Business Rescue, Restructuring & Insolvency

CDH INCORPORATED

ALERT | 10 April 2024

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SOUTH AFRICA

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The definitive position on the courts' ability to override existing orders

"If the errors and their consequences were not so serious, this appeal could be said to arise from a comedy of errors." This was the opening sentence in a judgment by the Supreme Court of Appeal (SCA) in *Standard Bank of South Africa v Swartz and Others* (Case no 1175/2022) [2024] ZASCA 28. The appeal focused on errors the High Court made in granting a *"non-existent"* business rescue application and adjudicating issues which had been disposed of by agreement

Background

Three applications were launched in the Western Cape High Court, for the liquidation of Pygon Trading CC (Pygon) and JCICC Network (JCICC) (together the CCs) and for the sequestration of the joint estate of Dr and Mrs Swartz, with Dr Swartz being the *"controlling mind"* of the CCs. Standard Bank of South Africa (bank) was the applicant. The applications were heard simultaneously and were provisionally granted by the High Court.

Swartz applied for leave to intervene to place Pygon in business rescue, however, the provisional trustees of the joint estate reported that Pygon was insolvent with no prospects of being rescued and as such they did not support the application for leave to intervene.

Prior to the return date for the liquidation and sequestration applications, a settlement agreement was concluded and made an order of court on 23 November 2021, in terms of which:

- The business rescue application was withdrawn.
- The application for Pygon's final liquidation was postponed.
- An amount of R18 million was to be paid within seven calendar days before 10 February 2022 (the return date) to conveyancers in terms of a sale agreement between Pygon and Zylec Investments (Pty) Ltd (Zylec).
- Distributions were to be paid to Pygon's creditors from that amount.
- If those payments and distributions were made, the provisional sequestration and liquidation orders would be discharged on the return date.
- If those payments and distributions were not made, the provisional orders would be made final.

Zylec failed to pay the R18 million timeously and the provisional liquidators of Pygon cancelled the sale.

The bank submitted that since the R18 million had not been paid, the consent order of 23 November 2021 should be put into effect in that the CCs and the joint estate should be finally liquidated and sequestrated. On 4 May 2022 the court *a quo* handed down judgment in terms of which the provisional liquidations and sequestration were discharged and Pygon was placed into business rescue with the liquidation proceedings against it being suspended in terms of section 131(6) of the Companies Act 71 of 2008. Further, the bank was ordered to pay costs for all the proceedings. The bank applied for leave to appeal, which was refused by the High Court. The bank appealed to the SCA.

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The appeal

The SCA set aside the High Court's judgment on the basis that there was no business rescue application before the High Court for it to grant an order on and that the issues between the parties, in light of the consent order, were *res judicata*.

Dealing first with the business rescue application, the SCA noted that the application had never been launched. This is because Swartz was never granted leave to intervene in the liquidation application, and so he could not have brought the business rescue application for Pygon. Furthermore, even if Swartz was granted the leave to bring the business rescue application, the first provision of the settlement agreement (which was made an order of court) was that the business rescue application was withdrawn. As such, the High Court was found to have erred in granting a business rescue application which was not before it and which essentially did not exist.

In respect of the liquidation and sequestration orders, the SCA stated that the settlement agreement amounted to a *transactio*, which is a compromise and has the effect *"to end, or to destroy, or to prevent a legal dispute"*. The compromise in this instance was that the outcome of the applications in question was agreed upon, in that if payment was made, the provisional orders would be discharged, and if payment was not made, the provisional orders would be made final. The compromise had the effect of *res judicata*. The settlement agreement and subsequent consent order were dispositive of the issues between the parties, which meant that nothing remained for the court to adjudicate upon or to determine.

Accordingly, the SCA held that, because an order made may not generally be altered and because no attack was launched on the consent order, the High Court had no power to alter it with its order of 4 May 2022 unless the consent order had been rescinded, set aside or abandoned, which had not happened. The SCA held that it has been established through case law that once a judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases.

Therefore, because the consent order had not been set aside, the High Court's authority had come to an end and the order had to be enforced. The SCA held that the High Court fundamentally erred in that it granted an order on a *"non-existent application"* and then *"assumed jurisdiction"* to adjudicate issues which were *res judicata*. The appeal was therefore upheld with the two liquidations and sequestration being made final.

Conclusion

While it is useful to note that orders may not be granted on applications that are not properly before a court, this judgment is a pertinent reminder that when an order is made, by agreement or otherwise, the music stops and there is no replay. Accordingly, a court's powers to adjudicate on the subject matter of that order are negated. A party aggrieved by an order may, of course, apply to rescind or appeal the order. Without an application to rescind or appeal, the next step after an order is made is enforcement or abandonment by the relevant party, not a revisit by the court.

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