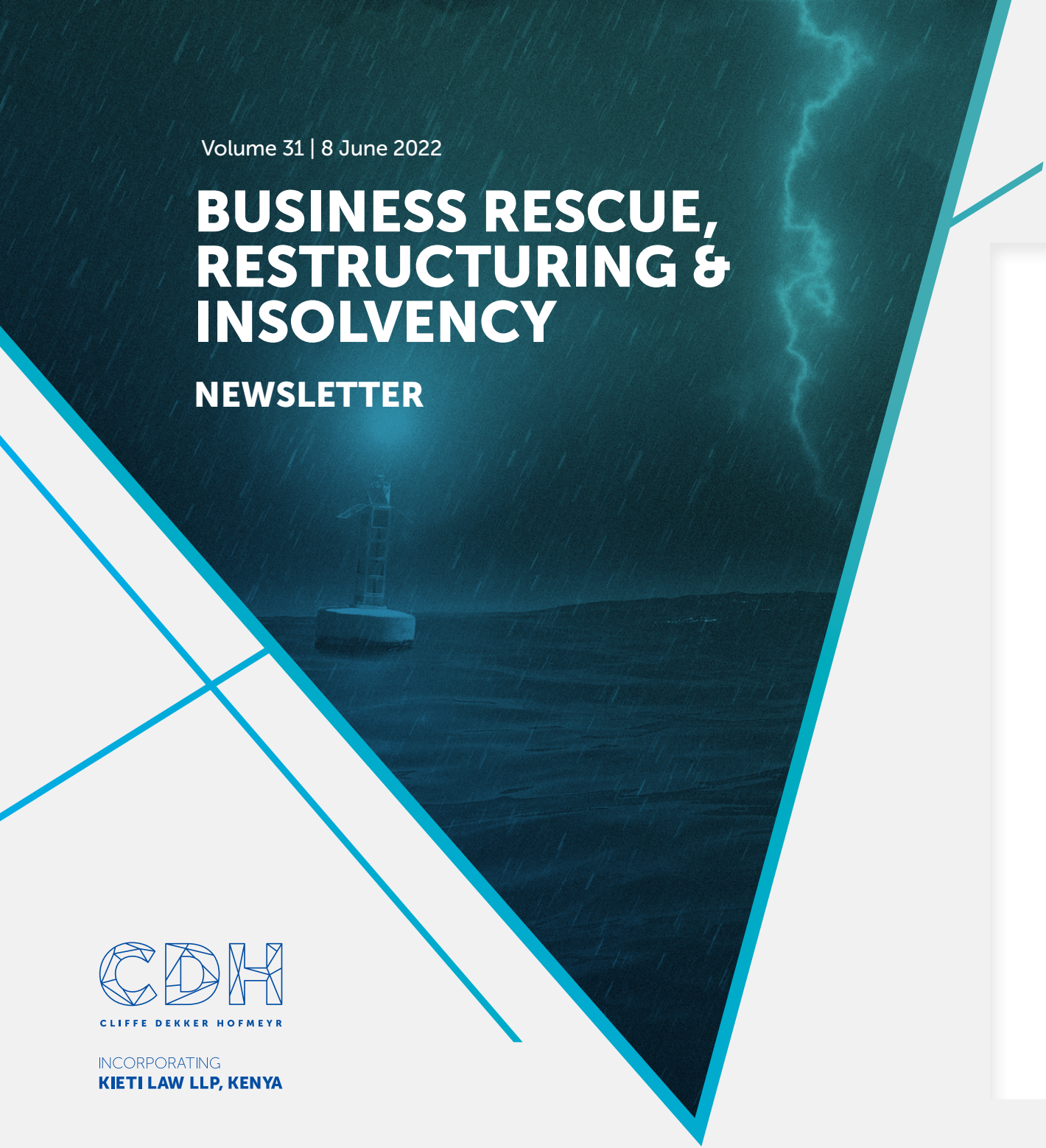

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BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

DISPUTE RESOLUTION

IN THIS ISSUE

Tobie Jordaan
Sector Head | Director
Business Rescue,
Restructuring & Insolvency

Winter has certainly reminded us all that 2022 is a story halfway told. While the New Year's resolutions have most likely been shelved, postponed or revised – a glimpse into our country's economic well-being might leave one feeling bent out of shape or left out in the cold. It bears repeating from previous newsletters that as a Team built on the principles of rebuilding from mishaps and disaster, the CDH Business Rescue, Restructuring and Insolvency Sector believes that the second half of the year can be a time for growth, innovation and redevelopment in spite of the harsh reality we presently face right now.

Just as we thought our aviation industry had turned a corner, leaving behind the disastrous effects of COVID-19 on the transport and tourism industries, Comair announced that all British Airways and Kulula flights will be suspended from 1 June 2022 until further notice as the airline tries to raise the necessary capital to continue with operations. Comair unfortunately serves as an important warning to ensure that there is a sufficient *"cash runway"* during rescue proceedings which not only provides enough capital to restart or continue with operations but also sufficient capital for unforeseen circumstances (or at least, foreseen consequences of COVID-19).

As our economy tries to rebuild, it will certainly be interesting to see how South Africa's aviation industry recovers and takes to the sky again.

With the world still attempting to adjust and settle into a new normal, many might feel despondent with rising food and petrol prices and continued load shedding. However, for the first time in a long time, the country's unemployment rate decreased by 0,8 percentage. Credit rating agency S&P Global announced that it had upgraded South Africa's economic outlook from *"stable"* to *"positive"*, which will likely lead to South Africa being able to attract more investment. This good news comes off the back of fellow credit agency Moody's moving South Africa's economic outlook from *"negative"* to *"stable"* in April.

In this month's newsletter, we explore the meaning of the term *"creditor"* where a person has an unliquidated claim by investigating the recent High Court judgment *Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) Ltd and Others* (53473/2021) [2022] ZAGPPHC and further an exploration of the judgment in *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others*; *African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others* (1088/2020;1135/2020) [2022] ZASCA 66 (10 May 2022) in relation to the interpretation of section 131(6) of the Companies Act 71 of 2008 providing for the suspension of liquidation proceedings at the time a business rescue application is made. We also discuss the case of *Kgoro Consortium (Pty) Ltd & Another v Cedar Park Properties 39 (Pty) Ltd* (in liquidation) *& 3 Others* (case number 935/2020) which deals with the Supreme Court of Appeal establishing what *"reasonable prospects of success"* are in rescue proceedings.

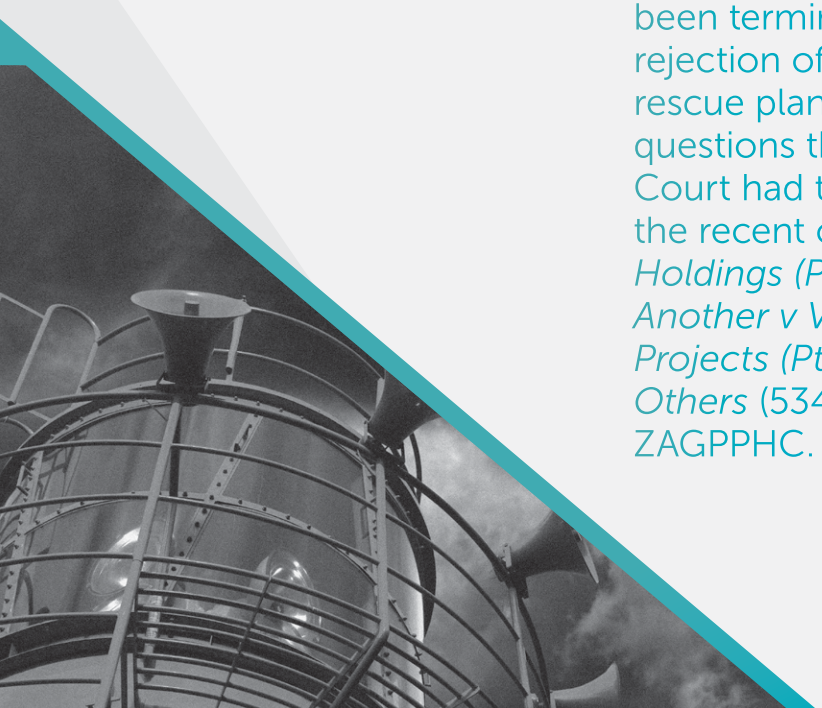
TOBIE JORDAAN

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

Contingent/ conditional/damages claims all have *locus standi* to set aside BR resolution but, once a plan is rejected and no further steps are taken by the BRP, it's over



Business rescue practitioners (BRPs) must tread with caution when they consider who is deemed a creditor in business rescue proceedings. Further care needs to be applied when the question of whether business rescue proceedings have actually been terminated by the rejection of a business rescue plan. These were questions the Pretoria High Court had to answer in the recent case of *Rogal Holdings (Pty) Ltd and Another v Victor Turnkey Projects (Pty) Ltd and Others* (53473/2021) [2022] ZAGPPHC.

THE FACTS

- On 10 January 2020 and 3 November 2020 respectively, the applicant, Rogal Holdings (Pty) Ltd (Rogal) and the first respondent, Victor Turnkey Projects (Pty) Ltd (VTP) concluded a written building agreement and an addendum to the agreement.
- Rogal complied with all its contractual obligations in affording VTP access to attend to the building works, not hinder, interfere with or obstruct VTP in carrying out its work and made payment of all the milestone payments on or before the date the payments became due and payable.
- VTP, however, breached the contractually agreed milestone and only completed 60% of the work.
- Rogal elected to enforce its right to cancel the agreement on 30 July 2021 in light of the breach and was of the opinion that it had overpaid VTP and VTP was indebted to Rogal in the amount of R588,784.53.
- Later, on 6 September 2021, VTP adopted a resolution to commence with voluntary business rescue proceedings in terms of section 129 (1) of the Companies Act, 71 of 2008 (the Act).
- The first creditors' meeting was held on 17 September 2021 and a second meeting held on 15 October 2021.
- On 3 December 2021, a meeting of creditors was held and the proposed business rescue plan was rejected by the majority of creditors present at the meeting, which meant no business rescue plan had been adopted.
- Rogal approached the court seeking an order that the resolution adopted by VTP to commence with business rescue proceedings in terms of the Act be set aside and that VTP be finally wound-up.

Contingent/ conditional/damages claims all have *locus standi* to set aside BR resolution but, once a plan is rejected and no further steps are taken by the BRP, it's over

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The issue of *locus standi* and whether BRPs are entitled to automatically revise a business rescue plan after the plan is initially rejected will be discussed in this article.

LOCUS STANDI

The main question the court had to grapple with was the issue of *locus standi* of Rogal to institute the proceedings before the court. Rogal stated it had the requisite *locus standi* to approach the court as it was a creditor of VTP. Rogal averred that for purposes of an application for business rescue, a creditor with an existing claim of which the enforcement is contingent or conditional, possesses the requisite *locus standi* to launch an application to set aside the resolution to commence business rescue proceedings.

VTP's opposition to the proceedings was based on its belief of a lack of *locus standi* in light of section 130(1) of the Act, which makes provision only for an affected person to apply to court for an order setting aside the resolution placing the company into business rescue. VTP was of the belief that Rogal had a damages claim and as such it was an unliquidated claim and could therefore not be deemed to be a creditor in business rescue proceedings.

Van der Schyff J did not dispute that Rogal's claim was an unliquidated claim against VTP. The court considered the judgment of *Tredoux v Kellerman* [2009(A 405/08) [2009] ZAWCHC 227 (3 February 2009) where it explained a liquidated claim as an amount which is either agreed upon or which is capable of *"speedy and prompt ascertainment"*. A liquidated claim is thus able to be merely calculated and is easily ascertainable. The Act does not define a creditor and the court considered *Moosa v Olgar and Another* 1932 NPD 686 where the question of whether a creditor must have a liquidated claim in order to be deemed a creditor in terms of section 121 of the Insolvency Act 32 of 1916. In the judgment, the court relied on the ordinary meaning of the word creditor as being *"one who gives credit in business matters i.e. to say, one relying on the promise of a person to pay money has given credit to such person: and therefore means one to whom money is due"* [emphasis added].

It was evident that the court had explored numerous judgments in considering whether Rogal was indeed a creditor. Trengrove J remarked in Gillis-Mason Construction Co (Pty) Ltd 1971 (1) SA 524 (T) that a person that has a valid claim for unliquidated damages for breach of a contract can be regarded as a creditor for purposes of section 113 of the repealed Companies Act 46 of 1926. Trengrove J went on to say *"The mere fact that the claim may still be unliquidated, at the time of the filing of a winding up petition, should not in itself disqualify such an applicant from petitioning for winding up"*. With a further consideration that the Act does not require that a creditor must have a liquidated claim before being recognised as a creditor, the court

Contingent/ conditional/damages claims all have *locus standi* to set aside BR resolution but, once a plan is rejected and no further steps are taken by the BRP, it's over

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thus deemed that Rogal was a creditor for the proceedings before it and indeed had the requisite *locus standi*.

ARE BRPS ENTITLED TO AUTOMATICALLY REVISE A BUSINESS RESCUE PLAN AFTER IT IS INITIALLY REJECTED?

The final topic of interest relates to the status of business rescue proceedings after a plan has been rejected by creditors. Section 153(1) of the Act states that if a plan is rejected (not approved on a preliminary basis or there is opposition to the adoption of the plan), the BRP must either seek a vote of approval from the holders of voting interests to prepare and publish a revised plan or to advise the meeting of creditors that the company will apply to a court to set aside the vote in rejection of the plan as inappropriate.

Rogal contended that the BRP, Mr Jerifanos Mashamba, failed to publish the business rescue plan in terms of section 150(5) and that Rogal holdings did not agree to or vote in favour of an extension of the prescribed timelines for the publication of the rescue plan. The court did not delve further into this contention but interestingly focused on the rejection of the business rescue plan and the obligations flowing from the rejection. Mashamba did not advise the meeting that VTP would apply to court to set aside the result of the vote. The transcribed records show that when asked whether he would terminate the business rescue proceedings, he merely stated he would follow the provisions of the Act and would provide an amended rescue plan.

Contingent/ conditional/damages claims all have locus standi to set aside BR resolution but, once a plan is rejected and no further steps are taken by the BRP, it's over

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Section 153(5) of the Act, however, provides that if no party takes the requisite steps afforded by section 153(1), the BRP must file a notice of termination of the business rescue proceedings. The court considered section 132(2)(c)(i) which provides that business rescue proceedings end when the plan is finally rejected, the act of filing the termination notice is thus an act of good administration but not a requirement for the termination.

The court found that Mashamba ought to heed the provisions of section 153, which leaves a resounding statement to BRPs that it is not their prerogative to decided that a revised plan should be prepared and published. The meeting can direct the BRP to prepare a revised plan on request. As such, the court concluded that in the matter before it, the rejection of the final plan meant that through the operation of law, the business rescue proceedings were terminated.

LIQUIDATION OF VTP

Lastly, the question of the winding-up of VTP had to be adjudicated. The court found there was no reasonable prospect of VTP being rescued and this was based on Mashamba's status report as the BRP. Van der Schyff J found that a proper case had been made to set aside VTP's resolution for voluntary business rescue. The court confirmed the termination of the business rescue proceedings when the business rescue plan was rejected at the meeting of creditors on 3 December 2021. The court further granted the order placing VTP in provisional liquidation and granted a rule nisi for any interested persons to appear on the return date if they oppose the final liquidation of VTP.

CONCLUSION

Many an entity has probably self-disqualified itself from attempting to set aside a section 129(1) business rescue proceeding due to it having a damages claim. It is, however, evident with a judgment such as this that courts are inclined to apply ordinary meanings in order to see equitable business rescue proceedings conducted. The judgment also provides a careful warning to BRPs that the formalities that they find themselves obliged to do are indeed obligations and they might find the proverbial wool pulled from their eyes if they take these prescribed duties for granted.

ROXANNE WEBSTER,
NSEULA CHILIKHUMA
AND KARABO NEMUDIBISA

Cutting corners in a rescue attempt: A most expensive lesson

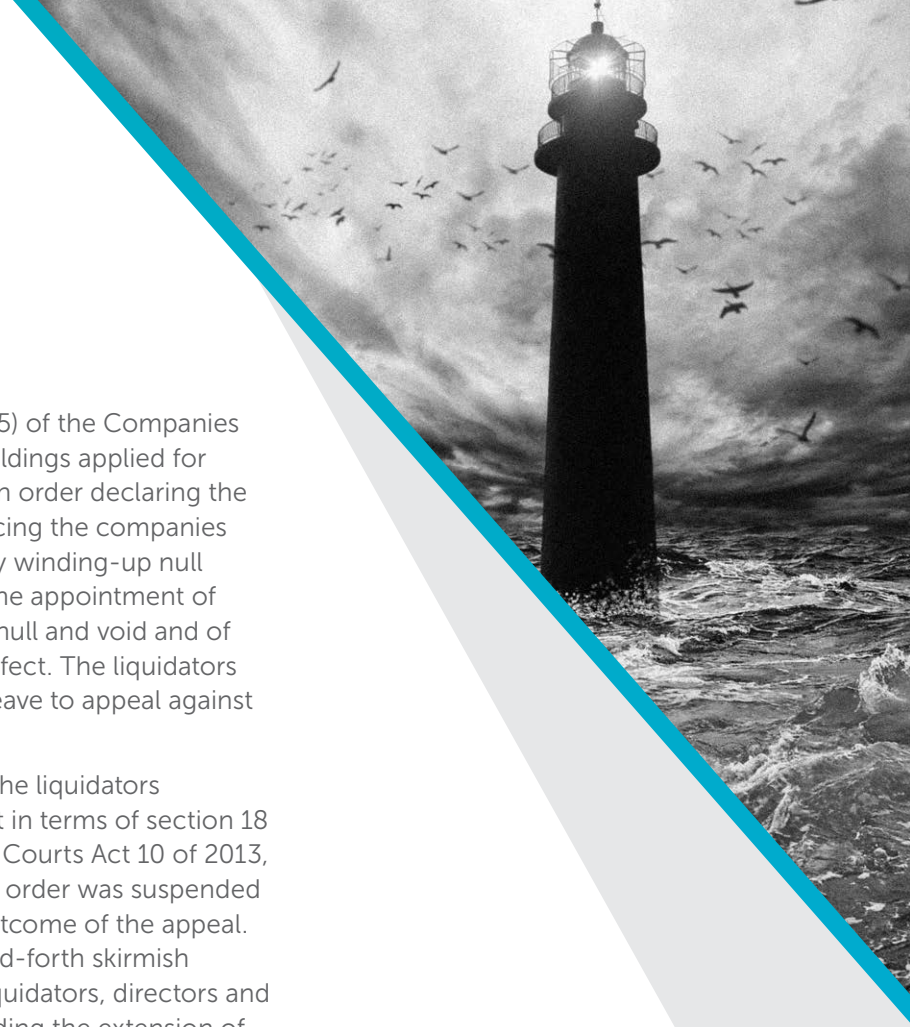
Business rescue is a procedure to give companies breathing space while they overcome their financial difficulties. The business rescue proceedings aim to help a company which is in financial distress by allowing it to reorganise and restructure its affairs, assets, equity, debts and liabilities while it continues its trading activities.

In order to aid the rescue of a financially distressed company, business rescue affords a debtor company various procedural and substantive protections and advantages during the business rescue process. The purpose of business rescue is twofold: first, to restructure the affairs of the company in an attempt to ensure that it continues to operate on a solvent basis; and second, if it is not possible for the company to continue in existence, for the business rescue to result in a better return for its creditors and shareholders than would ordinarily result from the immediate liquidation of the company.

To this end, the Companies Act 71 of 2008 (Companies Act) provides that an application for business rescue will serve to suspend liquidation proceedings that are already pending before the court. Section 131(6), a provision that is not a model for clarity, provides that:

> *"If liquidation proceedings have already been commenced by or against a company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until:*
>
> *(a) the court has adjudicated upon the application; or*
>
> *(b) the business rescue proceedings end, if the court makes the order applied for".*

Following conflicting High Court judgments on the provision, it arose sharply in the recent matter of *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others* (1088/2020;1135/2020) [2022] ZASCA 66 (10 May 2022). The issues confronting the court



Cutting corners in a rescue attempt: A most expensive lesson

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were when a business rescue application is considered to have been *"made"* and whether the business rescue application in the case was indeed *"made"* within the meaning of section 131(6), triggering the suspension of existing liquidation proceedings.

WINDING UP BOSASA COMPANIES

The facts leading up to the case are eventful and for the most part in the public domain. In 2019, the directors of Bosasa – now known as African Global Holdings (Pty) Ltd (Holdings) – and the directors of African Global Operations (Pty) Ltd (Operations) resolved to place Operations and its 10 wholly-owned subsidiaries (Bosasa companies) under voluntary winding-up in terms of section 351 of the Companies Act 61 of 1973 (Companies Act of 1973). When the duly appointed joint provisional liquidators began to exercise their statutory powers, which included an extension of their powers in terms of section 386(5) of the Companies Act of 1973, Holdings applied for and obtained an order declaring the resolutions placing the companies under voluntary winding-up null and void, and the appointment of the liquidators null and void and of no force and effect. The liquidators were granted leave to appeal against the order.

In the interim, the liquidators maintained that in terms of section 18 of the Superior Courts Act 10 of 2013, the declaratory order was suspended pending the outcome of the appeal. After a back-and-forth skirmish between the liquidators, directors and Holdings regarding the extension of the liquidators' powers, on 28 October 2019, a consent order was granted in terms of the Companies Act of 1973 for the extension of the liquidators' powers, *inter alia*, authorising them to sell all of the assets belonging to the Bosasa companies, in consultation with and with the consent of the board of Holdings, Operations and the

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respective boards of the subsidiaries. Notwithstanding the consent order, Holdings and the directors objected to the sale of some of the assets by public auction. Despite this, the liquidators proceeded with the advertisement and sale of the assets.

Ultimately, the liquidators' appeal against the declaratory order was successful, and on 22 November 2019, the application was dismissed with costs with the result that the Bosasa companies remained in a creditor's voluntary winding-up.

PROPERLY SERVING A BUSINESS RESCUE APPLICATION

In an attempt to suspend the liquidation proceedings, including the impending public auction, Holdings issued an application for an order placing six of the 11 Bosasa companies under supervision and business rescue in terms of section 131(1) of the Companies Act on 3 December 2019. This date is important in the context of this case. Contrary to the peremptory provisions of the Companies Act, Holdings failed to serve the application properly resulting in a fatal flaw. As an example, only one of the liquidators was served and only 29 of the 50 employees received notification of the business rescue application.

During the period between 4 and 6 December 2019, the liquidators caused most of the assets of the six Bosasa companies to be sold by public auction. In response to this, Holdings launched a further application seeking an order against the liquidators interdicting them from selling any further assets owned by the six Bosasa companies, and delivering the movable assets, causing transfer and registration of ownership of the immovable assets into the names of anyone who purchased the assets before the final hearing of the business rescue application and/or before the second meeting of the creditors, without the written consent of Holdings, and declaring that the sale of assets before the final adjudication of the business rescue application and/or before the second meeting of the creditors, without the consent of Holdings, to be null and void.

The auction and business rescue applications were consolidated and argued before the High Court. The relief sought in the auction application was granted, however, the business rescue application was dismissed. The liquidators and the South African Revenue Service were granted leave to appeal the auction application to the Supreme Court of Appeal (SCA). Similarly, the applicants in the business rescue application were granted leave to appeal the business rescue application order to the SCA.

Cutting corners in a rescue attempt: A most expensive lesson

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SUPREME COURT OF APPEAL FINDING

The SCA noted that there were conflicting High Court judgments on when a business rescue application is *"made"* within the meaning of section 131(6) of the Companies Act. Some considered the *"making"* of a business rescue application to mean the issue, service and giving notice thereof in the prescribed manner, and others the mere lodging of the business rescue application with the registrar and the allocation of a case number.

The SCA utilised the well-entrenched tools of interpretation to hold that *"made"* within the context of section 131(6) means the business rescue application must be issued, served on the company and the Companies and Intellectual Property Commission (Commission), and all reasonable steps must have been taken by the applicant to identify affected persons and their addresses and to deliver the application to them, to meet the substantive requirements of section 131(6) in order to trigger the suspension of the liquidation proceedings.

The court stated that both the application in respect of the action and the business rescue application should have been served on each of the joint liquidators of each of the six Bosasa companies. Mere knowledge of the business rescue application was insufficient. There is also a statutory obligation on any applicant to cause a business rescue application to be served on the Commission. Additionally, each affected person, being a shareholder or creditor of the company, any registered trade union representing employees of the company, or each of the individual employees is entitled to oppose or support the application and should therefore have been notified in the prescribed manner.

In this case, the court held that there was no substantial compliance with the service and notification prescripts set out in the Companies Act. The business rescue application should have been served by the sheriff on each joint liquidator or each of the six Bosasa companies as provided for in the Uniform Rules of Court, but this was not done, as it was only served on one of the many joint liquidators via the sheriff, and on one other liquidator by hand, with delivery effected by a candidate attorney. Further, only 29 of 50 remaining employees of the Bosasa companies were notified by electronic means, and it was not stated what steps, if any, were taken to identify any affected persons and their addresses to ensure that there was substantive compliance in respect of delivery of the business rescue application.

Due to the failure by the applicants to properly serve the business rescue application on all the affected persons as required in terms of section 131(6)

Cutting corners in a rescue attempt: A most expensive lesson

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of the Companies Act, the suspension of the liquidation proceedings, including the public auction and any subsequent sales, was not triggered.

Lutchman finally provides the much-awaited clarification on the interpretation of section 131(6) of the Companies Act. More importantly, the debate about the meaning of the word *"made"* is now resolved. The SCA has made it abundantly clear that a business rescue commences when the application has not only been presented to and issued by the registrar i.e. a case number allocated, but that it must have been served on the company and the Commission and every affected person must have received notice of the application in the prescribed manner to meet the requirements of section 131(6) in order to trigger the suspension of liquidation proceedings that have already commenced.

THABILE FUHRMANN,
VINCENT MANKO AND
JESSICA VAN DEN BERG

Requirements for establishing reasonable prospects of rescue: Vague and speculative allegations are not enough

It is trite law that:

- to be *"rescued"* means either assisting a company to trade back to a state of solvency, where it is no longer financially distressed; or the ability to obtain a better return for stakeholders than would result if the company was liquidated (section 128(1) of the Companies Act 71 of 2008 (Act)); and
- in order to succeed with a business rescue court application, the applicant bears the responsibility of proving that there are reasonable prospects of the company being *"rescued"*.

Speaking to the issue of *"rescue"*, in the case of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] (4) SA 539 (SCA) the court found that:

- the *primary* goal of business rescue is to facilitate the continued existence of the company in a state of solvency; and
- the alternative, and *secondary*, goal is to facilitate a better return for stakeholders than would result from liquidation.

Recently, in *Kgoro Consortium (Pty) Ltd and Another v Cedar Park Properties 39 (Pty) Ltd* (in liquidation) *and Three Others* (case number 935/2020), the Supreme Court of Appeal (SCA) had to decide whether Kgoro Consortium (Pty) Ltd (Kgoro), as the applicant, had proved that Cedar Park Properties 39 (Pty) Ltd (in liquidation) (Cedar Park) had reasonable prospects of being rescued.

BACKGROUND

Kgoro was the holding company of Cedar Park, a special purpose vehicle established to purchase and develop a prosperous mixed build (residential and commercial) undertaking in Sandown, Johannesburg. The value of the property alone was alleged to be R1,494 billion.

Due to various reasons Cedar Park had been placed in provisional liquidation. Before it was placed in final liquidation, Kgoro sought Cedar Park's rescue through a court application.

To be successful with its application Kgoro therefore had to convince the court that there were reasonable prospects of rescuing Cedar Park.

The court a quo found that Kgoro had not established this, and dismissed its application. The matter then came before the SCA.

SCA'S FINDINGS

Applying Oakdene, as well as the finding in *Propspec Investments v Pacific Coasts Investments 97 Ltd* [2013] (1) SA 542, the SCA was at pains to point out that the courts should not be prescriptive about the way an applicant has to prove *reasonable prospects* of rescue. However, as also stated in Oakdene and Propspec, the SCA confirmed that there must be:

- a "*factual foundation for the existence of a reasonable prospect that the desired [rescue objective] can be achieved*"; and

Requirements for establishing reasonable prospects of rescue: Vague and speculative allegations are not enough

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- a sufficient measure of detail in the founding affidavit supporting the proposed plan to rescue the company.

The court reiterated that *"vague and speculative"* allegations would not suffice.

PROSPECTS OF TRADING OUT OF FINANCIAL DISTRESS

The SCA found that Kgoro had failed to establish that there were reasonable prospects of Cedar Park trading out of its financial distress to a state of solvency.

It found that Kgoro had *"paid no more than lip service"* in trying to illustrate in its founding papers that Cedar Park was capable of continuing to trade, let alone to trade its way out of financial distress.

PROSPECTS OF YIELDING A BETTER RETURN

The next step was to confirm whether Kgogo had proven that there were reasonable prospects of obtaining a better return for stakeholders than in a liquidation scenario.

To this end, Kgoro tried to show that the development owned by Cedar Park was valuable and capable of being sold for a higher price than in liquidation.

In its founding papers Kgoro presented:

- a sale agreement that had already lapsed due to the nonfulfillment of certain suspensive conditions; and
- only *"vague and tentative"* evidence that there was interest in the purchase of the development owned by Cedar Park.

The SCA said that the mere fact that the development could be sold did not in itself show that rescue would yield a better return for stakeholders than liquidation.

The SCA found that Kgoro had again made no proper attempt to demonstrate that a better return could be achieved through rescue as opposed to liquidation.

THE PLAN

The court said that all Kgoro had managed to do in its founding papers was show that there were prospects of drawing up a plan, but *not* that the plan would be reasonably capable of achieving either trading Cedar Park out of distress, or yielding a better return for creditors.

The court reiterated that the test is not whether a plan can be drawn up, but rather whether the plan was capable of achieving one of the two objectives of rescue – *"the development of a plan cannot be a goal in itself"*.

Requirements for establishing reasonable prospects of rescue: Vague and speculative allegations are not enough

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CONCLUSION

The SCA confirmed that the court a quo had correctly dismissed the business rescue application, and that Kgoro had failed to establish in its founding papers that there were reasonable prospects of rescuing Cedar Park.

When considering business rescue, many applicants first consider what type of plan can be drafted. This is practical and advisable, as it assists in stress testing whether a business rescue is viable. However, the ability to draw up a plan must not be the focus of the application seeking business rescue.

This case must therefore be viewed as a warning to all applicants seeking to apply for business rescue. Not only must there be sufficient grounds for alleging reasonable prospects of rescue, but these grounds must be carefully detailed in the papers supporting the business rescue application.

It is also important for directors to remember that placing companies in rescue through section 129 resolutions does not exempt the process from the *"reasonable prospects of rescue"* test. Section 130(1)(a)(ii) of the Act allows affected parties to challenge the adoption of a business rescue section 129 resolution on grounds that, there is no reasonable prospect of rescuing the company.

It is always a good idea to consult a business rescue expert before considering business rescue, even in instances where the adoption of section 129 resolutions is being contemplated.

BELINDA SCRIBA

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

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

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

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

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

Mongezi Mpahlwa
Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@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:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

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

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

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

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

Lerothodi Mohale
Senior Associate:
Dispute Resolution
T +27 (0)11 562 1175
E lerothodi.mohale@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

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

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

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

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

Jessica van den Berg
Associate Designate:
Dispute Resolution
T +27 (0)11 562 1617
E jessica.vandenberg@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.

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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

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA