

Can a Business Rescue Practitioner and a Curator Bonis hold hands?

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The recent High Court judgment in *National Director of Public Prosecutions v Knoop N.O and others; National Director of Public Prosecutions v Templar Capital Limited and others* (“**judgment**”), has been referred to by some as a victory against State Capture and a promise of justice still to come.

Whilst these claims may be true, this judgment is of additional relevance, as it, *inter alia*, highlights the interplay between the business rescue provisions in Chapter 6 of the Companies Act 71 of 2008 (“**Companies Act**”) and other pieces of national legislation.

Prevention of Organised Crime Act 121 of 1998

The facts and issues before the Court, in this matter, presented a unique opportunity to better understand how our Courts will approach competing statutory provisions, and in particular, the provisions of the Prevention of Organised Crime Act 121 of 1998 (“**POCA**”), applied in conjunction with the Companies Act.

In this case, the National Director of Public Prosecutions (“**NDPP**”) brought two separate applications for preservation orders in terms of section 38 of POCA. The first application sought to preserve all the shares in Optimum Coal Mine (Pty) Ltd (“**OCM**”); the business of OCM; and all shares held in Optimum Coal Terminal (Pty) Ltd (“**OCT**”). Both OCM and OCT have been in business rescue since 2018. The second application sought to preserve the claims held by Templar Capital Limited (an alleged creditor) against OCM.

The basis of the two applications was that there were reasonable grounds to believe that certain assets and property related to, or connected with, the aforementioned companies comprised the proceeds of crime or were the instrumentality of an offence and thus fell to be preserved in terms of section 38 of POCA.

The primary objective of POCA is to fight, *inter alia*, organised crime and money laundering activities by targeting the proceeds of unlawful activities. The National Prosecuting Authority (“**NPA**”) has two civil remedies available to it – namely preservation orders in terms of section 38 of POCA and forfeiture orders in terms of section 48 of POCA.

An important add-on in relation to preservation orders is the appointment of a *curator bonis*. POCA confers certain statutory powers, duties and authority, on the appointed *curator bonis*, who is tasked with overseeing the business or undertaking (if applicable) of property that is the subject of a preservation order.

The objective of business rescue

Business rescue proceedings, on the other hand, have a different objective. The objective of business rescue is to, *inter alia*, facilitate the rehabilitation of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. Central to the business rescue process, is the appointment of a business rescue practitioner who is given full

management control of the financially distressed company in substitution for its board of directors and pre-existing management.

Business rescue practitioner

Considering the role of a *curator bonis* under POCA and that of business rescue practitioners under the Companies Act, it is clear that there are synergies, but also potential tensions, that may arise from the inter-play between these two role players.

In this matter, the Court had regard to section 5(4) of the Companies Act which, *inter alia*, set out the procedure to be followed in instances where there are inconsistencies between the Companies Act and any other national legislation. In the case of a conflict, the Companies Act provides that the provisions of both Acts ought to apply concurrently, but only to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the other.

In cases where it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the Companies Act will prevail, except in the case of certain statutes, of which POCA is not one.

The Companies Act and POCA

The Court held that the draft preservation orders proposed by the NDPP, and as amended by the Court, endeavoured to harmonise potential conflicts between the Companies Act and POCA, with the result that the business rescue could continue with the oversight of the *curator bonis*.

This illustrates that our Courts will always prefer an interpretation that accords with the interests of justice. However, it is not always easy or straightforward to determine what that interpretation might be. Statutory overlaps and inconsistencies will often require one to take a holistic approach to the law, with the aim of achieving a harmonious reading and application of various competing statutes. As we know, this is easier said than done.

The practical effects of this judgment are yet to be seen. Whilst the Court in this case deemed it possible for the two conflicting pieces of legislation to be read and applied together, whether this will be possible in practice remains uncertain. One might argue that the far-reaching management powers afforded to business rescue practitioners under the Companies Act are inimical to any sort of supervision by a third party, such as a *curator bonis*.

Business rescue proceedings

In addition, one may even venture to say that business rescue proceedings and any attempt at preservation are at cross-purposes, especially in circumstances where, for example, sales of businesses or assets are envisaged under a company's approved business rescue plan. Whether one may navigate such conflicts in all instances is open to debate. It is more likely that one process will take the back seat for the other.

It is submitted that the effectiveness and applicability of the Court's approach in future business rescues, will most likely depend on the facts and circumstances of the proceedings at hand, as well as the nature and extent of the legislative conflict.

However, given that business rescue proceedings arise in various contexts, circumstances, and for a variety of companies, the court's approach in this judgment will undoubtedly be regarded as a key reference point on interpretative issues and legislative conflicts in the business rescue context, going forward.

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