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DISPUTE RESOLUTION **ALERT**

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Grey area? Some clarity on joinder of creditors to court proceedings after publication but before adoption of a business rescue plan

The Court explained that the position of creditors under an adopted business rescue plan is materially different from the position of creditors who have not yet voted on and adopted a plan.

In the recent case of *Blue Nightingale Trading 709 (Pty) Ltd v Nkwe Platinum South Africa (Pty) Ltd (in business rescue) and Others*, the Gauteng Division of the High Court (the Court) provided some clarity on whether the creditors of a company under business rescue must be joined to legal proceedings for the setting aside of the business rescue proceedings, in circumstances where the business rescue plan has been published but not yet adopted.

Briefly, the facts of the matter are that Blue Nightingale Trading 709 (Pty) Ltd (Blue Nightingale Trading) brought an application for an order setting aside the business rescue proceedings of Nkwe Platinum South Africa (Pty) Ltd (Nkwe Platinum). Nkwe Platinum's proposed business rescue plan had been published. However, in terms of an interim court order, its creditors were prevented from voting on the plan until the Court had decided on the outcome of Blue Nightingale Trading's application for the setting aside of the business rescue proceedings (the main application). In addition to the main application and the interim order, Blue Nightingale Trading then brought a further interlocutory application for an order joining all of Nkwe Platinum's creditors to the main application.

On the issue of joinder in circumstances where a business rescue plan has already been adopted, our courts have made it clear in various judgments of the Supreme Court of Appeal that it is necessary to join all the creditors whose rights under the plan may be prejudiced by the outcome of legal proceedings which will affect the *status quo* established by the plan. However, in the *Blue Nightingale Trading* matter the circumstances were different in that no business rescue plan had been adopted yet.

In respect of the issue of joinder to legal proceedings, our common law essentially provides that a party must be joined to any process of litigation if they have a direct and substantial interest in the subject matter of the litigation and stand to be prejudiced by its outcome.

The Court accordingly had to decide whether the creditors had a direct and substantial interest in the legal proceedings for the setting aside of Nkwe Platinum's business rescue, in circumstances where its business rescue plan had been published but not yet adopted.

This distinction between pre and post the adoption of the plan for the purposes of the joinder test is significant, as the Court explained that the position of creditors under an adopted business rescue plan is materially different from the position of creditors who have not yet voted on and adopted a plan. Once a business rescue plan has been adopted, the creditors' claims are affected as their pre-existing rights in respect of the debt owed to them become novated. In other words, the adoption of the plan results in the creditors' claims against the company under rescue being compromised, and thereby replaces their pre-existing rights in respect of their claims with entirely new rights. The terms of the business rescue plan, once adopted, are therefore determinative of the creditors' substantive legal rights. Their financial interests are accordingly directly implicated in any legal

Grey area? Some clarity on joinder of creditors to court proceedings after publication but before adoption of a business rescue plan...*continued*

In these circumstances, the creditors would, in law, not have a direct and substantial interest in the subject matter of the litigation as their rights would remain unaffected by the outcome of the proceedings.

proceedings seeking to set aside the plan, as the outcome could have a prejudicial effect on their rights as set out in the plan.

By contrast, where a business rescue plan has not yet been adopted, the creditors' rights have not yet been redefined and replaced by the terms of the plan. Therefore, any legal proceedings seeking to set aside the business rescue process prior to the adoption of the business rescue plan will have no effect on the creditors' pre-existing substantive rights. In practical terms, should the business rescue process be set aside prior to the adoption of the business rescue plan, the creditors will simply maintain their rights to claim the full amount of debt owed to them by the company. Such creditors accordingly do not stand to be prejudiced by the setting aside of the business rescue proceedings, as it would not result in having any effect on their existing legal rights.

After considering the common law test for joinder, with reference to the position of creditors pre and post the adoption of the business rescue plan, the Court concluded that the creditors of a company under business rescue are not required to be joined to legal proceedings for the setting aside of the busines rescue proceedings in the absence of an adopted business rescue plan. In these circumstances, the creditors would, in law, not have a direct and substantial interest in the subject matter of the litigation as their rights would remain unaffected by the outcome of the proceedings.

In support of its conclusion, the Court further clarified that merely because there is no requirement to join the creditors to the legal proceedings does not mean that they are not able to participate should they so wish. The Court confirmed that sections 145(1)(a) and (b) of the Companies Act 71 of 2008 provide that the creditors are entitled to notice of, and participation in, each court proceeding that arises during business rescue proceedings (irrespective of whether or not a business rescue plan has been adopted). These provisions accordingly safeguard creditors who want to intervene in the proceedings by supporting either the continuation or termination of the business rescue proceedings. Accordingly, merely because joinder may not be necessary does not mean that creditors' rights to participate in the court proceedings are prejudiced. They remain fully empowered and entitled to intervene.

The Court accordingly dismissed Blue Nightingale Trading's application for joinder.

From the perspective of a party wishing to bring court proceedings against a company in business rescue where a business rescue plan has been published but not yet adopted, this judgment has provided some clarity and confirmed that it is not necessary to join the company's creditors to the court proceedings, although the creditors retain their right to receive notification of the court proceedings.

Kgosi Nkaiseng and Joshua Geldenhuys

COVID-19 silver lining? The dawn of a new digital era for South African dispute resolution

As a result of a practice note issued by the Judge President on 10 January 2020, the Gauteng High Court was the first court in the country to fully implement CaseLines.

The unprecedented COVID-19 pandemic, and the consequent lockdown levels, affected every aspect of life as we knew it – and the legal fraternity was no exception. Despite courts being considered an essential service since the first Alert Level 4 lockdown in 2020, court processes in South Africa had to rapidly change and recalibrate to adapt to the so-called "*new norm*". This was only made possible through the implementation of digital platforms.

Prior to mandatory lockdowns there were major discrepancies in the reception of the "*digital age*" within the legal fraternity, with many being distrustful of the possibilities introduced as a result of technology. In their minds "*flexi-hours*", "*working from home*", "*hot desks*", "*service via email*" and "*online consultations*" were distrustful phrases which the legal fraternity in South Africa was not yet ready for.

Then…rumours of a global health crisis started to spread, and within a few months South Africa found itself in "hard" (Alert Level 5) lockdown. There was no longer a choice. Go digital or be left behind.

Fortunately, there had already been some significant shifts towards transitioning to digital, which allowed some fast-tracking of the much-required move of our judicial system online.

High Court Rules

In 2012 already the High Court Rules had introduced the option of servicing court processes via email (Uniform Rule 4A). This mode of service has, however, become "*normal*" since the introduction of COVID-19 mandatory (and later preferred) "*stay at home*" laws.

CaseLines

With respect to filing of court proceedings during "*Covid-times*", thankfully, the Gauteng High Court had also been making plans to introduce CaseLines, an electronic case management and litigation system. CaseLines was considered even before whispers of possible lockdowns began to circulate, and as a result of a practice note issued by the Judge President on 10 January 2020, the Gauteng High Court was the first court in the country to fully implement CaseLines. The system has been operational in Gauteng since 27 January 2020. The introduction of CaseLines provides legal practitioners with the ability to enrol new civil matters, and subsequently file documents and present evidence, electronically in the Gauteng High Court. CaseLines is developed in a manner that enables users to present fully digital court bundles and provides options for involved parties to interact and collaborate in pre-trial preparation and procedures.

COVID-19 silver lining? The dawn of a new digital era for South African dispute resolution...*continued*

With or without access to CaseLines, as a result of the lockdowns most, if not all, of South Africa's High Courts introduced virtual hearings and handing down of electronic judgments into their practice directives.

Despite some initial challenges, which are to be expected with the implementation of any new system, CaseLines provides many solutions to problems otherwise faced in a traditional paper-based system. Judges are able to easily access a fully electronic version of a court file prior to the hearing of a matter, and virtual hearings can be set up, even during a lockdown.

CaseLines has been successfully implemented in other international jurisdictions, such as the UK, where it has been the selected tool of digitisation of the Crown Court, and the United Arab Emirates, which substantiates its efficiency as a digital justice tool. The Court of Justice for the Common Market for Eastern and Southern Africa (COMESA) implemented the use of CaseLines in 2019 to ensure that COMESA fulfils its goal of digital economic integration. The rise of digital justice systems has been commended as aligning with the United Nations Sustainable Development Goal 16 as it has the ability to transform the quality and efficiency of justice across Africa and contributes to the rule of law at large.

Unfortunately, in our other courts where CaseLines has not yet been implemented, different strategies has to be devised to circumvent the lack of access to court caused by lockdown restrictions. Thanks to email, these courts were able to adapt to allow filing by email. Although this did come with its own issues, especially with it being much more cumbersome than the instant access to online documents CaseLines offers.

Considering the success of CaseLines in the Gauteng High Court, it is guaranteed that it will be implemented in more jurisdictions. In fact, it has been announced that CaseLines will be rolled out in the Western Cape High Court imminently.

It has also been noted by academics and practitioners that CaseLines will increase efficiency, spearhead the legal profession towards sustainability, and improve access to courts, thereby promoting constitutionally entrenched rights in this regard.

Even though digitisation has been forced on us, many practitioners, even the traditional naysayers, have welcomed the era of digitisation and recognised that South African courts are now becoming more in line with the approach in other jurisdictions.

Virtual hearings

With or without access to CaseLines, as a result of the lockdowns, most, if not all, of South Africa's High Courts introduced virtual hearings and handing down of electronic judgments into their practice directives. Both the Supreme Court of Appeal and the Constitutional Court are using video conferencing facilities to hold hearings. There are numerous platforms that allow this, the most popular of which are Zoom, Skype and Microsoft Teams.

The Constitutional Court also live streams its hearings on its YouTube channel, which ensures transparency and public access (albeit virtually).

With access to physical office space being limited for almost a year and a half now, practitioners are also consulting with one another and their clients electronically.

Positives

There are many positive elements to the digitisation of dispute resolution procedures such as reduced costs, the ability of parties to conduct hearings without the need for traveling to physically attend hearings or to access case material. Other related costs

COVID-19 silver lining? The dawn of a new digital era for South African dispute resolution...*continued*

It is incontrovertible that virtual inter-personal access and live streaming have revolutionised dispute resolution procedures.

such as the printing, copying and transportation of physical files are also reduced. The opportunities for growth and improvement seem to outweigh the potential negative consequences of the traditional paper-based system such as missing files, unintentional environmental unsustainability and even far more dire things like fraud. With an electronic justice system, files can be easily traced, what occurred last in the matter can be accessed quickly and if a file cannot be located, the person responsible for the file can be identified. CaseLines also addresses some logistical challenges which may be faced by judges when reviewing documents that have been filed in different courts and thereby removes additional infrastructural barriers and ensures increased efficiency of civil litigation. In South Africa, there has been positive feedback as practitioners no longer have to face challenges such as missing court files or files being provided to the incorrect judge.

It is incontrovertible that virtual inter-personal access and live streaming have revolutionised dispute resolution procedures. It is evident that is possible to use digital platforms without compromising on the principles of open justice and transparency which underlie our democracy and legal system.

Challenges

As expected with any developments in practice, there are opportunities and potential challenges with an electronic judicial system and processes. Technology presents unique challenges such as potential technical errors, connectivity issues as well as lack of knowledge of individual practitioners as to how to utilise certain digital platforms.

It is important to acknowledge that these obstacles are not insurmountable. Training on the use of CaseLines is available to legal practitioners, to ensure the smooth functioning of the system. The South African judiciary is in the process of developing rules and guidelines relating to the new electronic court system. Well-known legal resource LexisNexis, with the endorsement of the Department of Justice, has supported this development by providing 16 courts across the country with Wi-Fi connectivity to ensure the optimal functionality of a digital system.

Alternative dispute resolution

The adjustments to the court process have naturally flowed over to alternative dispute resolution processes such as arbitration and mediation.

On a global level, the International Chamber of Commerce, amongst others, has provide a guidance note which addresses multiple aspects of alternative dispute resolution such as new procedural measures and timetables, potential delays, guidance on virtual hearings and cyber-protocol. Local arbitrations conducted in terms of the rules of The Arbitration Foundation of Southern Africa have further been the subject of updated procedures which ensure that the arbitration of disputes remain possible in a virtual era. Parties to commercial contracts are advised to include clauses which provide for the adjusted processes, procedures and rules of both court litigation as well as alternative dispute resolution to ensure that disputes, when they arise, are dealt with in the intended manner.

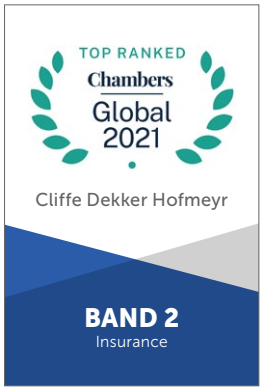
COVID-19 silver lining? The dawn of a new digital era for South African dispute resolution...*continued*

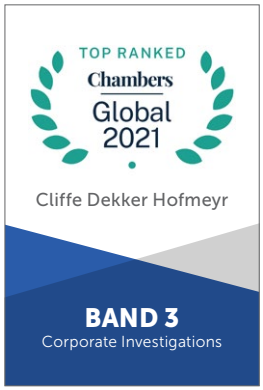
The use of digital tools within the legal field has the potential to remove many practical and financial barriers to justice which are prevalent especially on the African continent and in South Africa specifically.

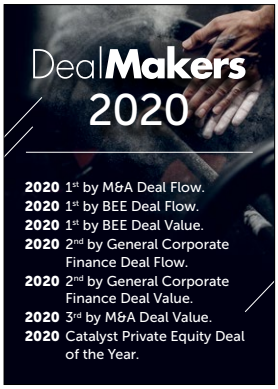
Conclusion

The use of digital tools within the legal field has the potential to remove many practical and financial barriers to justice which are prevalent especially on the African continent and in South Africa specifically. Since access to justice and the courts are constitutionally entrenched rights, the COVID-19 pandemic, coupled with its restrictions and effects, has accelerated the technological innovation process and demanded that the legal system adjust accordingly. Significantly, and ironically, COVID-19 has forced the South African judicial system to embrace the "*digital era*", making justice more accessible while reducing its carbon footprint. It's good to know that something positive has come of this devastating pandemic.

Belinda Scriba and Simone Nel







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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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