, PCF requires more legislative work to incentivise the raising of much needed new capital. It is recommended that the USA's Chapter 11 of the Bankruptcy Code be used a benchmark and reference point by law makers in South Africa to improve the robustness of its legislation around how post commencement finance is raised.

5 *The weakness of not knowing when business recue commences*

Section 132 of the Companies Act 71 of 2008 provides for the formal requirements to be met for business rescue to begin and the requirements to end it, coupled with the maximum duration

[14] https://www.saflii.org/za/cases/ZAGPJHC/2013/109.html
[15] http://www.saflii.org/za/cases/ZAFSHC/2013/215.html
[16] Stoop H and Hutchison A "Post Commencement Finance - Domiciled Resident or Uneasy Foreign Transplant?" PER / PELJ 2017(20) - DOI http://dx.doi.org/10.17159/1727- 3781/2017/v20n0a1370, page 19
[17] Osode PC "Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment" 2015 Penn State J L Int'l Affairs 459-488
[18] Stoop H and Hutchison A "Post Commencement Finance - Domiciled Resident or Uneasy Foreign Transplant?" PER / PELJ 2017(20) - DOI http://dx.doi.org/10.17159/1727- 3781/2017/v20n0a1370, page 23

of the rescue process. These are vitally important for all affected persons and the debtor company itself, as all moratoriums come into effect when business rescue commences and are removed when it ends.

There are three ways to commence formal business rescue according to section 132(1). Firstly, it can commence via a resolution by the board of directors, by filing through CIPC[19] thus the company voluntary places itself under formal business rescue. If the company was under business rescue that expired because of section 129(3) and 129(4), the board then needs to apply to the court for permission to start another business rescue process. Secondly, affected persons (such as employees, creditors, and suppliers) may apply to the courts for an order to commence formal business rescue proceedings. Finally, it may be initiated the courts, for example during liquidation the courts can place the company under formal business rescue. The hurdles to commence business rescue are low.

The weakness in legislation is that courts have yet to provide clear guidelines on the actual date when business rescue officially starts. To illustrate the point let us consider the commencement of business rescue via a court order. Does business rescue begin when the application is lodged at the High Court? Or when those affected are first notified? Or is it when the business rescue application is first called in open court? According to Cassim et al[20] the courts have made conflicting decisions regarding this issue. In *Investec Bank Ltd v Bruyns (19449/11)*[21] the court ruled that it is not necessary to provide clarity on the date of commencement:

> *"There was an intricate debate before me as to whether business rescue proceedings in respect of the two companies have already commenced or whether they will only commence if and when an order is made by the court… It is an important one that will no doubt have to be decided in due course by our courts. …. In the present case, and for reasons that will become apparent, it is unnecessary for me to decide these questions."*

In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC*[22] the court made clear that the business rescue *"…application is thus only to be regarded as having been made once the application has been lodged with the Registrar, duly issued, a copy thereof served on the Commission, and each affected person has been properly notified of the application."* Unfortunately, this ruling is contradicted in *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*[23] where the court made an interpretation of section 131(6) and concluded that business rescue officially begins with the lodging of the application with the Registrar:

> *"Applying this functional approach to section 131 (6), it is obvious that in this case the lodging of the application with the Registrar for the issue thereof, constituted the "making" of the application and the commencement of proceedings to place the company under business rescue…."*

The decision on exactly when business recue begins therefore remains an unsolved matter and will require the intervention of higher authorities to provide better clarity. The timing of commencement is critical. This can best be illustrated with the application to the court by employees of Denel to lodge business rescue around September 2021. The courts have not

[19] http://www.cipc.co.za/

[20] Contemporary Company Law, edited by F. H. I. Cassim, et al., Juta & Company, Limited, 2021. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/ukzn-ebooks/detail.action?docID=6965389.
Created from ukzn-ebooks on 2022-06-09 14:11:56.

[21] http://www.saflii.org/za/cases/ZAWCHC/2011/423.html

[22] http://www.saflii.org/za/cases/ZAKZPHC/2013/40.html

[23] https://www.saflii.org/za/cases/ZAWCHC/2013/136.html

issued an order yet. Denel leadership has undertaken a turnaround strategy which is not bearing fruit as the moratoriums placed via business rescue, to give the company a fighting chance to survive, are not in place. Employees are paid randomly and in a far lower quantum than what that their contracts of employment stipulate. This is causing significant financial distress to employees with at least one employee committing suicide.

Insofar as ending business rescue proceedings go, section 132(2)(a)–(c) makes clear all the possible options. No contention or issues in legislation were identified. The hurdles to exit are high and serves its intention to deter the easy reversal of a business rescue proceeding. However, it is believed that the extent to which affected persons are empowered to begin or terminate business rescue proceedings is yet to be defined by current day legislation. This matter was highlighted by Jakomien van Staden as early as 2013 in the paper "Cutting the lifeline: The termination of business rescue proceedings."[24] The courts have in the past granted leave to continue business rescue despite there being a reasonable prospect.

The writer opines that the lack of clarity on the commencement of business rescue is the most important weakness of the current legislation which needs to be addressed. As with any worthy venture a clear executable plan has commencement and exit dates. In the absence of this in business rescue and when the full wrath of the other weaknesses, some of which are described in this paper, come to bear, the affected persons may feel that the process is sabotaged to fail. This is contrary to the spirit of Chapter 6.

It is recommended that future research quantify the extent that weak legislation contributes to the large number of failed business rescue proceedings. Research is also needed to determine the extent to which weak legislation contributes to the avoidance of business rescue proceedings altogether by companies in financial distress should have embraced and benefitted from it.

6 *The weakness of low barriers of entry for business rescue leading to abuse*

The low hurdles to commence business rescue proceedings, already discussed, was intentionally designed to expedite the salvaging of a financially distressed company. Low entry barriers tempt the opportunistic company to proceed with business rescue to exercise the moratorium on creditors for a protracted period. The moratorium of all legal proceedings too, new and existing, plus the opportunity to thwart a liquidation proceeding are loopholes that are often exploited. Business rescue practitioners (BRP) sometimes use these loopholes to sell their services thereby encouraging abuse. Whether the business rescue ruse is initiated by the BRP or not, he remains a central proponent in the dissuasion of abuse.

Section 141(1) and subsection 141(2)(c) of the Companies Act place certain obligations on the BRP to conduct a thorough management and financial due diligence of the company and to report fraud or reckless trading to the respective authorities if identified. What happens when these contraventions are in full play? What legislative protection mechanism kick in? There is unfortunately no guidance on remediation steps to be taken and no sanctions in place, neither in the Companies Act, nor in its regulations, neither are there any guidelines present in case law, effectively rendering section 141 edentulous. Legislation does not obligate the BRP to report fraudulent activities, which is a weakness that augments the possibility of abuse.

There is some respite from *Sulzer Pumps (South Africa) (Pty) Ltd vs. O & M Engineering CC*[25] , wherein the court declared that they will not simply be used as "*a rubber stamp*" to commence business rescue proceedings and thus have a duty to ensure the validity thereof. This is contrasted against the criticism against the supreme court of appeal in the matter regarding *Oakdene Square Properties and Others v Farm Bothasfontein (Kyalami) (Pty)*

[24] https://www.saflii.org/za/journals/DEREBUS/2013/240.html
[25] http://www.saflii.org/za/cases/ZAGPPHC/2015/59.html

Ltd in respect of the judgment in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*[26]. Although in agreement with the lower courts, the SCA declares on the issue of what constitutes minimum requirements for a reasonable prospect:

> *"With respect to my learned colleagues, I believe that they place the bar too high."*

It is recommended that to eliminate the propensity for companies to abuse business rescue proceedings, legislation should be introduced that introduces sanctions and remedies against BRP's, directors and other affected persons who contrive creative schemes directed at abusing Chapter 6 of the Companies Act. These protection mechanisms should extend to section 141 and section 129. The final glaring anomaly, relative to liquidation, and not yet covered in this paper is the legislative lack of "judicial oversight"[27] when it comes to business rescue proceedings in South Africa, as commented by Baker McKenzie. The idea of fast- track business rescue courts to provide oversight, to expedite proceedings, to provide the much-needed attention that the fledgling legislation requires and to unencumber the higher courts sounds like an appealing proposition worth pursuing by the authorities.

7 *Conclusion*

The discussion covered weaknesses of the business rescue process in South Africa and recommendations to solve them. The common theme is that the current legislation regime requires updating in the critical matters revolving around the 'business rescue practitioner' professional. From making their fees market related to regulating their knowledge and competency criteria, to sanctions and remedies against them for irregular and unethical behaviour to prevent abuse of business rescue proceedings. The central role of the business rescue professional cannot be overstated in making the rescue and turnaround regime in South Africa successful.

Furthermore, broader legislation is required to incentivise the raising of critical post commencement finance. The USA's Chapter 11 of the Bankruptcy Code should be used as a reference point by law makers in South Africa to improve the robustness of its legislation around how post commencement finance is raised. The discussion also called for the intervention of authorities on business rescue legislation to put to rest the confusion on when business rescue commences.

When these weaknesses are addressed, the business rescue regime will be better positioned for success. As jobs are scarce in a dwindling South African economy, the socio-economic role that the business rescue regime can play in restructuring businesses in distress, to make them solvent again, is significant. If South Africa cannot create new jobs, then at least everything should be done to preserve the ones that exist. This is possible via a sleuth of highly professional business rescue professionals supported by a solid business rescue legislation regime.

[26] https://lawlibrary.org.za/za/judgment/supreme-court-appeal-south-africa/2013/68

[27] https://restructuring.bakermckenzie.com/2017/01/11/south-africa-business-rescue-open-for-abuse/

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