THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 617/2021

In the matter between:

SOUTHERN SKY HOTEL AND LEISURE (PTY) LTD trading as HANS MERENSKY HOTEL AND SPA (in liquidation) (Registration No. 2006/005152/07)	**FIRST APPELLANT**
MARYNA ESTELLE SYMES N O	**SECOND APPELLANT**
MUSTAFA MOHAMED N O	**THIRD APPELLANT**
JOHANNES ZACHARIAS HUMAN MULLER N O	**FOURTH APPELLANT**
PULENG FELICITY BODIBE N O	**FIFTH APPELLANT**
VAN'S AUCTIONEERS GAUTENG (PTY) LTD	**SIXTH APPELLANT**

and

SOUTHERN SKY FOOD ENTERPRISES (PTY) LTD	**RESPONDENT**

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

Coram: PONNAN and VAN DER MERWE JJA and MUSI, BASSON and MASIPA AJJA

Heard: 29 August 2022

Delivered: 13 October 2022

Summary: Whether agreement concluded by liquidators for the sale of the property of a company in liquidation is invalid by virtue of the provisions of s 131(6) of the Companies Act 71 of 2008.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Victor J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the high court is set aside and replaced with the following order: 'The application is dismissed with costs, including those of two counsel.'

JUDGMENT

Basson AJA (Ponnan and Van der Merwe JJA and Musi and Masipa AJJA concurring)

[1] The issue in this appeal is 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 have been

commenced, is invalid by virtue of the provisions of s 131(6) of the Companies Act 61 of 2008 (the Companies Act).

[2] The first appellant is 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 are the appointed provisional liquidators of the company (the liquidators). The sixth appellant is Van's Auctioneers Gauteng (Pty) Ltd (the auctioneer), who made common cause with the liquidators both before this Court and the one below. Where the context so requires the first to sixth appellants will jointly be referred to as the appellants. The respondent is Southern Sky Food Enterprises (Pty) Ltd (the respondent). Ms Shamira Rinderknecht (Rinderknecht) is the sole shareholder and director of the respondent.

[3] 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.

[4] 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.

[5] After the 2010 FIFA World Cup, occupancy in the hotel dropped dramatically and by 2013 the company was already in financial distress and unable to honour its obligations in terms of the rental pool agreements. This resulted in the Irish Investors launching the first winding-up application in the Gauteng Division of the High Court, Pretoria in 2013. Prior to the hearing of the application, the company settled its entire indebtedness, and the winding-up application was withdrawn.

[6] On 14 April 2016, the Irish Investors launched a second winding-up application in the Gauteng Division of the High Court, Pretoria due to the company's failure to again comply with its financial obligations in terms of the rental pool agreements. This application was withdrawn and reissued in the Limpopo Division of the High Court, Polokwane on 9 June 2016 when the company challenged the jurisdiction of the court on the basis that its registered address had been changed.

[7] On 8 June 2016, one day prior to the launching of the liquidation application, a resolution to place the company under business rescue was adopted. As a result of the company having been placed under business rescue, no opposing papers were filed, and the liquidation application was suspended in terms of s 131(6) of the Companies Act. In the same year, Nedbank Ltd and Zelpy 2539 (Pty) Ltd launched an application before the Gauteng Division of the High Court, Pretoria in terms of which an order was sought setting aside the business rescue resolution of 8 June 2016 and seeking the winding-up of the company.

[8] Despite the fact that business rescue proceedings had commenced as far back as 8 June 2016, almost a year went by without a business rescue plan having been adopted. The business rescue plan was only published on 15 March 2017 but was rejected when it was put to a vote at a creditors' meeting in terms of s 151 of the Companies Act on 6 September 2016. This resulted in yet another application by Rinderknecht in the Gauteng Division of the High Court, Pretoria for the setting aside of the vote in terms of s 153 of the Companies Act. On 18 October 2018, the high court dismissed the application with costs.

[9] The liquidation application launched by the Irish Investors in the Limpopo Division of the High Court, Polokwane finally served before Ledwaba AJ on 25 November 2019. On 21 January 2020, the court handed down its judgment placing the company under final liquidation by virtue of it being unable to pay its debts and being factually and commercially insolvent as envisaged in s 344*(f)*, read with s 345(1)*(c)*, of the 1973 Companies Act.

[10] 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.

[11] 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.

[12] The liquidators sought an expedited hearing date, namely a date *before* the auction was to take place, being 16 February 2021. Their counter-application to have the business rescue application dismissed was also set down for the same day. The liquidators took the view that the business rescue application ought to be dismissed, *inter alia*, on the basis that the application did not set out a reasonable prospect of rescuing the company, and because the application had not been served on interested parties and on the Companies and Intellectual Properties Commission (CIPC) as required by s 131 of the Companies Act. The liquidators accordingly decided to proceed with the auction as, according to them, there was no valid business rescue application as recognised in law.

[13] The respondent, by way of an affidavit deposed to by Rinderknecht, to use the words of the provisional liquidators, 'rather unsurprisingly' applied for leave to intervene in the business rescue application on 15 February 2021. The respondent proposed a different business rescue plan and a different business rescue practitioner. Once again, the papers were not properly served on interested parties or on the CIPC.

[14] On 19 February 2021, leave was granted to the respondent to intervene. At the hearing the court directed the respondent to serve the business rescue application and the intervention application on all affected parties and, more in particular, on the CIPC. On 22 February 2021, the business rescue application was served on all affected parties in terms of the court's directive.

[15] After the respondent's intervention, although Vision did not formally withdraw its application, it filed a notice to abide the outcome of the application.

[16] 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.

[17] Clause 24 of the agreement, which is headed 'SPECIAL CONDITION' is relevant. It provides:

'Subject to clause 4.1 herein above, the conclusion and implementation of this agreement shall be subject to the following:

24.1 If there is, at the date of the signing of this agreement, any application pending by any person to procure business rescue in respect of Southern Sky Hotel and Leisure (Pty) Ltd, registration number 2006/005152/07, then the seller, if it has not already been done by the time this contract is signed, shall take steps to accelerate the hearing of any such an application for business rescue in order to enrol it for hearing as soon as possible, including to ask for the disposal of such an application in a special court, in an endeavour to procure an order to dismiss any such an application.

. . .

24.3 If in respect of any such an application for business rescue the court does not dismiss the application, but either grant the relief or give any other order, except one dismissing the application, then this agreement shall lapse and be of no further force and effect.'

[18] Concerned, so the respondent claimed, about the validity of the auction and the agreement, as both events had occurred *after* the business rescue application was made and whilst the liquidation proceedings were 'suspended', on 25 March 2021, it launched an urgent application out of the Gauteng Division of the High Court, Johannesburg (the high court). The respondent sought an order that the high court declare the agreement invalid and set it aside. That application succeeded before Victor J. The appeal to this Court is with her leave.

[19] Of the four issues that served before the high court, only two remain on appeal, namely: (a) was there a valid business rescue application as envisaged in s 131(6) of the Companies Act; and (b) whether the agreement was invalid by virtue of the provisions of s 131(6) of the Companies Act.

[20] Section 131(6) of the Companies Act reads as follows:

'131. Court order to begin 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.'

[21] Insofar as (a) is concerned: The argument advanced on behalf of the appellants is that only a valid business rescue application can suspend the liquidation proceedings that have already been commenced. In what follows, I am prepared to assume in favour of the respondent, without deciding, that the business rescue application was properly 'made' as envisaged in s 131(6) of the Companies Act.

[22] It must be accepted that s 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.[1] It is not controversial that one of the most important functions of the liquidators is to commence with the process of winding-up or liquidating the assets of the company with the aim of constituting a *concursus creditorum*. This process is exhaustive and includes recovering and reducing into possession the assets of the company, to realise them and to distribute the proceeds thereof to the satisfaction of

[1] *GCC Engineering and Others v Maroos and Others* [2018] ZASCA 178; 2019 (2) SA 379 (SCA): '[17] In terms of s 131(6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is 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. The winding-up order is still in place; and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors'.

the costs of the winding-up as well as the claims of creditors and to distribute the residue (if any) amongst the shareholders in accordance with their rights.[2]

[23] The issue that arises for decision is thus whether s 131(6) of the Companies Act rendered the agreement invalid. To answer this question, the meaning and effect of clause 24 of the agreement must firstly be determined. 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. In my view, the combined effect of these provisions was that the property would not be realised unless the business rescue application is 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).

[24] The next question is whether, as a matter of statutory interpretation, s 131(6) evinces an intention to visit such an agreement with nullity. I find no such indication in its text, context or purpose. There is no direct prohibition of such an agreement as contemplated in *Schierhout v Minister of Justice*.[3] As I have said, s 131(6) does not suspend the appointment, office and powers of a liquidator; it suspends only the process of liquidation. There is no reason why a liquidator may not exercise these 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.

[25] One final comment is necessary regarding the manner in which Rinderknecht has over the years frustrated the various efforts to wind-up a company that was clearly financially distressed since at least 2013. I need not restate the facts. It took the Irish Investors close to eight years of litigation to obtain a final liquidation order. The

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[2] *AMS Marketing Co (Pty) Ltd v Holzman and another* at 268G-H. H S Cilliers et al *Cilliers & Benade Corporate Law* 3 ed at 494: 'The process of dealing with or 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) among the shareholders of the company in accordance with their rights, is known as the winding-up or liquidation of the company'.

[3] *Schierhout v Minister of Justice* 1926 AD 99 (A) at 109.

liquidators have the following to say about this latest attempt to frustrate the liquidation process:

'Simply put, the business rescue applications have been filed as part of a clear and unlawful stratagem to abuse the machinery of business rescue and to further frustrate the eventual winding-up of the insolvent estate of [the company]. [The respondent] acted in concert with the original applicant [Vision] who issued the first business rescue in December 2020. Both applications constitute an abuse and are nothing but simulated litigation. The aim and motive is to procure and [sic] ulterior object, namely a suspension of litigation.'

[26] Although these allegations are strenuously denied by Rinderknecht, the facts speak for themselves. Business rescue proceedings are intended to provide for the efficient rescue and recovery of financially distressed companies in a manner that maximises the likelihood of the company continuing in existence on a solvent basis.[4] Essentially, it is required that there must be a reasonable prospect of rescuing the financially distressed company.[5] This process is not, as so fittingly put by the court in *Welman v Marcelle Props 193 CC*,[6] for 'the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which, given time, will be rescued and become solvent'.

[27] I can put it no better than this Court did in *Panamo Properties (Pty) Ltd and Another v Nel N O and Others N N O*:[7]

'Business rescue proceedings under the Companies Act 71 of 2008 (the Act) are intended to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders". They contemplate the temporary supervision of the company and its business by a business rescue practitioner.

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[4] Section 128(1)*(b)*(i)-(iii) of the Companies Act states:
'*(b)* "business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –
(i) the temporary supervision of the company, and of the management of its affairs, business and property;
(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

[5] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; [2013] 3 All SA 303 (SCA); 2013 (4) SA 539 (SCA) paras 21, 23 and 29 *et seq*.

[6] *Welman v Marcelle Props 193 CC* 2012 JDR 0408 (GSJ) para 28.

[7] *Panamo Properties (Pty) Ltd and Another v Nel N O and Others N N O* 2015 (5) SA 63 (SCA).

During business rescue there is a temporary moratorium on the rights of claimants against the company and its affairs are restructured through the development of a business rescue plan aimed at it continuing 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. These commendable goals are unfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted. Consequently, they have given rise to confusion as to their meaning and provided ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose. This is such a case.'

[28] In the result, the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

'The application is dismissed with costs, including those of two counsel.'

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A C BASSON

ACTING JUDGE OF APPEAL

APPEARANCES

For first to fifth appellants:	M P van der Merwe SC (with J Hershensohn)
Instructed by:	Barnard & Patel Incorporated, Pretoria
	Hill, McHardy & Herbst Incorporated, Bloemfontein
For sixth appellant:	G J Scheepers SC (with J Stroebel)
Instructed by:	Vermaak Beeslaar Attorneys, Pretoria
	Hill, McHardy & Herbst Incorporated, Bloemfontein
For respondent:	L Hollander (with V Qithi)
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