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BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY ALERT

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SA Express placed under provisional liquidation by order of court

On 29 April 2020, judgment was handed down in an application brought by the Business Rescue Practitioners (BRPs) (applicants) of South African Express Airways SOC Limited (SA Express) (first respondent), whereby Daniel Terblanche and Phahlani Mkhobo, acting in their capacities as BRPs of SA Express, sought relief on an urgent basis seeking an order to discontinue the business rescue proceedings and to have SA Express placed in provisional liquidation.

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On 6 February 2020, SA Express was placed in business rescue by order of court, at the instance of the applicant creditor Ziegler South Africa (Pty) Ltd, and the BRPs of SA Express were appointed (we discussed this judgment in [our previous Alert](#) dated 12 February 2020). After having taken office, the BRPs' appointment was ratified/endorsed at meetings of creditors and affected persons.

The BRPs then approached the sole shareholder (being the government of the Republic) in an attempt to secure post commencement finance, however this endeavour was futile and there was nothing forthcoming in this regard.

As a result, the BRPs approached the commercial banks and other development finance institutions for finance, however this proved to be yet another avenue which yielded no return. The BRPs were therefore forced to continue with the business rescue of SA Express, albeit with no funding available.

As would be expected, expenses and debt continued to escalate throughout the process, and owing to the fact that there were no available funds to pay for the insurance and salaries of employees, aircrafts were ultimately grounded from 17 March 2020 and operations effectively ceased.

The BRPs previously listed the affected persons of SA Express to be in the range of over 900. However, there was no opposition at the time that the BRPs brought the application. This was a cause of concern for the court, which then extensively considered the issue of service of the court process on the affected persons in light of the degree of urgency under which the application had been brought before the court.

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SA Express placed under provisional liquidation by order of court...*continued*

The court held that although the BRPs had failed to meet the standards as set out in the court rules pertaining to service, they had ensured that the respondents were informed about the matter that was to be before the court on 29 April 2020, and found that the respondents had simply chosen not to participate.

Counsel for the BRPs highlighted that it would be impossible to engage the services of the sheriff to effect service on 900 affected persons in this instance, considering the urgency of the matter and that service was therefore affected by way of email. Counsel also made averments regarding the service, albeit unsuccessful, on SA Express offices, where despite its efforts, the sheriff was denied access to the premises and therefore service could not be properly effected on SA Express. The respondents (including SA Express) and members of the sole shareholder were ultimately advised of the proceedings by way of email on 25 March 2020.

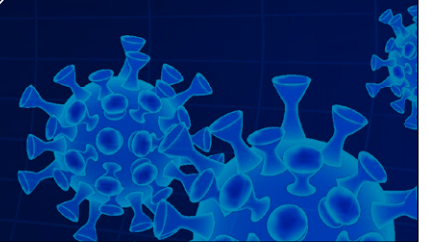
The court found in favour of the BRPs insofar as service was concerned, and held that although the BRPs had failed to meet the standards as set out in the court rules pertaining to service, they had ensured that the respondents were

informed about the matter that was to be before the court on 29 April 2020, and found that the respondents had simply chosen not to participate. Furthermore, having consideration of the fact that the order sought before the court was that of a provisional order, the respondents would still have an opportunity to participate in the proceedings going forward should they wish to do so.

Counsel for the BRPs went on to explain that the applicants had no alternative but to bring this application in terms of section 141 (2)(a) of the Companies Act 71 of 2008 (Act) due to futile attempts to raise any form of post commencement finance, coupled with continuously escalating expenses. The BRPs claimed that they were left with no alternative other than to have business rescue proceedings discontinued and to have SA Express placed in liquidation.

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SA Express placed under provisional liquidation by order of court...continued

The court held that due to the various factors brought before the court (including the lack of post commencement finance and the ceasing of operations), SA Express had no real prospects of rescue, and business rescue was bound to fail.

The purpose of the business rescue process is to allow breathing space and provide aid, by way of process and mechanisms, to a business facing financial distress. Business rescue is defined in section 128(1)(b) of the Act as "proceedings to facilitate the rehabilitation of a company that is financially distressed". In order to embark on, and continue the business rescue process, there must also be a reasonable prospect of rescue. A business under business rescue commonly continues to trade while afforded various procedural and substantive protections and advantages by the provisions as set out in Chapter 6 of the Act. Therefore, having regard to the fact that SA Express has ceased operations (in the sense that it has grounded its aircraft when its business is flying), the court held that due to the various factors brought before the court (including the lack of post commencement finance and the ceasing of operations), SA Express had no real prospects of rescue, and business rescue was bound to fail.

The court acceded to the fact that the applicants were left with no other alternative other than to bring the application.

The court granted the order in favour of the applicants, whereby it condoned the defective service of the applicants; declared the business rescue proceedings to be discontinued in terms of section 141(2)(a) of the Act; and placed SA Express under provisional winding up. The court called upon all persons/parties with a legitimate interest to put forward reasons why such provisional order should not be made final on 9 June 2020 (the return date).

We will write a follow up article subsequent to the proceedings on 9 June 2020.

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CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 as an up and coming Restructuring/Insolvency lawyer.



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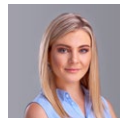
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