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CAN A PROPERTY BE AUCTIONED WHILE THERE IS A PENDING BUSINESS RESCUE APPLICATION?

This question was addressed in the case of Southern Sky Hotel and Leisure (Pty) Ltd and Others v Southern Sky Food Enterprises (Pty) Ltd (2022). In this case, there were attempts by investors and creditors to place Southern Sky Hotel and Leisure (SSH) in liquidation. The liquidation process allowed for the immovable property to be placed on auction. Moments before the auction, another business rescue application was brought by a creditor which triggered section 131 (6) of the Companies Act, which stipulates that business rescue proceedings pends liquidation proceedings.

Sky Food Enterprises however continued with the sale agreement despite the business rescue application. There was however a clause in the sale agreement that stated that if a business rescue application succeeded, the sale agreement would lapse. The validity of the auction was challenged by Sky Food on the basis that they said the sale was concluded after the business rescue which suspended the liquidation proceedings.

The High Court declared the agreement invalid on the basis that the sale was concluded after the last business rescue application which suspended the liquidation process, and it was set aside. The decision was appealed.

Section 131(6) of the Companies Act is applicable in this case. This section states that when there is a business rescue application, the liquidation process is suspended until the court has made a decision in the business rescue application.

The Supreme Court of Appeal (SCA) held that Section 131 (6) does not nullify the sale agreement, it only suspends the process of liquidation. The SCA concluded that the agreement was indeed valid, and that the execution of the agreement is suspended pending the outcome of the business rescue proceedings.