DISPUTE RESOLUTION

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 21 | 14 July 2021

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

Tobie Jordaan
Sector Head
Director

Business Rescue,
Restructuring &
Insolvency

With the third wave of COVID-19 infections fully underway, adjusted level 4 lockdown having been extended, political unrest sweeping our country, and former President Jacob Zuma still behind bars and awaiting the Constitutional Court's outcome on his application for the recission of the judgment that put him there in the first place, we lament that our country is currently undergoing the perfect storm. However, notwithstanding the unprecedented levels of uncertainty, destruction and sorrow which we are currently faced with, the CDH Business Rescue, Restructuring and Insolvency Sector stands firm in our belief in our country's collective ability to continue to reconstruct a better and more prosperous future through the rule of law.

That being said, we express our deepest sympathies towards the business owners in Gauteng and KwaZulu-Natal for whom rescuing their businesses has taken on an entirely different meaning. We urge and encourage these business owners to rise above the circumstances by continuing to apply the rule of law in their endeavours to rescue their and their employees' livelihoods. While in the short term this may require reliance on the South African Police Service and National Defence Force, in the long term it may require consideration of the legal mechanisms available to them to rescue their companies. Just as we have continuously urged businesses to take proactive steps towards rescuing their companies as a result of the challenges faced by COVID-19, we similarly urge business owners affected by the unrest not to be complacent in using the available business rescue mechanisms in order to save their companies. These legal mechanisms, as well as CDH, are here to help.

What remains clear in the current circumstances is that the survival of our economy depends both on our essential workers who are at the forefront of the pandemic, as well as us supposedly "*ordinary*" workers who remain at our desks, determined to keep the wheels moving. While it may be tempting to close your curtains and press pause on the world indefinitely, we remind you that every little bit of work goes a long way towards maintaining our economy. So do not underplay your role. Continuing to do your bit in the face of unmeritorious calls to shut down our country is in itself taking a stand.

With that being said, we return to a brief update on the world of business rescue, restructuring and insolvency. Ster-Kinekor has reached out to the Government to request a relaxation of the adjusted level 4 lockdown restrictions, citing the devastating effects it will have on its business and the diminished likelihood of the success of its business rescue process. Airlines have also taken another major knock from the adjusted level 4 lockdown restrictions as many have had to ground their flights because of the restrictions on travel in and out of Gauteng. As South Africa's economic hub, Gauteng hosts the country's busiest domestic flight routes. The anticipated losses that will be sustained by our airlines as a result of the latest restrictions are estimated at about R115 billion in 2021.

In somewhat comforting news, state-owned insurer Sasria, the only insurer in South Africa that provides cover against risks such as civil commotion, public disorder, strikes, riots and terrorism, has confirmed that it has sufficient capital to cover the ongoing destruction.

DISPUTE RESOLUTION

BUSINESS RESCUE, RESTRUCTURING & INSOLVENCY

NEWSLETTER

Volume 21 | 14 July 2021

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

Tobie Jordaan
Sector Head
Director

Business Rescue,
Restructuring &
Insolvency

In this month's newsletter, we discuss the rights (or lack thereof) of business rescue practitioners to unilaterally amend adopted business rescue plans with reference to the court's findings in the case of *Arqomanzi (Pty) Ltd v Vantage Goldfields and Others*. For those wanting to be fully appraised of what business rescue practitioners can and cannot do once a business rescue plan has been adopted, this month's article is a must-read.

The month of July 2021 has undoubtedly presented us with further unprecedented levels of adversity, both at an individual and country-wide level. While we remain optimistic and urge everyone to find it in themselves to keep forging forward, we also wish to remind you to please take proactive steps to look after yourselves and your families. While a full shutdown may not be possible, taking time to rest is essential. Just as a temporary moratorium is necessary for a company to survive under rescue, a temporary moratorium on work calls and emails in order to rest may also be necessary for you to take care of yourself. We at the CDH Business Rescue, Restructuring and Insolvency Sector wish everyone strength and safety for the coming days and weeks.

Tobie Jordaan
Sector Head and Director

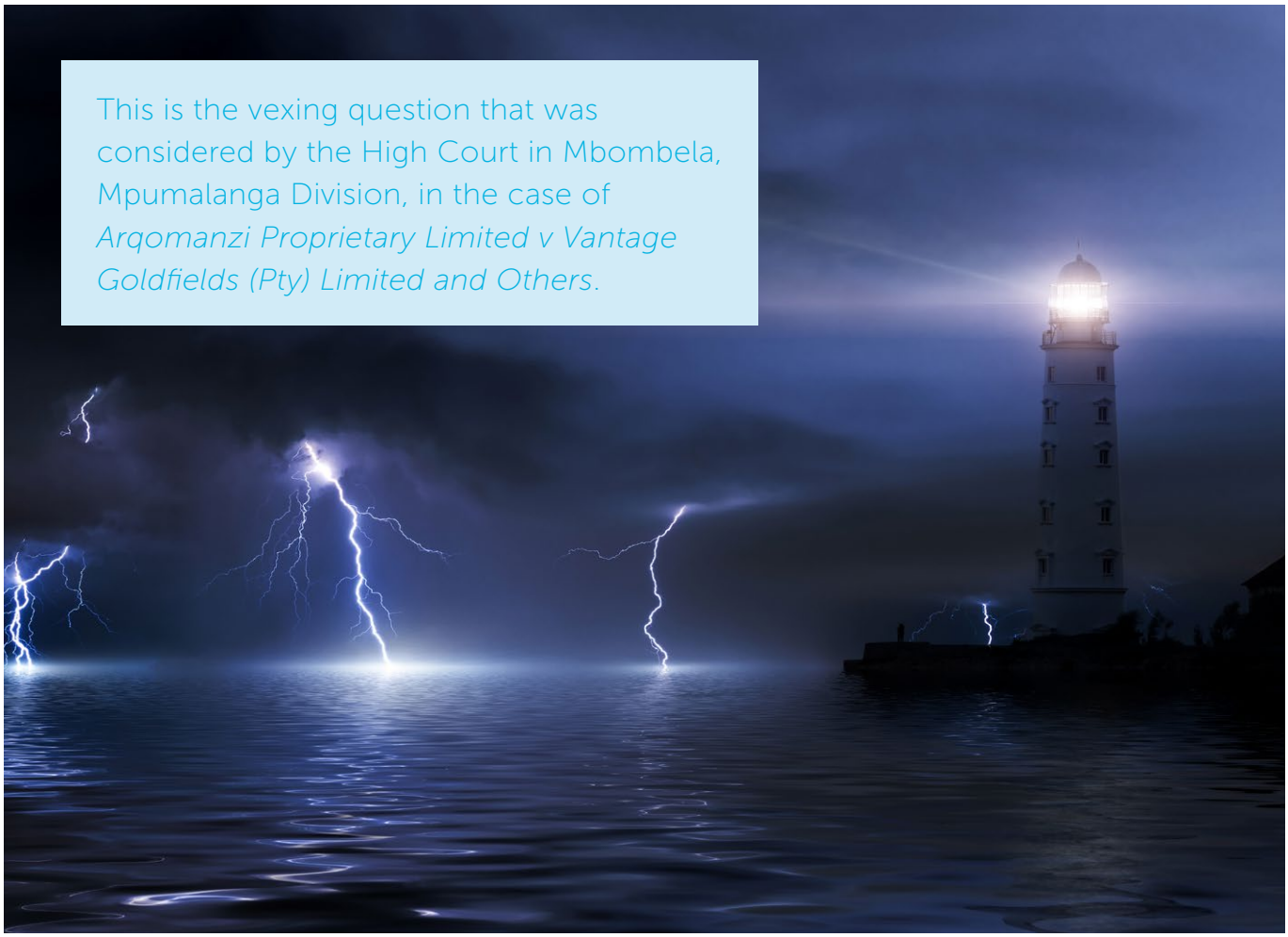
PRIMARY CONTACTS

Tobie Jordaan
Sector Head
Director
T +27 (0)11 562 1356
M +27 82 417 2571
E tobie.jordaan@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
M +27 82 902 9437
E richard.marcus@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
M +27 76 410 2886
E kgosi.nkaiseng@cdhlegal.com

Are business rescue practitioners entitled to unilaterally make amendments to an adopted business rescue plan?



This is the vexing question that was considered by the High Court in Mbombela, Mpumalanga Division, in the case of *Arqomanzi Proprietary Limited v Vantage Goldfields (Pty) Limited and Others*.

The case concerned an urgent interdict application by Arqomanzi against, amongst other things, the two business rescue practitioners (BRPs) of Vantage Goldfields, Barbrook Mines and Maronjwaan Imperial Mining Company. In this regard, a rule *nisi* was issued on 26 February 2021 in terms of which the BRPs of these three companies in business rescue were interdicted from further unilaterally implementing amended business rescue plans, pending finalisation of the dispute between the parties, which was laid before the court on 4 May 2021.

Previous Roelofse court order and the background facts

It is important to point out that Arqomanzi previously brought an application against the BRPs and accordingly obtained a court order against them.

This previous application came after the funding model provided for in the initial business rescue plans for the three companies, had failed. As a result of this failure, Arqomanzi made an offer to provide the necessary funding to the companies in rescue, in order to assist them with returning to a financially healthy state.

Various circumstances led to Arqomanzi bringing an application against the BRPs, which culminated in a court order by Roelofse AJ. The Roelofse court order directed that the BRPs introduce Arqomanzi's (and other parties') offer to the three companies' creditors and affected persons in accordance with the Companies Act 71 of 2008 (Act), for purposes of proposing an amendment to the initial business rescue plans. The BRPs were further ordered to then prepare amended business rescue plans in accordance with these offers, and to publish them for consideration and voting on by the companies' creditors and affected persons. These orders were allocated timelines within which the BRPs had to attend to the obligations.

Are business rescue practitioners entitled to unilaterally make amendments to an adopted business rescue plan?

...continued

The timelines provided for in the Roelofse court order were, however, not adhered to. Furthermore, two other companies, Vantage Goldfields SA and Vantage Goldfields Limited (collectively referred to as the new offerors), subsequently submitted a new funding offer to the BRPs. In the offer, it was proposed that the BRPs unilaterally amend the adopted business rescue plans. In response, the BRPs accepted the offer and unilaterally amended the adopted business rescue plans in accordance with this new offer.

Pertinent issues to be determined by the court in the Arqomanzi case

The court had to consider the two pertinent issues of:

1. Whether, as a general rule, the BRPs of the companies in business rescue proceedings can unilaterally (without the involvement of creditors) make substantial amendments to the business rescue plans, after the plans have been adopted by the creditors of the entities under business rescue.
2. Whether the BRPs can disregard a court order which directed them to publish amendments to the adopted business rescue plans and to allow creditors to vote on the amendments.

Can the BRPs unilaterally amend the adopted business rescue plans?

The respondents (the BRPs and new offerors) argued that the validity of the amended plans had to be determined in accordance with the terms of the originally adopted business rescue plans, and in particular, clause 9 of the business rescue plans which provided that the BRPs were permitted to amend the business rescue plans, as long as the amendments did not prejudice any affected persons and that the BRPs acted reasonably.

Arqomanzi argued that the clause in the adopted business rescue plan which allowed BRPs to amend the plan should be interpreted restrictively. It contended

that, amendments that the BRP would be entitled to make, would be amendments of an administrative nature that do not affect the substance of the plan that was adopted by the creditors. Any amendments of substance must be considered and voted on by creditors.

The court considered section 140(1)(d) of the Act which provides that a BRP is responsible to **develop a business rescue plan to be considered by affected persons** and to **implement any business rescue plan that has been adopted** in accordance with part D of Chapter 6 of the Act.

The court held that any clause in the adopted business rescue plan which gives the BRP general power and duties, has to be seen in the context of the restrictive imperative in section 140(1)(d) of the Act. Any implementation of a business rescue plan has to be laid for consideration by the affected persons as contemplated in section 140(1)(d).

The court indicated that this did not happen in the present case and the conduct of the BRPs in the circumstances was therefore not in accordance with the legislative scheme in the Act (including sections 150 and 151 of the Act, which deal with business rescue plans).

The court further stated that, even in the absence of a legislative restriction on the BRPs' powers to amend the business rescue plans, the amendments that had been made still did not meet the requirements for a valid amendment in terms of clause 9 of the plans. In this regard, the court noted that the BRPs were not acting reasonably, and that the amendment had the potential to prejudice Arqomanzi and other affected persons.

The court found that "*changing a funding entity which formed part of the adopted plans with another entity, is not an insignificant and inconsequential matter. It goes into the heart of seeking to resuscitate a distressed company.*" The court stated that

Are business rescue practitioners entitled to unilaterally make amendments to an adopted business rescue plan?

...continued

the ability and credibility of such a funder is something the creditors of the distressed company, including affected persons, would want to know and be sure of. The substitution of a funder in an adopted plan is therefore not something which can be done without consultation and approval by creditors and affected persons.

Did the Roelofse court order place a general duty on the BRPs to seek creditors' approval to amend the adopted plans?

The BRPs argued that the court order and associated timelines were only applicable to Arqomanzi's offer and to the subsequent offer made by the new offerors 14 months later. The BRPs contended that they were entitled to let the timeframes lapse, and, by so doing, move from the premise that the order was no longer in force (as it had run its course).

The court held that another reason why the BRPs could not unilaterally amend the adopted plans in the manner that they did was because of the court order which directed the BRPs to consult the creditors, prepare amendments to the adopted plans, and allow the creditors to vote on the amendments.

The court did not accept the arguments raised by the BRPs and stated that laws and court orders simply cannot be disregarded, as this would "*encourage disorder and potential prejudice that can turn into lawlessness and free for all, damaging the interest of justice*".

The court's finding

The court declared that the BRPs could not unilaterally amend the previously adopted business rescue plans of the companies and ordered that any offers (including those of Arqomanzi and the new offerors) be "*subjected to compliance with the relevant legislative framework for proper adoption by the creditors of the entities under business rescue*". The court further declared that the BRPs could not disregard the Roelofse court order. The rule *nisi* granted on 26 February 2021 was confirmed and granted as final relief.

Conclusion

It is clear that BRPs are not entitled to unilaterally make substantial or material amendments to an adopted business rescue plan, notwithstanding a clause in the plan that permits amendments.

It is important that any unilateral amendments that a BRP seeks to make are not material, that they do not prejudice any affected person, and that the BRP acts reasonably at all times.

BRPs are required to act within the confines of section 140(1)(d) of the Act and, accordingly, should any material amendments need to be made to an already adopted business rescue plan, a BRP is required to first consult the creditors and other affected persons, prepare and publish the amendments to the adopted plan, and allow the creditors and other affected persons to vote on the amendments.

Kylene Weyers
Senior Associate

Jessica Osmond
Associate

OUR TEAM

For more information about our Business Rescue, Restructuring & Insolvency sector and services in South Africa and Kenya, please contact:

Tobie Jordaan
Sector Head
Business Rescue, Restructuring & Insolvency
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Richard Marcus
Director
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Kgosi Nkaiseng
Director
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Mongezi Mpahlwa
Director
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie
Director
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Belinda Scriba
Director
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Ngeti Dlamini
Senior Associate
Dispute Resolution
T +27 (0)11 562 1664
E ngeti.dlamini@cdhlegal.com

Vincent Manko
Senior Associate
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Kylene Weyers
Senior Associate
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

Nomlayo Mabhena
Associate
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

Christine Mugenyu
Associate
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com

Jessica Osmond
Associate
Dispute Resolution
T +27 (0)11 562 1067
E jessica.osmond@cdhlegal.com

Muwanwa Ramanyimi
Associate
Dispute Resolution
T +27 (0)21 405 6093
E muwanwa.ramanyimi@cdhlegal.com

BBBEE STATUS: LEVEL ONE 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.

PLEASE NOTE
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA