

**Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd intervening) 2011 (5) SA 600 (WCC)
(29 February 2012)**

A financially distressed company can be held liable for the costs incurred by the applicant in launching a successful application for an order to place the financially distressed company under business rescue.

The applicant successfully applied for an order under section 131(4)(a) of the Companies Act 2008 (**Companies Act**) to place Pinnacle Point Group, the first respondent, under supervision and for business rescue proceedings to commence. The applicant also sought an order that its costs in the business rescue application be borne by the financially distressed first company.

The Companies Act does not contain any express provisions dealing with the costs incurred by the applicant in section 131 proceedings. However, it seems that section 135(3) gives priority to the payment of the business rescue practitioner's remuneration and expenses and to 'other claims arising out of the costs of the business rescue proceedings'. These costs will stand ahead of 'post-commencement proceedings' provided for in section 135.

The court considered the fact that a financially distressed company could pass a board resolution in terms of section 129 to commence voluntary business rescue proceedings. If the distressed company fails to follow the section 129 procedure but an affected person successfully applies for the commencement of business rescue proceedings in terms of section 131, the applicant should not be left out of pocket. If an applicant party is unable to recoup its reasonable costs, then affected persons would have no incentive to apply for proceedings under section 131 and may choose the liquidation route instead. This is undesirable and would hamper the objective of the Companies Act. The court therefore held that its inherent jurisdiction to make a costs order applies to section 131 proceedings.

The court ordered the applicant's costs in the business rescue application, as taxed by the Registrar, to be paid by the first respondent.