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DISPUTE RESOLUTION ALERT

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BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

"JUSTICE DELAYED IS JUSTICE DENIED" - WILLIAM E. GLADSTONE

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THE BRUSSON SCHEME: PRACTICAL DIFFICULTIES FOR EX-OWNERS TRYING TO IMPLEMENT THE CONSTITUTIONAL COURT'S DECISION

The decision of the Constitutional Court, in the case of *ABSA Bank Limited v Moore and Another* [2016] ZACC 34 has far-reaching implications and the implementation of the decision has posed several challenges.

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Certain debtors have become masters of delay and indeed professional insolvents, leaving creditors and failed businesses in their wake.

The legal moratorium is a protective mechanism inherent in business rescue proceedings. Another safety net available to debtors is the possibility of rehabilitation of insolvent estates. Debtors use these and other methods to take advantage of the system and their creditors, delaying the winding up process and impeding creditors' recovery.

The debtor not only hampers other creditors' recovery, if any, it drags the creditors into further lengthy and costly legal proceedings.

Originally, when seeking to delay a creditor's recovery, the favourite ruse of the professional insolvent was to allow a liquidation application to be instituted and taken to the gates of finality, only to then bring a business rescue application with no urgency to prolong the process further.

However, we have begun to see a new trend among debutant debtors and professional insolvents alike. Just as business rescue proceedings approach their finality and with that, the protection of the legal moratorium, a creditor and therefore an affected person intervenes. The catch is that this affected person usually has an ulterior motive, being either related to the debtor or someone with a personal connection to them. This affected person brings an application to review the business rescue practitioner's decision. This review will pertain to a specific action, such as disallowing the specific creditor from participating in the vote on the adoption of the prepared business rescue plan. By doing so, the debtor not only hampers other creditors' recovery, if any, it drags the creditors into further lengthy and costly legal proceedings.

So, what can you do as a creditor to mitigate these delays?

Many of the review applications we have seen of late are founded in s33 of the Constitution read with the provisions of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA). However, this appears to be a frail foundation on which to bring a review application easily opposed by a creditor.

A Practitioner's decision is not reviewable in terms of PAJA, as a Practitioner is neither an organ of state, nor performing a public function and is thus not an administrator. Only decisions of an administrator are reviewable in terms of PAJA.

CLICK HERE to find out more about our Business Rescue, Restructuring and Insolvency team.

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CONTINUED

While professional insolvents may attempt to delay or prevent winding up, creditors - if fully equipped and well informed - are able to counter and reduce these fictitious delays.

The second leg to the professional insolvents' reviews is 'a catch all review,' in terms of the common law. Unfortunately, this type of review is difficult to prevent, as the requirements of such a review are set so low you might well trip over them.

In terms of the common law, everyone is entitled to a decision that is lawful, reasonable and procedurally fair. Regrettably, as is often the case, the requirement of "reasonableness" allows for subjective interpretation and the broad application of this type of review.

However, in order to be successful with a common law review one must show that the decision being reviewed was irrational. To demonstrate that a decision is irrational it must be objectively reasoned that, based on the information available to the decision maker, they could not have rationally reached the conclusion that they did.

Consequentially, in order to proactively prevent a successful common law review, it becomes vital for creditors participating in creditors' meetings to ensure that, when a Practitioner is called upon to make a decision, the creditors with competing interests have provided the Practitioner with all relevant information required for the Practitioner to make an informed rational decision.

We suggest that creditors augment their proactive protection by asking informed questions of the Practitioner to certify that the Practitioner has applied his mind rationally. Such discussions should be minuted so that they may be submitted as evidence when opposing fictitious review applications. Such precautions should bring efficient and expeditious ends to such review applications so that the estate can finally be wound up and the creditors may make a recovery.

Fortunately or unfortunately, "some people are so busy learning the tricks of the trade they never actually learn the trade" and thus, while professional insolvents may attempt to delay or prevent winding up, creditors - if fully equipped and well informed - are able to counter and reduce these fictitious delays.

Tobie Jordaan and Jeffrey Long

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THE BRUSSON SCHEME: PRACTICAL DIFFICULTIES FOR EX-OWNERS TRYING TO IMPLEMENT THE CONSTITUTIONAL COURT'S DECISION

The Moores, like many other property owners in similar dire straits, approached Brusson Finance Proprietary Limited for a loan and signed three agreements.

The Supreme Court of Appeal held that the Brusson agreements were void and no ownership could be transferred due to the Moores' lack of genuine intention to transfer ownership.

The decision of the Constitutional Court, in the case of *ABSA Bank Limited v Moore and Another* [2016] ZACC 34 has far-reaching implications and the implementation of the decision has posed several challenges.

In this case, the Moores (ex-owners) owed money to ABSA Bank Limited (ABSA), which debt was secured by five mortgage bonds registered over their property. Unable to meet their bond repayments, the Moores, like many other property owners in similar dire straits, approached Brusson Finance Proprietary Limited for a loan and signed three agreements.

The agreements simply provided for the sale of the Moores' property to an unknown investor, followed by a resale of the property back to the Moores.

Pursuant to the sale of the property the following occurred:

- ABSA advanced a loan to the investor to finance the purchase of the property from the Moores. The investor's debt was secured by a mortgage bond registered over the same property; and
- Cancellation of the Moores' five mortgage bonds.

When the investor defaulted on the bond repayments, ABSA obtained default judgment, which allowed ABSA to sell the property in execution of the debt that the investor owed. Upon discovering that their property was to be sold in execution, the Moores instituted action to prevent the sale. They also applied to the High Court for an order declaring that they were entitled to the return of their property, submitting that they had no intention of transferring ownership to the investor, as they simply applied for a loan from Brusson. The respective Courts held as follows.

The High Court

The High Court found that the memorandum of agreement, concluded between the Moores and Brusson, and the offer to purchase and the sale agreement concluded between the Moores and the investor, were invalid, unlawful, and of no force and effect. Importantly, the court also ordered the reinstatement of the five mortgage bonds, which had been previously registered over the property.

The Supreme Court of Appeal

On appeal by ABSA, the Supreme Court of Appeal (SCA) similarly held that the Brusson agreements were void and no ownership could be transferred due to the Moores' lack of genuine intention to transfer ownership. The mortgage bond registered at the investor's instance was also found to be invalid. Distinguishably, the SCA was silent on the reinstatement of the previously registered bonds.

The Constitutional Court

On appeal to the Constitutional Court, ABSA accepted the restitution of the property to the Moores, but appealed against the SCA's decision to grant restitution to the Moores unconditionally. The Constitutional Court dismissed

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CONTINUED

The wake of the Brusson scheme still creates real and unresolved issues for ex-owners and disenfranchised purchasers.

the application for leave to appeal and endorsed the findings of the SCA, finding that the five mortgage bonds were lawfully cancelled by virtue of our law dealing with payment of debts, irrespective of fraud.

However, the Constitutional Court judgment has created several practical challenges:

- **The transfer of the property back into the Moores' name without a "causa"**

  A change to the Deeds Register cannot be effected without an order in terms of either s6 or s33 of the Deeds Registries Act, No 47 of 1937. These two sections facilitated the revival of ownership in the name of the ex-owners. This is a challenge for those ex-owners who do not have legal representation or the funds to bring an application to court. The Legal Resources Centre are presently assisting 100 of the ex-owners, but their resources are limited.

- **The accumulation of the arrear rates and taxes on the property**

  Who is responsible for the payment of the arrears? In the majority of the cases, the ex-owner has not vacated the property, but at the same time has not paid for the consumption of the utilities. Some of the ex-owners have entered into an agreement with their respective municipalities to pay off the arrears, but as it stands, the judgment is silent on this issue.

- **The position of "the purchaser" who is the present owner of the property, but is not the investor**

  The judgment did not canvas the situation where the property has been on-sold. The purchaser now has to return the property to the ex-owner, but who is to reimburse him for the loss? One of the larger banks decided to refund the purchaser with the purchase price, transfer duty and ancillary costs, but this is an issue that remains to be dealt with.

The wake of the Brusson scheme still creates real and unresolved issues for ex-owners and disenfranchised purchasers. Since affected ex-owners will still have to apply to court to have their properties registered in their names, the courts have surely not seen the end of this matter.

Luanne Chance and
Taryn Jade Moonsamy

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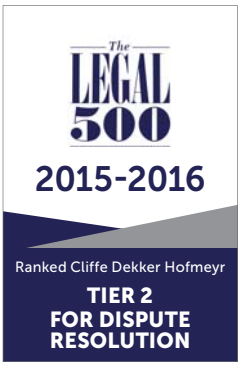

CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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