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DISPUTE RESOLUTION **ALERT**

Rescuing your business from your business rescue practitioner

The Great Privacy Bake-off

Bosasa – liquidation lessons learned

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Rescuing your business from your business rescue practitioner

The crisp issue to be determined by the court was therefore whether Mr Klopper and Mr Knoop ought to be removed as Tegeta's BRPs on the basis that there was a conflict of interest.

In an effort to salvage your business, you resolve to place it into business rescue and proceed to appoint an appropriate business rescue practitioner (BRP). You breathe a sigh of relief knowing that your business is going to be taken care of, or is it? It later transpires that the BRP appears to have a conflict of interest and is incapable of acting impartially. This very issue arose in the case of *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others* (83344/18) [2019] ZAGPPHC 411 (30 August 2019).

A brief summary of the facts are as follows: The applicant, Oakbay Investments (Pty) Ltd (Oakbay), a shareholder of Tegeta Exploration and Resources (Pty) Ltd (Tegeta), sought leave to institute proceedings to remove Tegeta's two BRPs, Mr Knoop and Mr Klopper. Oakbay was the holding company of eight subsidiary entities, five of which were in business rescue, including Tegeta, Optimum Coal Mine (OCM), Koornfontein Mines (KFM) and Optimum Coal Terminal (OCT), all of which had Mr Klopper, Mr Knoop or both as BRPs.

Importantly, OCM had two additional BRPs, being Mr Damons and Mr Monyela. Oakbay alleged that Tegeta's business rescue plan did not reflect the inter-company loan with OCM, destroying Tegeta's statement of assets and liabilities, to the extreme prejudice of Tegeta, its shareholders and other creditors. The alleged conflict of interest was based on the fact that Mr Knoop and Mr Klopper could not act in the best interest of OCM as a debtor of Tegeta and in the best interest of Tegeta, as a creditor of OCM. The crisp issue to be determined by the court was therefore whether Mr Klopper and Mr Knoop ought to be removed as Tegeta's BRPs on the basis that there was a conflict of interest.

In reaching its conclusion, the court highlighted that there is no South African case law on the removal of a BRP due to a conflict of interest and/or lack of independence. Importantly, the court confirmed that the principles set out in *Standard Bank v Master of the High Court* [2010] 3 All SA 135 (SCA) relating to liquidators, similarly apply to BRPs. As such, a BRP stands in a fiduciary relationship to the company of which he is the BRP. As a fiduciary, the BRP must, at all times, act openly and in good faith, and must exercise his powers for the benefit of the company and the creditors as a whole, and not for his own benefit or the benefit of a third party or for any other collateral purpose.

In considering the facts of the case, the court emphasised that besides Mr Knoop and Mr Klopper, OCM also had Mr Damons and Mr Monyela as BRPs. OCM therefore had two additional, independent BRPs who were not also Tegeta's BRPs. The court held that the inter-company loans did not create a conflict of interest. With the group structure as it is, the court agreed with

Rescuing your business from your business rescue practitioner...*continued*

This case is important as it lays some of the foundation in establishing the test for the removal of a BRP based on a conflict of interest.

the principle in *Pellow N.O. and others v Master of the High Court and others* 2012 (2) SA 491 (GSJ) that the "*common practice of appointing a single liquidator to oversee the winding-up of companies in the same group is a salutary one that has distinct advantages, including a broad understanding of the inter-relationship between associate companies and the justification of intergroup transactions*". The court therefore concluded that the appointment of the two additional BRPs provided a sufficient safety net in the efficient rescue and recovery of this group in a manner that balanced the rights and interests of all relevant stakeholders. The application was dismissed with costs.

This case is important as it lays some of the foundation in establishing the test for the removal of a BRP based on a conflict of interest. It would have been interesting to see whether the case would have been decided differently, had Damons and Monyela not been additional BRPs appointed to OCM or if the BRPs could not agree on the way forward. In the current economic climate, this is no doubt an area of the law that will see rapid development.

Julian Jones, Courtney Jones and Merrick Steenkamp

The Great Privacy Bake-off

The cherry on the top is that you were almost certainly directed to this article by some form of targeted marketing, based on the harvesting of your personal information and internet behaviour.

Throw into the mixing bowl: The burgeoning sophistication of radical terror groups; Moore's law (the number of transistors in a dense integrated circuit doubles about every two years); section 14 of the Constitution (everyone has the right not to have the privacy of their communications infringed); "The Great Hack" (a docufilm about the Cambridge Analytica scandal and harvesting of personal information by companies and governments as a tool for targeted marketing); the drive for enhanced international security; and Edward Snowden's reveal of global surveillance programs (many run by the NSA and the Five Eyes Intelligence Alliance with the cooperation of telecommunication companies and European government).

Whisk, bake at 180°C for 20 minutes and hey presto, you get a traditional matzo pudding which recognises the threats, understands the need for security, embraces constitutional rights, hates any breach of privacy, any manipulation of people and in all of that struggles to find a compromise position. The cherry on the top is that you were almost certainly directed to this article by some form of targeted marketing, based on the harvesting of your personal information and internet behaviour.

If you now have indigestion, chew on this legislative antacid but beware its side effects. The Protection of Personal Information Act 4 of 2013 (POPIA) gives effect to the right to privacy by safeguarding personal information when processed by a responsible party. To monitor and enforce compliance with POPIA and information laws generally, POPIA creates the Information Regulator who issues binding codes of conduct for the lawful processing of personal information. These codes must regulate the use of personal information in specific sectors and as a first step in the process, the Information Regulator has published proposed Guidelines on Drafting Codes of Conduct.

Unfortunately, the complaints process in the Guidelines, focussed on alternative dispute resolution (ADR), can cause mild schizophrenia when read with the regulations to POPIA, which require complaints to be adjudicated by the Information Regulator who can levy administrative fines for breaches of POPIA. The Guidelines by contrast prescribe a mandatory ADR process, with no power to levy fines, where the complaint "*must first be raised with the party that you believe has compromised your personal information. This party must be afforded the opportunity to respond to the complaint*". Then an independent adjudicator must be assigned to address the complaint. If either party is aggrieved by the outcome, that party must refer the matter to "*a certified alternate dispute resolution entity that is competent to handle the complaint*". The guidelines provide for different types of ADR, such as mediation/conciliation leading to arbitration or, coming full circle, that the Information Regulator itself determines the dispute. It isn't clear if the Information Regulator can participate in the ADR proceedings or whether it has some type of appellate jurisdiction over decisions from ADR proceedings. Before the Guidelines were published for comment we had POPIA and the Information Regulator. After the Guidelines, the answer is not so clear anymore. But these are draft Guidelines and hopefully in final form, there will be more clarity.

Ultimately though, there is still a balance to be found. The Constitution, POPIA and other means of protecting personal information will always be juxtaposed with national and international security, clever computing and the massive power of greed.

Suggest you find a way to enjoy that matzo pudding as you're going to be chewing on it for generations to come.

Imraan Abdullah, Vincent Manko and Tim Fletcher

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Bosasa – liquidation lessons learned

A litigious battle between the provisional liquidators and Holdings culminated into the case of *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* (306/2019) [2019] ZASCA 152, before the Supreme Court of Appeal.

The sensational revelations that were made during the Zondo Commission of Enquiry into Allegations of State Capture, by, *inter alia*, the former COO of Bosasa, namely Angelo Agrizzi, shocked the entire country. (Bosasa is now known as the African Global Group (Group), the holding company of which is African Global Holdings (Pty) Ltd (Holdings)).

This prompted the bankers of African Global Operations (Pty) Ltd (Operations) (which is a wholly owned subsidiary of Holdings and performed all the treasury functions of the Group, including receiving payment and making payment on behalf of various operating companies in the Group) to indicate that they will be withdrawing Operations' banking facilities and closing the banking accounts (which was catastrophic for its continued business operations).

After the Group failed to find another bank that would provide Operations with banking facilities, the directors of Holdings (and directors of Operations) resolved to place Operations and its subsidiaries under voluntary winding-up in terms of section 351 of the Companies Act 61 of 1973 (Old Companies Act).

However, when the provisional liquidators (who were appointed by the Master of the High Court in Pretoria) started to exercise their statutory powers, Holdings attempted to have its resolutions in terms of which Operations and its subsidiaries were placed under voluntary winding-up, declared null and void. In addition, and as a consequence of the aforementioned, Holdings attempted to have the appointment of the provisional liquidators declared null and void and of no force and effect.

A litigious battle between the provisional liquidators and Holdings culminated into the case of *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* (306/2019) [2019] ZASCA 152, before the Supreme Court of Appeal (SCA). This case was an appeal by the provisional liquidators against the decision of the Gauteng Division of the High Court, Johannesburg, setting aside the resolutions under which the companies had been placed in voluntary winding-up.

Legal questions

During the proceedings in the SCA, Holdings raised two interesting legal arguments which will be discussed hereunder, namely:

1. Holdings argued that, because the appointment of the provisional liquidators was effected by the Master in Pretoria, whilst the registered offices of all the companies were within the area of jurisdiction of the Master in Johannesburg, the appointment was invalid and as a result thereof the provisional liquidators had no locus standi in the court proceedings.
2. Holdings argued that Operations and all its subsidiaries were solvent companies and could therefore not be voluntarily wound up in terms of section 351 of the Old Companies Act. Instead, Operations and its subsidiaries should have been wound-up in terms of section 79 and 80 of the Companies Act 71 of 2008 (New Companies Act), which makes provision for the winding-up of solvent companies.

Jurisdiction and appointment of the provisional liquidators

Section 368 of the Old Companies Act requires the Master to appoint a provisional liquidator as soon as the special resolution for the winding-up of the company has been registered with the CIPC in terms of section 200 of the Old Companies Act.

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Bosasa – liquidation lessons learned

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The SCA held that it is open to parties requiring the assistance of the Master to use the office of either Master, where their areas of jurisdiction overlap.

"Master", in regard to a company that is not being wound-up pursuant to a court order, is defined in section 1 of the Old Companies Act as "*the Master having jurisdiction in the area in which the registered office of that company is situated*".

As mentioned above, Holdings contended that because the companies had their registered offices within the jurisdiction of the Master in Johannesburg, only that Master was legally entitled to appoint the provisional liquidators of the companies.

The SCA noted that the jurisdiction of the Master in Pretoria and the Master in Johannesburg overlaps. This is since the area of jurisdiction of the Master in Pretoria includes the entire area of jurisdiction of the Master in Johannesburg, in the same way that the former Transvaal Provincial Division exercised concurrent jurisdiction over the entire area of jurisdiction of the former Witwatersrand Local Division. As a result, the SCA held that it is open to parties requiring the assistance of the Master to use the office of either Master, where their areas of jurisdiction overlap. The SCA consequently held that the objection by Holdings to the appointment of the provisional liquidators by the Master in Pretoria, was without merit.

Winding-up of solvent and insolvent companies and meaning of "commercial solvency"

There are two ways in which an insolvent company can be wound-up voluntarily, namely, in terms of section 350 of the Old Companies Act (members voluntary winding-up) and section 351 of the Old Companies Act (creditors voluntary winding-up).

Should a solvent company wish to be wound-up voluntarily, it must rely on section 79 and 80 of the New Companies Act. During the SCA proceedings, Holdings attempted to argue that the resolutions that were passed by Operations and its subsidiaries were incorrectly passed in terms of section 351 of the Old Companies Act, instead of section 79 and 80 of the New Companies Act.

The reason for this being that, according to Holdings, Operations and all its subsidiaries were solvent (Holdings however did not provide the court with any financial statements or information to support its contention). Holdings argued that, because the wrong sections of the Old Companies Act were relied upon when passing the resolutions, the resolutions were null and void and of no force and effect.

Since there is no definition of a solvent company in the New Companies Act, the SCA considered in its judgment how it should be determined whether a company is solvent or insolvent. The SCA considered the judgment in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Limited 2014* (2) SA 518 (SCA), in which case the SCA previously held that for purposes of the New Companies Act, a company will be solvent, if it is commercially solvent.

It is trite law in South Africa that a company is commercially solvent if it is able to meet current demands on its debts, as well as its day-to-day liabilities in the ordinary course of business. The test is therefore not whether the company's assets exceeds its liabilities, since a company can be commercially insolvent while being factually solvent.

Bosasa – liquidation lessons learned

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The SCA stated that Holdings' argument regarding timing of the resolutions misconceived the nature of commercial insolvency, since commercial insolvency is not something that should be measured at a single point in time.

The SCA further considered the following passage from LAWSA to assist it with determining whether Operations and its subsidiaries were commercially solvent:

"The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant."

The SCA noted that liquid assets will include the following: cash on hand, receipts that the company can expect to receive in the ordinary course of business, overdraft or other banking facilities that can be used to pay debts when they fall due, or other assets such as shares, bonds and book debts, that can be realised quickly so as to generate cash with which it can pay debts. The SCA further stated that, when a company is unable to access any liquid assets, it is illiquid and unable to pay its debts as they fall due.

Holdings argued that the moment of the inability of the Group to pay its debts had not yet arrived when the voluntary winding-up resolutions were passed, since at that point in time the bank accounts of Operations had not yet been closed (notwithstanding that an inability to pay was imminent once Operations' banking accounts were closed).

The SCA stated that Holdings' argument regarding timing of the resolutions misconceived the nature of commercial insolvency, since commercial insolvency is not something that should be measured at a single point in time. The SCA held that the test is rather whether a company is able to meet its current liabilities, including contingent and prospective liabilities as they come due. In other words, the question is whether the company has enough liquid assets or readily realisable assets available in order to meet its liabilities as and when they fall due (in the ordinary course of business), and thereafter to be in a position to carry on normal trading. According to the SCA, a company's current financial position, as well as its financial position in the immediate future, should be considered in order to determine the commercial solvency of a company.

By applying the principles as set out above, the SCA held that the Group, including Operations and its subsidiaries, were commercially insolvent at the time that the resolutions were passed for their voluntary winding-up.

The SCA held that the companies were properly placed under voluntary winding-up and accordingly upheld the appeal by the provisional liquidators.

Conclusion

It is important for companies who are considering a voluntary winding-up to carefully determine:

a) whether the company is commercially solvent or commercially insolvent, based on the facts, by considering the company's current financial position, as well as its financial position in the immediate future (and further having regard to the fact that a company can be commercially insolvent while being factually solvent); and thereafter

b) in terms of which provisions of the Old and New Companies Acts the company should resolve to be wound up.

Kylene Weyers and Stephan Venter

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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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