

Corporate Debt, Turnaround & Restructuring

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SOUTH AFRICA

Determining when business rescue proceedings start and who qualifies as an *"affected person"*



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Determining when business rescue proceedings start and who qualifies as an “affected person”

In the recent judgment of *Sundays River Citrus Company (Pty) Ltd and Others v Lonetree Citrus CC and Others* [2024] JDR 4087 (ECG), the court clarified and confirmed the following three key questions regarding business rescue (BR) proceedings:

1. Court ordered BR proceedings begin when a court order is granted placing the company under business rescue.
2. Only affected persons are entitled to participate in the main application for an order placing a financially distressed company under BR.
3. The term “creditor” does not only refer to a creditor with a monetary debt or a debt due at commencement of the BR proceedings but includes a creditor with a non-monetary claim or a claim that will fall due during the BR proceedings, which is an affected person and entitled to intervene.

Facts

In *Sundays River*, Rolust Sondagrivierplase CC (Rolust), a property-owning entity, owned several farm properties from which Lonetree Citrus CC (Lonetree) conducted citrus farming. Lonetree was indebted to Standard Bank in the sum of R30 million for credit facilities in respect of which Rolust concluded a suretyship in favour of Standard Bank for Lonetree’s indebtedness to it. Rolust’s indebtedness included a loan facility for R40 million and, pursuant to its failure to honour its obligations, Standard Bank brought liquidation applications for the winding up of Lonetree and Rolust in February 2024.

On 7 May 2024, in terms of section 131 of the Companies Act 71 of 2008 (Act) the applicant applied for an order placing Lonetree under supervision. A simultaneous application was brought in respect of Rolust.

Sundays River Citrus Company (SRCC), the first intervening applicant, had entered into a production loan agreement with Lonetree in terms of which Lonetree’s operational costs for the period 1 May 2023 to 30 April 2024 of the citrus season were financed. Lonetree was indebted to SRCC in terms of the production loan agreement in the sum of R4,5 million. Having come to the knowledge of Standard Bank’s liquidation application on 24 April 2024, SRCC demanded full repayment of the amount due to it in terms of the production loan agreement. On 10 May 2024, three days after the Lonetree BR application was lodged, Lonetree purported to repay the production loan to SRCC, but despite this, SRCC sought to file an affidavit and participate in both the Lonetree BR application and Rolust BR application as an affected person.

Court’s findings

The court confirmed that there are two routes through which a company may enter BR, namely by way of a resolution by its board of directors in terms of section 129(1) of the Act or through a court order in terms of section 131(1) of the Act.

Section 131(4)(a) of the Act provides that a court may “*make an order placing the company under supervision and commencing business rescue proceedings*”.

Conversely, section 132(1)(b) states that “*proceedings begin when an affected person applies to the court for an order placing the company under supervision in terms of section 131(1)*”.



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It is apparent that the two provisions contrast one another regarding when BR proceedings commence. As part of its interpretative endeavour, a court is required to consider the most sensible interpretation that can be given to the provisions that will avoid anomalies. It must, as part of this, attempt to reconcile the provisions in a statute that appear to conflict with one another.

The court found that the heading of section 131 and the wording of section 131(4)(a) make it clear that BR proceedings only commence once a court makes an order in terms of section 131(4)(a). While section 132 also deals with when BR proceedings begin, its focus on the duration of BR proceedings.

Pertinently, the court found that an application for BR in terms of section 132(1)(b) initiates BR proceedings, which sets the process in motion. Supervision and oversight of a financially distressed company cannot commence when the application is made to court; at which point no BR practitioner has yet been appointed. It is only after an order in terms of section 131(4)(a) placing a distressed company under BR, that a court may make a further order appointing an interim BR practitioner. It stands to follow then, per the court, that BR proceedings commence when an order is made in terms of section 131(4)(a) and not when an application is made by an “affected person” in terms of section 132(1)(b).

In expanding on the court’s rationale for its finding above, and because of its preceding finding, Lonetree’s repayment of the production loan occurred prior to, and not during, BR proceedings.

Does SRCC nevertheless remain an “affected person” on the basis that it was a creditor, in respect of the production loan, at the time the proceedings were initiated by way of the application in terms of section 131? While the Act does not define a “creditor”, it defines an “affected person” in relation to a company as:

- a shareholder or creditor of the company;
- any registered trade union representing employees of the company; or
- if any of the employees of the company are not represented by a registered trade union, each of those employees or their representatives.



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The court confirmed that during BR proceedings, it is the BR practitioner and affected persons that take centre stage. An application for BR is brought by an “affected person” as defined in the Act and the purpose of BR supports the exclusion of other parties claiming an interest, including a direct and substantial interest.

In the words of the court at the end of paragraph 36, “*permitting non-affected persons, acting in their self-interest, to intervene risks clouding and delaying the enquiry*” in respect of whether it is just and equitable to make an order in terms of section 131(4)(a) to place the distressed company under BR. As a non-affected person pursuant to its loan claim being paid, it was held that SRCC could not, in that capacity, bring an application in terms of section 131 of the Act as the wording of the Act is clear and closes the door to broader forms of intervention.

However, and in respect of the main application, SRCC contended that it was an affected person by virtue of it being a creditor in respect of pack rights.

The court confirmed that the conclusion of the contract between SRCC and Lonetree conferred personal rights and imposed corresponding obligations on the parties. It further confirmed that the words “*creditor*” and “*debtor*” are to be applied not only in respect of a claim for money but to a claim for anything else which is owing, whether unconditionally, conditionally or in the future.

In accepting the broad interpretation of what a “*creditor*” is in our law, the court accepted that SRCC was an “*affected person*” for purposes of the Act and was therefore entitled to participate in the hearing of Lonetree’s BR application.

Conclusion

The impact of this judgment cannot be gainsaid as the category of “*affected persons*” as defined in the Act has now been extended to include non-monetary creditors such as SRCC. In addition, the court reaffirmed the position that BR proceedings commence not when the application is lodged but when the order placing a financially distressed in BR is granted in terms of section 131(4)(a) of the Act.

Lucinde Rhoodie and Dipuo Titipana



2023

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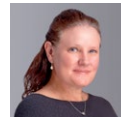
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