THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

Today, the Supreme Court of Appeal (SCA) upheld with costs, including the costs of two counsel, an appeal against the decision of the Gauteng Division of the High Court, Johannesburg (the high court).

The first appellant was Southern Sky Hotel and Leisure (Pty) Ltd t/a Hans Merensky Hotel and Spa (in liquidation) (the company). The second, third, fourth and fifth appellants were the appointed provisional liquidators of the company (the liquidators). The sixth appellant was Van's Auctioneers Gauteng (Pty) Ltd (the auctioneer), who made common cause with the liquidators both before the SCA and the high court. The respondent was Southern Sky Food Enterprises (Pty) Ltd (the respondent). Ms Shamira Rinderknecht (Rinderknecht) was the sole shareholder and director of the respondent.

The issue in the appeal was whether an agreement (the agreement) concluded by the liquidators of a company (in liquidation) for the sale of the company's immovable property in circumstances where business rescue proceedings had been commenced, was invalid by virtue of the provisions of s 131(6) of the Companies Act 61 of 2008 (the Companies Act).

The facts of the matter were as follows. The Hans Merensky golf course was established in 1967 by the Phalaborwa Mining Company. The golf course and the surrounding land were later purchased by the Hans Merensky Country Club (Pty) Ltd (the club) and developed into a golf estate. The company later bought the estate from the club and developed it into the Hans Merensky Hotel and Spa. During 2003 to 2007, various individuals, referred to in the papers as the 'Irish Investors', bought immovable property from the club and developed it into furnished bush lodges. An agreement was concluded between the Irish Investors and the club in terms whereof the club had the right to lease out the bush lodges to the public, subject to the Irish Investors receiving certain agreed returns (the rental pool agreements). At some point, the company took over the management of the rental pool agreements and assumed liability under these agreements. The company became financially distressed and unable to honour its obligations in terms of the rental pool agreements.

This resulted in the Irish Investors launching a winding-up application. On 21 January 2020, the court placed the company under final liquidation. On 3 February 2020, the liquidators were appointed and on 22 September 2020 their powers were extended to allow them to, inter alia, dispose of the movable and immovable property of the company by public auction. Pursuant thereto the liquidators resolved in November 2020 to put the immovable property of the company up for sale on auction. The auction was advertised to take place on 23 and 24

February 2021. On 1 December 2020, Vision Tactical (Pty) Ltd (Vision), a creditor of the company, launched an application for an order placing the company under supervision and commencing business rescue proceedings in terms of s 131(1) of the Companies Act. This application was only enrolled for hearing on 11 March 2021, shortly after the auction was to have taken place. On 19 February 2021, the respondent was granted leave to intervene in the business rescue application.

The liquidators decided to proceed with the auction as, according to them, there was no valid business rescue application as recognised in law. The liquidators proceeded with the online auction on 23 and 24 February 2021, which was conducted by the auctioneer, for the sale of the company's immovable property and its business as a going concern (the property). Despite the pending business rescue application, Rinderknecht, on behalf of the respondent, attended the online auction on 24 February 2021 and, being the highest bidder, presented a signed and written offer prepared by the liquidators to the auctioneer. On 11 March 2021, the liquidators accepted the respondent's offer, and the agreement was concluded.

On 25 March 2021, the respondent launched an urgent application out of the high court, in which it sought an order that the high court declare the agreement invalid and set it aside, as both the auction and the agreement had occurred after the business rescue application was made and whilst the liquidation proceedings were 'suspended'.

The SCA found that the issue was thus whether s 131(6) of the Companies Act rendered the agreement invalid. To answer that question, the SCA found that the meaning and effect of clause 24 of the agreement had to firstly be determined. The SCA found that clause 24.1 and 24.2 were aimed at expediting the finalisation of any business rescue application pending at the date of the signing of the agreement or subsequently launched prior to the transfer of the property. Clause 24.3 provided that the agreement would lapse in the event of such business rescue application succeeding. The SCA held that the combined effect of those provisions was that the property would not be realised unless the business rescue application was dismissed. Put differently, irrespective of whether clause 24 had suspensive or resolutive operation, the realisation of the property was subject to the termination of the suspension of the liquidation process under s 131(6).

The SCA found further that the next question was whether, as a matter of statutory interpretation, s 131(6) evinced an intention to visit such an agreement with nullity. The SCA held that no such indication was found in its text, context or purpose. The SCA held further that there was no direct prohibition of such an agreement as contemplated in *Schierhout v Minister of Justice* 1926 AD 99 (A). Section 131(6) did not suspend the appointment, office and powers of a liquidator; it suspended only the process of liquidation. The SCA thus held that there was no reason why a liquidator could not exercise those powers subject to the lifting of the suspension under s 131(6). Consequently, the agreement was valid and the high court should have dismissed the application to declare it invalid.

Notably, the SCA deemed a final comment necessary regarding the manner in which Rinderknecht had over the years frustrated the various efforts to wind-up a company that was clearly financially distressed since at least 2013. The SCA found that this was such a case in the latest attempt by the respondent to frustrate the liquidation process by stultifying the business rescue process.

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