

# NEWSLETTER



INCORPORATING  
KIETI LAW LLP, KENYA

Volume 25 | 10 November 2021



## Tobie Jordaan

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Business Rescue,  
Restructuring &  
Insolvency

Just as we started gearing ourselves towards closing up this tremendously challenging year by booking our December holidays, our phones started pinging with those dreaded EskomSePush notifications announcing that we would be vacillating between Stage 2 and Stage 4 load shedding for the foreseeable future. To add insult to injury, Rand Water has also announced that it will be implementing a 54-hour water shutdown in the next week that will result in temporarily reduced water supply to large parts of Johannesburg. These electricity and water shortages have resulted in an inevitable knock to the rand's value this week, and further pinched our efforts to achieve a COVID-19 economic recovery. This current state of affairs is a sobering reminder that while we have our much-needed December breaks to look forward to, we must not lose sight of the fact that there is still more work to be done in order to achieve economic recovery.

In the world of business rescue and insolvency related news, we are happy to report that the business rescue mechanism continues to achieve its desired results as multiple companies currently under business rescue are reporting successful milestones on their roads back to a state of solvency. The Ster-Kinekor Group recently reported that it is confident it has reached a stable condition, with a further upwards commercial trajectory being expected as a result of positive discussions with key stakeholders, good progress in negotiations with a potential investor, and the support of a strong slate of incoming film content that is attracting higher audience attendance rates.

Comair's business rescue practitioners have also reported that the airline's funding requirements have stabilized, and they believe that the company is capable of being rescued. The only challenge left to be resolved appears to be a legal battle that the airline is currently facing in a US court regarding the cancellation of a purchase agreement for airplanes. But in other good news for Comair, its wholly-owned subsidiary, Kulula.com, has experienced such a high demand in travel for its Cape Town to Durban route that it has been able to launch a double daily service on the route. The airline's CEO announced that even prior to the COVID-19 pandemic, the airline only operated one flight per day on this route.

Moving onto the news regarding our ever-controversial state-owned enterprises (SOEs), Transnet's CEO recently reported an R8,8 billion loss for the financial year ending March 2021, amounting to an R11,1 billion negative swing from its previous year's profit of R2,3 billion. There has been much speculation in the press as to the factors that have contributed to this negative outcome. However, Transnet's management has blamed this negative swing on lower volumes and revenues related to the COVID-19 pandemic and the ensuing lockdowns. Whatever the cause may have been, it appears that Transnet has now joined the host of other SOEs that are currently considering their legal options for economic recovery, and to avoid the inevitable swarm of creditors' demands.

In further news, the generally negative commercial state of our SOEs interestingly precipitated in the National Metalworkers Union of SA (NUMSA) approaching the Constitutional Court in May of this year with an application seeking to have Parliament decide whether SOEs can be allowed to go into liquidation. NUMSA envisioned a process whereby Parliament's Standing Committee on Public Accounts – or any parliamentary committee serving a similar purpose – would hold public hearings to entertain submissions on whether an SOE in financial distress should be allowed to be liquidated, and for Parliament to then

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pass a resolution on the matter. However, the Constitutional Court dismissed NUMSA's application on the basis that it was not within its jurisdiction to hear it. The current generally negative commercial state of our SOEs seems to have stimulated stakeholders into think-tanking various novel solutions to addressing the problem. However, we hope that the necessary stakeholders take cognizance of the success currently being achieved by companies that took timely advantage of the relief made available by our business rescue laws.

In this month's newsletter, we consider whether the insolvency procedure of administration is an effective corporate rescue mechanism in the Kenyan legal context. We further discuss the findings in the recent judgment of *Voltex (Pty) Ltd v First Strut (RF) Limited* (43914/2017) [2021] ZAPHC (5 October 2021).

While we continue to face novel economic challenges necessitating further work by all, we must also acknowledge that as a collective we have weathered an incredibly difficult year. The CDH Business Rescue, Restructuring and Insolvency Sector accordingly encourages you to continue with planning your December breaks, and enjoy the much-needed time of rest with your loved ones. As we reboot, we get ready to yet again pick up our tools and work together in continuing to strive towards recovering businesses and our economy in general.

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## KENYA

### Is administration an effective corporate rescue mechanism?

Actions of directors receive considerable attention when a company is facing financial difficulty. The law imposes a duty on directors of companies in financial difficulty to take all reasonable steps to minimise potential losses to creditors. These steps may include placing the company under an appropriate corporate rescue mechanism or winding it up. This article examines the use of administration, and particularly an out of court appointment, as a corporate rescue mechanism.



Administration is an insolvency procedure where a company is placed under the control of an insolvency practitioner, referred to as an administrator. The general rule is that a company cannot go into administration unless it is insolvent, or likely to become insolvent. This is when a company is not able to meet its liabilities as they fall due, or the value of its liabilities (including its contingent and prospective liabilities) exceeds the company's assets. The exception to this general rule applies where administration is commenced by a creditor who holds a qualifying floating charge over the company's assets.

Administration allows a company in financial difficulty to restructure its debt, with protection from its creditors by way of a statutory moratorium. A statutory moratorium is a freeze on all enforcement action that may be taken against a company's assets by the company's creditors. This includes suspending or stopping eviction by landlords for outstanding rent. The statutory moratorium comes into force immediately when the administrator is appointed, and it lasts for 12 months. It may be extended by a further 12 months by a court or by consent of the creditors, depending on whether the objectives of the administration will have been achieved.

There are two ways in which a company can go into administration. The first way is through a court appointment after a formal hearing (court process). The court process is dependent on the court's diary, and thus may be time consuming. The second way into administration is through an out of court appointment. This is more efficient and can be initiated by the directors or shareholders of the company or by a qualifying floating charge holder (often a bank or other commercial lender). It is initiated by lodging a notice of appointment together with board and/or shareholder resolutions at the official receiver's office and with the court. The filing done in court is not to seek its approval but merely to notify it of the appointment of an administrator because it retains an oversight role.

## KENYA

### Is administration an effective corporate rescue mechanism...*continued*

Advantages of an out of court administration include:

- It is faster than the court appointment route, thereby making the administration process less costly.
- It has the prime advantage of a statutory moratorium without a lengthy court proceeding to obtain it.
- Control of the company is given to an administrator who is an insolvency practitioner with knowledge and experience dealing with companies in financial difficulties. This will normally increase the survival chances of a company in financial difficulty.
- If the debt restructuring exercise during administration is successful, the company will be handed back to the old or new directors to actively manage it as a going concern.

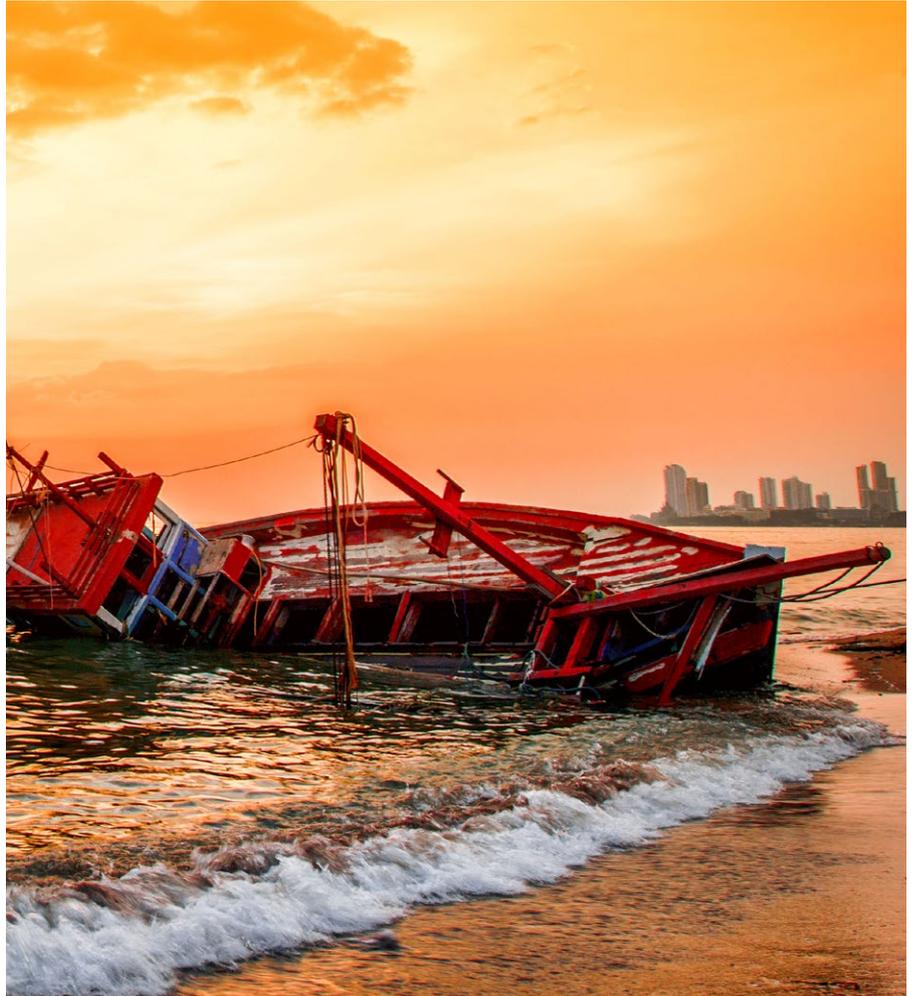
Corporate insolvency is a highly specialised area of practice. The key issue for directors is therefore realising when to call in the experts. Directors should seek expert advice during the early warning signs of insolvency when the company may still be rescued.

**Desmond Odhiambo**

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## Parties may seek rectification of agreements after liquidation, but beware



We have all been 'cultured' into ensuring that agreements are in writing, and preferably signed by all parties. This is mainly because the so-called 'gentlemen's agreement' by a handshake and the 'my word is my bond' agreements are generally difficult to prove, as the terms of such agreements are usually verbal, and not recorded in writing. Written agreements tend to give the parties comfort that all the commercial terms of the transaction have been condensed to writing, and all parties will comply with their obligations. However, what happens when there is an error in the written agreement, and that error is only picked once one of the parties is in liquidation?

Usually, parties to an agreement will regard the effective date of the agreement as the date on which the written agreement is signed, or some other date as decided between the parties. It is from the effective date that parties will render services or deliver goods to each other, and make payments in accordance with the agreement. Should one of the parties go into liquidation, and it turns out that the written agreement had an error in it, the written agreement would need to be rectified by a court. Rectification is a correction of a document by the court, in order for the document to reflect the true common intention of the parties.

When the other party to the agreement is in liquidation, there is an extra hurdle in obtaining a rectification court order. That hurdle is the laws of insolvency, which must

be applied in addition to the principles of the law of contract. Specifically, it is the principle of *"concursum creditorium"*. This principle effectively means that once a company is in liquidation, no creditor may exercise its rights as against the company in liquidation to the prejudice of other creditors. All creditors' contractual rights are *"frozen"* and are to be dealt with in terms of the laws of insolvency.

In *Voltex (Pty) Limited v First Strut (RF) Limited (In Liquidation) and Others* (43914/17) [2021] ZAGPPHC 662 (5 October 2021), the court highlighted the principle that during liquidation, rectification is still allowed but only to the extent that the rectification will not give the party seeking rectification more rights than it had prior to liquidation. Since the court does not deal with the terms of the agreement but rather

the document evidencing the agreement, rectification may be allowed in order for a written agreement to reflect the common intention of the parties.

The important 'take away' is that parties should ensure that written agreements correctly reflect every detail of the transaction, including names of the parties, registration numbers and the commercial terms of the agreement. To the extent that an error on the agreement is picked up during liquidation, then rectification may be sought but only to the extent that such rectification will not lead to a party acquiring more rights than it had prior to liquidation.

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### BBBEE STATUS: LEVEL ONE 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.

### PLEASE NOTE

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