

LIQUIDATOR AUCTIONING PROPERTY PENDING BUSINESS RESCUE APPLICATION

Southern Sky Hotel and Leisure (Pty) Ltd and Others v Southern Sky Food Enterprises (Pty) Ltd (617/2021) [2022] ZASCA 134 (13 October 2022)

In order to facilitate the possible resurrection of a business that is in dire straits financially, the Companies Act has provisions to the effect that liquidation proceedings (that have already commenced) are suspended if a business rescue application is launched. The suspension is valid only until a court has ruled on the business rescue application or, if granted, the rescue process has terminated.

Where does this leave the liquidation process that has already commenced? In this judgment, the liquidators proceeded with an auction sale of the property, despite the pending business rescue application. On the specific facts here, the Court held that the sale, which was subject to the outcome of the rescue application, was valid. Read the judgment and summary for an explanation why this is so.

The Judgment can be viewed [here](#).

FACTS

The Hans Merensky golf course was established in 1967. The golf course and surrounding land were later purchased by the Hans Merensky Country Club (Pty) Ltd (the Club). Southern Sky Hotel and Leisure (Pty) Ltd t/a Hans Merensky Hotel and Spa (in liquidation) ('SSH') later bought the estate from the Club and developed it into the Hans Merensky Hotel and Spa.

From 2013 onwards, several attempts were made by investors and other creditors to place SSH in liquidation. Initially none succeeded because of the filing and/or failure of numerous business rescue applications and other proceedings (which, in terms of company law, could suspend the liquidation). However, in 2022 the Limpopo High Court finally placed the company under final liquidation.

The liquidators' powers allowed them to dispose of SSH's immovable property by public auction and, in November 2020, they commenced with arrangements for an auction to take place in February 2021. However, in December 2020, one of SSH's creditors launched another business rescue application (which was enrolled for hearing on 11 March 2021). This triggered section 131(6) of the Companies Act which states that the launching of a business rescue application suspends liquidation proceedings that have already commenced by or against a company until: (i) the court has decided on the business rescue application; or (ii) if the business rescue application is successful, such proceedings have come to an end.

Despite the pending business rescue application, the liquidators proceeded with the online auction. Sky Food was the highest bidder and concluded a sale agreement with the liquidators. Importantly, clause 24 of the agreement, which is headed 'SPECIAL CONDITION' provided that the agreement would lapse in the event of the pending business rescue application succeeding.

Later, however, Sky Food challenged the validity of the auction and the sale agreement, arguing that the sale had been concluded after the launching of the last business rescue application, which effectively suspended the liquidation proceedings. It launched an urgent application in the Johannesburg High Court, which Court declared the agreement invalid and set it aside.

The decision was taken on appeal to the SCA.

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HELD

- Section 131(6) of the Companies Act provides that, if “liquidation proceedings have already been commenced by or against the company at the time an application is made” for business rescue, “the application will suspend those liquidation proceedings until – (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for.”
- It must be accepted that section 131(6) does not suspend the legal consequences of a winding-up order, but merely suspends the liquidation proceedings, which means that *the process of continuing with the realisation of the assets* of the company in liquidation with the aim of ultimately distributing them to the various creditors is suspended. It is the latter which allows for the continuation of the realisation of the assets of the company in liquidation.
- There is no indication in section 131(6)’s text, context or purpose which evidences an intention to nullify agreements of sale concluded by the liquidator, pending business rescue proceedings. Section 131(6) does not suspend the appointment, office or powers of a liquidator; it only suspends the process of liquidation.
- It was relevant that clause 24 of the auction agreement had the effect that the property will not be realized (i.e. converted into cash by effecting transfer) unless the business rescue application was dismissed.
- Thus, since the agreement in this case provided that the disposal would only take effect upon resolution of the business rescue application proceedings, there was no reason why the liquidators could not exercise their powers and conclude the sale agreement. However, because of section 131(6), the execution of the agreement was suspended pending the resolution or ending of the business rescue application or any subsequent business rescue.

CONCLUSION

The agreement was accordingly valid, its execution being suspended until the suspension of the liquidation proceedings fell away.