

Volume 34 | 14 September 2022

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

DISPUTE RESOLUTION

IN THIS ISSUE

Welcome Note: Tobie Jordaan

KENYA

Pre-insolvency moratorium and how it works in Kenya

A pre-insolvency moratorium is a new business rescue tool that allows an eligible company to obtain temporary relief from creditors while it works out a business rescue plan. It is not tied or limited to use with any other rescue mechanisms, such as administration or company voluntary arrangement, and it therefore presents a useful statutory-based option for a financially distressed company to injunct creditor action while it works out how to settle with its creditors.

SOUTH AFRICA

Opportunists beware: Abusing business rescue will not save you from liquidation

It is commonly known that while business rescue can be used as a statutory mechanism to assist financially distressed companies by allowing them to restructure their affairs, often, this mechanism is abused in order to frustrate the rights of creditors and avoid liquidation.



INCORPORATING
KIETI LAW LLP, KENYA



Tobie Jordaan

Sector Head | Director
Business Rescue,
Restructuring & Insolvency

Spring has sprung and like ducks to water, South Africans have taken to braai'ing and embracing social gatherings with friends and family. With the warmer temperatures, South Africa remains one of the best destinations to visit and explore by both local and international tourists. For those keen on a bush experience, South African National Parks (SANParks) announced that the 17th annual SA National Parks Week will run from 12 to 16 September 2022, which will afford visitors free access to most parks managed by SANParks from Monday to Friday. In other good news, the retail price of 93-octane and 95-octane petrol will decrease by R2.04/l. The reduction in the petrol price will have a knock-on effect for the continued growth of the economy as consumers' spending habits can be redistributed into the economy and not just into their vehicles.

On the insolvency front, the provisional liquidators of SA Express intend to apply for a final liquidation of the airline. After a failed business rescue attempt, SA Express went into provisional liquidation in April 2020. Numerous attempts to conclude a sale have proved futile and final liquidation seems unavoidable. In business rescue news, the board of Black Chrome Mine Proprietary Limited (Black Chrome Mine) had resolved to place Black Chrome Mine under voluntary business rescue. The initial business rescue plan was intended to be published on 31 August 2022, however the business rescue practitioner (BRP) has extended the publication of the plan to 14 October 2022. Black Chrome is a subsidiary of the JSE-listed Chrometco and the BRP has stated that there remains

a reasonable prospect of rescuing the entity. The Black Chrome Mine is an underground chrome mine having an excess of 20 million tons of chrome ore.

Some further interesting developments have transpired in the case regarding the liquidation of the crypto investment scheme Mirror Trading International (MTI). The High Court has granted a provisional declaratory order outlining how liquidators must treat bitcoin as intangible assets that constitute property. The High Court further ruled that the pay-outs must be calculated in rands as at the date of investment, rather than the day

of liquidation. MTI was placed in provisional liquidation as far back as 29 December 2020 after investors unsuccessfully tried to withdraw funds from a scheme that has been dubbed as the world's biggest crypto scam. The MTI return date is set to be heard on 31 October 2022.

In this month's edition of the newsletter, we explore two recent judgments where the courts explore how opportunists should avoid the tactic of using business rescue as a last-ditch attempt to keep creditors at bay. We also explore a pre-insolvency moratorium and how it works in Kenya.

TOBIE JORDAAN

PRIMARY CONTACTS



Tobie Jordaan

Sector Head

Director

T +27 (0)11 562 1356

M +27 82 417 2571

E tobie.jordaan@cdhlegal.com



Kgosi Nkaiseng

Director

T +27 (0)11 562 1864

M +27 76 410 2886

E kgosi.nkaiseng@cdhlegal.com

KENYA

Pre-insolvency moratorium and how it works in Kenya

A pre-insolvency moratorium is a new business rescue tool that allows an eligible company to obtain temporary relief from creditors while it works out a business rescue plan. It is not tied or limited to use with any other rescue mechanisms, such as administration or company voluntary arrangement, and it therefore presents a useful statutory-based option for a financially distressed company to injunct creditor action while it works out how to settle with its creditors. The pre-insolvency moratorium replaced and expanded the moratorium that was available with a company voluntary arrangement.

Any company that is financially distressed is eligible to utilise the pre-insolvency moratorium so long as it is not a bank or insurance company or a company that is under liquidation, administration, administrative receivership, a voluntary arrangement, or in respect of which a moratorium has had effect in the previous 12 months. Financial distress is used as a separate and distinct term to insolvency and it seems that the intention is to deal with a company that is in financial difficulties or that is nearly insolvent.

The procedure for applying for this pre-insolvency moratorium is prescribed to include reasons for seeking the moratorium and the company must also appoint an insolvency practitioner as its monitor. The monitor must submit an opinion on whether the proposed moratorium has a reasonable prospect of achieving its aim. The moratorium takes effect when the prescribed



KENYA

Pre-insolvency moratorium and how it works in Kenya

CONTINUED

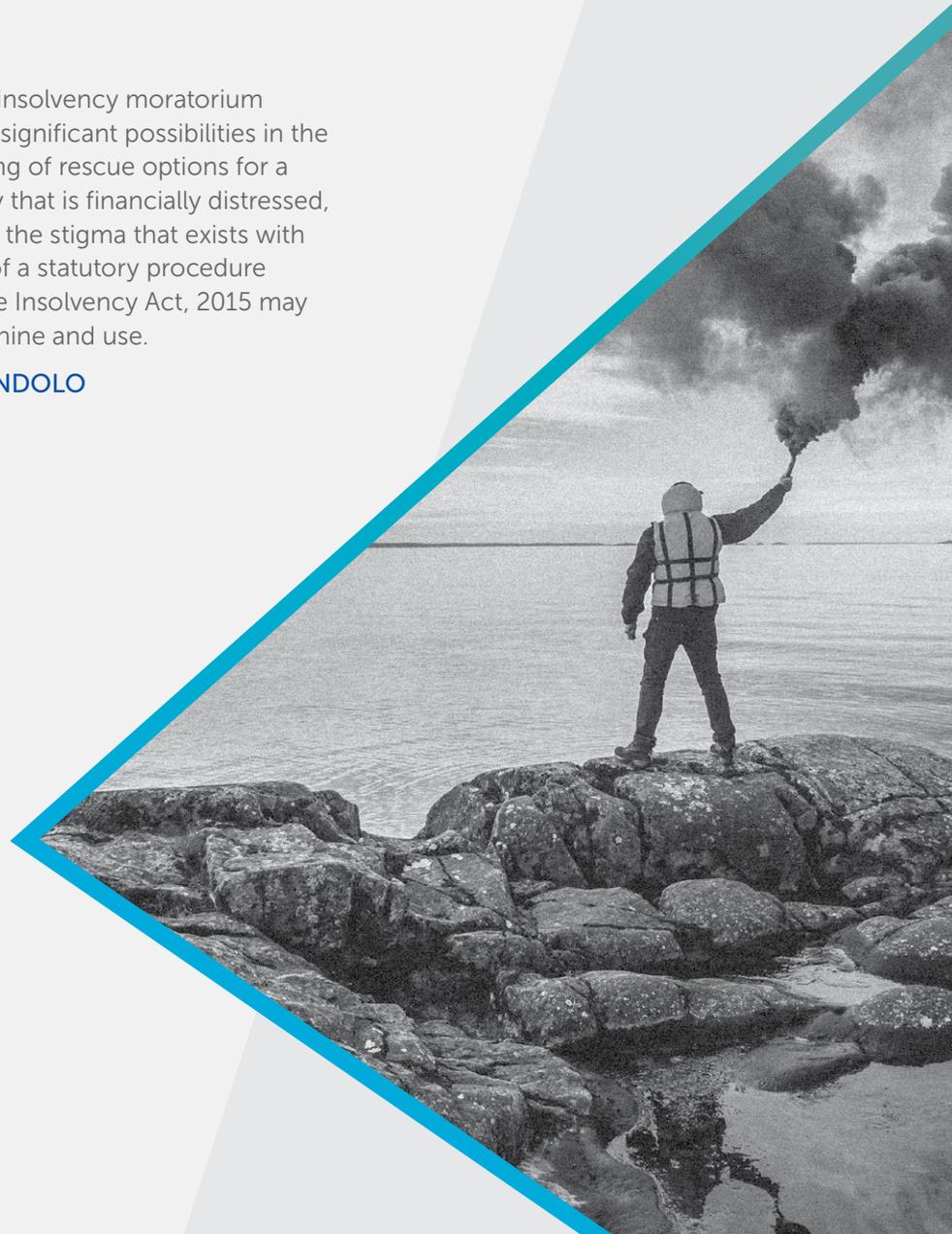
documents are filed in court. The moratorium lasts 30 days and can be extended for a further period of at least 30 days if the court considers it desirable to do so.

The moratorium has an effect similar to the moratorium that applies in the administration option. It prevents an application being made for the liquidation of the company or the appointment of an administrator or administrative receiver. Forfeiture and distress by a landlord or action to enforce security is only possible with court approval. The moratorium also restricts repayment of debt or other liability as well as disposal of property.

The directors of the company continue to manage the company during the period of the moratorium and this will be attractive to a company that wishes to keep control while it considers the best options to rescue it. Nonetheless, the convening of a meeting of shareholders must be with the consent of the monitor or with the court's approval.

The pre-insolvency moratorium presents significant possibilities in the structuring of rescue options for a company that is financially distressed, although the stigma that exists with the use of a statutory procedure under the Insolvency Act, 2015 may limit its shine and use.

SAMMY NDOLO



SOUTH AFRICA

Opportunists
beware: Abusing
business rescue
will not save you
from liquidation

It is commonly known that while business rescue can be used as a statutory mechanism to assist financially distressed companies by allowing them to restructure their affairs, often, this mechanism is abused in order to frustrate the rights of creditors and avoid liquidation. Two recent High Court judgments considered the abuse of business rescue proceedings and the impact on creditors' rights. These cases are: *Marias v Westline Aviation (Pty) Ltd and Others* (1993/2021) [2022] ZAFSHC 102 (30 May 2022) and *Henria Beleggings CC v Changing Tides 17 (Pty) Ltd NO; Changing Tides 17 (Pty) Ltd v CIPC and Others* (5412/2008; 43912/2016) [2022] ZAGPPHC 378 (1 June 2022).

WESTLINE AVIATION

In the case of *Westline Aviation*, a director of the company launched an application in terms of section 131 of the Companies Act 71 of 2008 (Companies Act) to place Westline Aviation (Westline) into business rescue. The application was launched after First National Bank (FNB) issued an application seeking a money judgment against Westline alternatively, the winding-up of Westline. Two separate money judgments were granted against Westline in terms of settlement agreements reached between the parties. FNB accordingly opposed the business rescue application and launched a counter application for the winding-up of Westline on the basis that it was commercially insolvent. No further affidavits were filed by Westline opposing FNB's counter application or in reply to FNB's answering affidavit in the business rescue application.

SOUTH AFRICA

Opportunists beware: Abusing business rescue will not save you from liquidation

CONTINUED

The court considered all the well-known cases on business rescue proceedings and noted that while sentiments expressed in adopting business rescue to avoid liquidation may be noble, it should not lead to a situation where an extraordinary amount of time is taken in a futile attempt to achieve this result. In support of the business rescue application, it was submitted that Westline did not require post-commencement finance as Westline supposedly had all the tools to trade out of its financial distress. The court noted that Westline did exactly what is not required of affected persons and a company in financial distress, i.e. keeping creditors on a string instead of finalising the business rescue process as soon as possible. Rightly so, Westline abandoned its business rescue application and the court further found that on the uncontested evidence before it, presented by FNB, Westline was commercially insolvent and it would be just and equitable in the circumstances for it to be wound-up.

HENRIA BELEGGINGS

In the case of *Henria Beleggings*, business rescue proceedings of Henria Beleggings commenced through the adoption of a board resolution in terms of section 129 of the Companies Act. Henria Beleggings instituted an application to rescind a default judgment granted against it in 2008 in favour of Changing Tides 17 (Pty) Ltd (Changing Tides). Changing Tides launched a separate application for, *inter alia*, setting aside the resolution commencing business rescue and placing Henria Beleggings in liquidation.

Prior to the commencement of the business rescue proceedings, Changing Tides sought to execute on its default judgment order and sell certain property subject to its security in terms of a special power of attorney provided by Henria Beleggings. However, four days before a further convened sale in execution, Henria Beleggings passed a resolution commencing business rescue. Changing Tides therefore



SOUTH AFRICA

Opportunists beware: Abusing business rescue will not save you from liquidation

CONTINUED

contended that the sole purpose of the business rescue was to proceed with the rescission of the judgment. Henria Beleggings had no employees and no annual turnover and was simply a property holding company. In addition, the resolution commencing business rescue fell short of the procedural requirements set out in section 129 of the Companies Act.

Rejecting the application for rescission, the court then considered whether the business rescue resolution should be set aside and Henria Beleggings placed into liquidation. In its founding affidavit to the rescission application, it was stated that the only reason why the company was placed into business rescue was to pursue the rescission of the default judgment. The court held that it must follow that if the rescission application fails, so too would the business rescue. On further analysis, the court found that despite Henria Beleggings' contention that the business rescue could be

successful, it was purely a property holding company with no business to restructure, it had no employees nor any "costs" which it could "shed". As a property holding company, there were no interested parties beyond the major creditor who held almost all of the debt.

The business rescue proceedings were simply being instituted in order to delay the inevitable and to prevent Changing Tides from executing on the default judgment. Henria Beleggings was further commercially insolvent, and the business rescue process was merely a sham to avoid the repercussions of the default judgment. The plan stated that an unidentified investor would be sought in order to improve the property and continue its renting out. It made no provision for how – during this improvement and renting out process – the debts would be reduced, not did it identify who the mystery investor was. The institution of the business rescue proceedings was thus held to be an abuse of

process, and it was subsequently set aside and the company was placed into final liquidation.

CONCLUSION

The result of these cases is clear, in both *Westline Aviation* and *Henria Beleggings*, the institution of business rescue proceedings was merely a last-ditch attempt to keep creditors at bay. Abuse of the business rescue proceedings in circumstances where there is no reasonable prospect of rescuing the company will always result in liquidation.

In *Westline Aviation*, the court quite clearly held that creditors are *entitled* to finality. Business rescue proceedings naturally frustrate a creditor's right to finality, but the courts are more inclined now to come to the aid of creditors where it is clear that business rescue proceedings are simply a façade.

**ROXANNE WEBSTER AND
JACQUES ERASMUS**

OUR TEAM

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



Tobie Jordaan

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



Desmond Odhiambo

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



Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com



Sammy Ndolo

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



Lucinde Rhoodie

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



Nseula Chilikhuma

Associate:
Dispute Resolution
T +27 (0)11 562 1067
E nseula.chilikhuma@cdhlegal.com



Thabile Fuhrmann

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



Belinda Scriba

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



Kara Meiring

Associate:
Dispute Resolution
T +27 (0)21 481 6373
E kara.meiring@cdhlegal.com



Richard Marcus

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



Roxanne Webster

Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com



Muwanwa Ramanyimi

Associate:
Dispute Resolution
T +27 (0)21 405 6093
E muwanwa.ramanyimi@cdhlegal.com



Kgosi Nkaiseng

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



Kylene Weyers

Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com



Jessica van den Berg

Associate:
Dispute Resolution
T +27 (0)11 562 1617
E jessica.vandenbergh@cdhlegal.com



Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com



Nomlayo Mabhena-Mlilo

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



Shaad Vayej

Associate:
Dispute Resolution
T +27 (0)21 481 6444
E shaad.vayej@cdhlegal.com



Mongezi Mpahlwa

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



Lerothodi Mohale

Senior Associate:
Dispute Resolution
T +27 (0)11 562 1175
E lerothodi.mohale@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 11514/SEPT