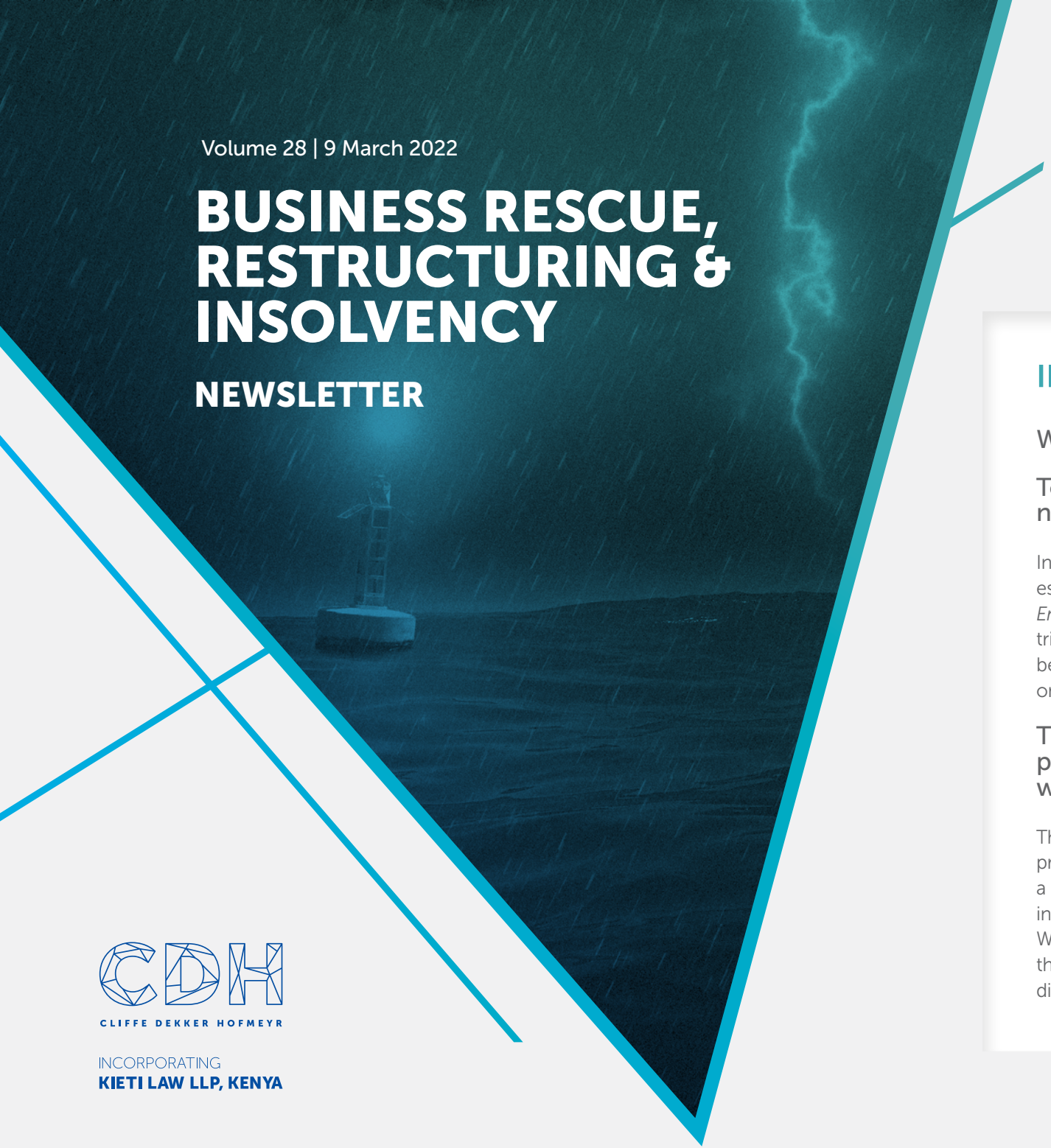

Volume 28 | 9 March 2022

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

DISPUTE RESOLUTION

IN THIS ISSUE

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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

2022 is in full swing, and like its predecessors, it intends to demonstrate that nothing remains beyond the realm of possibility. Almost exactly two years ago we were unknowingly on the precipice of global shutdowns because of the COVID-19 pandemic. Many refuted the very suggestion of the possibility of a global pandemic and resultant shutdowns, based on the assumption that pandemics were limited to the contents of our history books. However, what ensued seems to have shifted global consciousness into the realisation that we are not immune from being faced by the same global crises we once read about in our history books. Similarly, in March 2022, we are again witnessing an impending global crisis as Russia invades Ukraine in a manner akin to historical wars on the European continent; despite the various international bodies that have since been created to prevent such events from occurring in the contemporary world. So, while we were patiently waiting for the end of the pandemic to resume our lives in peace, this year reminds us that there will likely never be a limit on either the frequency or the magnitude of the challenges posed to us and our businesses. With this lesson in mind, we realise that all that can be done to ultimately overcome these challenges is to remain adaptable and proactive in the face of them – being the same philosophy underpinning the business rescue process.

In business rescue related news, Ster-Kinekor seems to still be going strong in its business rescue proceedings. After multiple delays, the cinema group's business rescue plan was finally published at the end of February and proposes a transaction in terms of which UK-based Blantyre Capital and Cape Town-based Greenpoint will acquire full ownership of the cinema group at a price of R250 million.
In further news, to overcome the lasting negative economic impact of COVID-19 on the airline industry, Global Airways - being one of the partners of the Takatso Consortium is set to acquire a majority stake in SAA – has brought a court application to place its subsidiary, Global Aerotech, under business rescue. Global Aerotech runs an airplane maintenance facility from OR Tambo International Airport. According to the court papers, the company has gone into financial distress because of the massive reduction in demand for airplane maintenance services during the last two years when the

pandemic practically halted most air travel. If no affected party opposes the application, then Global Aerotech will be placed under business rescue.

On the topic of the Takatso Consortium's impending acquisition of a majority stake in SAA, while the DPE has confirmed that the sale agreements have been signed, it seems that the transaction is still not without its challenges. Stakeholders have started to become impatient with the secrecy surrounding the transaction, as National Union of Metalworkers (NUMSA) and the South African Cabin Crew Association (SACCA) have reportedly commenced with arbitration proceedings against SAA to obtain proper disclosure regarding the transaction.

In this month's newsletter we consider whether the existence of a counterclaim during liquidation proceedings constitutes sufficient grounds to refuse a winding-up order, with reference to the SCA's findings in the case of *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd 2022* (1) SA 91 (SCA). We further consider what the court had to say about the role of directors during business rescue proceedings in the recent case of *Ronica Ragavan and Others v Optimum Coal Terminal (Pty) Ltd* (OCT).

Although the world around us continues to present us and our businesses with new and unforeseen challenges, the CDH Business Rescue, Restructuring and Insolvency Sector reiterates that we remain on standby to assist our clients and readers in navigating these trying times. While the history books may be repeating themselves, our services are here to assist in making sure that the conclusions for yourselves and your businesses are rewritten for a better outcome.

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

To wind up or not to wind up: The narrow discretion of the courts

In accordance with the so-called "*Badenhorst Rule*" established in the *Badenhorst v Northern Construction Enterprise (Pty) Ltd* [1956] (2) SA 346 (T) judgment, it is trite that winding up (liquidation) proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds. Where, however, the respondent's indebtedness has been established, the onus is on it to show that this indebtedness is in indeed disputed on *bona fide* and reasonable grounds.

In the recent case of *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2022] (1) SA 91 (SCA) the Supreme Court of Appeal (SCA) was called upon to determine whether the existence of a counterclaim constituted sufficient grounds to refuse an order for winding up.

In *Afgri* the appellant applied for a final order for the liquidation of the respondent, for failure by the respondent to discharge a debt owed to the appellant. The court *a quo* dismissed the application for the winding up of the respondent solely on the basis that it had a counterclaim against the appellant. Notably, the underlying debt giving rise to the application was not in dispute.

The SCA found that the existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order, was not in itself a reason for refusing to grant an order for the winding up of the respondent, but it could be a factor to be taken into account in the court exercising its discretion as to whether or not to grant the order.

Fundamentally, the discretion of the courts to refuse a winding up order, where it is common cause that the respondent has not paid a debt that has been established or admitted, is, notwithstanding the existence of a counterclaim, a narrow and not a broad one. The court's power to grant a winding up order is a discretionary power, irrespective of the ground upon which the order is sought and the discretion must be exercised on judicial grounds. Winding up proceedings ought not to be resorted to in order to enforce payment of a debt, where the existence of such debt is disputed by the company on reasonable grounds. The procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt.

To wind up or not to wind up: The narrow discretion of the courts

CONTINUED

As has been correctly held by our courts, where the indebtedness exists the onus is on the company to show that the existence of a debt is disputed on reasonable grounds. In upholding the appeal, the court in *Afgri* therefore concluded that mere recourse against an applicant in the face of a liquidation application will not, in itself, enable a respondent to successfully resist an application for its winding up. However, if it is considered to be an applicable factor in the court's narrow discretion as to whether to grant the order or not, then the counterclaim must be "*genuine*" and actively pursued by the respondent.

EUGENE BESTER,
NOMLAYO MABHENA
AND ALPHA ZUNGU

The role of directors in business rescue proceedings: To not get in their own way

The fundamental objective of a business rescue practitioner (BRP) is to assess whether (and how) a company could be rescued and, due to their independent nature, is well positioned to do so. What then is the role of the board of directors during the business rescue process and, moreover, what of directors who still want to be in control? As a point of departure, there is enough certainty in Chapter 6 of the Companies Act 71 of 2008 (Companies Act) to conclude that directors must give way to the BRPs.

In the matter between *Ronica Ragavan and Others v Optimum Coal Terminal (Pty) Ltd* (OCT) Case no. 53832/21, the Gauteng Local Division of the High Court (the court) were asked to resolve the tension that, in the view of the applicants, exists in business rescue proceedings. This tension stems from the BRP assuming full control of the company, while the board of directors is expected to continue performing its functions in terms of the Companies Act. The applicants, the directors of Tegata Exploration and Resources (Pty) Ltd (in business rescue) (Tegeta), brought an application for the declaration that the applicants, in their capacity as directors of Tegeta, should vote on behalf of Optimum Coal Terminal (Pty) Ltd (in business rescue), (OCT) at any section 151(1) meeting of creditors in respect of OCT and further that they may only exercise this vote upon receipt of a prior mandate adopted in terms of an adopted business rescue plan of Tegeta.

This decision came as part of a two-part series of proceedings between the parties, Part A being the granting of an interdict preventing the continuation of a section 151(1) meeting pending the outcome of this Part B decision. A section 151(1) meeting includes creditors convened by BRP's with the desirable outcome being the preliminary approval of the business rescue plan.

After the granting the Part A interdict, new facts were brought before the court by way of several supplementary affidavits, which had the potential of redirecting the entire application and were thus not dealt with by the court. At the time of Part A of the dispute, Tegeta held a claim in OCT in excess of R47 million, was the major creditor of OCT and consequently held the right to veto any business rescue plan.

The role of directors in business rescue proceedings: How to not get in their own way

CONTINUED

In determining the issues before it, the court considered the role of directors in terms of the Companies Act and referenced the decision of Judge Davis in *Kaimowitz v Delahunt 2017* (3) (WCC), where Davis confirmed that section 66 of the Companies Act provided the overall supervision and management powers lay with the directors however, a director was not, as of right, entitled to participate in the daily management functions of the company. Additionally, the court emphasised that the Companies Act provided for the limitation of these powers, where appropriate.

The court used an internal versus external categorisation, in support of the view of the authors in Henochsberg, to distinguish between the roles of the BRPs and the directors. The internal or governance aspects would relate to the day-to-day internal aspects of the company like calling board and shareholder meetings, whereas the 'external' or 'management' aspects related to the company's interactions with the outside world and its existence in general.

The court accepted that the management powers and functions of directors, i.e. the external aspects, are transferred to the BRP in business rescue proceedings in terms of section 140. The court also found that section 137(2) of the Companies Act, which requires directors to exercise their functions within the company subject to the authority of the BRP, clearly reinforced this transferal of power as the directors would only be able to exercise their management functions under express direction from the BRP.

It was found that section 151(1) meetings, including voting at such a meeting were external acts and were thus solely in the mandate of the BRP of the creditor company under business rescue.

In turning to the applicants' second request, a declaratory order confirming that any right to vote at a section 151(1) creditors meeting would only be permissible in light of a prior mandate in terms of an adopted business rescue plan of Tegeta, the court quickly dismissed the applicants' contention by finding that no such obligation exists in the Companies Act and that delaying the adoption of a business rescue plan for the resolution of these sorts of disputes would lead to long delays that frustrate business rescue proceedings.

This decision makes it clear that, where directors and BRPs understand their duties under the Companies Act, no tension exists between these responsibilities. Directors transfer their management powers and functions to BRPs while continuing their internal functions, subject to the authority of the BRPs practitioners. The golden rule to understand is that the directors, by virtue of their fiduciary duties, owes the BRP their full cooperation and these drawn-out disputes only serve to frustrate the business rescue process.

LUCINDE RHOODIE, KARA MEIRING AND HLONELWA LUTULI

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
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@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

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

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

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

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

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

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

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

Jessica Osmond
Associate
Dispute Resolution
T +27 (0)11 562 1067
E jessica.osmond@cdhlegal.com

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

Joshua Geldenhuys
Associate Designate
Dispute Resolution
T +27 (0)11 562 1710
E joshua.geldenhuys@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

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA