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Dispute Resolution ALERT

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Business rescue is not simply for the asking

The debate as to whether business rescue or liquidation is appropriate for a company in financial distress ultimately comes down to which process is likely to yield a higher return for creditors and/or stakeholders. We often hear of failed business rescue proceedings where the company ends up being liquidated, but it is seldom the case that liquidation proceedings are converted to a business rescue.



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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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The Western Cape High Court in *Forty Squares (Pty) Ltd and Another v Noris Fresh Produce (Pty) Ltd t/a Golden Harvest and Others* (4200/2023) [2023] ZAWCHC 78, dealt with an application to place a company that was under final liquidation, in business rescue. In early 2022, Golden Harvest ran into severe cash flow problems, resulting in it defaulting on several of its payments due to suppliers and creditors. A disgruntled supplier applied for the liquidation of Golden Harvest. A provisional liquidation order was granted, however on the return date, Golden Harvest's counsel appeared and sought a postponement to prepare an application to place the company under business rescue. The application for postponement was denied, and Golden Harvest was placed under final liquidation.

In March 2023, the sole shareholder of Golden Harvest, Forty Squares (Pty) Ltd (Forty Squares) and certain employees of Golden Harvest lodged an application for an order placing the company under business rescue in terms of section 131 of the Companies Act 71 of 2008 (Act). The application was opposed by the liquidators of Golden Harvest and by Erfco, the latter having intervened by virtue of its claim in Golden Harvest's insolvent estate for over R44 million. In support of the business rescue application, a business rescue plan was prepared by a senior business rescue practitioner. The plan proposed the introduction of post commencement finance of R20 million, which was to be contributed to the company by its sole shareholder, Forty Squares.



The graphic features a gold diagonal stripe across a light blue background. At the top left, it displays 'The LEGAL 500 EMEA' logo. Below this, the text reads: 'Dispute Resolution 2023 Rankings', 'Dispute Resolution practice is ranked in Tier 1.', 'Leading Individuals: Tim Fletcher', 'Recommended Lawyers: Jackwell Feris | Anja Hofmeyr | Corné Lewis | Rishaban Moodley | Mongezi Mpahlwa | Kgosi Nkaiseng Lucinde Rhoodie | Clive Rumsey | Tim Smit', and 'Next Generation Lawyers: Kgosi Nkaiseng | Tim Smit'.

Business rescue is not simply for the asking

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Reasonable prospect of rescue

The main consideration in business rescue applications is that a court must be satisfied that there is a reasonable prospect of rescuing the company. It has been held that a “reasonable prospect” requires more than a mere *prima facie* case or an arguable possibility. Furthermore, the prospect must be based on reasonable grounds, and not on a mere speculative suggestion. In order to successfully prove that there is a reasonable prospect of rescuing the company, the applicant will need to provide a substantial measure of detail about the proposed plan. To allege that there is a proposed plan is not sufficient. Such detail would include, *inter alia*, concrete and objectively ascertainable details

of the likely costs of rendering the company able to resume its business, and the likely availability of the necessary cash resources in order to enable the company to meet its day-to-day expenditure.

A further important factor is that during liquidation, where evidence becomes available that business rescue proceedings will yield a better return for creditors and jobs will be retained, such business rescue proceedings should not be denied. However, a guiding factor is that the application for business rescue must be dismissed where it is not genuine or in good faith, or where it does not establish that the benefits of a successful business rescue will be achieved.

No prospect of solvency and commercial viability

In considering this application, the court held that the evidence presented to the court demonstrated that there were no anticipated circumstances which would radically improve the prospects of Golden Harvest being returned to solvency and commercial viability. Firstly, the major creditors had all stated that they would not vote in favour of the proposed business rescue plan or any other proposed plan. This is significant, as in terms of the Act, the proposed business rescue plan will be approved only if it is supported by the holders of more than 75% of the creditors’ voting interests. The court found that this factor alone rendered the application for business rescue problematic.

Business rescue is not simply for the asking

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Secondly, the liquidators had cancelled all of the company's leases, meaning that the company no longer had any premises from which to trade. Thirdly, the company's workforce had depleted and many of the top managers had moved on. Fourthly, the company had suffered severe reputational damage and would undoubtedly experience difficulty in procuring produce from suppliers.

Fifthly, the court noted that the post commencement finance provided for in the plan was vague and the amount was manifestly insufficient as it amounted to approximately 12% of the company's liabilities. Finally, it was highlighted that a business rescue plan with a proposed duration of three years was an extraordinarily long time given that business rescue is meant

to be a speedy process aimed at a "quick-fix solution", and the proposed return of 30c in the rand to creditors was based on skewed calculations and was overly ambitious. The court concluded that the haste with which the application was brought, together with the inadequate plan, left the impression that the application was not in fact brought in good faith.

While the judgment confirms the principle that business rescue may be granted after a company has been placed in final liquidation, it also highlights the extent to which the viability of the business rescue proceedings needs to be proven in court. Business rescue is not simply for the asking.

**Lucinde Rhoodie,
Muwanwa Ramanyimi and
Claudia Grobler**



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2022 - 2023
ranked our Dispute Resolution practice in
Band 2: Dispute Resolution.

Chambers Global 2018–2023 ranked us
in Band 2 for Restructuring/Insolvency.

Tim Fletcher ranked by
Chambers Global 2022 - 2023 in Band 2:
Dispute Resolution.

Clive Rumsey ranked by
Chambers Global 2019 - 2023
in Band 4: Dispute Resolution.

Tobie Jordaan ranked by
Chambers Global 2022 - 2023 in Band 4:
Restructuring/Insolvency.

Lucinde Rhoodie ranked by
Chambers Global 2023 in Band 4:
Dispute Resolution

Jackwell Feris ranked by
Chambers Global 2023 as an upcoming
dispute resolution lawyer.

Kylene Weyers ranked by
Chambers Global 2023
as an upcoming
restructuring/insolvency lawyer.

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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.

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