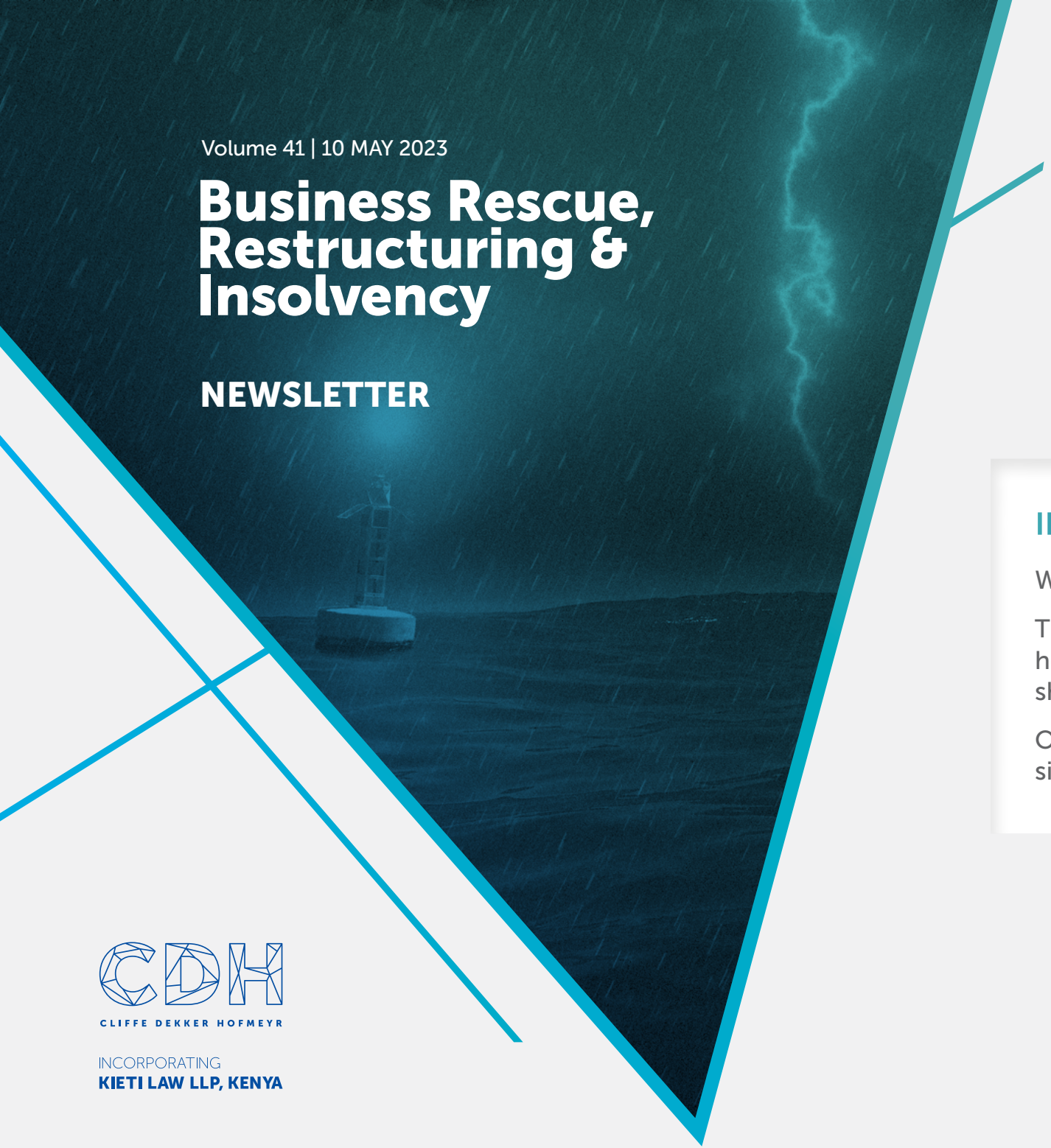

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Business Rescue, Restructuring & Insolvency

NEWSLETTER

DISPUTE RESOLUTION

IN THIS ISSUE

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

Tobie Jordaan
Sector Head | Director
Business Rescue,
Restructuring & Insolvency

As the array of public holidays have come to an end, we find ourselves ready to tackle the new financial year, ever increasing stages of loadshedding, and the seemingly volatile economic climate with a renewed sense of resilience, all while wearing a few extra layers and a consuming a few more warm beverages than usual.

In recent insolvency news, the annual Deloitte Restructuring Survey was published, providing a glance into the Restructuring and Insolvency space. One of the topics the survey delves into is our energy crisis and the severe impact it has had on our economy. The survey demonstrates that many of its respondents have approached 2023 with more pessimism than in previous years as loadshedding had reached a total of 150 days in 2022, and with experts further predicting that South Africans will suffer an approximate 200 days of loadshedding in 2023. Ever-rising interest rates have similarly added to the dour outlook on the South African economic landscape.

Deloitte's survey also highlights that the majority of respondents are aligned and support the purpose of business rescue where the "*Part A*" outcome is the rescue of a company through restructuring its affairs, business, property, debt, and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis. This is contrasted with "*Part B*" being the outcome where there is a better return than liquidation to creditors. Eighty percent of respondents defined the primary purpose of business rescue as a Part A outcome. Interestingly, Deloitte notes that only 3% of lender respondents experienced Part A success in more than 50% of their portfolios – juxtaposed with the 39% of lender respondents experiencing success in more than 50% of their portfolios using a Part B outcome. The survey delves into the critical factors that contribute to a successful business rescue and also unpacks the Kenyan insolvency space. For further insight, the survey can be accessed at the following link: za-Deloitte-Restructuring-Survey-2023.pdf.

In business rescue news, the business rescue practitioners of Lily Mine advised in a notice to creditors that the implementation of the business rescue plan has been delayed by ongoing litigation. In the Tongaat Hulett (Tongaat) rescue, Tongaat has instituted proceedings seeking an order that it is not required to pay R1,4 billion in outstanding levies to the South African Sugar Association. Tongaat owes creditors over R10 billion and believes that because the Sugar Association is an organ of state, it is not entitled to immediately claim the payment of debt as this would defeat the purpose of the business rescue.

In this month's edition, Kgosi Nkaiseng, Jessica Osmond and Nseula Chilikhuma discuss the recent judgment of *Strategic Partners Group (Pty) Ltd and Others v The Liquidators of Ilima Group (Pty) Ltd (in liquidation) and Others* (Case no 1291/2021) [2023] ZASCA 27 (24 March 2023) where the rights of liquidators to information to administer their statutory duty is examined by the Supreme Court of Appeal (SCA).

In addition, Belinda Scriba and Katekani Mashamba analyse the SCA's judgment in *Louis N O and Others v Fenwick N O and Others* (598/2021) [2023] ZASCA 59 to consider the interpretation of the Companies Act 71 of 2008 when a business rescue plan is rejected.

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

The price isn't always right: Liquidators hold their ground in dispute over shareholding valuation

On 24 March 2023, the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal brought by Strategic Partners Group (Pty) Ltd (SPG) against a judgment of the High Court in the matter of *SPG and Others v Liquidators of Ilima Group (Pty) Ltd (in liquidation)* and Others (Case no 1291/2021) [2023] ZASCA 27 (24 March 2023). This, after a myriad of litigation in the court a quo where SPG brought an application for declaratory relief against the liquidators of Ilima Group (the main application) with the liquidators responding with a counter-application.

The dispute arose over certain documents which the liquidators of Ilima Group (Pty) Ltd (in liquidation) (Ilima) claimed to have been entitled to. Ilima had been placed in final liquidation in April 2010 and held 16 million ordinary shares in SPG (representing some 11,784% of the shares in SPG). To ensure some return to creditors and performance of their statutory duty to realise the shareholding and distribute the proceeds, the liquidators were obliged to value and sell the shares for the best possible price. In order to do so, the liquidators requested a valuation from SPG.

SPG provided the liquidators with a valuation prepared by its appointed auditors, Mazars, however this valuation was disputed by the liquidators. This led to a dispute over what information liquidators of an insolvent shareholder in a company are entitled to and the manner in which that information can be obtained. It also turned out that the

The price isn't always right: Liquidators hold their ground in dispute over shareholding valuation

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SPG valuation had been performed based on a disputed shareholders' agreement and as a result the liquidators rejected the valuation.

The liquidators then procured the services of their own appointed auditor, Mr Zeelie of Zeelie Auditors, to perform a valuation of the shares. The liquidators thereafter made an offer to sell the Ilima shares for an amount of R100 million, however, SPG claimed that this amount was inflated and rejected it.

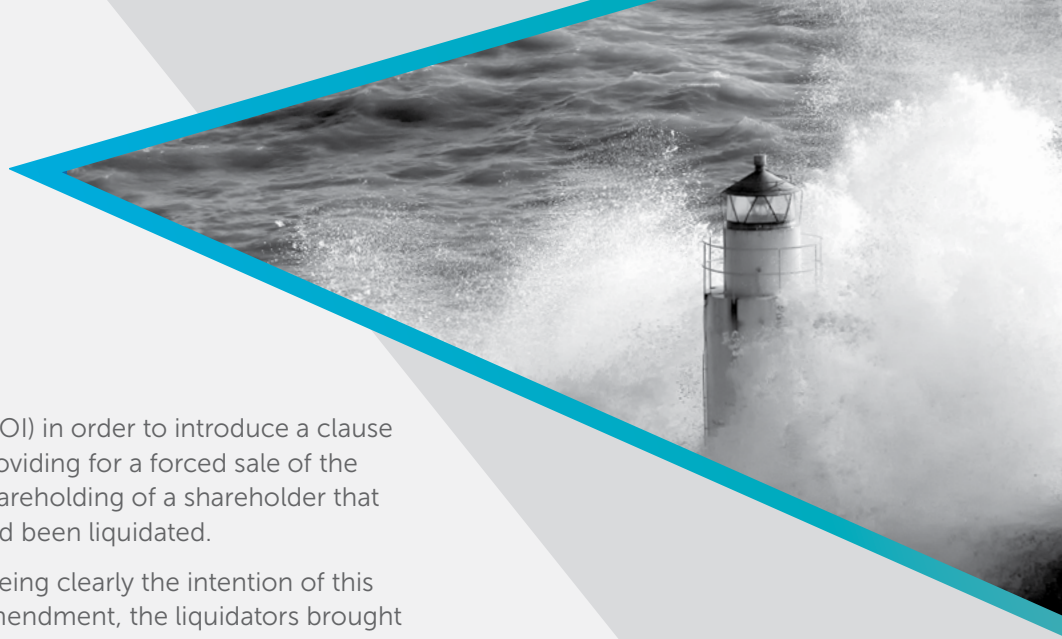
It was clear that the parties were not going to agree on a valuation. SPG maintained that the valuation ought to be performed based on the disputed shareholders' agreement. To put this argument to rest, the liquidators sought a declarator from the High Court to determine the validity of the shareholders' agreement. The High Court found that no valid or binding shareholders' agreement had been concluded between the shareholders of SPG as there was no proof that all the shareholders had consented to the agreement. Therefore, the basis upon which the valuation had been performed by SPG was flawed.

The dispute on the valuation of the shares continued and, given the finding of invalidity of the shareholders' agreement and certain developments within SPG over the duration of the dispute, it was evident that an updated valuation was required. The liquidators made various enquiries to SPG on whether an updated valuation had been procured, however, their enquiries were left unanswered. The liquidators themselves proceeded to procure an updated valuation from Zeelie.

To do this, Zeelie required additional information and documentation and requests to this effect were made to SPG. These requests were also ignored. The liquidators resolved to convene an insolvency enquiry to obtain the necessary information and documentation.

Despite various undertakings by SPG to provide the information and documentation, only some of the requested information and documentation was forthcoming. This was followed by further attempts to reach agreement on the value of the Ilima shares, which were all unsuccessful and, despite settlement discussions having taken place, SPG launched the main application.

SPG in its main application sought a declarator that the liquidators were entitled to no more documents than those which are provided for in sections 26 and 31 of the Companies Act 71 of 2008 (2008 Act),



The price isn't always right: Liquidators hold their ground in dispute over shareholding valuation

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and alternatively section 113 of the Companies Act 61 of 1973 (1973 Act). As such, the inference was obvious that the launch of the main application signaled the end of any prospect that SPG would be providing further documents to assist the liquidators in procuring an updated valuation.

Despite the launch of these proceedings, the liquidators (through Zeelie) persisted with their requests for further information and documentation and also identified several issues in the documents already obtained from SPG which merited discussion at the forthcoming SPG annual general meeting – these raised concerns of inter alia dubious corporate governance on the part of the SPG board.

This pressure from the liquidators resulted in the calling of a special general meeting of shareholders of SPG to amend the existing memorandum of incorporation (MOI) in order to introduce a clause providing for a forced sale of the shareholding of a shareholder that had been liquidated.

Seeing clearly the intention of this amendment, the liquidators brought a counter-application seeking the dismissal of the main application and a finding that the clause in question to be introduced in the new MOI would not apply to the Ilima shareholding because it fell afoul of section 163 of the 2008 Act on the basis that such amendment constituted an act of SPG which would result in the oppressive or unfair prejudice to, or unfair disregard of, the interests of a shareholder. The liquidators further sought a declarator that the documents and records sought by the liquidators at the respective insolvency enquiries (which were held in terms of section 414 and 415 of the 1973 Act) fell within the category of documents to which the liquidators were legally entitled.

The price isn't always right: Liquidators hold their ground in dispute over shareholding valuation

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The High Court found in favour of the liquidators, dismissing the main application and granting an order in terms of the requests contained in the liquidators' counter-application, including costs in respect of both applications to be paid by SPG. On appeal, the SCA agreed with this finding.

The appeal was therefore dismissed and the SCA highlighted that it is common cause that the liquidators are duty bound to obtain sufficient documentation and information in order to act in a manner that is diligent in the interests of creditors in recovering and distributing assets of the company in liquidation and the effect of the amended MOI was clearly to undermine the performance by the liquidators of their statutory duties. The amendment operated oppressively, was unfairly prejudicial against the liquidators, and unfairly disregarded their interests in obtaining an accurate valuation.

Kgosi Nkaiseng, Jessica Osmond and Nseula Chilikhuma

Orthogonal tactics to try save a sinking ship

People rarely abandon a ship unless they have absolutely no alternative. The same can be said of some affected parties even when it is clear that the business rescue process has failed. This was again demonstrated in the recent Supreme Court of Appeal (SCA) judgment of *Louis N O and Others v Fenwick N O and Others* (598/2021) [2023] ZASCA 59, where certain affected parties pursued an orthogonal interpretation of the legislation to try rescue (every pun intended) the business rescue of Louis Group SA (Pty) Limited (Company).

Hope

There is always a glimmer of hope when a company enters into the business rescue process, and it is difficult for some to acknowledge when that hope fades with a rejected business rescue plan.

Fight

In 2020 the Alan Louis Trust (trust) fought to stay the conversion from business rescue to liquidation of the Company, which had been placed under business rescue supervision in February 2013. This notwithstanding that the business rescue practitioners (BRPs) of the Company, supported by other creditors, contended that the ship was not capable of being saved from liquidation.

In February 2020 (seven years after the commencement of business rescue) the BRPs presented a business rescue plan for a vote to the creditors of the company in terms of section 151 of the Companies Act 71 of 2008 (Act). The plan was subsequently rejected.

Orthogonal tactics to try save a sinking ship

CONTINUED

Options after a plan is rejected

Section 153 contains potential avenues which can be explored to save the company rescue once a business rescue plan has been rejected.

The court summarises the "*saving*" options available once a plan is rejected, as follows:

1. The BRPs may, either:
   (i) seek approval, from the holders of voting interests, to prepare a revised plan; or
   (ii) apply to the court for an order setting aside the result of the vote on the grounds that it was inappropriate,

   (subsection 153(1)(a)).
2. If the BRPs fail to take the above actions, or decide not to exercise these options, an affected party is then presented with three alternatives:
   (i) seek a vote of approval to prepare and publish a revised business rescue plan;
   (ii) apply to set aside the result of the vote as inappropriate; and
   (iii) offer to acquire, by means of a "*binding offer*", the voting interests of any persons who opposed the adoption of the plan,

   (subsection 153(1)(b)).
3. Upon the presentation of a binding offer (as referred to in 2 above) the BRPs must adjourn the meeting for no more than five business days to afford the BRPs an opportunity to make any necessary revisions to the plan to reflect "*the results of the offer*", **and set a date for the resumption of the meeting, at which the provisions of section 152 would apply *afresh*** (subsection 153(4)).

Section 152 is of course the section that deals with presenting and considering the business rescue plan in the first instance, and provides that a rejected plan could only be considered further as per the terms of section 153.

Orthogonal tactics to try save a sinking ship

CONTINUED

The trust's offers

When the creditors rejected the plan in February 2020 the trust:

- exercised its right to make a binding offer; and
- attempted to reserve its rights to apply to court to have the vote rejecting the plan set aside as inappropriate.

The BRPs adjourned the meeting to allow the trust's offers to be assessed in terms of subsection 153(1)(b)(ii) of the Act.

If the trust's binding offers had been accepted it would have meant that the realm around the voting rights would have changed, with the trust now holding those voting rights for those claims which they had purchased.

This did not happen though. At the rejourned meeting the trust's binding offers were ultimately rejected by all the creditors. The BPRs consequently declared:

- the meeting closed; and
- the intention to apply for the conversion of the rescue to a liquidation.

Before the High Court

In response to this, the trust brought an urgent application in the Western Cape Division of the High Court, Cape Town for an order setting aside as irregular the decision of the practitioner to close the reconvened meeting and to not apply the provisions of section 152 afresh – i.e. starting the entire presentation and rejection of the plan from scratch.

The case therefore revolved around the proper interpretation of section 153(4) – whether it meant that the section 152 process started anew even in circumstances where the binding offers were rejected.

In trying to stay the sinking of this ship, the trust argued that section 153(4) spoke only to submission of a binding offer, not to the acceptance or rejection of such offer.

Avoiding absurdities

The court confirmed that in terms of the literal translation of section 153(4), the trust was correct and that on such an interpretation the BPRs were in fact obliged to refer the plan back to the section 152 process, notwithstanding that:

- the binding offer had been rejected; and
- consequently, there was no change in the voting rights.

The BRPs submitted that on a proper construction, a fresh application of section 152 and 153 can only arise where the binding offer is accepted, resulting in an alteration of the voting rights, which would then necessitate a second round of voting on a revised plan in terms of section 152 of the Act.

Orthogonal tactics to try save a sinking ship

CONTINUED

The SCA once again confirmed that sometimes it was necessary to deviate from literal translation to avoid absurdities in process, and again reiterated what it had said in *African Banking Corporation of Botswana v Kariba Furniture Manufacturers and Others* [2015] (5) SA 192 (SCA):

> *"I do not believe it is unfair to comment that many of the provisions of the Act relating to business rescue, and s 153 in particular, were shoddily drafted and have given rise to considerable uncertainty. Questions which immediately spring to mind in regard to the procedure envisaged by s 153(1)(b)(ii), and to which no answers are clearly expressed in the Act, include (this list is not intended to be all-embracing) . . . the effect of an offer being rejected. . ."*

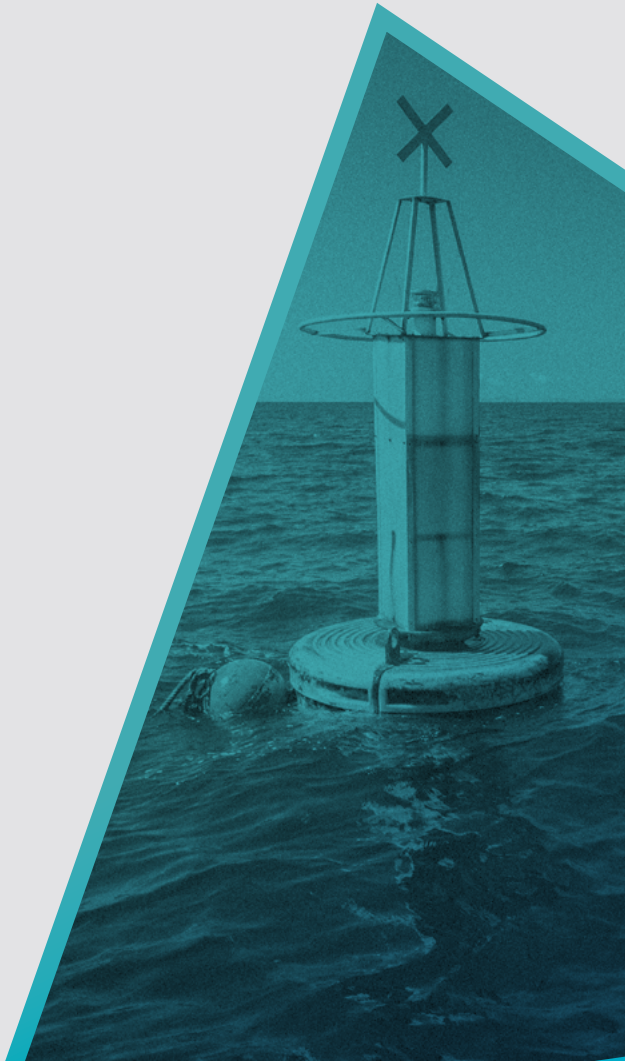
In this case the trust conceded that a further vote on a rejected plan, when the status of the voting rights had not changed,would make no sense.

Nonetheless, the trust argued that BRP being obliged, in terms of subsection 153(4), to refer the plan back to the section 152 process it would give the trust a further opportunity, after the rejection of its binding offer, to apply for the setting aside as inappropriate of the original vote under section 153(1)(b). In a nutshell – it would give them a second bite at the cherry.

The court however agreed with the BPRs and found that it could not have been the intention that the mere making of an offer triggered the section 153(4) steps. To interpret the section otherwise would be nonsensical and absurd. The court therefore dismissed the appeal.

The lesson, as has been in so many cases before this, is to be careful when applying a literal meaning to legislative interpretation, especially in terms of Chapter 6 of the Act (its business rescue provisions). Sometimes, like the Titanic, a sinking ship is not capable of being saved.

Katekani Mashamba and
Belinda Scriba



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

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

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

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

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

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

Nomlayo Mabhena-Mlilo
Senior Associate:
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@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

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

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

Katekani Mashamba
Associate:
Dispute Resolution
T +27 (0)11 562 1392
E katekani.mashamba@cdhlegal.com

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

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

Jessica van den Berg
Associate:
Dispute Resolution
T +27 (0)11 562 1617
E jessica.vandenberg@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.

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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 cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA