

Court clarifies impact of 'business rescue' regime on admiralty matters

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Background

Facts

Decision

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The promulgation of the Companies Act 2008 in South Africa saw the introduction of a company rehabilitation process termed 'business rescue'. As in many other jurisdictions, a company under business rescue enjoys a temporary moratorium on the prosecution of claims with a view to allowing the distressed company breathing space to reverse its financial difficulties and avoid full-scale liquidation.

The business rescue procedure sought to replace the 'judicial management' procedure under the earlier Companies Act 1973, which was generally considered overly burdensome and unwieldy in facilitating effective corporate turnaround plans.

Against this background, admiralty matters have enjoyed special treatment in the context of claims against insolvent companies. Specifically, Section 10 of the Admiralty Jurisdiction Regulation Act 1983 (the Admiralty Act) provides that any property arrested in respect of a maritime claim shall not:

- vest in a trustee in insolvency; or
- form part of the assets to be administered by a liquidator or judicial manager of the owner of the property.

Further, any proceedings in respect of such property shall not be stayed by reason of the owner's winding up or judicial management.

Facts

Given that Section 10 was introduced before the new Companies Act, the provision does not make reference to business rescue proceedings, and it was inevitable that the courts would, at some point, be required to rule on the interplay between admiralty matters and business rescue.

The recent case *Southern African Shipyard (Pty) Ltd v mfv Polaris* is the first judicial pronouncement on the matter and serves to reaffirm the special treatment afforded to maritime creditors in respect of arrested property.

In this case, a local ship repairer sought to recover a debt from the owners of the mfv Polaris for services rendered, by way of the arrest of the vessel in Cape Town in October 2017. The repairers thereafter applied for the judicial sale of the vessel in January 2018, which was opposed by the owners of the mfv Polaris, resulting in the matter being set down for hearing by the court on 15 March 2018. In the period between the filing of the sale application and the hearing date, the owners placed the company into the business rescue by adopting a resolution to that effect in late February 2018.

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The matter for determination by the court was whether – as the owners asserted – the business rescue proceedings placed a bar on the continuation of the sale application, as contemplated in the Companies Act.

Decision

On consideration of the authorities, the judge made the following findings:

- While judicial management and business rescue differed in a number of respects, they both provided for third-party control of companies in severe financial difficulties and for their temporary reprieve from creditors' claims;
- It was sensible to hold that reference to "judicial manager" in Section 10 of the Admiralty Act should be interpreted to have been replaced by a "business rescue practitioner", and "judicial management" to have been replaced by "business rescue proceedings";
- Although Section 10 of the Admiralty Act appears to be in conflict with the business rescue provisions in Section 113 of the Companies Act (eg. one provides for a stay of proceedings while one does not), the two prevailing provisions are capable of being interpreted concurrently. This is possible by drawing a distinction in the timing of the events to be protected by each of the statutes. In terms of Section 10 of the Admiralty Act, once maritime property has been arrested, it is ring-fenced. It falls under the jurisdiction of the Admiralty Act and must then be dealt with in accordance with that statute. That ring-fencing cannot be undone by subsequent business rescue proceedings; and
- The same is true of insolvencies and windings up. Once those proceedings have commenced, the assets are vested in the trustee or under the administration of the liquidator. The same can be said of business rescue proceedings; once they have commenced, the property is placed under the control of a business rescue practitioner and out of the reach of any other persons – including creditors – and the business rescue practitioner places a moratorium on all legal proceedings. However, this process does not exclude any arrest proceedings that have already been isolated and made a subject of the admiralty jurisdiction.

In conclusion, the court was satisfied that a proper case had been made out for the judicial sale of the mfv Polaris and that the arrested vessel fell outside the scope of the moratorium of claims against the owner, because the arrest had occurred before the resolution for business had been passed.

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