

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

BUSINESS RESCUE POTENTIAL EVEN AFTER FINAL LIQUIDATION ORDER

Richter v Absa Bank Limited (20181/2014) [2015] ZASCA 100 (01 June 2015)

At first glance it may seem odd that business rescue can be initiated even after a final liquidation order has been issued for a company. The court here however clarified that the liquidation process is only finalised once the entity is deregistered. As such, the Companies Act allows for a business rescue application to be brought at any time before finalisation of the liquidation process. A potential lifeline for struggling entities running out of time to secure an upturn, although real concerns exist for the administration of liquidations as a result.

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

FACTS

In September 2012, a final order of liquidation was granted in respect of Bloempro CC despite its opposing arguments that it should rather have been placed in business rescue.

Nonetheless, in February 2013, Mr Richter (Bloempro's general manager and an "affected party" as defined in the Companies Act), brought an application in the Gauteng High Court seeking an order: (i) that Bloempro be placed in business rescue; and (ii), for rescission of a judgment ABSA had previously obtained against Bloempro. ABSA argued that business rescue cannot be commenced with after a final liquidation order has been granted.

The High Court held that business rescue would be impermissible as Bloempro was in final liquidation. Mr Richter appealed to the Supreme Court of Appeal.

Applicable law

Section 131 (1) and (6):

'(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

...

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), 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.'

HELD:

- Section 131 of the Companies Act deals with the commencement of business rescue by order of court. Section 131(1) entitles an affected party to apply to a court, at any time, for an order placing a company under supervision and commencing liquidation proceedings. Section 31(6) provides that if liquidation proceedings have already commenced at the time application is made for business rescue, the liquidation proceedings will be suspended.

The liquidation process

- Generally, in law and in business, liquidation is the exhaustive process by which a company is brought to an end and the assets thereof, if any, are redistributed. It is the process of administering a company's affairs prior to its dissolution by ascertaining and realising its assets and applying them firstly in the payment of creditors of the company according to their order of preference, and then by distributing the residue (if any) amongst the shareholders of the company in accordance with their rights.
- In other words, upon the final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company. As to when liquidation commences and ends, in terms of section 348 of the previous Companies Act (61 of 1973), liquidation of a company by the court was deemed to commence on presentation to the court of the application for the winding up and continued until the affairs of the company have been finally wound up and the Master's certificate to that effect is published in the Government Gazette, thus dissolving the company.
- Section 82, although not part of the business rescue chapter in the current Act, provides similarly for existence of a company until its deregistration by the Commission.

The interpretation of 'liquidation proceedings' within the context of s 131(6)

- The crux of the matter is whether the term 'liquidation proceedings' refers only to a pending application for a liquidation order or includes the process of winding up of a company after a final liquidation order has been granted.
- An investigation shows that the phrase 'liquidation proceedings' did not alter what is understood by liquidation. It includes liquidation prior to and after a final order of liquidation is granted up until deregistration.
- This interpretation is consistent with the historical interpretation of liquidation and also

with the meaning of liquidation as used in other sections of the Act. This interpretation is also consistent with the provisions of the previous Companies Act.

- In addition, the intention of the legislature in introducing the business rescue procedure is also relevant in the circumstances. It was introduced against the background of general acceptance that the judicial management process provided for under the previous Companies Act was failing the local economy because only few, if any, judicial management orders resulted in the saving of companies experiencing financial difficulties. Business rescue was therefore introduced 'to provide for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.' It is meant to be a flexible, effective process of extending the lifespan of companies and businesses. A necessary consequence thereof was limitation, to some extent, on the power of creditors to singlehandedly curtail the life of a company. This however remains subject to compliance with the procedural and substantive requirements set out in section 129 of the Act.

Concerns

- The court admitted that this interpretation of liquidation proceedings can have negative results for the liquidation process generally. These include repetitive disruptions and uncertainty that may result from various affected parties making applications for business rescue at different times during the winding up process, reversion of business control to the same directors who may have been the cause of the financial distress experienced by the company, and the capacity of a company under final liquidation to conduct effective business, including concluding contracts, during the implementation of the rescue plan.
- However, these do not justify an unduly restrictive approach in the interpretation of the provisions of the Act. The safeguard is that a court can dismiss any application for business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved.

The appeal was upheld and the matter reverted back to the High Court for determination of the application for rescission of judgment.

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