DISPUTE RESOLUTION
ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Timing (and good faith) is everything

A company resolution to enter into business rescue must be passed in good faith, with the requisite intention of attaining the objectives of the Companies Act 71 of 2008 (Companies Act), i.e. rescuing the company. The timing of the resolution is in some instances equally important, as any prior application for the liquidation of the same company may invalidate such resolution.

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In the Supreme Court of Appeal (SCA) decision of *Park 2000 Development11 (Pty) Ltd v Johan Mouton and Others*, the bench gave reasons for a decision to dismiss an appeal of a Western Cape Division judgment handed down by Sher J, which was impacted by the timing and (lack of) good faith surrounding a business rescue application.

As a result of the first respondent's (Mr Mouton) averment that the appeal was moot, the court first had to consider section 16(2)(a)(i) of the Superior Courts Act 10 of 2013, which allows the court to dismiss an appeal on the mere ground that the decision made by that court upon hearing the issues, would have no practical effect. Thus, the court evaluated whether, on the facts, an appeal would have any practical effect on the parties.

The appellant, Park 2000 Development11 (Pty) Ltd, was the owner of properties earmarked for development (such developments being its only business activity). Mouton had purchased certain debentures from the appellant in 2007 and eventually sought to redeem them by claiming repayment of the loan amount linked to the debentures. When no payments had been made and after successfully applying for default judgment in October of 2017, Mouton obtained a writ of execution authorising the sale of the appellant's properties by public auction on 12 December 2018.

Surprisingly, the day before the auction, the respondent was informed via emails received in sequence that, firstly, Meiprops Twee en Twintig (Pty) Ltd (Meiprops) had launched a liquidation application against the appellant and, secondly, that the appellant had made an application that very day to be placed under business rescue. The liquidation application was subsequently withdrawn and Mr Stewart, the fifth respondent, was appointed as the business rescue practitioner. The auction continued as scheduled, the properties were sold, and ownership thereof consequently transferred to the second respondent.

SAFEGUARDING AGAINST FRIVOLOUS LITIGATION

Much to both the court *a quo* and the SCA's chagrin, a director of the appellant, Mr Van Rooyen, deposed to supporting affidavits in both the liquidation application and the business rescue proceedings. The SCA concurred with the finding of the court a quo that these affidavits were mutually contradictory and that the resolution adopted to place the appellant in business rescue must have been passed to frustrate the auction of the properties, which at the date of the applications was mere days away. The court a quo had accordingly declared the resolution invalid and set it aside. Furthermore, the court *a quo* authorised the

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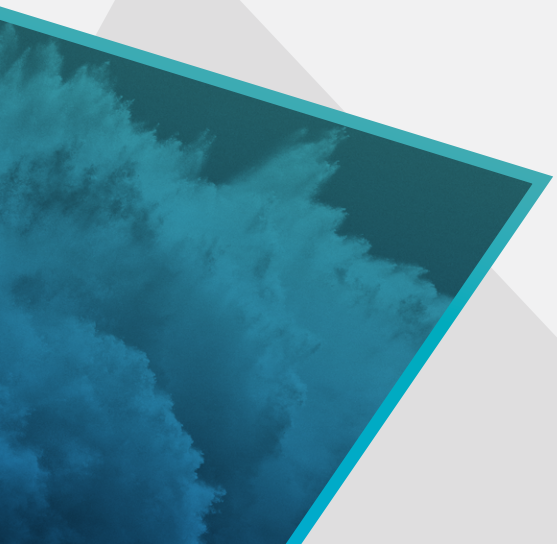
transfer of ownership of the two properties to the second respondent upon payment of any amounts owing and declared the sale in execution to be valid.

The appellant, before the SCA, in an attempt to motivate the practical effectiveness of the appeal as required by section 16(2)(a)(i), submitted that the restoration of the company's business rescue status would allow the consequently restored business rescue practitioner to retroactively set aside the transfer of the appellant's properties. They relied on the *Knox N.O. v Mofokeng* judgment to assert that the second respondent assumed the risk of the sale being set aside for invalidity under section 133(1) of the Companies Act, when they became aware of the adoption of the business rescue resolution. The SCA dismissed these arguments by citing the reliance on the Knox decision as being *"misconceived"* due to the facts in the Knox decision relating to rescission of judgments and not business rescue.

Further, the SCA reasoned that the unchallenged validity of the transfer of the properties meant that the appellant no longer held any noteworthy assets to be administered under a process of business rescue. Additionally, the SCA emphasised that the granting of any appeal would not undo the sale of the properties. For these reasons, the court held that the appeal would have no practical result and, reiterating its position in *Legal Aid South Africa v Magidiwana and Others* that courts should not decide matters of purely academic interest, dismissed the appeal.



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This decision illustrates the approach that courts are likely to take when deciding whether to consider an appeal and the implications of section 16 of the Supreme Courts Act, which serves as a safeguard against frivolous litigation. Additionally, (and albeit in its obiter remarks) the SCA clearly expressed its displeasure with what it perceived to be the appellant's attempted manipulation of the business rescue mechanism. This approach is consistent with its previous judgments and lack of tolerance for misuse of the process. Had the business rescue resolution been passed timeously and without the back-up liquidation application which necessitated contradictory affidavits, the sale in execution may have been wholly avoided, as would the stain of misusing legal mechanisms.

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