Harmful practices

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Human rights

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Insolvency law

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Seegobin, R 'Restoring dignity to our courts: The duties of legal practitioners – Insulting, inappropriate, vulgar, and disparaging language have no place in litigation' (2023) 36.2 *Advocate* 63.

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Police brutality

Ecoma, BE 'A post-mortem assessment of the #EndSARS protest and police brutality in Nigeria' (2023) 23.1 *AHRLJ* 156.

Principle of complementarity

Ncame, NP 'Justice in conflict: Principle of complementarity or principle of competition?' (2023) 23.1 *AHRLJ* 75.

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Mutu, P 'Leveraging technology to deliver basic education to children in conflict areas of Northern Nigeria' (2023) 23.1 *AHRLJ* 182.

Tax evasion

Animashaun, O and Chitimira, H 'An analysis of the statutory measures adopted to curb tax evasion in Nigeria after the COVID-19 pandemic' (2023) 56 *DJ* 1363.

Tribute

Masuku, T 'Tribute to Thulani Rudolf Maseko' (2023) 36.2 *Advocate* 66.

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Vicarious liability

Knobel, JC 'The use of vicarious liability in environmental law to enhance the legal conservation status of birds of prey' (2023) 56 *DJ* 66.

Winding-up orders

Boraine, A and Swart, WJC '*NCA Plant Hire CC v Blackfield Group Holdings (Pty) Limited* [2021] JOL 51810 (GJ): Some critical observations on the legal effect of a provisional winding-up order' (2023) 56 *DJ* 125.

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Zambian company law

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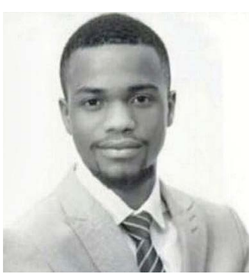

By Bongani Memani

The questionable justifiability in the utility of statutory suspension of third-party claims during business rescue proceedings in South Africa

A company is temporarily exempt from legal proceedings (civil proceedings) during business rescue proceedings (s 133(1) of the Companies Act 71 of 2008 (the Act)). That is so because if a company is not temporarily protected against legal proceedings, costly litigation may ensue, which may diminish the company's prospects of being potentially rescued from its financially distressed position. However, that being the case, it is important to note that this protection has loopholes in that the Act does not provide for the interim suspension of instituting litigation against a distressed company while the company awaits approval of the business rescue proceedings (Anneli Loubser 'The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part 2)' (2010) 4 *TSAR* 689). What this means, for example, is that, without the interim suspension of

instituting legal proceedings against a distressed company while that company awaits approval to commence with business rescue proceedings, a creditor may, for example, get a notification of the company's intention to apply for business rescue proceedings and then opportunistically attach all the company's assets before they are affected by the suspension order, which may potentially leave the company in a position that is beyond rescue.

The suspension of litigation against a company under distress is, as such, a moratorium. The question, therefore, is whether the effect of a moratorium when it comes to time bar clauses, is viable and does not contradict, which is to say it is consistent with the purposes of business rescue in s 7(*k*) of the Act, which is mainly to cater for all stakeholders.

Time bar clauses are clauses whereby a person in a contract is only allowed to sue another party to the contract within a certain limited time. The question, however, is whether the measurement of a time bar clause is justifiable to be suspended in the moratorium. In other words, if you are the other party suing a company under business rescue, you are deprived of approaching the courts for a certain period of time. Does that not then infringe on ones right to access the courts within the period stipulated in the contract, which is an important right found in the Constitution (s 34 of the Constitution states that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum') and if more time is given to the other party in terms of business rescue proceedings, does that not outshine the relevance of time bar clauses in terms of contract law and provide the other party more advantage to prepare for a case?

Floodgates tend to open from s 133(3) of the Act, in that minority creditors who disagreed with business rescue proceedings commencing, generally consider money owed to them as a current asset. Such money is a form of property, and if the creditors' payment is suspended it is a deprivation of their property rights to use it and enjoy it at that moment. That being said, it is still yet to be clarified by the legislature when it comes to s 36 of the Constitution, which embodies the limitation clause, whether the business rescue provision provided by the Act outweighs the property rights in the Constitution in this regard.

It is worth noting further that this moratorium may also make other financially stable businesses become financially distressed. That is so because the company under business rescue's payments which may be due, are also suspended, which in turn means that it does not have to pay any interest, legal costs and other costs, further meaning that with that relaxation, the company accesses the market more cheaply, which could ordinarily affect their solvent competitors who have to access the market by spending fortunes (Eberhard Braun and Wilhelm Uhlebruck *Unternehmensinsolvenz* (IDW-Verlag GMBH: Düsseldorf 1997) at 423 in Anneli Loubser 'Tilting at windmills? The quest for an effective corporate rescue procedure in South African law' (2013) 25 *SA Mercantile Law Journal* 437). A good example of how the suspension of rights could have a negative effect towards smaller businesses, is the question of whether small property rental companies would survive if their property were leased to a financially distressed company which is under business rescue, of which their rental income would be paid after an extended period because of the suspension of rights. Would those companies also not be in financial distress due to lack of liquidity, which should be balanced by the rental income?

A person who is in lawful possession of the business property is allowed to continue to use the property even during the proceedings, and the first economical argument for this is that if the business rents out its premises before the supervision process, the rental income will continue to be generated of which it could be of much assistance in rescuing the company. The argument against this relates to corporate giving – if a corporation lets its premises for free as part of a social responsibility programme, would the continuation of free possession not put the business in a worse situation on their financially distressed status, instead of getting income over that property? It is my argument that this is a certain loophole to the procedure, but moreover, the Act also fails to address the issue of the effects to social responsibility programmes that a company may currently be pumping money into. Should we interpret that by this provision they also continue to be in force? A grey area remains, which is also another criticism of the business rescue procedure.

The business rescue practitioner, in exercising his powers of allowing or disallowing disposal of the company property, must act reasonably not to withhold consent to those transactions where it is not necessary to do so, but must look at whether it is allowed to do so by ch 6 of the Act, the state of the company at that period of time and the nature of the property and rights claimed in respect of it. This is important in the sense that the practitioner must not allow the disposal of property which forms a greater part of the business, which, if sold, could lead to the demise of the company as a whole. For example, the property which generates the greater part of the income in a company must be the last to be put on the disposal list. Suppose a financially distressed company which is under business rescue wishes to dispose of some of the property in which a person has a particular interest or security. In that case, it may do so by getting consent from such a person or the company may dispose of that property and pay the amount owed to that person or provide other alternative security for the amount owed to that person.

However, s 134(3)(*b*)(ii) might raise an issue because what if the alternative security which is given, which amounts to the amount owed at that time to the other party, is not a viable asset to form security – for example a vehicle which depreciates in value? A form of a complete codification would have assisted in s 134(3)(*b*)(ii) because the facts raise a problem of unjustified enrichment to the debtor company if the form of security is an asset which depreciates in value.

Great scrutiny needs to be done as the South African business rescue regime seems to be good on paper rather than practically.

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