DISPUTE RESOLUTION

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 19 | 21 May 2021

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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Sector Head
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Business Rescue, Restructuring & Insolvency

A lot has happened in the world of business rescue, restructuring and insolvency law since we last checked in a mere month ago. From new colleagues, to oncoming third waves and further developments in both the SAA and Steinhoff sagas, we have a lot to cover.

Starting on home ground, we would like to welcome our new colleague and Senior Associate, Lerothodi Mohale, to the CDH Business Rescue, Restructuring and Insolvency Sector Team. Lerothodi joins us from Fasken and brings with him extensive knowledge and experience in the areas of business rescue, corporate restructuring, insolvency and general commercial litigation.

As of 30 April 2021, SAA was finally taken out of business rescue when its business rescue practitioners filed a notice of substantial implementation of the business rescue plan with the CIPC. The national carrier has now officially been placed back in the hands of its management, with interim CEO Thomas Kgokolo at the helm. As SAA was our first state-owned enterprise to be placed under business rescue, we have learnt many lessons from the approximately year and a half long process. From highlighting the deep interrelation between labour law and business rescue law, to revealing the challenges in obtaining Government funding, the SAA business rescue process has provided an informative blueprint for the future rescuing of state-owned enterprises under Chapter 6 of the Companies Act 71 of 2008 (Act). So, while the process was certainly not without any faults, it was these faults which helped our courts iron out some of the ambiguities and uncertainties contained in the business rescue legal framework.

Interestingly, it appears that although the business rescue process has been terminated, all is far from being said and done as parts of SAA's business rescue plan still require implementation by the Receivership which has been set up under its terms. The deadlock with the SAA Pilots Association also continues to be an obstacle in the way of the airline taking to the skies again. The longer it takes for SAA to return to the skies, the more scope competitors are given to eat into their share of the market. So in addition to providing lessons during the business rescue process, SAA also serves as sobering reminder that complacency is not an option as the commercial problems which faced a company prior to entering into business rescues will likely be waiting again at the finish line. The only difference being that the company will (hopefully) be more capable of resolving these problems.

Another saga worth paying attention to is that of Steinhoff, as the former owners of Tekkie Town, which was acquired by Steinhoff in 2016, launched an application in the Western Cape High Court to liquidate the company.

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The Legal 500 EMEA
TIER 1
DISPUTE RESOLUTION
2017-2021

DealMakers 2020
2020 1st by M&A Deal Flow.
2020 1st by BEE Deal Flow.
2020 1st by BEE Deal Value.
2020 2nd by General Corporate Finance Deal Flow.
2020 2nd by General Corporate Finance Deal Value.
2020 3rd by M&A Deal Value.
2020 Catalyst Private Equity Deal of the Year.

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The application comes while Steinhoff is trying to persuade former business partners and shareholders to accept a proposed approximately R14 billion global settlement. The application questions the bona fides of the proposed settlement, on the basis that it favours some of the company's creditors over others. It seems as the applicants are feeling as though Steinhoff are trying to walk over them with the same 'tekkies' which it bought from them.

In this month's newsletter we explore the appealability of a court order placing a company under business rescue, as well as what the effect of an appeal against such an order has on its operation. So for those of you who are disgruntled by a court order placing a company for which you are a creditor of under business rescue, or who are opposing an appeal against such an order, this month's newsletter is a must read.

After having hung up our costumes and pulled out the extra blankets for winter, we are again face-to-face with the pandemic as many provinces begin to experience a resurgence in the number of positive COVID-19 cases. At least this time we have taken a few strides forward, with Government having declared the commencement of the next stage of the vaccination roll-out. With the plan for the vaccination roll-out in full swing, we continue to encourage businesses to be similarly proactive by developing and implementing plans to ensure that they can either continue in or return to a state of profitability. The imminent third wave reminds us that the uphill battle to maintain our physical as well as socio-economic well-being is far from over; and, just like SAA's board, now is not the time for complacency.

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Defending the defenceless on appeal: preventing the suspension of an order placing a company under business rescue

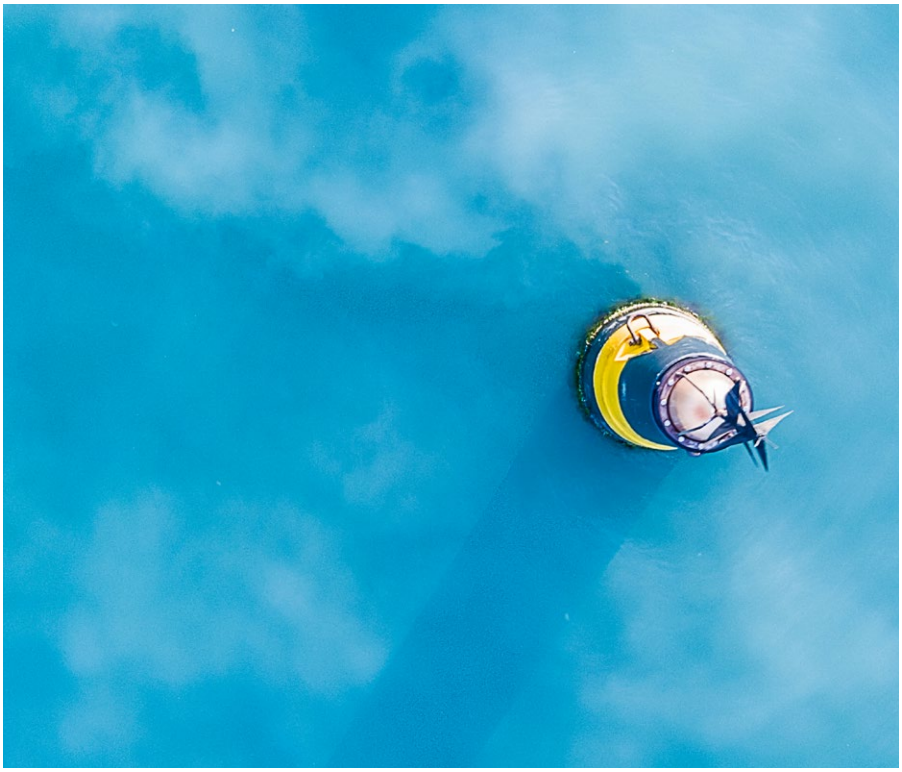
It is not uncommon for companies that have been placed under business rescue by way of an order of court (business rescue order) to have discontented creditors, who are of the opinion that the company should rather have been liquidated. Depending on their level of discontent, such creditors have the option to bring an urgent application to liquidate the company. However, it will be difficult for the creditors to establish a case of urgency where there is a reasonable prospect that the company can be rescued. In such a case where there is a reasonable prospect of rescue, a court will likely give the business rescue practitioner an opportunity to rescue the company. Disgruntled creditors then have two further options should they adamantly insist on liquidation of the company, they can either vote against the business rescue plan, or bring an application to appeal the business rescue order. In the latter instance, the question becomes: what is the legal effect of the application for leave to appeal on the operation of the business rescue order?

Defending the defenceless on appeal: preventing the suspension of an order placing a company under business rescue...*continued*

The default position is that the operation of the business rescue order will be suspended in terms of section 18(1) of the Superior Courts Act 10 of 2013 (Superior Courts Act). However, in the case of *Al Mayya International Limited (Bvi) (Formerly Al Mayya South Africa Ltd (Bvi) v Valley of the Kings Thaba Motswere Proprietery Limited* (carrying on business at Thaba Mtsweri, Thabazimbi) and others (Al Mayya), the Eastern Cape High Court (Court) essentially found that the suspension of the business rescue order would undermine the very purpose of business rescue and mechanisms as provided for in Chapter 6 of the Companies Act 71 of 2008 (Companies Act).

An appeal against a business rescue order by a discontented creditor is a relatively rare, although not unheard of, situation. Inasmuch as this situation may not be peculiar to the *Al Mayya* case, in this article we consider the circumstances which the Court in *Al Mayya* found convincing enough to justify deviating from suspending the business rescue order.

Briefly, the facts in *Al Mayya* were that the Court had ordered that the Applicant (the company) be placed under business rescue in August 2016 (the business rescue order). The First and Second Respondents (Respondents) subsequently brought an application requesting leave to appeal the Court's business rescue order. In terms of section 18 of the Superior Courts Act, the Respondents' application would ordinarily automatically result in the operation of the business rescue order being suspended. The company would not be under business rescue in law, and would therefore not have the protections afforded to companies under rescue in terms of the Companies Act available to it. To avoid these consequences, the company brought an urgent application to court under section 18 (3) of the Superior Courts Act, where it essentially requested that the Court find that the business rescue order not be suspended pending the decision of the Respondents' application for leave to appeal.



Subsections 18(1) and 18(3) of the Superior Courts Act are the applicable provisions, and provide as follows –

> *"(1) [...] unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
>
> *[...]*
>
> *(3) A court may only order otherwise as contemplated in subsection (1) [...], if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."*

In accordance with the above provisions, to succeed in its application for the non-suspension of the business rescue order pending the appeal, the company had to establish that:

1. there were exceptional circumstances present;
2. there was a likelihood that the company would suffer irreparable harm if the application is not granted; and
3. there was no likelihood that the Respondents will suffer irreparable harm if the application is granted.

In determining whether exceptional circumstances were present, the court considered the objectives of the Companies Act and the legal consequences of business rescue proceedings. The court stated that one of the objectives of the Companies Act is, *"to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and*

Defending the defenceless on appeal: preventing the suspension of an order placing a company under business rescue*...continued*

interests of all relevant stakeholders" (Section 7(k) of the Companies Act). To achieve this objective, the Companies Act provides a company under rescue with wider-ranging protections, including a moratorium on the legal proceedings being brought against the company without the consent of the business rescue practitioner or the leave of a court.

After considering the fact that the stakeholders' interests would not be benefitted in a situation where a party can nullify the aforementioned protections by merely filing an application for leave to appeal, the court found that exceptional circumstances existed. Notably, in coming to this finding, the court considered its findings in the main application (being the initial application to place the company under rescue) to the effect that placing the company under rescue would likely result in it being able to pay its creditors in full, whilst continuing to trade profitably.

The court was further satisfied that the company would suffer irreparable harm if the application was not granted, as, in the absence of the moratorium on legal proceedings, it would be defenceless against an application for its liquidation. Lastly, the court also found that it was satisfied that there was no likelihood of the Respondents suffering irreparable harm as a result of the granting of the application, as it was common cause that there was a reasonable prospect of the company being rescued.

The court therefore concluded that the applicant had sufficiently met the case for the granting of the application, and ordered that the business rescue order was not suspended pending the appeal process.

Although the case of *Al Mayya* serves as convincing precedent for the granting of an application in terms of section 18(3) of the Superior Courts Act in respect of a

Defending the defenceless on appeal: preventing the suspension of an order placing a company under business rescue*...continued*

business rescue order, it must be noted that it does not establish a new default position in relation to the suspension of business rescue orders which are subject to appeal. The default position remains that a business rescue order is automatically suspended once it has been subjected to an appeal, and an applicant seeking its non-suspension will still have to establish their case with reference to the aforementioned three requirements under section 18 of the Superior Courts Act.

It is quite conceivable that a court may not find the three requirements under section 18 of the Superior Courts Act have been met. For example, in spite of the court a quo's findings, the facts of the matter may indicate to the court hearing the application under section 18(3) that there is actually a low likelihood of a company being successfully rescued, and the delaying of its inevitable liquidation would only reduce the amounts available for the payment to its creditors. In these circumstances, a court may well conclude differently to that in *Al Mayya* by finding that the Respondents will suffer irreparable harm should the application under section 18 (3) of the Superior Courts Act be granted.

The case of *Al Mayya* has shown that while the bar for deviating from the default position under section 18 (1) of the Superior Courts Act remains high, it is not unreachable for parties seeking the non-suspension of a busines rescue orders which are subject to appeal. However, whether a court will grant such a deviation in terms of section 18(3) of the Superior Courts Act remains dependent on the particular facts and circumstances of a case.

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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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