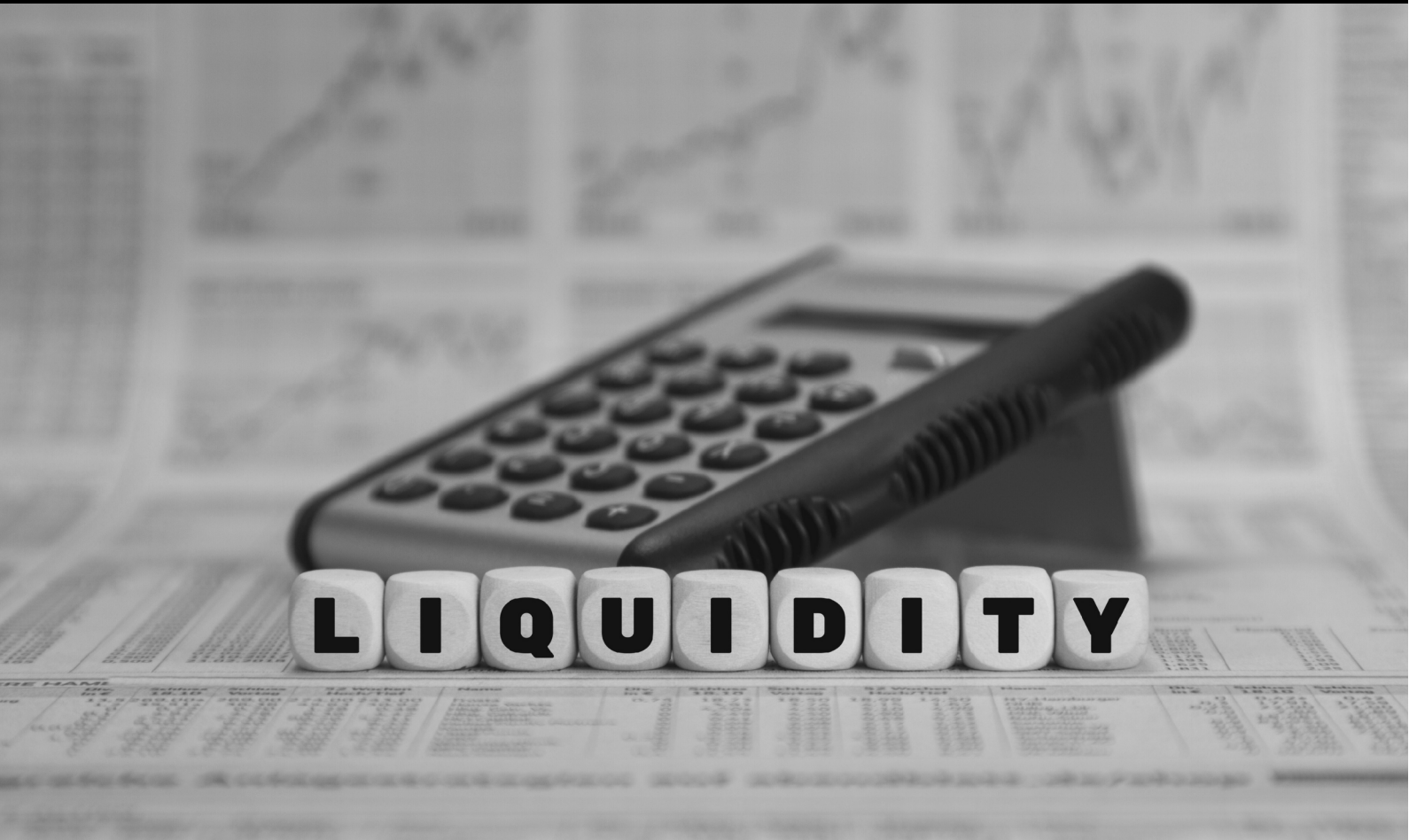




INSOLVENCY & BUSINESS RESCUE

Disruptors Beware – The Court’s Firm Stance on Abusive Business Rescue and Setting Aside Applications

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Introduction

Liquidation proceedings place companies in an undesirable legal and operational position which they or other affected persons may often seek to escape from. Section 131(1) read with section 131(6) of the 2008 Companies Act ("**business rescue applications**") and section 354(1) of the 1973 Companies Act ("**setting aside applications**") provide mechanisms whereby affected persons may either interrupt ongoing liquidation proceedings or set aside a liquidation order that has already been granted.

Regrettably, there has been an uptick of affected persons abusing these processes, in bad faith, by launching business rescue applications merely to delay and disrupt ongoing liquidation proceedings or launching setting aside applications where there is no basis for such relief.

The courts have adopted a strict approach when considering the merits of either business rescue applications and setting aside applications. This article discusses the requirements for successful business rescue applications and setting aside applications, and serves as a cautionary tale to affected persons of distressed and/or insolvent companies that business rescue applications and setting aside applications brought in

circumstances where a company ought to be wound up may be regarded as an abuse of the provisions of the 2008 and the 1973 Companies Acts.

The abuse of business rescue applications: *Globustarr Trading Co LLC v Mayana Properties (Pty) Ltd* [2025] 3 All SA 160 (GJ) ("*Globustarr*")

In the recent reported judgment of *Globustarr*, the Court found that Mayana Properties Limited's ("**Mayana**") business rescue application, brought in terms of section 131(1) of the 2008 Companies Act, was an abuse, and placed Mayana in final liquidation by order of the court.

Section 131(1) prescribes that:

"Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings."

Section 131(6) prescribes that:

"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 –

- the court has adjudicated upon the application; or*
- the business rescue proceedings end, if the court makes the order applied for.*

Mayana had brought a business rescue application in circumstances where there were ongoing proceedings brought by Globustarr Trading Co LLC ("**Globustarr**") for Mayana's winding-up. In terms of section 131(6), Mayana's business rescue application would have ordinarily had the effect of suspending Globustarr's ongoing liquidation application pending the adjudication of Mayana's business rescue application.

However, the Court determined Mayana's business rescue application to be an abuse (and came to this conclusion after considering Mayana's conduct throughout the proceedings), for the following reasons:

- Mayana filed its answering affidavit to the liquidation application one court day before its (unopposed) hearing date, and without a reason for this late filing placed before the court;
- Unsubstantiated claims of fraud (which form a part of Mayana's opposition) were pleaded in the answering affidavit;
- Despite being required to do so in terms of the practice directives of the Court, Mayana failed to deliver heads of argument and a practice note, and did not cooperate in the preparation and filing of a joint practice note; and
- There was a delay of at least a month in bringing the business rescue application.

The Court concluded that Mayana's actions, as outlined above, formed part of a deliberate and concerted attempt to frustrate the ongoing liquidation application. Essentially, the Court held that Mayana's business rescue was merely launched in pursuit of delaying the adjudication of the application for Mayana's winding-up.

The Court held that section 131(6) of the 2008 Companies Act (which would have resulted in the suspension of the ongoing liquidation proceedings) did not, and could not, apply to business rescue applications constituting an abuse.

In addition, the Court held that Mayana's business rescue application was meritless as it failed to set out the requirements for a successful business rescue application such as a detailed business rescue plan, projected funding and the cost of business rescue, financial statements, and where necessary and possible, management accounts, comparative income statements indicating Mayana's previous profits and shedding light as to its trading going forward and the availability of necessary resources to enable Mayana to meet its operations and expenditure.

Therefore, a business rescue application can constitute an abuse by virtue of the circumstances under which it was launched (i.e., the applicant's conduct) and/or the merits, wherein the business rescue application lacks merit to such an extent that it constitutes an abuse.

The Court in *Globustarr* found Mayana's business rescue application to be an abuse and subsequently granted an order placing Mayana in final liquidation. As a show of its disdain, the Court also awarded punitive costs against the director of Mayana in his personal capacity.

Globustarr serves as a warning to all applicants in business rescue applications not to abuse the business rescue process as the courts will not tolerate such abuse.

Setting aside applications in terms of section 354(1) of the 1973 Companies Act: a relook at the seminal case of *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd 1998 (3) SA 175 (SCA) ("Ward")*

In *Ward*, while the word "abuse" is not explicitly used, the Court was critical of the appellant's (the "**Local Liquidators**") case before it to set aside the winding-up order granted in South Africa for Zambia Airways Corporation Limited ("**Zambia Airways**" or the "**Company**").

Zambia Airways was an external company in terms of South African law, that was incorporated in Zambia and had an office in Johannesburg. In 1994, it was voluntarily wound-up in Zambia, with the Local Liquidators appointed as the joint liquidators. Shortly after its liquidation in Zambia, the Company was finally wound-up in South Africa by order of court.

Subsequently, the first respondent in *Ward* was appointed as the Company's provisional liquidator (the "**Foreign Liquidator**"), and had already begun the process of winding-up the Company's South African estate, had held two meetings of creditors when the Local Liquidators brought an application, among other things, seeking recognition in South Africa, the power to "administer" the Company's South African estate and setting aside the winding-up of the Company in South Africa.

The Court highlighted that the Local Liquidators had taken approximately five months after the final winding-up order was granted to apply for their recognition in South Africa, and during which time the Foreign Liquidator was appointed and had begun the work of winding-up the Company's estate in South Africa.

The Court, in *Ward*, was then tasked to determine whether to set aside the Company's winding-up in terms of section 354(1) of the 1973 Companies Act, which reads as follows:

"The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit."

The Court in analysing and applying this section seminally held that section 354(1) offered the court "*a discretion to set aside a winding-up order both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events*".

The Court held that in order for such an application to succeed "exceptional circumstances" must exist and outlined that such an applicant in such proceedings must additionally demonstrate:

- how the insolvency came about;
- the company's full financial position, including its obligations to any creditors;
- whether the company was run with probity; and
- why they did not initially oppose the winding-up or appeal against it.

Other factors considered by the courts in setting aside applications are whether there were any delays in seeking the setting aside as well as any developments in the winding-up.

In applying the above factors for consideration, the Court held that the Local Liquidators had not satisfied section 354(1) of the 1973 Companies Act, due to the fact that a sufficient explanation was not placed before the court as to why the winding-up in South Africa was not opposed, a sufficient explanation was not proffered for the delay in seeking recognition and by the time this recognition was sought, the winding-up of the Company's estate in South Africa had already commenced with "considerable progress" already made.

Accordingly, the Court in *Ward* found no acceptable reason or set of exceptional circumstances to set aside the winding-up and the matter was dismissed with costs.

Conclusion

While the abuse in *Globustarr* was more apparent and deliberate, Ward, almost 30 years earlier, set the precedent that practitioners (as a whole) are not to abuse the statutory and court processes afforded to them and that, whether it is relief under section 131(1) of the 2008 Companies Act or section 354(1) of the 1973 Companies Act, the relief is not merely for the asking.



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