

Volume 44 | 19 July 2023

Business Rescue, Restructuring & Insolvency

NEWSLETTER

DISPUTE RESOLUTION

IN THIS ISSUE

Welcome Note: Tobie Jordaan

Liquidation of Tuskys Supermarket:
A case of too little too late

Digging deeper: SCA prospecting for
solutions in financially distressed group
of companies



INCORPORATING
KIETI LAW LLP, KENYA



Tobie Jordaan

Sector Head | Director
Business Rescue,
Restructuring & Insolvency

August 2012 was the last time Johannesburg was stunned with snowfall. For many Johannesburg residents it felt like 'Christmas in July' last week Monday, as many were left braving the cold weather to take some memorable snaps with friends and family with some children seeing snow for the first time. While snow in South Africa is uncommon, for the less fortunate, snow can be the ultimate harshness to an already bitterly cold winter. Symbolically, our economy has also had to brace itself for the harshness of the economic landscape with our energy crisis and rising repo rates.

In some good news, Stats SA has released the latest inflation figures for South Africa, showing that headline inflation cooled from 6.3% in May to 5.4% in June 2023. In addition, the pace of acceleration of food prices is easing and trends evidencing a downward trajectory in food inflation. Stats SA's recent findings show annual inflation for food and non-alcoholic beverages slowed for the third month in a row, dropping from 11.9% in May to 11.0% in June. Motorists are also bracing themselves for a potential fuel hike due to the rising price of oil, which has climbed to just under \$80 a barrel, from around \$75 a barrel at the start of July 2023.

Rating agency Fitch has decided to keep South Africa's credit rating unchanged at BB- and has maintained the South African outlook as stable. The United States based rating agency said the forecast for South Africa remained inhibited by low GDP growth hampered by the energy crises, high level of inequality,

a high government debt-to-GDP ratio, and further a modest path of fiscal consolidation. However, the current stable rating is also based on the country's favourable debt structure and its current ability to continue servicing its debt.

In this month's newsletter, Desmond Odhiambo, Christine Mugenyu and Effie Atieno consider a recent judgment where the Kenyan High Court ordered the liquidation of the Tuskys Supermarket chain. Further, Kylene Weyers and Zachary Kokosioulis consider the Supreme Court of Appeal decision in *Vantage Goldfields SA (Pty) Ltd & Another v Arqomanzi (Pty) Ltd & Others* (733/2022) [2023] ZASCA 106 (27 June 2023) where the Court was

required to determine and provide clarity on critical aspects of business rescue proceedings and highlight the significance of ministerial consent in cases dealing with mining rights.

Although the temperature continues to drop and even snowflakes descend, the CDH Business Rescue, Restructuring and Insolvency team the CDH Business Rescue, Restructuring and Insolvency team stand ready to navigate stands ready to navigate the frosty landscapes of financial distress and help our clients and readers in navigating these trying times and finding solace in the midst of the icy challenges that we face.

Tobie Jordaan

PRIMARY CONTACTS



Tobie Jordaan

Sector Head

Director

T +27 (0)11 562 1356

M +27 82 417 2571

E tobie.jordaan@cdhlegal.com



Kgosi Nkaiseng

Director

T +27 (0)11 562 1864

M +27 76 410 2886

E kgosi.nkaiseng@cdhlegal.com

Liquidation of Tuskys Supermarket: A case of too little too late

On 31 May 2023, Justice Majanja issued a judgment that marked an end to the restructuring efforts of Tuskys Supermarket after a three-year court battle. It was another classic example of an attempt to restructure a company's debt at the tail end of a distress cycle rather than at the early stages when the chances of recovery are higher.

The early stage of the distress cycle is when the company is underperforming but it has not run out of cash. At this stage the warning signs of insolvency include overtrading, high gearing, or declining service standards. In the case of Tuskys, it is reported that it was overtrading by using suppliers' money to expand its business at a rate that could not be supported by its working capital. It was thus inevitable that its outstanding debts would outweigh its assets.

Brief background

Tusker Mattresses Limited operated a chain of supermarkets under the name of Tuskys Supermarket. On various dates during 2020 Tuskys was faced with three petitions by Hotpoint Appliances Limited, Rositalia Limited and Syndicate Agencies Limited (petitioners). The petitioners sought a liquidation order against Tuskys and the appointment of a liquidator to manage its affairs. The petitioners stated that despite several requests

and demands, Tuskys had refused and/or neglected to pay its debts to them. Section 435 (1)(b) of the Insolvency Act gave the creditors the right to present a liquidation petition to invoke the powers of the court.

The court, in deciding whether to issue the liquidation order or not, focused on three main issues:

1. Whether Tuskys had been unable to pay its debts.
2. Whether Tuskys had any means or potential means of raising funds to warrant an extension of time to give it a lifeline.
3. The discretionary power of the court to decide on the liquidation.

In an effort to allow the company to rescue its operations, Tuskys had three years to restructure and figure out how to pay its debts after the first application by creditors. The company alluded to the existence of an external investor who was set to pump

Liquidation of Tuskys Supermarket: A case of too little too late

CONTINUED

money in to revive the supermarket. The supermarket also claimed to have raised KES 37,5 million from the sale of its non-core assets to offset the debt owed to its creditors. Unfortunately, the outstanding debts and liabilities amounted to KES 4,5 billion, which significantly exceeded the amount raised. The court was therefore satisfied that Tuskys was unable to repay its debts and found that allowing it more time than the three years it had already been given would be unfair to the creditors.

In assessing the prospects of revival of the supermarket the court found that Tuskys failed to prove any viability of maintaining solvency and that after three years, there was no chance that things might change and therefore there was no reason to keep the creditors at bay. The court also noted that three years was sufficient time for a company to restructure and having already been given that time with no positive changes, the chances of any rescue prospects were thin.

In light of these findings, the court was guided by section 424 of the Insolvency Act, which allows it to liquidate a company if the company is unable to pay its debts. The court exercised its discretion after analysing the circumstances presented and carefully weighing the creditors' rights and the company's prospects of revival.

Lessons learnt

The liquidation may have been avoided if Tuskys had sought help to restructure its debts much earlier than it did. Business owners should pay attention to the early warning signs of insolvency. These can be grouped into three categories:

1. **Operational** – for example, overtrading, high gearing and declining service standards.
2. **Financial** – such as lack of financial control, failure to compare actual versus budget and take corrective action, and poor forecasting.

3. **Management** – for example, a domineering chief executive, an uninvolved board of directors, lack of focus on business risk management, speculation in the market, or investing in products away from core activity.

Once these signs appear it is important for business owners to seek an independent business review so that they can know whether the business is still viable. If it is viable, they can explore restructuring options with the help of financial and legal experts.

**Desmond Odhiambo,
Christine Mugenyu and Effie Atieno**

Digging deeper: SCA prospecting for solutions in financially distressed group of companies

In a recent ruling, the Supreme Court of Appeal (SCA) upheld the judgment of the Mpumalanga High Court in a long-standing dispute between Arqomanzi (Pty) Limited (Arqomanzi) and the appellants, Vantage Goldfields SA (Pty) Ltd and Vantage Goldfields Ltd. The case centered around the business rescue proceedings of certain companies in the Vantage group of companies, which faced financial distress following a tragic mining accident at one of its mines.

The Background

The appeal arose from a dispute between Arqomanzi and the appellants regarding the business rescue proceedings faced by the Vantage companies. The Vantage companies, including Vantage Goldfields SA (Pty) Ltd (VGSA), Vantage Goldfields (Pty) Ltd (VGL), Makonjwaan Imperial Mining Company (Pty) Ltd (MIMCO), and Barbrook Mines (Pty) Ltd (Barbrook), experienced financial distress after a mining incident at MIMCO's Lily Mine, where a crown pillar collapse at the gold mine resulted in the loss of lives and the inaccessibility of the mine due to the structural collapse. Consequently, MIMCO was placed in business rescue on 4 April 2016.

In August 2016, VGL requested a banking facility increase of R10 million on its existing facilities from Standard Bank, which was granted on the condition that certain additional security be provided in the form of cession to Standard Bank of the VGSA-VGL claim and the VGL-Barbrook claim, as collateral. The condition was accepted, and the claims were ceded to Standard Bank. Both cessions entitled Standard Bank, upon any breach which was not remedied, to sell or otherwise realise the security.

MIMCO's financial turmoil contributed to VGL and Barbrook facing similar difficulties, leading to them also being placed in business rescue in 2016. The creditors of VGL and Barbrook adopted business rescue plans on

Digging deeper: SCA prospecting for solutions in financially distressed group of companies

CONTINUED

16 February 2017 and 6 August 2018, respectively. The adopted plans were interdependent, and their success was dependent on finance that was principally to be sourced from the Industrial Development Corporation.

When it became apparent that the necessary funding for the adopted plans would not become available, Arqomanzi held discussions with Standard Bank with a view to acquiring both the VGSA-VGL and the VGL-Barbrook claims. Following those discussions, Standard Bank agreed to sell those claims to Arqomanzi (after a failure by VGSA and VGL to remedy the breaches).

However, the business rescue practitioners (BRPs) refused to recognise Arqomanzi as the owner of the claims. Despite Arqomanzi paying the purchase price for the claims to Standard Bank, the BRPs

and the appellants denied that Arqomanzi had lawfully acquired the claims, and accordingly disputed their ownership of the claims. They also contended that the loan account claims were fully subordinated under two subordination agreements. They further asserted that the Vantage proposal was superior to Arqomanzi's proposed amended business rescue plans, because the former would not require the consent of the Minister of Mineral Resources and Energy (Minister), under section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), whereas Arqomanzi's amendment of the plans would.

As the issues raised would impact Arqomanzi's voting interest when the new business rescue plans were to be voted on, Arqomanzi launched an application to the High Court.

High Court ruling

The High Court ruled in Arqomanzi's favour. It held that:

- the Vantage proposal could not be implemented without section 11 consent by the Minister, and the BRPs and appellants were interdicted from representing otherwise;
- Standard Bank lawfully and validly ceded the VGSA-VGL and VGL-Barbrook claims to Arqomanzi and Arqomanzi was an independent creditor of VGL and Barbrook; and
- the subordination agreements subordinated only R14 million and R17 million (and not in each instance the full amount) of the claims in favour of VGL and Barbrook's creditors respectively.

Digging deeper: SCA prospecting for solutions in financially distressed group of companies

CONTINUED

SCA ruling

The following issues were raised in the appeal:

1. Whether certain “*affected persons*” should be joined as parties to the appeal.
2. Whether Arqomanzi had validly and lawfully acquired the loan account claims that were initially ceded to Standard Bank.
3. Whether Arqomanzi was an independent creditor of VGL and Barbrook.
4. Whether, by virtue of the two subordination agreements, Arqomanzi had a voting interest in the companies in business rescue.

5. Whether MIMCO and Barbrook’s mining rights could be exercised without the consent of the Minister under section 11 of the MPRDA, in circumstances where there had been a change of control in the ultimate holding company of the Vantage group.

This SCA held that:

1. The “*affected persons*” could hardly have any legal interest in the issues that arose. The only parties that had a legal interest in those issues were Arqomanzi, Standard Bank, VGL and Barbrook, all of whom were parties to the proceedings. It therefore rejected the appellants’ belated non-joinder argument.

2. Where the parties to the agreement had already performed in accordance with its terms, it could hardly be open to persons in the position of the appellants, who were strangers to the agreements, to challenge the validity thereof.
3. Section 128(1)(g) of the Companies Act 71 of 2008 makes it clear that the identity of the creditor and its relationship to the company in business rescue are the determining factors. Therefore, because Arqomanzi had validly acquired the claims and was not related to any of the Vantage companies, it was an independent creditor of VGL and Barbrook.
4. With reference to the other relevant facts, particularly the relevant financial statements of the companies, the High Court was correct in rejecting the appellant’s interpretation of the subordination agreements and declaring that only R14 million of the VGSA-VGL and R7 million of the VGL-Barbrook claims had been subordinated.

Digging deeper: SCA prospecting for solutions in financially distressed group of companies

CONTINUED

5. The main object of section 11 of the MPRDA is *"to prohibit any change in ownership or control of a mining right or an interest in a mining right, without the consent of the Minister"*. Section 11(1) should accordingly be interpreted as including both direct and indirect cessions, transfers, leases, etc., and a change of control by the issue of new shares in a company that controls the mining right. The Vantage proposal therefore required section 11 ministerial consent.

In the result, the SCA concluded that the appeal should be dismissed with costs, including those of the Minister and the two counsel who were employed.

This judgment provides clarity on critical aspects of business rescue proceedings, and highlights the significance of ministerial consent in cases dealing with mining rights. The case also sets a precedent for future disputes within the business rescue and mining sectors and offers valuable insights into the interpretation of relevant legal provisions.

**Kylene Weyers and
Zachary Kokosioulis**

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
Director: Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com



Desmond Odhiambo

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



Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@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



Lucinde Rhoodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com



Muwanwa Ramanyimi

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



Thabile Fuhrmann

Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com



Belinda Scriba

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



Nseula Chilikhuma

Associate:
Dispute Resolution
T +27 (0)11 562 1067
E nseula.chilikhuma@cdhlegal.com



Richard Marcus

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



Roxanne Webster

Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com



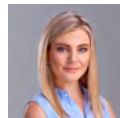
Kara Meiring

Associate:
Dispute Resolution
T +27 (0)21 481 6373
E kara.meiring@cdhlegal.com



Kgosi Nkaiseng

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



Kylene Weyers

Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com



Jessica Osmond

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



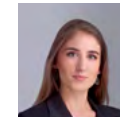
Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com



Nomlayo Mabhena-Mlilo

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



Jessica van den Berg

Associate:
Dispute Resolution
T +27 (0)11 562 1617
E jessica.vandenberg@cdhlegal.com



Mongezi Mpahlwa

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@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

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. 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 cdh Stellenbosch@cdhlegal.com

©2023 12500/JUL