

# DISPUTE RESOLUTION ALERT

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# INSURANCE LAW: THE REAL HEAT OF VELDFIRES

*The National Veld and Forest Fire Act, No 101 of 1998 (Act) contains provisions that materially impact liability arising from veld fires.*

*Section 12(1) of the Act provides that “every owner on whose land a veldfire may start or burn or from whose land it may spread must prepare and maintain a firebreak on his or her side of the boundary between his or her land and any adjoining land”.*



South Africa has a rainfall climate of great variability. The SA Weather Service reports that between July 1960 and June 2004 there have been eight summer rainfall seasons where the total rainfall was 80% of the norm. A deficit of 25% is regarded as a severe meteorological drought. The average rainfall for 2015 was 400mm against an average of 600mm. The country is in the grip of a disastrous drought. The executive director of AgriSA predicted that the impact of this would only have run its course by 2019.

Veld fires are one of the hazards that accompany drought. The SA Weather Service reported that devastating veld fires occurred in South Africa during 1992, 1994 and 2002. Thousands of hectares of grassland were destroyed and 19 people died in those fires. In 2015 Santam reportedly paid out around R82 million to policy holders for losses caused by veld fires. The National Veld and Forest Fire Act, No 101 of 1998 (Act) contains provisions that materially impact liability arising from veld fires. These provisions and the application thereof, are important to short-term insurers who offer agricultural insurance cover. This will impact on liability where an insured farmer is being sued for damages and will also impact on the merits of a subrogated claim for damages against the owner of a farm from which a veld fire spread onto the land of the insured.

The Act defines a veld fire as a “veld, forest or mountain fire”. While this definition is rather vague, case law offers a clear definition. The definition was considered in *West Rand Estates v New Zealand Insurance Co Ltd* [1925] AD 245 and again more recently in *Gouda Boerdery BK v Transnet* [2004] 4 All SA 500 (SCA). The meaning of “veld” can be summarised as “uncultivated and undeveloped land with relatively open natural vegetation” and

“the uncultivated and unoccupied portion of land, as distinct from the portion which is cultivated, occupied or built upon”. The ground immediately around a farm house is therefore not “veld” even though veld grass may be growing upon it, meaning that if a fire started there, it would not be regarded as a veld fire, even if it subsequently spread to areas that are regarded as veld. For example, our courts have on occasion held that a fire that started on a golf course was not a veld fire.

Section 12(1) of the Act provides that “every owner on whose land a veldfire may start or burn or from whose land it may spread must prepare and maintain a firebreak on his or her side of the boundary between his or her land and any adjoining land”. The Act does not provide specifications for firebreaks but s13 creates an obligation to ensure that given the specific weather, climate, terrain and vegetation of the area, the width and length of the firebreak will have a reasonable chance of preventing a fire from spreading to or from adjoining land.

Chapter 2 of the Act makes provision for the formation of fire protection associations (FPAs). In this regard s3(1) reads “owners may form an association for the purpose of predicting, preventing, managing and extinguishing veldfires”.

# INSURANCE LAW: THE REAL HEAT OF VELDFIRES

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*The insurer of an insured who is not a member of an FPA runs a much higher risk of facing claims arising from veldfires.*



The use of the word "may" as opposed to "must" means that membership of an FPA is voluntary. While this is so, it is important to have regard to the provisions of s34.

This section reads as follows:

Presumption of negligence

(1) If a person who brings civil proceedings proves that he or she suffered loss from a veldfire which:

(a) the defendant caused; or

(b) started on or spread from land owned by the defendant,

the defendant is presumed to have been negligent in relation to the veldfire until the contrary is proved, unless the defendant is a member of a fire protection association in the area where the fire occurred.

(2) The presumption in subsection (1) does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful.

It is practice for a plaintiff in a damages claim that arose from a veldfire to sue in delict and to invoke the provisions of the Act, and particularly rely on the presumption of negligence where the defendant was not a member of an FPA. The insurer of an insured who is not a member of an FPA runs a much higher risk of facing claims arising from veldfires, hence the need (and practice) of insurers to impose warranties around this in the policy contract and exclusions of liability where the insured is not a member of an FPA. In a paradoxical way, the expression "it never rains but it pours" may hold true for the prevalence of claims arising from veldfires for as long as the drought reigns.

*Roy Barendse*



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# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

## IS COMMERCIAL AND/OR FACTUAL INSOLVENCY AN ABSOLUTE BAR TO BUSINESS RESCUE OR IS THERE STILL HOPE?

*The Court respectfully disagreed, stating that: "the definition of 'financially distressed' in s128(1) of the Companies Act, No 71 of 2008 creates a threshold. Current commercial or factual insolvency is not a prerequisite."*

*The Court therefore had regard to the argument raised by Tyre Corporation that the current insolvency of the Company was an absolute bar to the granting of the business rescue application.*



On 21 September 2016, the Western Cape High Court (Court) handed down judgement in the case of *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd and Others* (Rogers J) [2016] ZAWCHC 124 in terms of which the Court considered, among other questions, the following:

- whether GT Logistics (Pty) Ltd (Company) could be placed into business rescue despite it being commercially and/or factually insolvent; and
- if the answer to question 1 was in the affirmative, were reasonable grounds for the belief that the Company could be rescued established?

The salient facts of the matter are as follows:

- Tyre Corporation Cape Town (Pty) Ltd and its related companies (Tyre Corporation), as creditors of the Company, applied to Court to place the Company into liquidation;
- the managing director and sole shareholder of the Company, Mr Glen Esterhuizen (Esterhuizen), responded by instituting an application to place the Company into business rescue; and
- as a result, the Court suspended the liquidation proceedings and directed that both the liquidation application and the business rescue application be heard on the semi-urgent roll.

### **Is commercial or factual insolvency an absolute bar to business rescue proceedings?**

There was no dispute about the Company's insolvency as Esterhuizen, on his own version, acknowledged that the Company was commercially insolvent.

The Court therefore had regard to the argument raised by Tyre Corporation that the current insolvency of the Company was an absolute bar to the granting of the business rescue application. This argument was based on the obiter remark of Kgomo J in the case of *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd & Another* [2013] ZAGPPHC 109 (at para 8) that it was clear from the definition of 'financially distressed', that a company could not be placed in business rescue if it was already insolvent.

The Court respectfully disagreed, stating that:

"the definition of 'financially distressed' in s128(1) of the Companies Act, No 71 of 2008 creates a threshold. Current commercial or factual insolvency is not a prerequisite...[sic] It does not follow that, because a company is already commercially or factually insolvent, and thus obviously financially distressed, that it can no longer be the subject of business rescue."

The Court cited the case of *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2013 (4) SA 539 (SCA) where Brand AJ regarded current commercial insolvency as constituting "financial distress". The Court found no reason why factual insolvency should be treated differently.

# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

IS COMMERCIAL AND/OR FACTUAL INSOLVENCY AN ABSOLUTE BAR TO BUSINESS RESCUE OR IS THERE STILL HOPE?

CONTINUED

*In terms of s131(4)(a)(iii) Companies Act, a court may grant a business rescue application if it is just and equitable to do so for financial reasons.*



The Court concluded that, although the existence and extent of commercial and/or factual insolvency may have an important bearing on the prospect of rescuing a company, it cannot be a bar to a business rescue application. In any event, in terms of s131(4)(a)(iii) Companies Act, a court may grant a business rescue application if it is just and equitable to do so for financial reasons.

**Since the company was not barred from being placed into business rescue, have reasonable grounds for the rescuing of the company been established?**

In assessing whether Esterhuizen had established reasonable grounds for the belief that the Company may be rescued, the Court considered the various financial information provided in the business rescue application as well as the draft business rescue plan.

The Court stated that, in assessing the aforementioned, regard must be had to three key aspects:

- the argument that the non-critical creditors would receive no dividend in a liquidation scenario;
- however in the draft business rescue plan, the non-critical creditors would be compromised at 40 cents in the rand; and

- the projections of increased revenue and profits in the year ahead.

The most important of these aspects is the compromise of non-critical creditors as contained in the draft business rescue plan as well as the revenue and profit projections.

**Compromise of non-critical creditors**

In respect of the compromise of non-critical creditors, Esterhuizen averred that if the Company obtains financial relief by way of the proposed compromise, the Company will be able to meet its liabilities to critical creditors as they fall due and to fund its future operational expenses.

Tyre Corporation countered the compromise proposal by arguing that a business rescue plan cannot permissibly include a compromise with creditors. Such compromise may only be achieved by way of s155 of the Companies Act.

The Court disagreed, stating that s150(2) of the Companies Act requires that the proposals in a business rescue plan include the extent to which the company is to be released from the payment of its debts. This provision, read with s154, makes it clear that a business rescue plan may incorporate elements of a compromise with creditors. The business rescue mechanism would be sadly deficient if it were otherwise.



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# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

## IS COMMERCIAL AND/OR FACTUAL INSOLVENCY AN ABSOLUTE BAR TO BUSINESS RESCUE OR IS THERE STILL HOPE?

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*If no reasonable grounds have been established for rescuing the company and the business rescue application simply does not pass legal muster, the court will dismiss the application and place the company into liquidation where a liquidation application has already been instituted.*

In these circumstances, the Court found that the proposed compromise of the non-critical creditors (60 % reduction of the value of their claims and the remaining 40% to be paid in instalments without interest over 10 months) was unfair and the argument that these non-critical creditors would be receiving more during business rescue than in liquidation, would not suffice.

### Revenue and profit projections

Esterhuizen placed before the court certain financial projections upon which the business rescue plan depended. The Court found these projections to be "unreliable, contradictory, and not based on reasonable grounds". Furthermore, the plan prejudiced certain "non-critical creditors" at the expense of other "critical creditors". This prejudice would not withstand liquidation proceedings where both "critical" and "non-critical" creditors would rank as concurrent creditors.

The Court thus found that Esterhuizen "has not established reasonable grounds for a belief that the company will achieve the projected turnover and profits on which the rescue plan depends... Something more than a prima facie case or arguable possibility is needed."

### Conclusion

Accordingly, the position in the Western Cape jurisdiction seems to be clear – commercial and/or factual insolvency is not an absolute bar to business rescue proceedings. A company which is commercially and/or factually insolvent may still be rescued if reasonable grounds exist for the belief that such company can be rescued.

However, if no reasonable grounds have been established for rescuing the company and the business rescue application simply does not pass legal muster, the court will dismiss the application and place the company into liquidation where a liquidation application has already been instituted.

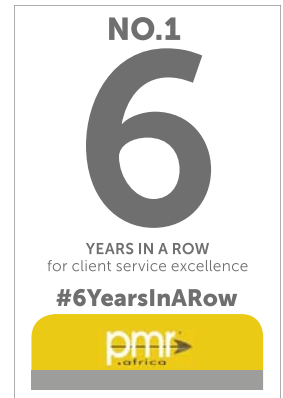
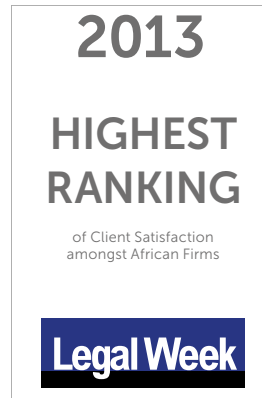
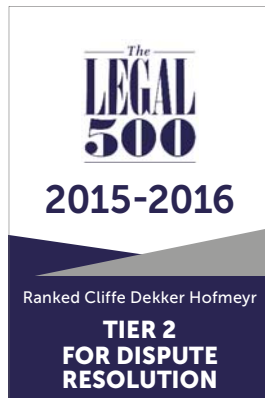
Furthermore, a compromise of creditors' claims may be included in a business rescue proposal. However, such compromise must not be manifestly unfair and disadvantageous as a court may not simply allow the business rescue application to proceed where it would be supported by a majority of creditors yet is unfair to the minority of creditors.

*Grant Ford, Julian Jones, Roxanne Wellcome and Andrew MacPherson*

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