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COMPLIANCE WITH BUSINESS RESCUE PROVISIONS, S129

During business rescue there is a temporary moratorium on the rights of claimants against a company and its affairs are restructured through the development of a business rescue plan aimed at continuing the company in operation on a solvent basis, or if that is unattainable, leading to a better result for the company's creditors and shareholders than would otherwise be the case in a liquidation.

The goals of the business rescue legislation are often hampered because the statutory provisions are not all clearly drafted which gives rise to confusion and provides ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at delaying the business rescue process.

On 27 May 2015, the Supreme Court of Appeal (**SCA**) delivered judgment dealing with, *inter alia*, the need for strict compliance with the provisions of section 129 of the Companies Act, 2008 (the **Act**).

THE PANAMO JUDGMENT

Section 129 of the Act sets out *inter alia* the technical requirements for placing a company in business rescue by way of a company resolution. There are certain statutory time periods included in the section that need to be met and the considered view to date has been that compliance with these time periods is mandatory. By way of example, the company must publish the resolution within five business days of adopting and filing the resolution.

In the matter of *Panamo Properties (Pty) Limited v Nel and Another NNO,* the SCA held that non-compliance with the technical provisions of section 129 of the Act does not automatically result in the business rescue being terminated and non-compliance is merely a ground for bringing an application to court to set aside the initial resolution. Such an application must be brought on the grounds that it is just and equitable for the court to grant such an order.

In this case, a property owning company (**Panamo**) had as its sole shareholder, a trust. The directors of Panamo were also the trustees of the trust who lived on a portion of the property which was declared executable by FirstRand Bank Limited when Panamo fell into arrears with the bond repayments.

In order to prevent the sale of the property, the directors placed Panamo in business rescue by way of resolution. In a ploy to further delay the sale of the property, some two years later, the trust sought to declare the business rescue proceedings a nullity by reason of non-compliance with the provisions of section 129 of the Act. This application was brought by the trustees well after the adoption of the business rescue plan, and was brought in a clear attempt to delay the sale of the property.

The trustees alleged that they (as directors) had not complied with the statutory provisions and had, for instance, missed certain time deadlines. They advanced the argument that the consequence of non-compliance is that the resolution to begin business rescue automatically lapses and is a nullity.

In October 2011, Khumalo J upheld this contention and issued a declaratory order that the resolution to commence business rescue had lapsed and was a nullity.

The SCA judgment of Wallis J overturned this decision and provides at para 12 that "*the time for bringing such an application is restricted. An application to set aside the resolution may be brought at any time after the date of adoption of the resolution but, once a business rescue plan has been adopted, the time for challenging a resolution is past.*"

After an examination of the relevant sections, Wallis J found that the trustees were precluded from bringing the application since the business rescue plan had already been adopted and further, the trustees were also the directors of Panamo who resolved to place Panamo in business rescue in the first place.

In all cases, the court must be approached for an order to set aside the resolution commencing business rescue (and in doing so, terminating the business rescue process) and such an application must be brought by setting out the technical issues as well as advancing reasons why it would be just and equitable in the circumstances. This "*avoids the absurdity that would otherwise arise of trivial non-compliance with a time period, e.g. the appointment of a business rescue practitioner one day late as a result of the failure by CIPC to licence the practitioner timeously.*" [para 29].

CONCLUSION

This interpretation of the Act now precludes litigants, whether shareholders and directors of the company, or creditors from exploiting technical issues in order to subvert the business rescue process or turn it into their own advantage.

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