



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 26 March 2019  
**STATUS** Immediate

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

***Born Free Investments 247 (PTY) Ltd v Pierre Du Plessis Kriel NO (1183/17) [2019]  
ZASCA  
(26 March 2019).***

Rockland Asset Management and Consulting (Pty)(Ltd) (RAM) and two other entities was placed under provisional curatorship. Pierre de Plessis Kriel was appointed the curator.

In terms of paragraph 6.2 of the provisional order, a rule nisi was issued calling upon all interested parties to show cause on the return day why an order should not be granted that actions against RAM and the two entities should not be instituted without leave of the court whilst the curatorship existed.

On the return day, a final order was made. Paragraph 1 thereof read: ‘Subject to the terms of this order, the rule nisi is confirmed in respect of the business of first and third respondents (RAM and the entities) and the appointment of the curator is made final.’

Born Free Investments 247 Pty Ltd (Born Free) instituted action against the curator of RAM. The action was instituted whilst the curatorship existed but without obtaining leave of the court. The curator raised a special plea asserting that Born Free did not obtain leave of the court before instituting the action. Born Free replicated and argued that upon proper construction of the provisional and final orders, it was not required to obtain such leave.

The curator’s special plea was dismissed in the Western Cape Division of the High Court. In an appeal to the full court of the Western Cape Division, the appeal and special plea were upheld and Born Free’s action dismissed. The full court held:

- (a) That the moratorium on legal proceedings which formed part of the rule in the provisional order was confirmed by the final order.
- (b) That Born Free was required to obtain leave of the court before instituting the action.

The Supreme Court of Appeal held that the language of confirming a rule nisi is frequently encountered and well understood in the legal practice. A practical and common sense approach needs to be adopted in ascertaining whether paragraph 6.2 of the provisional order has been excluded.

The Supreme Court of Appeal concluded that the usual procedure with a rule nisi is that, the applicant moves to have the order made final, whereupon the court may either make the rule final or discharge it. In the absence of an exclusion or qualification, the confirmation of a rule means that what was in the provisional order becomes part of the final order.

The Supreme Court of Appeal held that the purpose of putting in place the moratorium on legal proceedings in the provisional order was to offer a breathing space to the curator, allowing him to investigate the affairs of the distressed company and to prepare a report to the court. A moratorium would assist with the administration of the distressed company and help bring it back to its financial well-being without the extra burden of having to deal with litigation which may delay/disrupt the process. There is no reason in principle why the court, having imposed a procedural safeguard of this nature for the period of an interim order and issued a rule nisi calling for reasons why it should not be made final, would then have left it out of the final order. An order upholding the appeal and staying Born Free's action pending the court order granting it leave to proceed with the action was made.

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