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DISPUTE RESOLUTION ALERT

IN THIS ISSUE

And that's the tea... An analysis of financial distress and reasonable prospect in business rescue proceedings

During July 2020, the High Court in Kimberley was faced with the task of determining the fate of a 100% state owned rooibos tea producer and distributor, Nieuwoudtville Rooibos (the First Respondent). Clouds Kraal Boerdery CC (the Applicant), a commercial agricultural farming operator in the production of rooibos tea, and now creditor of Nieuwoudtville, brought an application before the abovementioned court, for an order placing the First Respondent under supervision and commencing with business rescue proceedings.

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The First Respondent was established with the assistance of the Northern Cape Department of Agriculture, Land Reform and Rural Development to stimulate the economy of the Hantam area to create jobs and business opportunities for previously disadvantaged individuals and to support small and upcoming farmers.

The First Respondent's primary business was to acquire raw rooibos tea from local farmers, and then prepare, sort and package the tea before it is marketed as a wholesaler to various local and international outlets.

By virtue of its function, the First Respondent concluded production agreements with various farmers in terms whereof the farmers would commit to supply fixed quantities of their rooibos tea harvest at a predetermined price per kg. This allowed for a secure and steady source of rooibos tea for the First Respondent's operations.

The Applicant was one of the 84 farmers that had concluded a production agreement with the First Respondent, and unfortunately the First Respondent had fallen behind on its repayments, until such time that there was an outstanding amount of R1,972,482.58. Despite the Applicant having received payments after a letter of demand was sent to the First Respondent, the debt still remained largely outstanding, thus the Applicant was forced to bring this application on the grounds that it believed that the First Respondent was financially distressed.

The Applicant alleged that the First Respondent was financially distressed as it was unable to settle its debts as they became due and payable; while the First Respondent adamantly refuted this allegation and alleged that it had sufficient stock on hand to settle its outstanding debt owed to the Applicant but that it had been reluctant to flood the market with its stock, as this could run the risk of a further drop in prices after an already difficult last couple of months due to COVID-19. Although not pleaded, the First Respondent further alluded to the defence of supervening impossibility in the circumstances – an allusion that the court did not take kindly to.

The court thus had to consider whether the Applicant had made a sufficient case in terms of section 131(4) of the Companies Act of 2008 (the Act) and in fact proven that the First Respondent was financially distressed. The court further had to

And that's the tea... An analysis of financial distress and reasonable prospect in business rescue proceedings...continued

The court found that it was satisfied that the Applicant had made a sound case to allege that the First Respondent was in fact financially distressed and that it would be just and equitable for it to be placed under business rescue for financial reasons, with a reasonable prospect of success for rescuing the First Respondent.

consider that if there were in fact grounds to justify placing the First Respondent in Business Rescue, was there then a reasonable prospect of success.

In coming to its findings, the court considered various case law, one of which was *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 (LTD)* wherein the court held that a prospect of success is in fact seen as an expectation. And while an expectation may come true or may not, there is still a possibility. A possibility was then said to only be reasonable if it rested on a ground that was objectively reasonable.

Considering the facts before it, the court was of the view that due to the fact that the debt of the First Respondent had been outstanding since 2019 and that, on the First Respondents own version, it was currently unable to settle same, the court stated that this was a strong indication that the First Respondent was in financial distress. Further, the fact that the First Respondent had alluded to the defence of supervening impossibility further solidified the Applicants case made out to allege that the First Respondent was in fact financially distressed.

In a further attempt to rebut the Applicant's allegations, the First Respondent submitted that it did not need the assistance of a business rescue practitioner or a business rescue plan as it had already set out a plan which it submitted to be viable and sustainable, to meet short-term and long-term obligations. The court did not entertain this submission and stated

that the First Respondent could not blow hot and cold alleging on the one hand that the Board of Directors of the First Respondent will be able to save the First Respondent in terms of its existing plan, while on the other hand, alleging that the business rescue proceedings will not have a reasonable prospect of succeeding in saving the First Respondent.

The court went on to quote the court in *Ziegler South Africa (Pty) Ltd v South African Express Airways SOC Ltd and Others 2020 (4) SA 626 (GJ)* wherein the court held:

"Section 131(4) of the Act affords a Court a discretion in a loose sense, and requires of the Court no more than a value judgment. As to whether there is a reasonable prospect of rescuing a company, it cannot be said that it involves a range of choices which a Court can legitimately make. The answer to the question can only be 'Yes' or 'No.'"

By virtue of the above, as well as the fact that the debt owed was not in fact disputed and had been due since 2019, while further the First Respondent was reluctant to disclose its full financial position, the court found that it was satisfied that the Applicant had made a sound case to allege that the First Respondent was in fact financially distressed and that it would be just and equitable for it to be placed under business rescue for financial reasons, with a reasonable prospect of success for rescuing the First Respondent.

Kgosi Nkaiseng and Jessica Osmond

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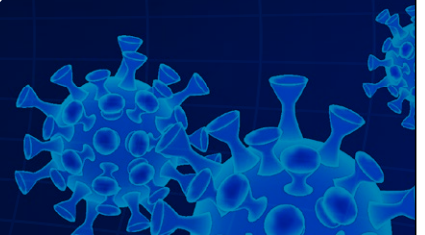
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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