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Insolvency 2021

Mauritius: Trends & Developments

Jean-Eric Sauzier and Shane Mungur
BLC Robert & Associates

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Trends and Developments

Contributed by:
Jean-Eric Sauzier and Shane Mungur
BLC Robert & Associates** ****see p.5

Cram-Down in Voluntary Administration

Voluntary administration has been particularly topical in Mauritius over the past year, with Air Mauritius, the national carrier, having been in that process for about 17 months and exiting it following the approval by its creditors of a deed of company arrangement that compromises several of its liabilities. Voluntary administration was introduced into the legal landscape of Mauritius by the Insolvency Act 2009 (IA 2009), as an alternative to liquidation and receivership of companies, with the specific objectives of rescuing companies or their businesses or (if rescue is not possible) ensuring better returns to creditors and shareholders than an immediate liquidation.

Creditors of the company, at a meeting called the "watershed" meeting, must decide on one of the following exit routes.

- The company being placed into liquidation.
- The administration ending.
- The company entering into a "deed of company arrangement" to be signed by deed administrators and the company; the deed of company arrangement (DOCA) then sets out the terms on which the company's debts are restructured to maximise its chances of survival.

The IA 2009 requires that for a resolution to be passed at a meeting of creditors or classes of creditors, it must be approved by a majority in number representing at least 75% in value of those voting; the requirement for numerical majority ensures that small creditors have a meaningful say in approving a proposed DOCA. In 2019, Section 232 of the IA 2009 was amended to impose an obligation on administrators to call separate meetings for each class of creditors who shall vote separately, and to ensure that all classes of creditors are given equal treatment. While these requirements result in more fairness in the treatment of creditors as a whole in a DOCA, they also imply that each and every class of creditors has to approve a DOCA by a majority in number representing 75% in value. This gave rise to a real concern that a small class of disgruntled creditors could effectively veto a DOCA which was otherwise beneficial to the company as a whole.

The concern has now been addressed by a further legislative amendment in 2020, whereby a new Section 237A was introduced into the IA 2009 to give the power to the Bankruptcy Division of the Supreme Court (Bankruptcy Court) to cram-down classes of creditors who vote against a DOCA. The Bankruptcy Court would exercise its discretion to approve a DOCA and make it binding on all classes of creditors within certain parameters.

- An application must be made to the Bankruptcy Court by the administrators or, with permission of the Court, the company or a creditor.
- The Bankruptcy Court shall not make an order unless:
  - (a) creditors representing at least 75% in value of all creditors who are intended to be bound by the DOCA – voting in person, by proxy or by postal vote – have voted in favour of the DOCA; and
  - (b) it is satisfied that no provision of the DOCA would be (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against,

one or more of the creditors; or (ii) contrary to the interests of the company as a whole.

This is a welcome development as it, at least, provides an avenue to approve a DOCA where there are diverging results among classes of creditors. There are, however, still uncertainties in that during the time when a cram-down application is ongoing, the company is in a state where administration has otherwise ended and it does not have the protection of a statutory moratorium against claims and enforcement actions against it; it is also unclear whether the administrators are still in office to manage the company or whether it is the board of directors which takes back management powers. The requirement that the Bankruptcy Court will only intervene if the requisite majorities of all creditors who are intended to be bound have voted in favour of the DOCA also means that if several creditors have not voted at all, the Bankruptcy Court might find itself unable to approve the DOCA.

It will be up to the legislature to consider whether further amendments should be made to address those matters.

Priority of Tax Claims in Formal Insolvency Processes

A couple of Supreme Court judgments have cast doubt on the ability of secured creditors to recover their claims against companies in liquidation or receivership. In a liquidation, the Fourth Schedule to the IA 2009 sets out the order in which claims against the company are meant to be paid. In a receivership, Section 204 of the IA 2009 was amended in 2019 to provide that claims are to be paid in such order as may be prescribed; as at the date of writing, the regulations prescribing the ranking of claims in receivership are still awaited. In their absence, a commonly held view is that a receiver ought to distribute the proceeds of realisation in accordance with rules on priority of claims set out in the Civil Code.

Section 81A of the Income Tax Act 1995 (ITA 1995) sets out that an appointed person such as a liquidator, administrator or receiver must, before disposing of any asset of the company, set aside such sum out of the asset as appears to the Director-General of the Mauritius Revenue Authority (MRA) to be sufficient to provide for any income tax that is or may become due and payable by the company. A similar provision, now repealed, was found in Section 64 of the Value Added Tax Act 1998 in respect of value added tax.

In the decision of AAPCA (Mauritius) Limited (in receivership) and another v Mauritius Revenue Authority 2020 SCJ 297, the receiver had requested the MRA to erase the privilege it had inscribed in respect of taxes on the immovable property of the company – the MRA accepted subject to the receiver remitting all proceeds of realisation to it. Considering that such a condition was abusive, the receiver applied to the Bankruptcy Court for orders that sale be allowed to proceed, that the proceeds of sale be remitted to the receiver, that the receiver be allowed to distribute the proceeds in accordance with the law and that the MRA be ordered to erase its privileges upon the registration of the deed of sale. At first instance, the Bankruptcy Court decided that the application was premature in as much as the company was still disputing some taxes before the Assessment Review Committee and the outcome of that process had to be awaited. The company and the receiver appealed to the Court of Civil Appeal. Before the appellate Court, the MRA relied on Section 81A, and the Court ruled as follows:

- Section 204 of the Insolvency Act was a law of general application whereas Section 81A of the Income Tax was a law of specific applica-

tion, such that the latter prevailed over the former;
- Section 81A of the Income Tax Act was peremptory in nature, as evidenced by the fact failure to comply with it is a criminal offence; and
- therefore, the MRA was justified in imposing the condition that all proceeds of sale be remitted to it.

The Court of Civil Appeal judgment did not consider the provisions of the Civil Code dealing with the ranking of claims and omitted to consider certain factors which could have been relevant, namely:

- its interpretation of Section 81A gave a superpriority to the MRA over all other creditors such as banks and employees;
- its interpretation of Section 81A would mean that a different regime of distribution applies when a bank decides to appoint a receiver compared to when it decides to seize the property and sell it in the Master's Court under the Sale of Immovable Property Act; and
- if the MRA has a super-priority, why it is that taxes are listed (and capped to certain limits) in the ranking of claims both in the Fourth Schedule to the Insolvency Act and in the Civil Code?

As such, the Court of Civil Appeal's judgment regrettably failed to address how Section 81A of the ITA 1995 could have been read in a way which is harmonious with the existing regimes on ranking of claims in the IA 2009 and the Civil Code. The appellants in AAPCA have obtained conditional leave to appeal to the Judicial Committee of the Privy Council.

AAPCA being a Court of Civil Appeal judgment, when a similar issue came before the Bankruptcy Division, the judge considered herself to be bound by it: Best Flour & Co Ltd (in receivership), in the presence of the Director-General of the Mauritius Revenue Authority 2021 SCJ 301. In Best Flour, unlike AAPCA, the MRA did agree to the sale of the property and erasure of its privilege but on the condition that the proceeds of sale up to the amount of tax due be kept in an escrow account pending the outcome of a court application for directions.

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AUTHORS

Jean-Eric Sauzier is a partner at BLC Robert and heads the firm's banking and finance team. He also possesses decades of experience in diverse practice areas and he regularly advises financial institutions on domestic and cross-border financing and acts for both lenders and borrowers in a wide range of tasks, including assisting lenders in preparing their finance, security and disbursement documentation and advising sophisticated borrowers in the raising of their debt financing and their drawdowns. Jean-Eric also advises banks on their recovery routes and provides them with hand-holding support through administration, receivership and liquidation procedures. In the real estate space, his expertise includes advising promoters on development, documentation and financing.

Shane Mungur is an associate at BLC Robert. He forms part of the banking and finance team and specialises in derivatives and structured finance. He advises international corporations on OTC-traded derivative transactions with Mauritian counterparties, listing exchange-traded funds as well as on matters related to collateral arrangements and security issues. He has assisted clients on major transactions, including advising international lenders on the structure of their security packages, and has drafted their security documents in connection with cross-border financing. He was part of the transaction team that advised a leading Mauritian bank on a debt restructuring exercise of a hotel and the financing of an acquisition in the hospitality industry.

BLC Robert & Associates

2nd Floor, The Axis
26 Bank Street, Cybercity
Ebene 72201
Mauritius

Tel: +230 403 2400
Fax: +230 403 2401
Email: Chambers@blc.mu
Web: www.blc.mu