DISPUTE RESOLUTION

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 15 | 11 December 2020

CDH
CLIFFE DEKKER HOFMEYR

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Business Rescue,
Restructuring &
Insolvency

As we finally welcomed December after what has been an extraordinary year, we've come to realise that this December doesn't quite have the same Michael Bublé Christmas cheer as it had in previous years. With a lot of people and businesses still recovering from the effects of the first wave of COVID-19 which hit South African shores in March, and others still heavily concerned and hesitant as we approach what is looking like a second wave of the COVID-19 virus, this Christmas and New Year may look a little different for South Africans and, in fact, for people around the world.

For many of the matric students throughout South Africa, December most definitely doesn't have the same gees of years past, with many of them them potentially having to rewrite exams having to rewrite exams as a result of a leak; while others attended Matric Rage, which caused another super spreader event.

Hopefully, South Africans elect to remain as responsible as possible during this silly season so as to avoid exacerbating the spread of the potential second wave. If not, we will have to hope and pray that the newly developed vaccine gets the go-ahead and reaches our shores soonest.

While we remain concerned about the virus and its devastating effects, hopefully this is a time for you and your loved ones to recoup and rejuvenate and enjoy a well-deserved rest after what has been a taxing year.

In this, our last Insolvency newsletter for the year, we discuss the SCA's latest judgment of *SA Airlink v SAA* wherein the court had to decide whether or not funds held by SAA and owed to Airlink, at the time SAA went into business rescue, were to be handed over to SA Airlink regardless of the business rescue proceedings.

We wish to thank our readers for keeping up with our newsletters to date, and would like to wish those readers celebrating, a blessed Christmas, and all of our clients and readers a wonderful festive season and happy New Year.

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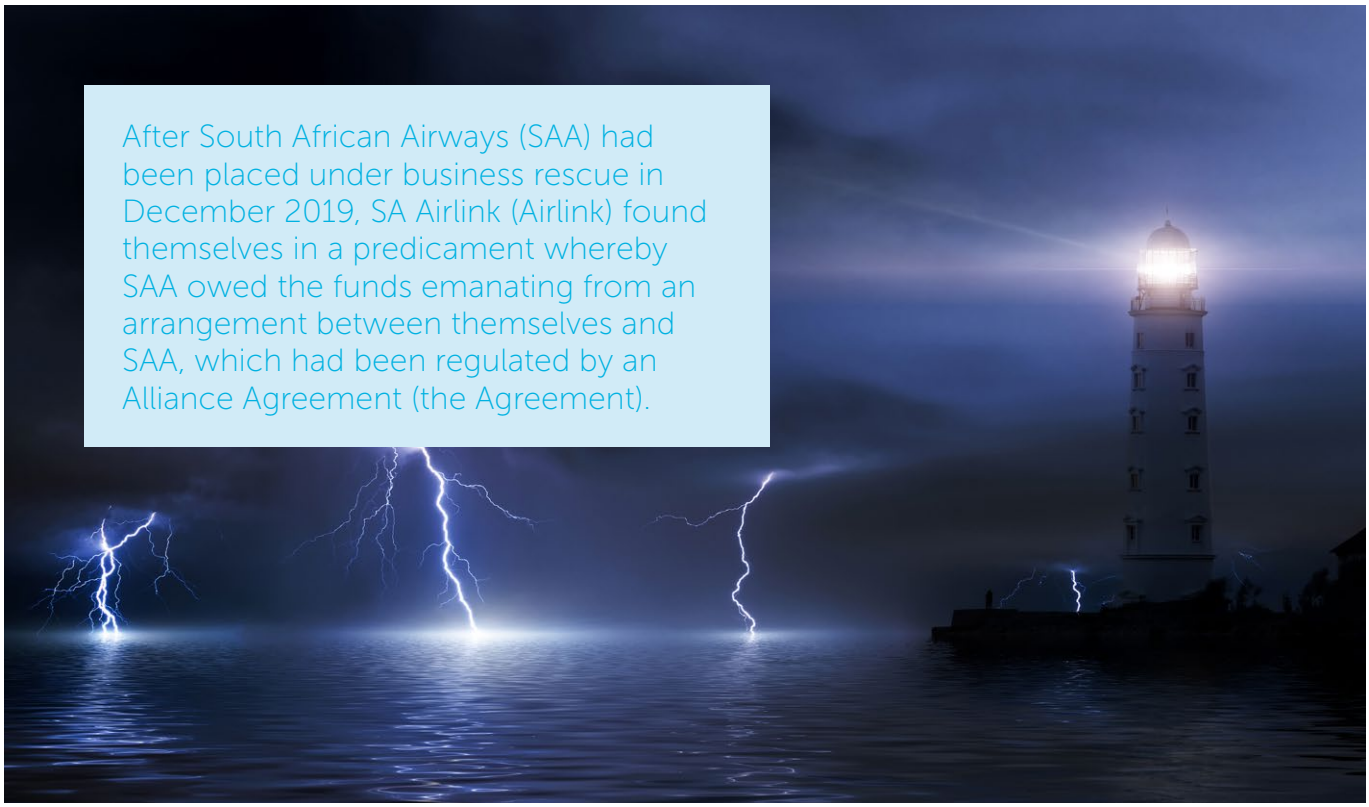
Whose money is it anyway? SA Airlink's attempt to recoup funds which were held by South African Airways prior to SAA being placed under business rescue.



After South African Airways (SAA) had been placed under business rescue in December 2019, SA Airlink (Airlink) found themselves in a predicament whereby SAA owed the funds emanating from an arrangement between themselves and SAA, which had been regulated by an Alliance Agreement (the Agreement).

The Agreement provided for an arrangement whereby Airlink passengers could book and pay for their air tickets through SAA-operated platforms. SAA would then pay over the Airlink revenue received for the tickets on the seventh business day of the month following the respective purchases. Another payment would then be made on the 15th working day of each month, which accounted for the balance between the revenue paid on the seventh day and other moneys which would have been processed for the given month of operation.

At the time of being placed under business rescue, SAA still held a sum of R430.000,838.80 due to Airlink.

Airlink demanded payment of the funds, however, SAA's business rescue practitioner, Mr Matuson, highlighted that the funds constituted pre-commencement debt and thus could not be paid to Airlink.

In an attempt to overrule the BRPs decision, in January 2020, Airlink approached the High Court on an urgent basis on the grounds that the relationship between SAA and Airlink was that of an agency relationship as SAA had an obligation to pay the funds received from the ticket sales to Airlink after the deduction of commission, royalties and service charges and thus SAA were merely acting as its agent in receiving the funds. Airlink submitted that as a result of the agency relationship, that the funds never belonged to SAA and SAA had merely acted as a holding agent in terms of the Agreement.

Unfortunately for Airlink, the High Court dismissed Airlink's application and found that no agency relationship existed between SAA and Airlink as Clause 12.2 of the Commercial Agreement signed by the parties specifically excluded the possibility of an agency relationship between the parties (except where it was specifically provided for), and thus found that the relationship consisted rather of a debtor creditor relationship. Secondly, the Court found that Airlink had failed to show proper cause for the lifting of the moratorium imposed under the Companies Act 71 of 2008 (the Act) on legal proceedings being brought against a company in rescue.

Whose money is it anyway? SA Airlink's attempt to recoup funds which were held by South African Airways prior to SAA being placed under business rescue....*continued*

Airlink took the decision on appeal to the SCA grounded on the three main issues as previously raised by it. These were:

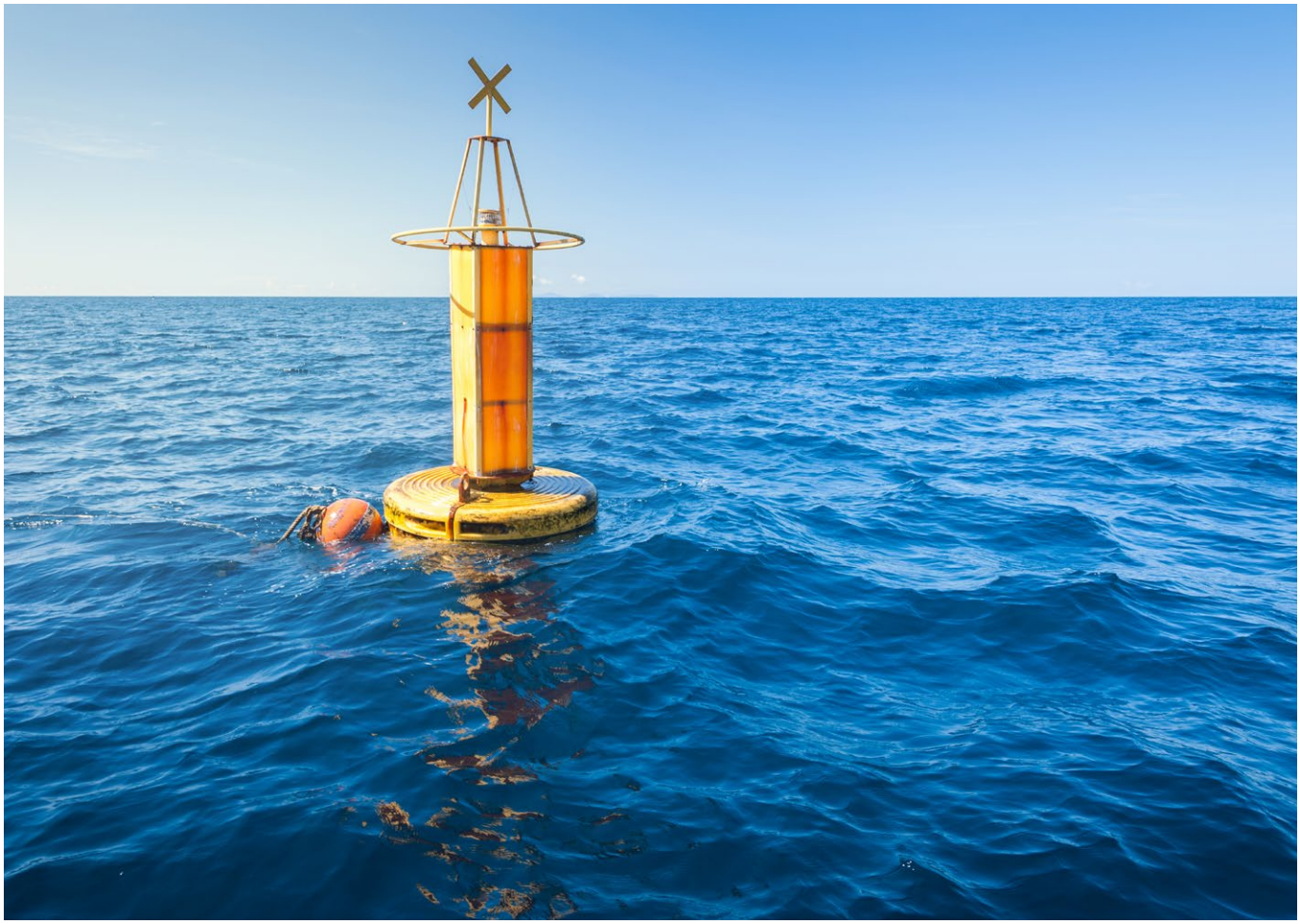
1. The relationship between themselves and SAA constituted that of an agency relationship and thus the moneys belonged to Airlink;
2. Even in the case that the court found that there was no agency relationship, and the debt was in fact owed by SAA, the debt arose only after the commencement of the business rescue proceedings and thus could not be compromised in terms of section 154(2) of the Act; and
3. SAA abiding to the Alliance Agreement precluded it from raising the section 133 moratorium as a defence to a claim of performance of its contractual obligations.

Unfortunately for Airlink, they were met with the same fate in the SCA.

The SCA once again had to determine whether certain monies paid to SAA prior to it being placed in business rescue, should be released to the Appellant, Airlink. The SCA dismissed the appeal on the grounds that Airlink had indeed not given proper cause to justify the lifting of the moratorium in terms of section 133 of the Act. Particularly, that Airlink had not obtained consent from the BRP to institute such proceedings, nor leave of the court to do so. The SCA stated that the application fell to be dismissed on this ground alone but continued to weigh in on the other issues raised by Airlink.

The SCA confirmed the findings of the High Court insofar as the agency relationship submission was concerned, and found that the two companies were, rather, in a mutually supportive relationship as the monies were never held in trust or a separate bank account by SAA on behalf of Airlink, but rather formed part of SAA's total revenue stream.

Whose money is it anyway? SA Airlink's attempt to recoup funds which were held by South African Airways prior to SAA being placed under business rescue....*continued*



The court further had to consider Airlink's alternative argument, which was that the funds amounted to post-commencement debt. The court dismissed this argument on the grounds that on receipt of the funds by SAA, a liability immediately arose for it to account to Airlink and the fact that the agreed accounting day for payment of the funds fell on a day which was subsequent to that of the commencement of the business rescue proceedings did not have an effect on the date on which the liability arose. The fact that the statement was generated only on 6 December 2019 – a day after the commencement of business rescue proceedings – did not cause for the funds to be considered as post-commencement debt, and thus this argument by Airlink was misconceived and ultimately dismissed.

Lastly, the court commented on Airlink's contention that SAA was bound by its election to abide by the Alliance Agreement and was thus precluded from seeking relief in terms of section 133(1) of the Act. The court found no merit in this contention as on Airlink's own version, SAA was in fact in breach of the Agreement by refusing to pay the moneys in question, it could not then be said that SAA elected to abide by the Agreement. Airlink would only be afforded this option as the innocent party.

For the reasons set out above, the SCA found that Airlink's appeal would fail. The appeal was dismissed with costs.

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BBBEE STATUS: LEVEL TWO 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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