DLA CLIFFE DEKKER HOFMEYR

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DISPUTE RESOLUTION MATTERS

IS THE BAR TOO HIGH?

When considering whether a company should be placed under business rescue there appears to be conflicting views on determining whether there is a reasonable prospect for rescuing a company. Is the proverbial bar being set too high or too low by our courts?

In terms of s128(1)(h) of the Companies Act, No 71 of 2008, rescuing a company, relates to achieving the goals set out in the definition of the term 'business rescue'.

In the case of *Propspec Investments (Pty) Ltd vs Pacific Coast Investments 97 Ltd & Another*, Van Der Merwe J, held that a goal, in the context of the definition of 'business rescue', means a desired end or result. The goals set out in the definition are that the company continues in existence on a solvent basis or, if not possible, a better return for the creditor or shareholders than would result from the immediate liquidation of the company.

Van Der Merwe J furthermore stated that the bar is being placed too high. He concluded that a prospect refers to an expectation, which may or may not come true, or a possibility that the company may be able to continue in existence on a solvent basis.

What then is the meaning of a reasonable prospect of attaining these goals?

Eloff AJ held in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd (2012)(2) SA 423 WCC*, that the term 'reasonable prospect' indicates something less than a reasonable probability, as was required for placing a company under judicial management. Vague averments and mere speculative suggestions would therefore not suffice and the application must submit a factual foundation for the existence of a reasonable prospect that the desired goal can be achieved.

In a recent decision in the South Gauteng High Court in the case of *Newcity Group (Pty) Limited vs AD Pellow No & Others*, it was held by Van Eeden AJ that the bar should not be placed too high, given the legislator's preference of business rescue over liquidation. Van Eeden AJ concluded that the test should be flexible and the circumstances of each case will determine whether the available facts give rise to a reasonable prospect or not.

The standard of what is expected from an applicant when applying to court for the business rescue of a company therefore remains unclear and the positioning of the proverbial bar is yet to be determined.

In light of the limited number of successful business rescues and that the concepts of business rescue is in general being abused by companies which are financially distressed, one is forced to consider whether the bar should rather be set too high than too low.

Tobie Jordaan

IN THIS ISSUE

FIRST MEETING OF CREDITORS IN RELATION TO S40(1) OF THE INSOLVENCY ACT

Section 40(1) of the Insolvency Act, No 24 of 1936 (Act) provides that the Master shall immediately convene a first meeting of the creditors of the estate by notice in the Government Gazette "…on receipt of an order of the court sequestrating an estate finally."

The purpose of the meeting is for the creditors to prove their claims and elect a trustee. Section 364(1)(a) of the Companies Act, No 71 of 1973 (old Act) contains a similar provision saying that the Master shall summon a meeting of the creditors of the company as soon as may be after a winding-up order has been made by the court. In terms of Item 9 Schedule 5 of the Companies Act, No 71 of 2008 (new Act), Chapter 14 of the old Act continues to apply with respect to the winding-up and liquidation of companies despite the repeal of the old Act. S364 of the old Act enjoins the Master to 'summon' a meeting of the creditors as soon as may be after a final winding-up order has been made by a court.

The Master's obligations are very clear. Firstly, there is an obligation on the Master to convene the first meeting by notice in the Gazette. Secondly and most importantly, such meeting can only be convened on receipt of the final liquidation order. Two important questions arise from the provisions of s40(1), namely:

i. what is the meaning of the word 'convene' and

ii. what are the legal implications of the Master placing an advertisement in the Gazette prior to the granting of the final order?

In the unreported decision of the Witwatersrand Local Division (as it was then) in *Industrial Development Corporation of South Africa Limited v The Master of the High Court Johannesburg and Others* [2007] ZAWLD (01527/07), one finds a pertinent interpretation of this section.

The facts in this case were that prior to the granting of the final liquidation order, the Master dispatched an instruction to the government printers to advertise the first meeting of creditors. A final liquidation order was granted a month later, but before the publication of the notice in the Gazette. By then, the instruction to publish had reached the government printers. The applicant attacked the validity of the first meeting of creditors as well as the decisions taken thereat and consequences thereof on the ground of contravention by the office of the Master of the provisions of s40.

In casu the court held, per Snyders J *inter alia* that:

1. The words determine a time at which the Master shall take steps and convene a meeting and that time is "on receipt of an order of the Court sequestrating an estate finally." (our emphasis)

2. Only upon final liquidation does the procedure of convening the first meeting of creditors arise and only upon final liquidation is the Master entitled to decide on a date for such a meeting and a date for publication of the notice;

3. The word convene in this section is used in the broad sense of the word as defined in the Greater Oxford English Dictionary: "To cause to come together."

4. Deciding on a date for the meeting and a date for the publication of the notice is part of the process to convene and in terms of s40(1) has, of necessity, to happen after final liquidation.

Although the matter was referred to the Supreme Court of Appeal on various grounds, the Court did not pronounce on the interpretation of this section as held by Snyders J above. There appears to be limited authority on the interpretation of s40(1), therefore it seems that the correct legal position at present is that found in the case discussed above.

In conclusion, to safeguard the interests of a creditor with regards to the nomination and appointment of liquidator/(s) it is advisable for the creditor and/or its legal representatives to monitor events prior and leading up to the actual date of the first meeting of creditors.

Vincent Manko and Thabile Fuhrmann

DILEMMA: A LACUNA IN THE NEW COMPANIES ACT OR?

Previously s73(6)(a) of the repealed Companies Act, No 61 of 1973 (old Act) allowed an interested party to apply for restoration of a company following deregistration for failure to submit its annual returns. In contrast, in the case of dissolution following a winding-up, the liquidator or any interested party could approach the court in terms of s420 of the old Act to declare the dissolution void. These were separate and distinct remedies under the old regime.

Currently s82(4) of the Companies Act, No 71 of 2008 (new Act) provides that any interested person may apply in the prescribed manner and form to the Companies and Intellectual Property Commission (CIPC) for reinstatement of a company following its deregistration for failure to file annual returns for two or more years in succession. In giving effect to s82(4) above, regulation 40(6) states that the CIPC may reinstate a company "only after it has filed the outstanding annual returns" and paid the outstanding prescribed fee. Practice Note 6 of 2012 states that upon the successful processing of the reinstatement application, all outstanding annual returns must be filed within 30 days failing which the company would be finally deregistered without any further notification. Regulation 40(7) posits that an application to reinstate a company must be in Form 40.5 and must comply with such conditions as the CIPC may determine.

Section 83(4) of the new Act provides that after a company has been dissolved, a person with an interest in the company may apply to court for an order declaring the dissolution void. One can go as far as to say that s83(4) above provides for the type of situation envisaged by s420 of the old Act, which is different to what is envisaged by s82(4).

Although it is arguable whether it was the intention of the legislature or not, it is clear that s82(4) above caters only for when a director or a shareholder of the deregistered company makes the application. What then is the recourse for a creditor of such a company? Does the answer lie in the use of the word "it" in Regulation 40(6) above and that a creditor would not ordinarily have access to the required documentation.

The dilemma

The position outlined above raises intricate and practical questions such as:

1. What is the position of a creditor who cannot comply with all the requirements prescribed by Regulation 40(6) and (7)?

2. Can a deregistration process aimed at enforcing compliance by corporate entities in respect of filing annual returns strip a creditor of its rights?

First and foremost it is clear from the new Act that "the reinstatement of the registration of companies deregistered in terms of s82(3) of the new Act fall exclusively within the province of the CIPC" and there is no provision in the new Act for the restoration of the registration of a company by order on application to a court. (*Peninsula Eye Clinic (Pty) Ltd v Newland Surgical Clinic 2012 (4) SA 484*)

There is a view that there is no reason why the legislature could have intended to divest the court of the power to restore a deregistered company for failure to file annual returns. Although in a slightly different context, the closest the courts have come in supporting this view was in *Fintech (Pty)* Ltd *v Awake Solutions (Pty) Ltd and Others* [2012] ZAGPJHC paragraph 14. It was held that there was "… no reason why the court should not be able to exercise its inherent jurisdiction, in view of the absence of enabling statutory provision under the new Act, on application or otherwise, to validate anything done by or against the effected company, between deregistration and its reinstatement and to make such order as it considers appropriate."

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Regrettably the recent decision of the Western Cape High Court in *ABSA Bank Ltd v CIPC and Others; ABSA Bank Ltd v Viogro Investment 19 CC* disagreed and in doing so concluded that:

"...In terms of s82(4), a court is not empowered to grant a reinstatement of a deregistered company – that power lies exclusively in the hands of the CIPC."

The appeal

The above decision *was reversed on appeal by the full bench in ABSA Bank Ltd v Companies and Intellectual Property Commission of South African and Others* (A29/13) [2013] ZAWCHC 57. The court as per Rodgers J (with Yekiso J and Cloete J concurring) held that the court a *quo* erred in concluding that s83(4) does not apply to a company deregistered for reasons other than liquidation.

Furthermore it was held that the court a *quo* attached significance to the distinction between deregistration and dissolution in the old Act and there was no basis for such distinction. The court came to the conclusion that s83(4) applies in all cases where a company's (or a close corporations) name has been removed from the register of companies and where the company has as a result been dissolved. This includes any of the grounds as set out in s82(3). The court also disagreed with the view expressed by Binns-Ward J in the *Peninsula Eye Clinic* case that the new Act contains no provision for the restoration of a company to the register by order of the court.

The practical significance of the above conclusion is that where a company has been deregistered by the CIPC in terms of s82(3), any interested party may either apply to the CIPC for restoration in terms of s8(4) or to the court in terms of s83(4). Particularly where the interested party (creditor) finds it impossible or practically difficult to comply with the prescribed requirements relating to reinstatement in terms of s82(4), an application to court in terms in terms of s83(4) is available as an alternative remedy.

There is no doubt the decision of the full bench will be a welcome relief by creditors in particular, who are having to deal with directors (or shareholders) that intentionally allow the company to be deregistered in order to frustrate any winding up application by creditors.

Thabile Fuhrmann

PROPER APPROACH TO INTERPRETATION OF DOCUMENTS

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) is one of the most important recent judgments regarding the interpretation of documents.

In this judgment Wallis JA said that, over the last century, there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.

Wallis JA said that the present state of the law can be expressed as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

Wallis JA said that the proper approach to the interpretation of documents is that, from the outset, one considers the context and the language together, with neither predominating the other. The judge

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said that he deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would he use its counterpart in a contractual setting, 'the intention of the contracting parties', because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties.

The reason, according to the judge, is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself. Despite their use by generations of lawyers to describe the task of interpretation it is doubtful whether the said expressions are helpful. If interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them.

The proper approach to the interpretation of documents is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That, according to Wallis JA, is how people use and understand language and it is sensible, more transparent and condusive to greater clarity about the task of interpretation for courts to do the same.

Marius Potgieter

SILK: TRADITIONAL GOWNS, A STATUS SYMBOL OR A BAD THING

During the course of last year a certain (disgruntled) practising Advocate of the Johannesburg Society of Advocates brought an application in the North Gauteng High Court challenging the President of the Republic's authorisation to confer the status of Senior Counsel (also known as Silks) on practising Advocates.

The reference to silk derives from the fabric of the gowns traditionally worn by senior counsel. (This judgment is now reported as *Mansingh v The President of the Republic of South Africa.*) Adv Mansingh succeeded in the first round in the High Court and an order was granted in her favour that the Constitution does not include the power of the President to confer the status of Senior Counsel on practising Advocates.

Had this judgment gone unchallenged, no new Silks would have been appointed at any of the Societies of Advocates throughout the country. It is then not surprising that no less than four senior counsel were involved in the appeal which was argued before the Supreme Court of Appeal on 18 February 2013.

In the judgment of the Supreme Court of Appeal it is recorded that the applicant made it clear in her founding affidavit that as a matter of principle and for considerations of policy she is opposed to the institution of senior counsel or silk and that in consequence she actively sought its abolition. She supported these contentions by arguing that practising Advocates who apply for Silk but who are unsuccessful in their applications (she had applied but was unsuccessful) "suffer real disadvantage in their practices and great distress." In her mind, it was a bad thing.

The judgment handed down by the five Appeal Judges makes for interesting reading. The judgment quotes a formulation of Lord Watson in Canada in 1898 that the position occupied by Queen's Counsel "... is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred." The terminology of Senior Counsel replaced that of Queens Counsel when South Africa left the Commonwealth, but there remains one or two practising Queens Counsel in practice.

The question repeatedly asked is how is a Senior Counsel appointed? The various constituent Bars of the General Counsel of Bars of South Africa have their own procedure but they all have certain elements that are common.

The process starts with an application for an appointment by the candidate for Silk to his or her Bar. A committee of Silks of that particular Bar then consider the candidates application. Only the names of the approved candidates are then presented to the Judge President of that particular High Court who in turn makes a recommendation to the Minister of Justice. The Minister of Justice in turn makes a recommendation to the President who then confers the status of Silk on the approved candidates.

The Supreme Court of Appeal, by upholding the appeal, reached the conclusion that the President has the authority to confer the status of senior counsel on practising advocates. In the words of the president himself "I regard silk as an honour."

Eugene Bester

FUNCTUS OFFICIO – A PRINCIPLE WHICH AFFECTS OUR DAILY LIVES

A Supreme Court of Appeal judgement in May now ensures that the nearly one million tyres consumed monthly in South Africa will, as a result of the approval of the implementation of the REDISA Plan, now be recycled effectively and productively. New jobs and industries will be developed. The Plan has been praised by international experts as best practice, and may form the blueprint for future recycling plans in other waste streams.

The judges also took the opportunity to clarify the application of the doctrine of *functus officio* in relation to administrative decision making. Since this doctrine affects the lives of each and every citizen, the judgement is worth discussing.

Functus Officio is the principle in terms of which decisions of officials are deemed to be final and binding once they are made. They cannot, once made, be revoked by the decision maker. Both the granter and receiver of rights know where they stand. The doctrine supports fairness and certainty. A simple example would be the granting of a fishing license against payment of the required fee - the right to fish endures for as long as the permit endures. The official who has granted the license has discharged her office, and is *functus*.

But the doctrine does not apply to all administrative decisions. It applies only to decisions which have the following qualities:

- The decision must be final
- Rights or benefits must have been granted

Such decisions can be revoked if the empowering legislation provides for it (subject to procedural fairness and the protection of entrenched rights).

But, as the case clarified, the doctrine does not apply to the amendment or repeal of subordinate legislation.

In this case a plan was withdrawn and a new plan was published in its place, with the removal of an offending portion. The Appellants argued that the Minister could not do this – the court found that she could.

Why should subordinate legislation be excluded from the doctrine of *functus officio*? Firstly, at common law a person empowered to make legislation has the power to amend or repeal it. Secondly, in South Africa, the Interpretation Act expressly provides that a body having a power to make rules, regulations or by-laws has the power to revoke, vary or amend the same rules.

And what is subordinate legislation as distinct to other forms of administrative action by officials? Once more, regard must be had to the characteristics of the administrative action to determine this distinction. As the legal academic Hoexter points out, subordinate legislation has the following qualities:

- It is general in its application, applying to society as a whole, or groups within it, rather than individuals within society
- It is concerned with the implementation of policies , rather than the resolution of individual disputes
- It usually remains in force indefinitely and continuously (but may be designed to last for a specific period)
- Usually it requires specific promulgation in the government gazette before it is effective
- Often it may require the enforcement of a sanction before it has legal force

If administrative action has most or all of these qualities it is subordinate legislation, and therefore is not subject to the *functus* doctrine. The REDISA Plan has most of these qualities, and accordingly the Minister could amend or repeal it, and re-publish it in an amended form.

The case is therefore significant since it clarifies the distinction between subordinated legislation, which is not subject to the doctrine of *functus officio*, and other forms of administrative action which are so subject. This will govern the conduct and expectations of both the authorities, who exercise powers, and ordinary citizens subject to such powers, henceforth.

Richard Marcus

CONTACT US

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@dlacdh.com

Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@dlacdh.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@dlacdh.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@dlacdh.com

Pieter Conradie
Director
T +27 (0)11 562 1071
E pieter.conradie@dlacdh.com

Sonia de Vries
Director
T +27 (0)11 562 1892
E sonia.devries@dlacdh.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@dlacdh.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@dlacdh.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@dlacdh.com

Craig Hindley
Director
T +27 (0)21 405 6188
E craig.hindley@dlacdh.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@dlacdh.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@dlacdh.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@dlacdh.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@dlacdh.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@dlacdh.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@dlacdh.com

Nick Muller
Director
T +27 (0)21 481 6385
E nick.muller@dlacdh.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@dlacdh.com

Sam Oosthuizen
Director
T +27 (0)11 562 1067
E sam.oosthuizen@dlacdh.com

Marius Potgieter
Director
T +27 (0)11 562 1142
E marius.potgieter@dlacdh.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@dlacdh.com

Brigit Rubinstein
Director
T +27 (0)21 481 6308
E brigit.rubinstein@dlacdh.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@dlacdh.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@dlacdh.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@dlacdh.com

Jay Da Conceição
Senior Associate
T +27 (0)11 562 1428
E jay.daconceicao@dlacdh.com

DLA CLIFFE DEKKER HOFMEYR

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com