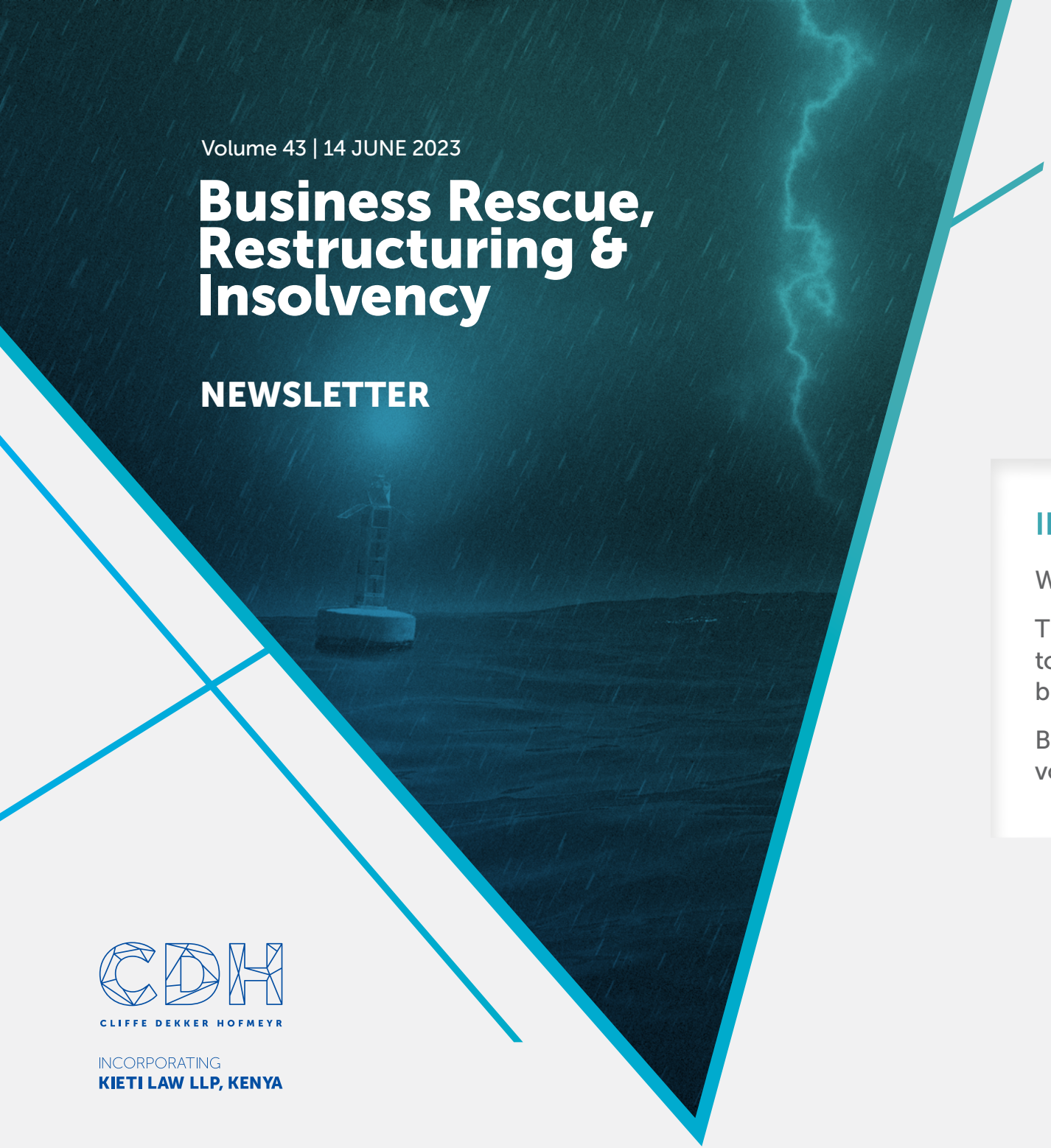

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Business Rescue, Restructuring & Insolvency

NEWSLETTER

DISPUTE RESOLUTION

IN THIS ISSUE

CDH
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Winter is officially here as we enter the midpoint of the year. It is now significantly harder to get out of bed in the morning, electricity bills are rising as we boil our kettles more often, and we now find every excuse to complete tasks in front of our heaters. Without losing ourselves to the passing months, it is important to remember the significance of June for our nation. This year, 16 June marks 47 years since the 1976 Soweto Uprising, and commemorates the power and impact that our youth has had on our country.

Much has happened since our last newsletter, and while it is easy for many South Africans to feel disheartened and left out in the cold, there are some positives to be seen around us. In some good news, it has recently been reported that notwithstanding unprecedented levels of loadshedding, the country's GDP grew by 0,4% in the first quarter of the year. In addition, the manufacturing, mining and construction industries have also demonstrated significant resilience and shown some unexpected growth. Although the current cost of living is significantly high, Bloomberg has reported that the pace of acceleration of food prices is easing and trends are evidencing a downward trajectory in food inflation. The current economic climate will provide food producers with a challenge of how to produce cheaper foods while still satisfying consumers.

In a dourer contrast, Statistics SA (Stats SA) has confirmed that the official unemployment rate increased by 0,2 of a percentage point to 32,9% in the first quarter of the year. The number of people who have become unemployed in the period between December 2022 to March 2023 is 179,000, increasing the total number of unemployed people to a worrying 7,9 million. Among some of the reasons for this increase is that previously discouraged work-seekers have now begun to look for employment, which changes their classification from *"not economically active"* to *"unemployed"*. According to Stats SA, employment increases were mainly seen in the financial services sector. Economists were expecting a slight increase in the unemployment rate in the first quarter, given the likely effect of severe loadshedding on job creation. It goes without saying

that we encourage businesses and employers to consider the option of business rescue timeously in order to avoid liquidation and the dire consequences that winding down has on the ever-increasing unemployment rate.

Looking within the latest business rescue news, the rescue of Tongaat Hulett Development (Pty) Ltd (THD) is showing promise as numerous buyers have shown interest in purchasing the ailing sugar producer. Further, the property development arm of Tongaat Hulett Limited announced that creditors voted overwhelmingly in favour of THD's business rescue plan and that the adopted plan would be implemented.

In this month's newsletter, we look at how business rescue proceedings will not "*rescue*" void dispositions as determined in the recent judgment in *Macneil Plastics (Pty) Ltd v Van Der Heever and Others* (A228/2019) [2023] ZAGPPHC 357. We also consider the price of oversight as a business rescue practitioner was ordered to pay back fees charged after termination of business rescue proceedings.

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The price of oversight: BRP ordered to pay back fees after termination of business rescue proceedings

When, why and how do business rescue proceedings terminate? This was one of the pertinent questions raised in the matter of *Danco Boerdery (Pty) Ltd v Cawood, Werner and Others* which the Pretoria High Court had to consider after Danco Boerdery (Danco) approached it to seek relief against Mr Werner Cawood (first respondent), Mr Christian Beer (second respondent) and the Rescue Company (Pty) Ltd (third respondent).

During the latter half of 2015, Danco found itself in financial distress, and ultimately filed for business rescue in October 2015. Cawood and Beer were the jointly appointed business rescue practitioners for Danco. Beer, however, played no role in the matter after November 2015 and also did not oppose the application.

The business rescue proceedings of the company commenced and proceeded in accordance with the provisions of the Companies Act 71 of 2008 (Companies Act). However, on 22 January 2016 the published and amended business rescue plan was rejected by creditors at the second meeting of creditors.

It was therefore resolved at this second meeting of creditors that an application would be made to convert the business rescue proceedings into liquidation proceedings (the conversion application). This application was subsequently made in the names of jointly appointed business rescue practitioners against Danco on 26 January 2016.

The price of oversight: BRP ordered to pay back fees after termination of business rescue proceedings

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Despite the business rescue plan having been rejected on 22 January 2016, Cawood seemingly continued to act in his role as business rescue practitioner, and on 3 March 2016 he addressed correspondence to Danco to set out the way in which the business of Danco should be conducted pending the hearing of the conversion application. Cawood was also authorised to sign all relevant investment documentation on behalf of Danco in line with his appointment as business rescue practitioner.

Allan Gray investment account

As such, Cawood used his authority to open an Allan Gray investment account and on 6 May 2016, he transferred a sum of R600,000 into the account.

While the conversion application had been set down for hearing on 29 April 2016, the application was never moved, and was ultimately withdrawn. As such, nothing further transpired insofar as the business rescue proceedings were concerned until the end of July 2016.

During August 2016, a number of events took place which raised alarm bells for Danco. For one, Danco contacted Allan Gray to make enquiries regarding the investment funds in the account, only to be informed that Cawood had previously given notice to Allan Gray to cash in the investments held by it and to transfer these funds to a Standard Bank account that had been opened by him. It later came to light that at some stage during the business rescue proceedings, Cawood had opened this separate Standard Bank account in the name of Danco – this notwithstanding the First National Bank account which had been opened at the commencement of the business rescue proceedings that was intended to be used for business rescue activities. Cawood was the only person aware of the existence of the Standard Bank account and he was the only person who had authority to transact on the account.

The investment was transferred from the Allan Gray account into the Standard Bank account in two tranches in the sums of R386,870 and R209,088.95 respectively (a total of R595,958.95). Thereafter, the Rescue Company, an entity claimed to have been used by Cawood as a vessel for payment of fees for the services rendered by him in his capacity as a business rescue practitioner, raised an invoice for R519,074.45.

Cawood transferred a sum of R595,000 from the Standard Bank account, to the Rescue Company, and then closed the Standard Bank account on 25 August 2016.

The price of oversight: BRP ordered to pay back fees after termination of business rescue proceedings

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Notice of termination of business rescue proceedings

On 29 August 2016, Cawood then filed a notice of termination of business rescue proceedings with the Companies and Intellectual Property Commission (CIPC) stating that the reasons for termination were that there was no reasonable prospect of rescuing Danco and further that the business rescue plan had been rejected by the majority of holders of voting interests.

The above turn of events brought Cawood's conduct into question and, as such, led the parties to the current dispute wherein Danco sought an order for payment in the amount of R595,958.95, together with interest and costs against the Cawood and the Rescue Company (jointly and severally).

In considering the application the court was presented with two issues: The first issue was considering when the business rescue proceedings in fact terminated – was it on 1 February 2016, after the plan had been rejected at the second meeting of creditors; or 29 August 2016, when the notice for termination of business rescue proceedings was filed with CIPC by Cawood?

The second issue was whether Cawood was entitled to make payment to the Rescue Company.

The Companies Act

In considering the first issue, the court considered section 132(2) of the Companies Act which regulates the duration of business rescue proceedings and determines how business rescue proceedings terminate. Section 132(2) provides as follows:

"132. Duration of business rescue proceedings

(2) Business rescue proceedings end when:

a) the court:

i. sets aside the resolution or order that began those proceedings; or

ii. has converted the proceedings to liquidation proceedings;

b) the practitioner has filed with the Commission a notice of the termination of the business rescue proceedings;

c) a business rescue plan has been-

i. proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or

ii. adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of the plan."

The price of oversight: BRP ordered to pay back fees after termination of business rescue proceedings

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Cawood argued that until the notice to terminate the business rescue proceedings was filed, the business rescue proceedings endured. He went on to argue that the conversion application did not result in the ending of the business rescue as no order was granted in this regard, and further, the rejection of the business rescue plan did not automatically result in the termination of the business rescue. He premised this argument on the fact that section 132(2)(c)(i) referred to section 153 of the Companies Act, with subsection (5) providing for the filing of a notice of termination.

Ultimately, Cawood's argument was such that the provisions of section 132(2)(a) to (c) could only be considered conjunctively and that the individual subsections which define when business rescue ends could not be regarded separately as individual grounds for termination of business rescue proceedings.

Contrary to the above, Danco argued that the business rescue came to an end when the business rescue plan was rejected and no further steps were taken in terms of section 153 of the Companies Act. Danco relied on the findings in the matter of *Artio Investments (Pty) Ltd v Absa and Others* in support of its argument.

Findings

From the authorities considered by the court, the court found in favour of Danco's argument that the provisions set out in section 132(2)(a) to (c) are to be viewed disjunctively, each giving rise to a separate and distinct instance as to when business rescue proceedings come to an end. As such, the court found that the business rescue proceedings came to an end in terms of section 132(2)(c)(ii) on 22 January 2016.

This finding gave rise to the second question of whether Cawood was entitled to make payments to the Rescue Company, supposedly for his services rendered as the business rescue practitioner from date of appointment until the end August 2016.

The price of oversight: BRP ordered to pay back fees after termination of business rescue proceedings

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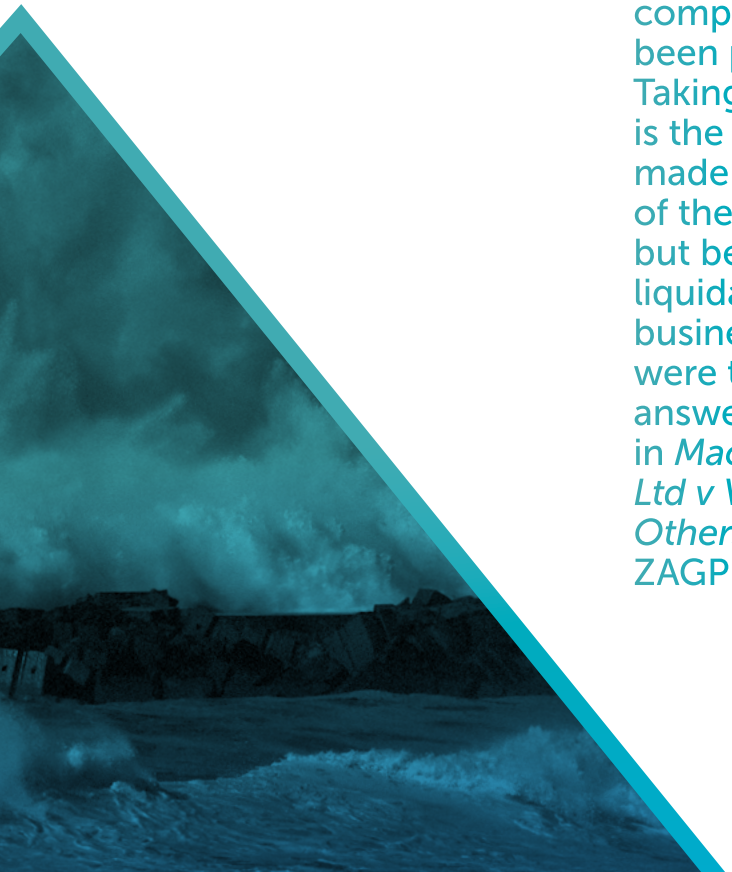
The court noted that while the business rescue proceedings had come to an end on 22 January 2016, both Cawood and Danco proceeded on the mistaken belief that Danco was still under business rescue. Despite Cawood's argument that the business rescue proceedings endured until end August 2016, the court found that Cawood's conduct did not meet the standard expected of a business rescue practitioner in any event. Further, the court found that had Cawood been forthcoming in disclosing his intentions regarding the Rescue Company, he may well have avoided the current litigation and been deemed to have been entitled to the funds due to him for the work done as the appointed business rescue practitioner. Alas, his conduct warranted otherwise.

Given Cawood's conduct and his failure to prioritise the needs of the business, the court found in favour of Danco and granted an order against Cawood and the Rescue Company for payment in the sum of R595,958.95 together with interest and punitive costs.

Kylene Weyers and Jessica Osmond

Business rescue will not "*rescue*" void dispositions



As insolvency proceedings are becoming increasingly popular in South Africa, we see that the unanswered questions relating to the finetuned details of the proceedings are starting to surface. For example, what is the status of dispositions made by or on behalf of a company which has already been placed in liquidation? Taking it a step further, what is the status of dispositions made after the granting of the liquidation order, but before the company in liquidation was placed under business rescue? These were the questions recently answered by the court in *Macneil Plastics (Pty) Ltd v Van Der Heever and Others* (A228/2019) [2023] ZAGPPHC 357.

Background

The case involves an appeal against a judgment made on 21 August 2022, where the court ruled that payments made by the fourth respondent (Water Africa Systems (Pty) Ltd) (Water Africa) to the appellant (Macneil Plastics (Pty) Ltd) (Macneil Plastics) following a liquidation order, should be declared void and that the appellant should return the funds with interest and costs. On 28 October 2015, DIP Plastic (Pty) Ltd was granted an order for the final liquidation of Water Africa due to its inability to pay its debts. However, despite being placed under final liquidation, Water Africa made two payments totalling R407,010.30 to Macneil Plastics on 2 November 2015. This payment was for a credit facility that Macneil Plastics had granted to Water Africa for the provision of goods. Subsequently, on 9 December 2015, the court granted an order suspending the liquidation proceedings and placing Water Africa under supervision and in business rescue in terms of section 131(1) of the Companies Act 71 of 2008 (Companies Act).

During Water Africa's business rescue, the business rescue practitioner paid out the creditors (excluding Macneil Plastics) a total of R25,483,536.00 before applying to court for the setting aside of the business rescue and reinstatement of the final liquidation order granted on 28 October 2015. The order reinstating the liquidation order was made on 12 April 2016. The court declared that the business rescue proceedings had ended and ordered for costs of the business rescue intervention to be included in the company's winding-up. Thereafter, on 30 June 2016, the Master appointed the first, second and third respondents as the liquidators for Water Africa.

The dispute on appeal revolved around the impact of the order issued under section 131(6) on ongoing liquidation proceedings,

Business rescue will not "*rescue*" void dispositions

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and specifically whether these proceedings are merely suspended and then resumed if business rescue fails, or whether they are terminated and then restarted.

In the appeal, Macneil Plastics contended that the final liquidation order granted on 28 October 2015 was replaced by the order granted on 9 December 2015 in terms of which the liquidation proceedings were converted to business rescue proceedings. Accordingly, so they argued, the liquidation proceedings were brought to an end and the *concursus creditorium* formed thereby was undone. Thereafter, the business rescue proceedings were terminated and replaced by a fresh liquidation order on 28 October 2015, forming a new *concursus creditorium*. The previous liquidation order or previously formed *concursus creditorium* was not revived. Macneil Plastics submitted that there is a gap in section 131(6) of the Companies Act in that it does not speak to the effect of a court order placing the company in business rescue on a pre-existing liquidation order.

On the other hand, the liquidators argued that the effect of liquidation is to establish a *concursus creditorium* and after that nothing can be allowed to be done by any of the creditors to alter the rights of or prejudice the other creditors. It was further argued that the remedy of a liquidator who seeks repayment of an amount paid by or on behalf of a company placed under liquidation depends on the stage at which the payment was made. In the present case, the payment was made after a liquidation order had been granted but before the company was placed under business rescue, and thus at a stage where the *concursus creditorium* was formed. Accordingly, the payments were void and the fact that the company was later placed under business rescue could not undo this fact.

Looking at the wording of the court a quo orders, the appeal court found that these orders intended to suspend the liquidation proceedings upon commencement of the business rescue proceedings, without terminating them, and, when the business rescue proceedings were terminated, to reinstate the initial liquidation proceedings. With this in mind, the court turned to considering the legal position.

The status of dispositions made by or on behalf of a company which has already been placed in liquidation

In terms of section 341(1) of the Companies Act 61 of 1973 (old Companies Act), dispositions made after the commencement of liquidation proceedings are void. In a previous judgment the Supreme Court of Appeal had confirmed that once a court grants provisional or final liquidation, a *concursus*

Business rescue will not "*rescue*" void dispositions

CONTINUED

creditorium is established. Accordingly, any disposition made after liquidation proceedings have commenced is void and cannot be validated by the court. Thus, the court of appeal found that when the payments were made by Water Africa on 2 November 2015, the company had already been placed under final liquidation and therefore the payments were void.

The status of dispositions made after the granting of a final liquidation order, but before the company is placed under business rescue

After finding that dispositions made after liquidation is granted are void, the court considered what the effect of this disposition would be once the company is placed under business rescue thereafter. Section 131(6) of the Companies Act provides that where liquidation proceedings have already been commenced, the application for business rescue will suspend those proceedings until the court has adjudicated the application or until the business rescue proceedings end upon court order. In *GCC Engineering v Maroos* [2019] (2) SA 379 (SA) it was held that upon an application for business rescue, the liquidation proceedings are suspended, but the order which originally granted the liquidation is still in place. Thus, the ongoing process of liquidating the company's assets for distribution to the different creditors has been put on hold. The order that granted the liquidation remains in place and the office of the liquidator is not terminated.

Accordingly, the appeal court concluded that the disposition made by Water Africa to Macneil Plastics was void, and placing the company under business rescue thereafter could not validate or undo the void disposition. The disposition should not have occurred as the concursus creditorium was already formed and the control of the assets had already vested with the Master and the liquidators had been appointed.

Furthermore, the order granted on 12 April 2016 had explicitly mentioned the reinstatement of the final liquidation order, which was suspended by the order granted on 9 December 2015 when business rescue was granted. The court held that it is incorrect to suggest that an order placing a company that is in business rescue, into liquidation, is initiating a new process, thus establishing a new concursus creditorium. The previous liquidation order and the *concursus creditorium* which was formed thereby are simply revived.

Following this straightforward judgment, there can be no doubt that a creditor who had received a disposition from a company in liquidation will have to repay the disposition to the liquidator, even if the company is subsequently placed under business rescue. The *concursus creditorium* will remain throughout, and the business rescue proceedings will not save the void disposition that was made.

Lucinde Rhoodie, Kara Meiring and Claudia Grobler

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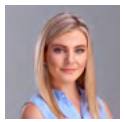

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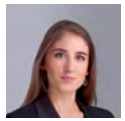

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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