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BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

DISPUTE RESOLUTION

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Welcome Note: Tobie Jordaan

**Directors be warned: There is not
absolution in rescue**

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Although the National State of Disaster may now have come to its official legal end, we can hardly say there aren't many more unmitigated disasters that still need to be addressed. From reports indicating that the extent of the economic damage wrought by state capture is even greater than we had initially comprehended (which is somewhat unsurprising, at this stage), to rolling electricity blackouts – it has become even clearer that our state is far from being not disastrous. However, as a Team that has been built on the principles of rebuilding from the remnants of disaster, the CDH Business Rescue, Restructuring and Insolvency Sector sees opportunity for rebuilding and eventual growth in spite of these severely adverse economic circumstances.

Recent developments in various business rescue proceedings have demonstrated how the process can be beneficially used to make the best of a bad situation. While often being far from resulting in compensating creditors for the whole, or even a major portion of, the debt owed to them; it has nonetheless served as a vehicle for fortitude by enabling financially distressed companies to do best by their stakeholders. For example, Ster-Kinekor's business rescue practitioner (BRP) recently reported that the implementation of its business rescue plan is still well underway and that it has improved all of its sites' trading and operational days to six days per week.

Additionally, as a result of the identification of a strategic equity partner during the business rescue process, the Minister of Public Enterprises, Mr Pravin Gordhan, recently stated in Parliament that the terms for the sale of a majority stake in South African Airways SOC Ltd (SAA) to the Takatso Consortium have almost been finalised. While SAA's business rescue did not come without its criticism, it has in fact resulted in the continued survival and privatisation of the national carrier.

While many jobs and debts, or portions thereof, may be written off as a matter of course during the process, we should not forget the (albeit minority share of) jobs that have been preserved as a result.

Comair's rescue seems to have encountered some unique hurdles. Consequent to rising fuel prices, the red listing of South African planes during December 2021, and Comair's recent domestic grounding, the BRPs have reported that more working capital will be required in order to successfully implement its business rescue plan.

In restructuring-related news, the saga regarding the debt restructuring of Ascendis seems to be continuing in anticipation of the special general meeting of shareholders to be held on Wednesday, 11 May. In a relatively new, although not entirely strange, turn of events, pharmaceutical company Austell has offered to provide Ascendis with a R590 million loan facility in exchange for the

right to purchase its subsidiary, Ascendis Pharma, which distributes over-the-counter and prescription medicines. This is not the first time Austell has extended an offer of this nature, and it will be interesting to see how this new development influences the restructuring dynamic.

In this month's newsletter, we investigate the extent of power retained by directors during business rescue proceedings, with reference to the Supreme Court of Appeal's recent findings in the case of *Shiva Uranium (Pty) Ltd v Tayob*.

Just as masks remain mandatory despite the end of the National State of Disaster, so does staying proactive in navigating the current tumultuous economic waters. While the world may be "*normalising*", there is still much to be done in order to achieve a beneficial outcome for all companies' stakeholders.

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Directors be warned: There is not absolution in rescue

As a juristic person under section 19 of the Companies Act 71 of 2008 (Act), a company has all the legal powers and capacity of an individual. The company itself is unable to exercise this capacity. Therefore, the power to exercise it normally vests in the company's board.

When a company enters business rescue under the provisions of the Act, the business rescue practitioner (BRP) is given wide-ranging powers in order to successfully try and rescue the company. It is a common misconception that these powers mean that the directors, like in a final liquidation scenario, effectively become redundant.

However, that is not the case. Either as prescribed by the Act or on the court's interpretation of the business rescue provisions of the Act directors (i) continue exercising certain powers and duties, albeit subject to the authority of the BRPs; or (ii) retain certain powers and duties without requiring the approval of the BRP.

Therefore, although business rescue limits the directors' powers and their roles, it does not mean that the directors are incapacitated and no longer hold power or have fiduciary duties to remain active participants in the running of the company.



Directors be warned: There is not absolution in rescue

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DETERMINING WHO HAS WHICH POWERS

In a previous article [Cliffe Dekker Hofmeyr - Residuary powers of directors of companies in provisional liquidation](#) the limits to the powers of provisional liquidators, and the residual powers of directors of companies in liquidation were discussed. These scenarios raise the question of whether a similar situation exists where directors of companies in business rescue are concerned.

The answer to this question seems to lie in distinguishing certain powers and precisely delineating whose responsibility it is to exercise them - the directors or the BRP.

The High Court dealt with this question in *Ronica Ragavan v Optimum Coal Terminal (Pty) Ltd* (Optimum). As we pointed out in a [previous article](#) the court made the distinction between internal powers and duties (internal day-to-day

governance of a company) and external powers and duties (external relationships between a company and those outside it). The court confirmed that (i) the directors retain the former, subject to BRP authority; while (ii) the latter powers are transferred to BRPs.

In the recent case of *Shiva Uranium (Pty) Ltd v Tayob* (Shiva) the Supreme Court of Appeal (SCA) and the Constitutional Court introduced nuances to this distinction. Here, the court had to pronounce on the validity of the appointment of BRPs themselves following the resignation of previous BRPs (see our [previous article](#)).

The facts, in short: Shiva Uranium's directors resolved to place the company under voluntary business rescue. To this end they appointed two BRPs. However, Shiva Uranium's largest creditor launched an application in the High Court to remove the BRPs. Before the matter was heard, these BRPs resigned.

Upon hearing the matter, the High Court appointed a replacement BRP and ordered the Companies and Intellectual Properties Commission (CIPC) to appoint a second replacement BRP, which the CIPC did.

When the court-appointed BRP wished to resign, he and the remaining BRP passed a resolution appointing his replacement BRP. However, Shiva Uranium's directors passed a resolution to appoint different BRPs instead to replace the resigning BRP. The question thus became: which BRP was validly appointed – the one appointed by the existing and resigning BRPs, or the ones appointed by the directors.

Section 139(3) of the Act provides that a company must appoint a new BRP where it is in voluntary business rescue and an existing BRP resigns. The court in Shiva held this power of appointment to vest in a company's

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directors, and not the resigning BRP. This was on the basis that in voluntary business rescue there is a balancing of rights and interests of stakeholders. This suggests that, where a company has elected to enter business rescue, its directors retain certain powers and are not absolved of continuing to act as the company's directors, albeit in a limited capacity.

At first this appears to break from the strict curtailment of powers put forward in Optimum. However, these two decisions can be reconciled.

INSTANCES OF VOLUNTARY BUSINESS RESCUE

Shiva specifically concerned voluntary business rescue and must be read in this context. The court's decision therefore was a recognition of the company taking steps to bring its affairs into order. As in any other business rescue process, the company comes under the control of the BRPs, but where the danger of a gap in this control appears (i.e. the resignation of a BRP), the company remains the rudder of the process, having the power to appoint a new BRP who it sees as suitable to carrying the process forward.

WARNING TO DIRECTORS

A further consequence of these cases, and equally important to note, is that directors have to be alert to the fact that they are not absolved of actively continuing to fulfil their fiduciary duties once a company is placed in business rescue, and they do not merely relinquish all their powers to the BRP during the business rescue process.

This is especially so when considering the following:

- In Shiva, the SCA made a ruling that BRPs are only ordained with the powers and duties relating to the "management" of the company – i.e. in relation to the "day-to-day" running of the business.
- The SCA ruled that any other functions falling outside of the parameter of what was considered "management" of the company remained directors' functions and "were not subject to the authority of the [BRP]".
- The Constitutional Court neither verified nor dispelled this ruling made by the SCA as the parties did not persist with the argument before the Constitutional Court.

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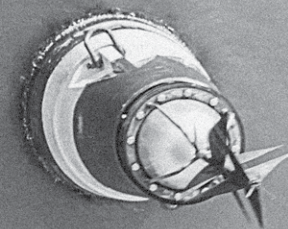
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The effect of this is that the SCA's decision on this issue is binding, and directors remain the sole decisions makers for a company on all issues which fall outside the definition of the day-to-day management of the company.

Therefore, there will be instances where a BPR does not hold the power to make certain decisions during the rescue process, and these decisions would still fall on the company's directors. Failing to be aware of this could lead to instances where directors are found wanting in fulfilling their fiduciaries duties, resulting in potential liability from which the BRP is absolved, and the directors are accountable.

It is for this reason that we recommend that directors of companies in rescue seek independent advice to assist them with navigating the quagmire between the powers that are retained and those that are relinquished (hopefully only temporarily until the company is financially stable again) as a result of the company being placed in business rescue (whether voluntarily or through court proceedings).

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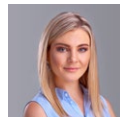
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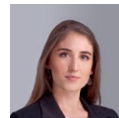
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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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