DISPUTE RESOLUTION

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 14 | 27 November 2020

CDH
CLIFFE DEKKER HOFMEYR

Tobie Jordaan
Sector Head
Director

Business Rescue,
Restructuring &
Insolvency

Just when we thought 2020 couldn't surprise us anymore, the powers at be still had it in them to throw a few more curve balls to see us out of what has been described as a gruelling year for the majority of us.

While there is much uncertainty surrounding the US elections and whether or not Biden will, in fact, be sworn in as the next President of the United States, and the effect this may have on the economy and in turn our rand; we too, as South Africans, face some immediate uncertainties as we head into the final month of what has been an extremely tumultuous year.

We have seen another rise in COVID-19 cases, particularly in the Eastern Cape, where hospital beds are scarce, and while COVID 2.0 seems to be even more ruthless than the first, we had no choice but to start returning to some sort of normality for the sake of reviving the economy.

We have seen that the voluntary relief initiative previously offered by the banks under a special dispensation has since come to an end, leading us to believe that we will see far more liquidations and business rescues in the new year.

On one side of the spectrum, we have creditors actively pursuing outstanding debt as payment holidays and the like come to an end, and on the other side we note the fundamental shifts seen in the housing market with new mortgage applications having rebounded beyond pre-lockdown levels across the price spectrum. The level of buyer interest seen on property portals has said to have surpassed levels seen in the early 2020.

This gives us an indication that while some are still trying to recover from the effects of this difficult year, all hope is not lost, and the wheels are still turning – even if slowly.

In this edition of our Insolvency Newsletter, we consider the latest judgment handed down by the SCA in *Knoop and Another NNO v Gupta* (No 1) (115/2020) [2020] ZASCA 149 (19 November 2020) and the courts consideration as to how far a court may go in exercising its inherent power, particularly in the case of granting an execution order to remove business rescue practitioners whilst an appeal of the order to remove the practitioners was still pending.

Tobie Jordaan
Sector Head and Director

PRIMARY CONTACTS

Tobie Jordaan
Sector Head
Director
T +27 (0)11 562 1356
M +27 82 417 2571
E tobie.jordaan@cdhlegal.com

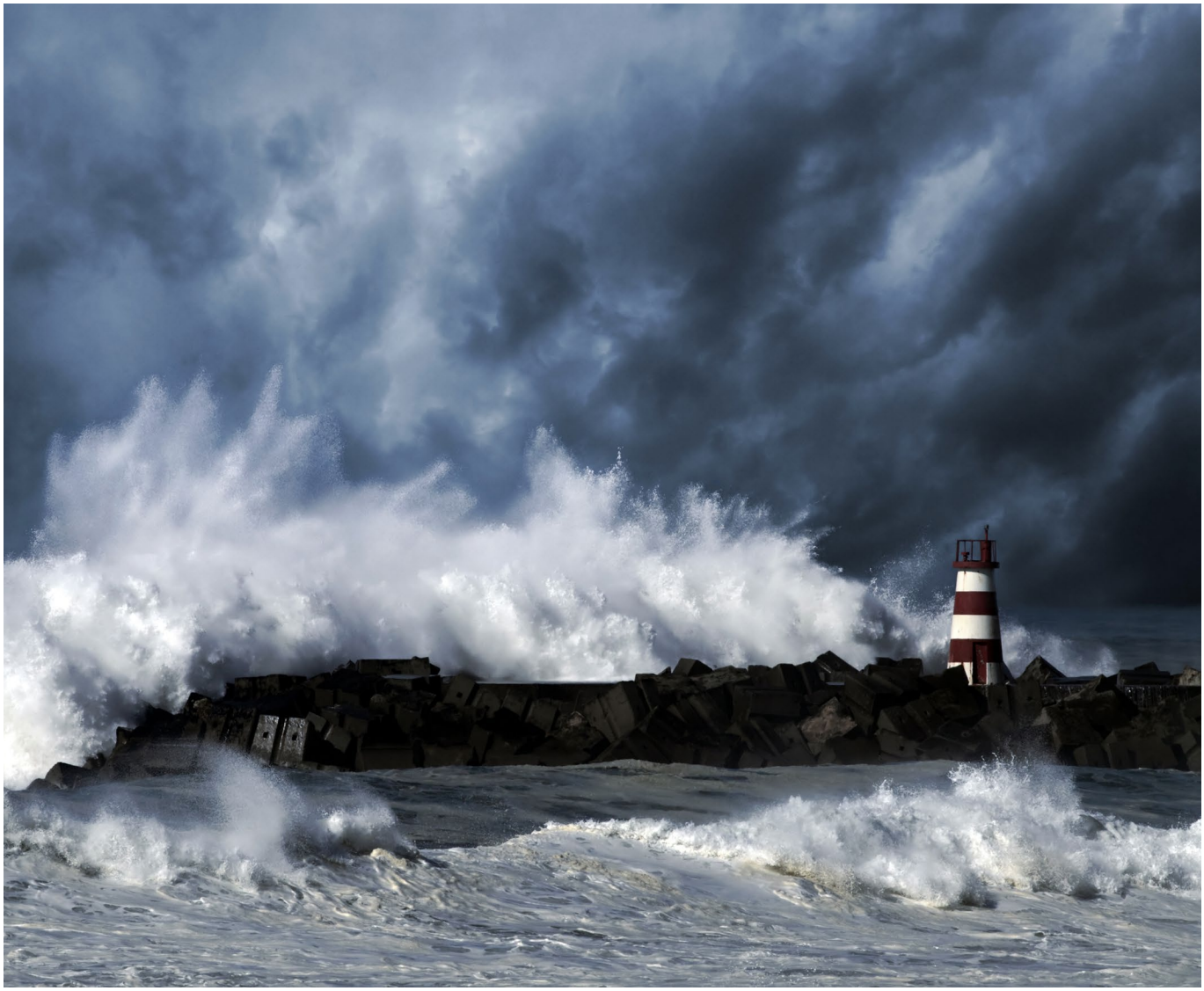
Richard Marcus
Director
T +27 (0)21 481 6396
M +27 82 902 9437
E richard.marcus@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
M +27 76 410 2886
E kgosi.nkaiseng@cdhlegal.com

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY
NEWSLETTER
Volume 14 | 27 November 2020

CDH
CLIFFE DEKKER HOFMEYR

How far is too far? Considering the exercise of the court's inherent powers in the face of statutory provisions



In the recent SCA judgment of *Knoop and Another NNO v Gupta* (No 1) (115/2020) [2020] ZASCA 149 (19 November 2020) the court had to consider not only the main issue on appeal which was the appeal against a judgment in the High Court ordering for the removal of two business rescue practitioners of two unbanked companies, Islandsite Investments One Hundred and Eighty (Pty) Ltd (Islandsite) and Confident Concept (Pty) Ltd (Confident Concept), but also the issue of the suspension of the execution order and whether or not this was to be upheld despite the High Court's direction to execute immediately.

How far is too far? Considering the exercise of the court's inherent powers in the face of statutory provisions....*continued*

As is alluded to above, the High court found in favour of the Respondents and ordered for the removal of the Business Rescue practitioners. The practitioners took the judgment on appeal to the SCA on an urgent basis.

While upholding the application for leave to appeal, the High Court at the same time, granted an execution order permitting the immediate removal of the practitioners – hence the urgency of the appeal.

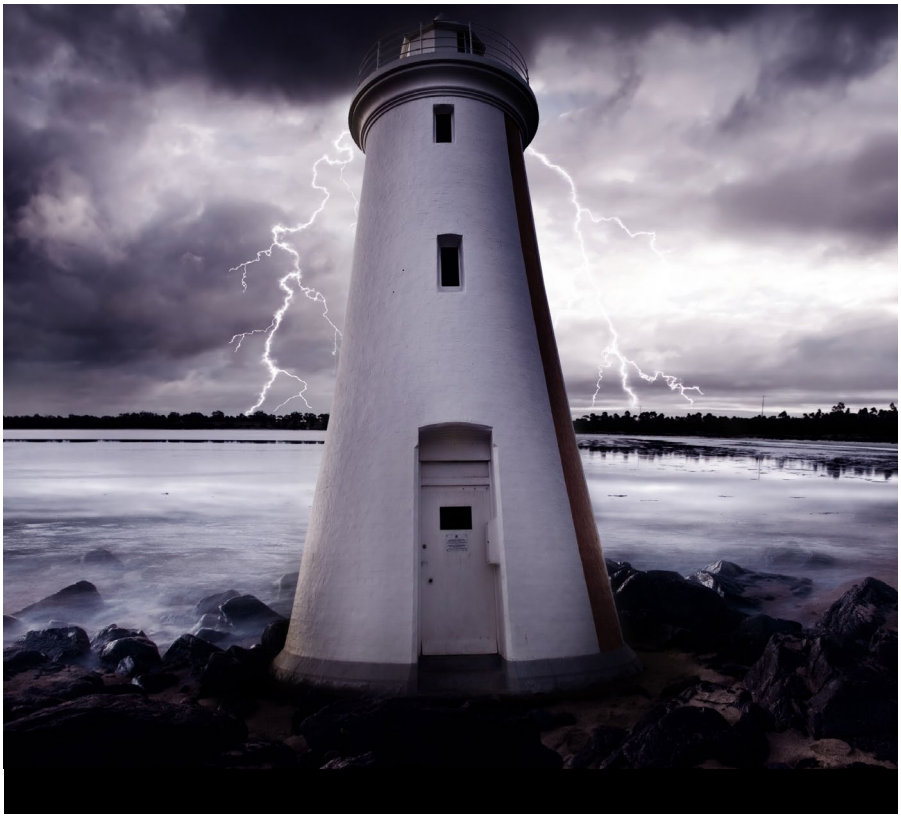
Pending the hearing of an appeal, statute provides that an execution order is to be suspended. This is so as the immediate execution of a court order, when an appeal is pending has the potential to cause enormous harm to the party ultimately successful. Regardless of this however, the full bench granted an order that the urgent appeal would not suspend the operation of the execution order and new practitioners were thus appointed in respect of the two companies.

As a result thereof, in the first instance, the newly appointed BRPs withdrew the appeal lodged by the practitioners who were removed on the premise that consequent to their removal, they no longer had legal standing to pursue the appeal.

The new BRPs then purported to terminate the business rescue proceedings in respect of the two companies.

The matter was brought on an extremely urgent basis before the SCA and it was highlighted that the court first had to deal with the validity of the full bench's order of the overriding of the suspension of the execution order and then only could the court consider the appeal against the order for the removal of the BRPs.

The SCA found that the overriding of the suspension of the execution order was invalid as it flew in the face of the express



provisions of the statute giving the right of appeal. Specifically referring to section 18(4) of the SC Act which reads as follows:

> *'If a court orders otherwise, as contemplated in subsection (1) –*
>
> *(i) the court must immediately record its reasons for doing so;*
>
> *(ii) the aggrieved party has an automatic right of appeal to the next highest court;*
>
> *(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and*
>
> *(iv) such order will be automatically suspended, pending the outcome of such appeal.'*

The section is intended to safeguard against irreparable prejudice occurring as a result of a court grating an execution order when it should not have done so – i.e. prior to the outcome of an appeal being finalised.

Further, the overriding of the suspension had been granted by the court of its own volition and without notice to the parties therefore denying them the opportunity to make submissions in that regard. The court found that the inherent power of a court to regulate its own procedure cannot be used to override the provisions of a statute directly governing the issue.

This finding by the SCA meant that pending the outcome of the appeal, the "*erstwhile*" practitioners remained the duly appointed

How far is too far? Considering the exercise of the court's inherent powers in the face of statutory provisions....*continued*

BRPs in respect of Islandsite and Confident Concept and the removal of their appeals was therefore invalid and ineffective, as was the termination of the business rescue proceedings. The appointment of the new BRPs also effectively became invalid.

In considering the main issue to be decided and main ground of appeal, the SCA had to consider whether the Respondent had proven that the circumstances which warranted the removal of the practitioners were exceptional. Further, that the Respondent would suffer irreparable harm should the BRPs not be removed immediately and in turn whether the BRPs would suffer such harm if they were to be removed immediately.

The court in this instance found that the Respondent had not put forward any evidence to suggest that these were exceptional circumstance and that the fact that the Respondent merely alleged that the BRPs failed to meet the required standard expected of a BRP, without further evidence, did not constitute exceptional circumstances.

In considering the second and third requirements, the court further found that no irreparable prejudice had been established in the case of the Respondent from the evidence put before it, nor had the Respondent successfully discharged the onus in showing that the removal of the BRPs would not cause them irreparable harm.

The court ultimately upheld the appeal and the order of the full *court a quo* was set aside.

Tobie Jordaan
Sector Head

Jessica Osmond
Candidate Associate

OUR TEAM

For more information about our Business Rescue, Restructuring & Insolvency sector and services, please contact:

Tobie Jordaan
Sector Head
Business Rescue, Restructuring & Insolvency
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

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

Kgosi Nkaiseng
Director
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Mongezi Mpahlwa
Director
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

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

Belinda Scriba
Director
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Andrew MacPherson
Senior Associate
Dispute Resolution
T +27 (0)21 481 6359
E andrew.macpherson@cdhlegal.com

Vincent Manko
Senior Associate
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Kylene Weyers
Senior Associate
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

Ngeti Dlamini
Associate
Dispute Resolution
T +27 (0)21 481 6474
E ngeti.dlamini@cdhlegal.com

Nomlayo Mabhena
Associate
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

Stephan Venter
Associate
Dispute Resolution
T +27 (0)11 562 1750
E stephan.venter@cdhlegal.com

Jessica Osmond
Candidate Associate
Dispute Resolution
T +27 (0)11 562 1067
E jessica.osmond@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR
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.

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@cdhlegal.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@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com