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DISPUTE RESOLUTION **ALERT**

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All or nothing: A note on the inadequacy of gambling as legal strategy

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All or nothing: A note on the inadequacy of gambling as legal strategy

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On the eve of a sale in execution of the appellant's immovable property by way of public auction, the first respondent received an email from the attorneys acting for the appellant's creditor, Meiprops Twee en Twintig (Pty) Ltd, advising that Meiprops had launched an application for the liquidation and winding up of the appellant and that the sale in execution should, therefore, be suspended. About 15 minutes later, the first respondent received a second email from Smoken Consulting (Pty) Ltd, advising that it provides business rescue services and that on that same day the appellant's director, van Rooyen, had made an application for the appellant to be placed under business rescue.

Notwithstanding the appellant's request for the suspension of the sale in execution, the sale happened as scheduled and the properties were transferred to the purchaser. The first respondent approached the court *a quo* for an order that the resolution adopted by van Rooyen to place the appellant under business rescue be declared invalid and set aside.

A key fact that went undisputed in both the liquidation and business rescue applications was that van Rooyen, who passed the resolution to place the appellant in business rescue, was also a director of the appellant's creditor, Meiprops. In textbook hedging fashion, van Rooyen stated in the motivating affidavit for the liquidation proceedings that the appellant was indebted to Meiprops, could not pay its debts, and was hopelessly insolvent, while in the motivating affidavit for the business rescue proceedings he stated that the appellant (although financially distressed) *"could in all probability trade profitably"* if it were to be placed under business rescue.

The Supreme Court of Appeal (SCA) agreed with the court *a quo* that the averments made by van Rooyen were contradictory and that, at least in one of the affidavits, he was being untruthful. Further, the SCA agreed that the resolution to place the appellant under business rescue was adopted in bad faith as there was no intention of attaining the objectives of business rescue as contemplated in the Companies Act 71 of 2008, and it was purely done to frustrate the sale in execution. The SCA dismissed the appeal with costs as it agreed with the court *a quo* that the sale in execution were valid and that there were no longer any live issues between the parties which could be considered by the court. On this note, the court highlighted the position in *Legal Aid South Africa v Magidwana and Others* [2014] ZASCA 141 that *"courts should not and ought not to decide issues of academic interest only"*.

Van Rooyen, in his capacity as director of the appellant, placed the original bet when he initiated liquidation proceedings. However, in an attempt to hedge his bets, he tried to use the business rescue proceedings as a wager on the opposite side of his original bet. It is evident from the reading of this case that the appellant could have made a good argument to be placed under business rescue but while trying to mitigate its losses, it put itself in a bind and lost the lot.

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