

DISPUTE RESOLUTION ALERT

19 APRIL 2022



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

The nitty-gritty of winding up external companies

The reasons for judgment by Slingers J of the Western Cape Division of the High Court in the *AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings N.V. and Others* matter dealt with the issue of whether the court has the jurisdiction to wind up an insolvent external company. The reasons for judgment also dealt with the issue of properly establishing locus standi as a creditor of an insolvent company.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

The nitty-gritty of winding up external companies

The reasons for judgment by Slingers J of the Western Cape Division of the High Court in the *AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings N.V. and Others* matter dealt with the issue of whether the court has the jurisdiction to wind up an insolvent external company. The reasons for judgment also dealt with the issue of properly establishing locus standi as a creditor of an insolvent company.

In May 2021, the applicants instituted proceedings for the provisional winding-up of Steinhoff International Holdings N.V. (“respondent”). The SIHNV Financial Creditors (“Financial Creditors”) brought an application to be granted leave to intervene in and oppose the liquidation application, Frederic Verhoeven and Christiaan Robert Zijderveld (“Dutch Administrators”) brought a similar application, in addition they also sought to be recognized as court appointed administrators of the respondent by virtue of the orders of the Amsterdam District Court (“ADC”) which granted them authority to institute and defend proceedings in South Africa. An in limine application was also brought challenging the court’s jurisdiction to hear a matter regarding the winding up of an external company.

On 6 September 2021, the intervention applications and the in limine application regarding the court’s jurisdiction were heard and subsequently all dismissed with costs. As a result, the hearing of the liquidation application was scheduled to proceed on another date. The Financial Creditors requested reasons in terms of Rule 49(1)(c) and brought an application for leave to appeal. The Dutch Administrators also brought an application for leave to appeal. The winding up application was scheduled to proceed on 9 September 2021, however the Financial Creditors and the Dutch Administrators brought applications to postpone the hearing of the winding-up application. The respondent sought an order postponing the hearing of the winding-up application pending the final appeal of the in limine point. The applications to postpone the hearing of the liquidation application and to suspend operation of the court order were subsequently dismissed with costs.

In providing the reasons of the court orders, the court dealt firstly with the in limine issue of whether the court has jurisdiction to wind up the respondent, it being an external company. The court set out the existing framework for winding-up of companies as set out in the Companies Act 71 of 2008 as well as Chapter 14 of the Companies Act 61 of 1973. The court favoured the applicants’ argument that there is an overlap between the two Acts. This argument considered the fact that the definition of company in section 1 of the 2008 Act does not include external companies, and section 337 of the 1973 Act does. Further, it considered that Item 9 of Schedule 5 in the 2008 Act provides for the continued application of Chapter 14 of the 1973 Act with respect to the winding-up of companies under the 2008 Act. The applicants relied on the decision of the court in *Van Der Merwe v Duraline (Pty) Ltd* where the court held that,

The nitty-gritty of winding up external companies

CONTINUED

where a company is found to be insolvent, the provisions of Chapter 14 of the 1973 Act would regulate the process and that the definitions applicable to that section would continue to apply. The applicants argued that when these provisions are read together, as they should be, Chapter 14 is incorporated into the 2008 Act and continues to regulate the winding-up of companies. In terms of this interpretation, the section 337 definition of company in the 1973 Act, which includes external companies, extends the section 1 definition of the 2008 Act in the context of winding-up. The court accepted this argument and found that it had the necessary jurisdiction to hear the provisional winding-up application in respect of the respondent, although it being an external company.

With respect to the intervention applications, the court dealing with the issue of locus standi, stated that a creditor has the onus to show that they have a direct and substantial interest in the winding-up of the company and that merely stating so is insufficient. The court found that none of the alleged Financial Creditors set out the necessary details of their claims against the respondent and that they had consequently not established a direct or substantial interest for the purposes of locus standi. In dealing with the Dutch Administrators application, the court set out the legal framework which requires a foreign liquidator to be granted recognition by a South African court before they can deal with assets in South Africa. A court will only enforce a foreign judgement where it is, among other things, made by a court with the requisite jurisdiction

and competence to do so. The court found that the ADC only had the jurisdiction to appoint liquidators where the company's main interests are situated in the Netherlands and that as Steinhoff's operations are controlled and conducted from South Africa, the ADC did not have the jurisdiction to make the appointment and as such the Dutch Administrators were not entitled to the recognition they sought.

In respect of the application seeking to postpone the winding-up application the respondent relied on section 18(1) of the Superiors Courts Act 10 of 2013, arguing that the applications for leave to appeal suspended the operation of the court orders and therefore the court could not continue with the winding-up hearing. The court dismissed such application in doing so, the court

The nitty-gritty of winding up external companies

CONTINUED

relied on the decision of the SCA in *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 which made it clear that the dismissal of an application is not suspended pending an appeal as there is nothing upon which execution can be levied. The court stated specifically that “...the intervening parties’ application for leave to appeal can never bestow upon the standing to intervene in and oppose the winding-up application when they never had it in the first place”. Therefore, the court found that section 18(1) was not applicable in this instance. The court found

that the point in limine regarding the court’s jurisdiction did not impact the rights of the parties and does therefore not meet requirements of an appealable decision. The court also remarked that the granting of a postponement would not necessarily be in the interests of justice as it would result in a fragmented and prolonged adjudication.

These reasons for the court order notably clarify the approach to interpreting the overlap between the 2008 Companies Act and the still relevant Chapter 14 of the 1973 Act and confirms that the court

has the jurisdiction to entertain the winding-up of external companies. Further, it is crucial that parties hoping to intervene in the winding-up applications must properly establish their locus standi as the court will not take any assertions in this regard at face value.

**LUCINDE RHOODIE,
MUWANWA RAMANYIMI AND
HLONELWA LUTULI**

2021 WINNERS OF M&A DEAL FLOW 2021

2021

1st by M&A Deal Flow.
2nd by General Corporate Finance Deal Flow.
2nd by BEE Deal Value.
3rd by General Corporate Finance Deal Flow.
3rd by BEE Deal Flow.
4th by M&A Deal Value.

2020

1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018

1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

DealMakers



OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Tim Fletcher

Chairperson
Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker

Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris

Sector Head
Industrials, Manufacturing & Trade
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann

Joint Sector Head
Government & State-Owned Entities
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr

Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan

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

Corné Lewis

Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus

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

Burton Meyer

Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley

Sector Head
Gambling & Regulatory Compliance
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa

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

Kgosi Nkaiseng

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

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie

Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head
Construction & Engineering
Director
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

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

Tim Smit

Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle

Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Jonathan Witts-Hewinson

Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2022 11027/APR