8 APRIL 2020

DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

Is it time for a re-boot of the South African discovery process?

There is much to be learnt from the United States of America when it comes to the discovery process. Not only does the US Federal Court system make use of the deposition process, but they have adopted e-Discovery in their Federal Rules of Civil Procedure which has revolutionised the assessment and processing of mass amounts of data for evidentiary purposes at trial.

No business rescue option for financially distressed foreign and external companies

The High Court clarifies that the business rescue provisions in the Companies Act, 2008 do not apply to foreign and external companies operating in South Africa, even for those companies for which there appears to be a reasonable prospect of rescuing the company.

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Is it time for a re-boot of the South African discovery process?

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The deposition process

Depositions are witness out-of-court testimony that are reduced to writing for later use in court or for discovery purposes. The deponent gives sworn oral answers to questions by counsel. Parties, non-parties and even trial witnesses may be deposed. Depositions enable a party to know in advance what a witness will say at the trial. This gives each party an opportunity to prepare thoroughly for their case and promotes transparency in the truth-seeking process.

Depositions present litigants with the opportunity to see all of the strengths and weaknesses of their case and the strongest weapon is that it is all recorded in writing. The written testimony may later be used in trial to impeach a witness in the event that they offer an inconsistent statement with their prior testimony.

Whilst Rule 37 pre-trial conferences attempt to narrow the issues before the court by parties requesting admissions and agreements on common cause facts and settlement discussions are had, a lawyer's hand is never truly shown when it comes to oral evidence. Although relevant documentary evidence must be handed over during the discovery process, the devil is in the detail – which is often in witness testimony.

One of the reasons why the implementation of depositions would be ground-breaking in South Africa, is that depositions encourage settlement, which in turn would greatly decongest the court roll. South African court rolls are back-logged and judges are inundated with an excessive amount of cases to adjudicate. Not only are litigants' rights to the speedy resolution of their disputes greatly prejudiced, but it often occurs that a judge does not have enough time in the day to consider the papers in the court file, prior to the hearing. This leads to the inevitable result that issues may be overlooked or misunderstood in the court process. If parties decide to settle after all of their cards have been placed on the table in the deposition process, it could save not only time for litigants, but thousands of rands in legal costs.

Is it time for a re-boot of the South African discovery process?

...continued

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E-Discovery

Currently in South Africa, Rule 35 governs the discovery process. This Rule provides that any party to any action may require any other party to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action which are or have at any time been in the possession or control of such other party. Erasmus provides that the word "*document*" is not defined in the Rules which means it must bear its ordinary meaning, namely 'a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record'. Erasmus states that when compared with foreign developments, it is clear that the current wording of this subrule does not adequately provide for discovery of information created, stored and retrieved primarily in electronic form, and it should be appropriately amended.

In the United States, the Federal Rules of Civil Procedure (FRCP) have incorporated the concept of e-Discovery. Electronic discovery, commonly referred to as "*e-discovery,*" is "*the process of identifying, collecting, filtering, searching, de-duplicating, reviewing and potentially producing Electronically Stored Information that relates to pending or reasonably anticipated litigation*".

The FRCP provide that a party must produce "*any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations – stored in any medium from which information can be obtained either directly, or if necessary, after translation by the responding party into a reasonably usable form.*" It is accordingly evident that the FRCP are far broader than our South African equivalent.

The benefits of amending our current Rules is that it blows the doors wide open on the extent of evidence that can be retrieved for purposes of trial and it promotes transparency. The particular benefits of electronically stored information are mobility, portability and searchability, volume and ease of replication, together with the existence of hidden metadata. Access to electronically stored information in a data system that can be discovered will allow attorneys to thoroughly prepare for trial with all relevant evidence at hand.

The digitised world is ever-evolving and the South African court systems need to keep up with international best practice. Whilst it is certainly commendable that the courts have recently implemented CaseLines on the journey to a paperless system, there is still much room for development.

Pieter Conradie and Ashleigh Gordon

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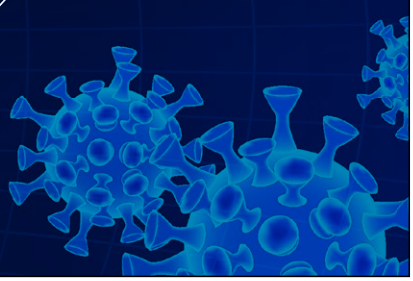
No business rescue option for financially distressed foreign and external companies

The basis for that decision was that CMC had been awarded multiple large construction contracts and was involved in substantial projects in Italy and South Africa. Based on this, there appeared to be a reasonable prospect of rescuing the company.

The Companies Act 71 of 2008 (as amended) (Companies Act) introduced an option, other than liquidation, for companies that are financially distressed. This option is 'business rescue' and it provides for the temporary supervision of a financially distressed company's affairs by a business rescue practitioner, and gives the company breathing space by allowing a temporary moratorium (suspension) on claims against the company. During business rescue the company is given an opportunity to restructure its affairs (including liabilities) with the hope that it can turn its business around and operate from a solvent position.

Liquidation, on the other hand, has always had the objective of simply dissolving the company, disposing of its assets and paying the proceeds to creditors. The decision to rescue versus let the company be liquidated has largely been left to companies who made that decision based on an assessment whether there is a reasonable prospect for the company to turn things around. However, a recent High Court judgment has taken this decision out of the hands of external companies as far as South African law is concerned, ruling that the business rescue option does not apply to such companies.

In the case of *Cooperative Muratori & Cementisti-CMC Di Ravenna Societi Cooperative A Responsabilita Limitada v Companies and Intellectual Properties Commission* 2019 JDR 2263 (GP), the first applicant was CMC, a company duly incorporated in terms of the laws of the Italian Republic, and registered in South Africa as an external company. The board of CMC adopted a resolution to place the company under business rescue. The basis for that decision was that CMC had been awarded multiple large construction contracts and was involved in substantial projects in Italy and South Africa. Based on this, there appeared to



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No business rescue option for financially distressed foreign and external companies*...continued*

The court has put an end to any uncertainty as to which companies operating in South Africa enjoy the protections afforded by the business rescue regime.

be a reasonable prospect of rescuing the company. The Companies and Intellectual Properties Commission of South Africa however declined to confer the 'under business rescue' status on CMC for the reason that it was an external company subject to the laws of the jurisdiction within which it was incorporated (Italy) and not the South African Companies Act (save for minimum compliance requirements applicable).

CMC therefore approached the court to ask for a declaration that CMC was validly under business rescue as contemplated under section 129 of the Companies Act.

In making the determination, the court considered the wording of the relevant sections of the Companies Act, including and especially the definition of *"company"* and *"juristic person"* in terms of sections 1 and 129.

Section 1 of the Companies Act, in the relevant parts defines *"company"* as a juristic person incorporated in terms of the Companies Act, a domesticated company, or a juristic person that, immediately before the effective date was registered in terms of the previous Companies Act, 1973, *other than as an external company as defined in that Act*. The court noted the specific exclusion of external companies and found that there was nothing in the definition of *"company"* that specifically includes an external company.

Section 129 of the Companies Act deals with business rescue. This section provides that the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that the company is financially distressed, and there appears to be a reasonable prospect of rescuing the company. Again, the court noted that nothing in this section expressly includes external companies.

Reading the sections together, the court found that since external companies are specifically excluded in the definition of *"company"*, a foreign or external company (even if such company has operations in South Africa) would not be able to avail itself of the business rescue provisions contained in the Companies Act.

With that decision, the court has put an end to any uncertainty as to which companies operating in South Africa enjoy the protections afforded by the business rescue regime. International companies and their advisors should therefore consider this carefully when deciding how to structure their businesses when operating within South Africa. On the one hand, external and foreign companies are less regulated under the Companies Act and can operate with less red tape from a South African point of view but, on the other hand, they miss out on various benefits of falling under the South African companies legislation which can, in some circumstances, provide assistance in times of financial difficulty.

Siviwe Mcetywa and Tim Baker

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