IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

MAAL DEUR WAT NIE VAN TOEPASSING IS NIE

(1) RAPPORTEERBAAR: JA/NEE.
(2) VAN BELANG VIR ANDER REGTERS: JA/NEE
(3) HERSIEN.

CASE NO. 3624/2013

DATUM **HANDTEKENING**

In the application of:

In the application of:

CREDIT SUISSE GROUP AG First Intervening Party

STANDARD CHARTERED BANK
(Reg. No.: 2003/020177/10) Second Intervening Party

IN RE:

The *Ex Parte* application of:

PETRUS FRANCOIS VAN DEN STEEN N.O. First Applicant

SOUTH GOLD EXPLORATION (PTY) LIMITED
(in business rescue) Second Applicant

JUDGEMENT

Rautenbach AJ:

1. This application came before me as an *Ex Parte* application on the unopposed roll of the Motion Court of this division. There are two applications before this Court.

2. The first application is an application by the Credit Suisse AG and Standard Chartered Bank respectively as the First and Second Intervening Parties seeking leave to intervene in the main application brought by the First and Second Applicants.

3. The second application is the application by the First and Second Applicants seeking an order in the following terms:

   3.1. Declaring that the Second Applicant has complied with sections 129(3) and 129(4) of the Companies Act, 71 of 2008 and is accordingly in business rescue under the supervision of the First Applicant, pursuant to a resolution filed at the Companies and Intellectual Property Commission on 14 September 2012.

4. At the hearing of the matter my attention was specifically drawn to section 129 of the Companies Act, 71 of 2008 and more specifically to sub-sections (3) and (4) which read as follows:

   "(3) Within five business days after a company has adopted and filed a resolution, as contemplated in sub-section (1) or such longer time as the commission, on application by the company, may allow, the company must

   (a) publish a notice of the resolution, and its affective date, in the prescribed manner to every affected person,

including with the notice a sworn statement of the facts relevant to the ground on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by sub-section (3)(b) a company must

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed."

5. Of further importance is the contents of sub-section (5) which reads as follows:

"(5) If a company fails to comply with any provision of sub-section (3) or (4)

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a

nullity; and

(b) the company may not file a further resolution contemplated in sub-section (1) for a period of 3 months after the date on which the lapsed resolution was adopted, unless a Court, on good cause shown on an ex parte application, approves the company filing a further resolution."

6. The provisions were pointed out to me as they were pronounced upon in a judgement by Fabricius J in the North Gauteng High Court in the matter of **Advanced Technologies and Engineering Company (Pty) Limited (in business rescue) v. Aeronautique Et Technologies and Others, unreported, North Gauteng High Court case no.: 72522/11**. In this matter Fabricius J held that:

"It is clear from the relevant sections contained in chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the resolution beginning rescue proceedings. The purpose of section 129(5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with section 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument

pertaining to 'substantial compliance'."

7. It is because of these comments by Fabricius J and a similar judgement in **Madodza (Pty) Limited (in business rescue) v. Absa Bank Limited and Others, unreported, North Gauteng High Court, Case No.: 28906/12** that I have listened to full argument by the parties that appeared before me and that I have decided to reserve judgement in order to consider the matter properly before giving this judgement.

8. The relevant facts for purposes of this application are as follows:

8.1. South Gold (Second Applicant) is a South African company with its registered office at 138 West Street, Sandton, Gauteng and who is a wholly subsidiary of Great Basin Gold Limited ("GBG"), a public company which was listed on the Toronto, New York and Johannesburg Stock Exchange (those listings are now suspended), incorporated in British Columbia, Canada and carrying on business in South Africa from 138 West Street, Sandton, Gauteng and in Canada from 1108 East Georgia Street, Vancouver, British Columbia.

8.2. GBG is the sole shareholder of N5C Incorporated, a Cayman Island registered company, which is in turn the sole shareholder of N6C Incorporated, also a Cayman Island registered

company, which is in turn the sole shareholder of the Second Applicant.

8.3. During August 2012 GBG announced that it had reviewed its liquidity position, and that, as a result of that review, the authority suspend active production of South Gold's Burnstone Mine, which was to be placed on care and maintenance. GBG hoped that it would be able to sell, *inter alia*, the Burnstone Mine, in order to settle its and its subsidiary's creditors. However, as any sale process would necessarily take some time, GBG believed it needed to seek to protection from creditors in the interim period. This was particularly the case in respect of South Gold, whose mineral licenses would revert to the State in the event of its liquidation, thereby obliterating the value of its business and share capital.

8.4. On 14 September 2012 South Gold's directors resolved to place South Gold into business rescue, in terms of section 129(1) of the Companies Act. The resolution was filed at the Companies and Intellectual Property Commission ("CIPC") on the same day which caused business rescue proceedings to commence. The notice appointing the business rescue practitioner was filed at the CIPC on 18 September 2012.

8.5. On 21 September 2012 South Gold published the following documents *"The section 129 notices"* in the prescribed manner to what it at the time believed were the affected persons.

8.5.1. A covering letter from South Gold addressed to all affected persons attached to the Founding Affidavit in the main application as **"PS3"**.

8.5.2. The notice of commence of business rescue proceedings, contemplated by Section 129, on form CoR123.1, attached to the Founding Affidavit in the main application as **"PS4"**.

8.5.3. The board resolution to commence business rescue proceedings, attached to the Founding Affidavit in the main application as **"PS5"**.

8.5.4. The sworn statements of the facts relevant to the grounds upon which the board resolution was founded, attached to the Founding Affidavit in the main application as **"PS6"**.

8.5.5. The notice of appointment of business rescue practitioner, including a registration certificate, on form CoR123.2, attached to the Founding Affidavit in

the main application as **"PS7"**.

8.6. During November 2009 GBG had issued a tranche of senior unsecured convertible debentures in GBG ("the debentures"). The debentures were taken up by a number of lenders ("the note holders"), who authorised the Computer Share Trust Company of Canada ("CTCC") to act as trustee on their behalf.

8.7. At the same time, South Gold issued the note holders with a security guarantee for the debentures. The intervening parties, Credit Suisse AG and Standard Chartered Bank are creditors of South Gold to the tune of some US$ 80 million plus a further US$ 25 million as post commencement financing.

8.8. As pointed out above on the 21st September 2012, South Gold published the section 129 notices in the prescribed manner within the prescribed time. However, South Gold did not publish the notices to a group of individual investors, represented by the Computer Share Trust Company of Canada who is collectively referred to as the note holders.

8.9. This is because, at the time it issued the section 129 notices, South Gold's directors had been advised that the note holders were not creditors.

8.10. In addition to publication in the prescribed form to creditors, South Gold took additional steps in order to ensure that every interested party became aware of its business rescue. Two press releases were released regarding the proceedings in South Africa and further electronic copies were published of the section 129 documents on the website of its shareholder, Great Basin Gold Limited.

8.11. As a result of these measures the note holders became aware of the business rescue shortly after the resolution was filed, and within the time period prescribed by section 129.

8.12. The First Applicant subsequently determined that the note holders were creditors.

8.13. As pointed out above section 129(5) of the Act provides that if a company fails to notify every affected person of the commencement of business rescue proceedings and the appointment of a business rescue practitioner, in the prescribed manner, within the prescribed time periods, its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity.

9. It is common cause that in this case the Second Applicant failed to

directly deliver the section 129 notices to the "note holders" and that this may constitute non-compliance with the prescribed procedure.

10. There are basically two issues that I have to decide. The first is whether the intervening parties may intervene in the main application. It is apparent from the papers before me that the first and second intervening parties both have a substantial and material interest in the outcome of these proceedings. The application to intervene will have to be allowed.

11. The second issue that I have to determine, especially in the light of the provisions of section 129 of the Act and the two judgements that I have referred to above is whether South Gold complied with its obligation to notify the note holders (creditors) of the business rescue and whether substantial compliance will be sufficient in the light of the provisions of section 129(3) and (4).

12. At the outset it is necessary to point out that there are some distinguishable facts in the matter before me when compared to the facts in the Advanced Technologies matter and the Madodza matter. In those matters before the North Gauteng High Court, in both cases the issue was whether the time limits were adhered to in terms of the appointment of the business rescue practitioner. There is no guidance from the Act itself in regard to any possible condonation of time limits

specifically the time limits as provided for in section 129. It is probably based on this that the learned Judges in the matters referred to above came to the conclusion that non-compliance with the time limits can only result in a nullity of the process. What the learned Judges did not deal with as they were not required to do so was what the effect of section 6(9) would be in regard to the giving of notice and the delivery of documents. More about this later in this judgement. Because the issue before me seems to be quite different from the issue before the judges in the abovementioned matters, it is not necessary for me to make a finding as to whether those judges were wrong or not.

13. Sub-section 129(3) contains a requirement to publish a notice of the resolution in the prescribed manner to every affected person including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded. Sub-section (4) also contains the requirement that a copy of the notice of appointment has to be published to each affected person within 5 business days after the notice was filed.

14. In the Companies Regulation 2011 "publish a notice" is defined as follows:

> *"Means to publicise information to the general public, or to a particular class of persons as applicable in specific circumstances,*

by any means that can reasonably be expected to bring the information to the attention of the persons for whom it is intended."

15. Of even more important is section 6(9) of the Act which expressly provide for substantial compliance with the prescribed manner of delivery of a notice as follows:

> *"(9) If a manner of delivery of a ... notice is prescribed in terms of this Act for any purpose*
>
> *(a) it is sufficient if the person required to delivery such a ... notice does so in a manner that satisfies all of the substantive requirements as prescribed; and*
>
> *(b) any deviation from the prescribed manner does not invalidate the action taken by the person delivering that ... notice unless the deviation*
>
> *(i) materially reduces the probability that the intended recipient will receive the ... notice; or*
>
> *(ii) is such as would reasonably mislead a person to whom the ... notice, or is to be, delivered."*

16. This particular sub-section of the Act in my view enable a Court to find that there was substantial compliance with giving notice to all affected

parties if it is established that all affected parties had full knowledge of the notice and its contents. In any event the probability that the recipient would have received the notice was not reduced at all in the matter before me.

17. As far as strict compliance with statutory provisions are concerned, Trollip J in **Du Preez and Another v. Garber: In re Die Boere Bank Bpk 1963 (1) SA 806 (W)** stated the following **at 814 C - G**:

> *"A Court will not insist upon absolute or meticulous observance of all those terms and requirements, but would generally act on substantial compliance therewith if no prejudice or possible prejudice to anyone's legal interests has resulted from non-observance of the prescribed formalities. The reason is that the object of those formalities is to ensure that the creditors and members are sufficiently informed of the compromise or arrangement and are afforded a reasonable opportunity of considering and discussing it and of accepting or rejecting it. If that object has been attained through substantial compliance with the prescribed formalities and the statutory majority of the creditors and members have agreed to the compromise or arrangement, it would be sheer unnecessary formality for the Court to refuse or assume jurisdiction in the matter."*

18. In **Maharaj and Others v. Ramprasad 1964 (4) SA 638 (A) at 646 C – D** the Appellate Division stated the following:

> *"The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and as a resultant comparison between what the position is and what, according the requirements of the injunction, it ought to be. It is quite conceivable that the Court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."*

19. Although the regulations 7 and 123 cannot be said to have been complied with meticulously, one should also consider the definition of *"publish a notice"* in the Companies Regulations 2011. *"Publish a notice"* means to publicise information to the general public, or to a particular class of persons as applicable in specific circumstances, by any means that can reasonably be expected to bring information to the attention of persons for whom it is intended. This definition slots in with

section 6(9) insofar as 6(9) stipulates that a deviation from the prescribed manner does not invalidate the action unless the deviation materially reduces the probability that the intended recipient will receive the notice. The section 6(9) and also from the definition of *"publish a notice"* in the Companies Regulations 2010 recognise that what is of paramount importance in respect of the delivery of notices to persons entitled thereto is not whether or not delivery has taken place strictly in accordance with the prescribed manner, but whether or not, as a fact, the person to whom delivery ought to have been affected received the requisite notice.

20. In my view the purpose of section 129 is to protect the rights of affected persons so that they could not be bypassed in an attempt by a company to opt for the option of business rescue without such affected party having had the opportunity of utilising the provisions of section 130 (which was apparently not considered by Fabricius J) in order to set aside any such resolution opting for a business rescue. There is also merit in the argument that the creditors who were not informed that the affected persons who were not given notice as per the strict requirements of the Act, waived any rights they may have had in that they became aware of the notice and did not act in terms of section 130 of the Act.

21. In the matter before me, it is clear from the papers that the *"note holders"* were not only aware of the resolution taken but they also support the application by the First and Second Applicants.

22. Not only did the affected persons who are the intervening parties become aware of the business rescue process within the time limits provided for and by way of inference of the identity of the business rescue practitioner but they firstly acted on the information by issuing notices marked as **"NC5"**, **"NC6"**, **"NC7"** and **"NC8"** attached to the Applicants' papers. Apart from this action taken the Applicants are also supporting the business rescue process.

23. In the circumstances I am of the view that it will be highly technical and to the prejudice of affected persons should I not find that sections 129(3) and (4) have been substantially complied with.

24. I may further add that should I find that the non-compliance with section 129(3) and (4) was a nullity; the Applicants have the right to launch, in terms of section 129(5), an *ex parte* application to Court on good cause shown to approve the company filing a further resolution.

25. On the facts before me if such an application was brought before me, I would have been inclined to grant relief in terms of sub-section (5) on the facts currently before me. It is senseless to expect from the

Applicants to first having its resolution declared a nullity and then on the same facts to expect the Applicants to again approach the Court, probably on an urgent and/or *ex parte* basis, to ask for virtually the same relief in order to notify affected persons of some events they already know about. This will only lead to a waste of money, time and resources without achieving a better result.

26. In the circumstances I find that there was substantial compliance with sections 129(3) and (4) as far as notice of the resolution and notice of the appointment of a business rescue practitioner appointment were concerned.

27. As far as this particular application to Court is concerned, I had the opportunity of service affidavits filed by Steven Jacobs and Kerry Brockway and I am thus satisfied that proper service to all affected parties according to the Act and regulations were affected.

In these circumstances I grant the following orders:

1. That the application for intervention is heard together with the main application.

2. That the First and Second Intervening Parties be given leave to intervene in the main application for a declaratory order under Case No.: 3624/2013.

3. Declaring that the Second Applicant has complied with sections 129(3) and 129(4) of the Companies Act, 71 of 2008 and is accordingly in business rescue under the supervision of the First Applicant, pursuant to a resolution filed at the Companies and Intellectual Property Commission on 14 September 2012.

J G Rautenbach
Acting Judge of the High Court
27 February 2013