REPUBLIC OF SOUTH AFRICA

HIGH COURT, SOUTH GAUTENG LOCAL DIVISION (JOHANNESBURG)

Case No. 20456/2014

Date: 11 July 2014

Reportable

Of interest to other judges

In the matter between:

ATCHUTHANANDAN NADARAJA MOODLEY	Applicant
and	
ON DIGITAL MEDIA (PTY) LTD	First Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Second Respondent
STARTIMES COMMUNICATIONS	
TECHNOLOGY COMPANY LTD	Third Respondent
FIRST AONE TRADE AND INVEST 12 (PTY) LTD	Fourth Respondent
NATIONAL EMPOWERMENT FUND	Fifth Respondent
REDGOLD INVESTMENTS 16 (PTY) LTD	Sixth Respondent
SES GLOBAL AFRICA SA	Seventh Respondent
INDUSTRIAL DEVELOPMENT CORPORATION OF SA	Eighth Respondent
FIRST NATIONAL MEDIA INVESTMENT	
HOLDINGS (PTY) LTD	Ninth Respondent
COMPANIES AND INTELLECTUAL	

PROPERTY COMMISSION Tenth Respondent

HANTEX INTERNATIONAL COMPANY LTD Eleventh Respondent

2012/200078/07 (SOUTH AFRICA) (PTY) LTD Twelfth Respondent

DIDUSCAN (PTY) LTD Thirteenth Respondent

DEVELOPMENT BANK OF SA LTD Fourteenth Respondent

Case Summary: Companies Act 71 of 2008 - Business Rescue Proceedings -Whether the general moratorium on legal proceedings against a company in business rescue provided for in s 133 of the Companies Act finds application in legal proceedings against a company in business rescue and its business rescue practitioner in connection with the business rescue plan, its interpretation and execution towards implementation - Whether the adopted business rescue plan has been executed according to its terms and in accordance with the applicable provisions of the Companies Act.

JUDGMENT

MEYER, J

[1] In this application a minority shareholder of a company in business rescue seeks leave (if it is required in terms of s 133 of the Companies Act 71 of 2008) to proceed with the remainder of the application against the company and its business rescue practitioner in terms whereof declaratory reiief is sought that certain transactions (a share buy-back, an issue of new shares and the adoption of a new memorandum of incorporation and a draft subscription agreement) are not in accordance with the adopted business rescue plan and/or certain provisions of the Companies Act, and accordingly unlawful, and for the company and its business rescue practitioner to be interdicted from implementing the transactions or that they be set aside insofar as they have been implemented.[1]

[2] On 10 June 2014, Twala AJ granted an order in terms of prayer 1 of the notice of motion herein (the customary prayer in respect of urgency). The application was postponed for hearing on 25 June 2014. By agreement between the parties the following undertaking by the company and its business rescue practitioner was made an interim order pending the return day:

> ‘Without prejudice to any of the parties' rights and without conceding any obligation to do so, the First and Second Respondents undertake until the hearing on 25 June 2014, not to take any further steps to implement any of the transactions contemplated in the documents and the correspondence (as defined in paragraph 56.1 of the founding affidavit of ATCHUTHANANDAN NADARAJA

MOODLEY) which includes an undertaking not to take the First Respondent out of business rescue.'

[3] The first issue that presently requires determination is whether the general moratorium on legal proceedings against a company in business rescue provided for in s 133 of the Companies Act finds application in this case (prayer 2 of the notice of motion). Section 133 reads:

'(1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its officers;

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time limit must be suspended during the company's business rescue proceedings.'

[4] The applicant argued that the requirements of s 133(1) do not apply to proceedings, such as these, which are aimed at enforcing the implementation of an adopted business rescue plan consistently with its terms and in accordance with the provisions of the Companies Act. The opposing respondents, on the other hand, argued that section 133(1) affords a company in business rescue protection against any conceivable type of proceedings.

[5] Authority for the contention of the opposing respondents is to be found in *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others*,[2] a matter in which the setting aside of an adopted business rescue plan was sought. Kgomo, J held that the provisions of s 133 also apply to litigation against a business rescue plan or related thereto' and that such litigation may '[o]nly in exceptional circumstances' be permitted by a court.[3] This judgment has elicited the following comment from the authors of *Henochsberg on the Companies Act 71 of2008*[4]

> 'It is respectfully doubted that s 133 is intended to operate also in this category as opposition to a business plan is not legal proceedings against the company or property belonging to the company or lawfully in its possession.'

[6] The present state of the law as to the correct approach to interpretation was stated by Wallis JA, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), to be the following:[5]

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those for the production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes have been omitted.)

[7] Section 128(1)(b) of the Companies Act defines 'business rescue' as meaning-'... proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

> (i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;

[8] Section 140(1)(d) of the Companies Act enjoins the business rescue practitioner during a company's business rescue proceedings to 'develop a business rescue plan to be considered by affected persons' and to 'implement any business rescue plan that has been adopted'. Section 152(5) requires that '[t]he company, under the direction of the practitioner, must take all necessary steps to- (a) attempt to satisfy any conditions on which the business rescue is contingent; and (b) implement the plan as adopted.' Section 152(4) provides that '[a] business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person- (a) was present at the meeting; (b) voted in favour of adopting the plan; or (c) in the case of creditors, had proven their claims against the company.'

[9] Thus, s 128(1)(ii) imposes a temporary moratorium on the rights of claimants against the company or in respect of property in its possession. The purpose of s 133(1) in prohibiting (subject to the stated exceptions) the commencement or continuation of any legal proceedings against the company or in relation to its property or property lawfully in its possession, is to give effect to the temporary moratorium that is provided to a company during business rescue proceedings in terms of s 128(1)(ii). Section 133(1) is not concerned with temporary supervision (s 128(1)(i)) or the development and implementation of the business rescue plan (s 128(1)(iii)), which, in addition to the temporary moratorium, form part of business rescue proceedings.

[10] The language of s 133, when read in context with the other relevant provisions in Chapter 6 and having regard to its purpose, does not include within its ambit proceedings relating to the development, adoption or implementation of a business rescue plan. It is the business rescue practitioner who must develop a business rescue plan and implement it if adopted and the company, under the direction of the practitioner, must take all necessary steps to attempt to satisfy any conditions on which the business rescue is contingent and implement the plan as adopted. Legal proceedings, such as the present case, which seek that an adopted business rescue plan be executed and implemented strictly according to its terms and in accordance with the applicable provisions of the Companies Act, are legal proceedings against the business rescue practitioner and the company in business rescue in connection with the business rescue plan. They are not legal proceedings against the company or property belonging to the company or lawfully in its possession within

the meaning of s 133(1).

[11] Section 133, therefore, finds no application in legal proceedings against a company in business rescue and its business rescue practitioner in connection with the business rescue plan, including its interpretation and execution towards implementation, i respectfully consider the contrary finding in *Redpath* to be clearly wrong and decline to follow it. The applicant does not require the leave of this court as contemplated in s 133(1)(b) of the Companies Act to proceed with the present proceedings.

[12] Apart from costs, the other pertinent prayers contained in the notice of motion are these:

> '3 declaring that the transactions contemplated in the Documents and the Correspondence (as defined in paragraph 56.1 of the founding affidavit of ATCHUTHANANDAN NADARAJA MOODLEY) are not in accordance with the Business Rescue Plan dated 30 April 2013 ("the BR Plan") and/or the Companies Act and are unlawful;
>
> 4 interdicting and restraining the first and second respondents from taking any steps to implement any of the aforesaid transactions and, to the extent that any such transactions have been implemented, setting those transactions aside.
>
> 5 directing the first and second respondents to implement the BR Plan in respect of the first respondent dated 30 April 2013 in its terms and consistently with the Companies Act.

[13] The relief in terms of the notice of motion is claimed as final relief or as interim relief pending the final determination of this application. An amendment to the notice of motion introduced a further alternative basis upon which the relief is claimed as interim relief pending the final determination of this application (only certain of the relief claimed in this application should then be determined) and the finalisation of dispute resolution proceedings under clause 6.5 of the business rescue plan (for the determination of the balance of the relief claimed), which are to be initiated within 25 days of the date of final judgment in this application. The amendment, counsel For the applicant informed me from the bar, was a cautionary measure taken in the event of the opposing respondents raising the dispute resolution mechanism provided for in the business rescue plan as a bar to final relief being granted to the applicant. The dispute resolution mechanism does not '... preclude any party from seeking urgent interim relief from any Court of competent jurisdiction.'[6] Other than in argument, none of the respondents have raised the dispute resolution mechanism substantively nor did they apply for the stay of the proceedings for final relief.[7] I accordingly agree with the submission of counsel for the applicant that the dispute resolution mechanism is in this instance no bar to final relief being granted to the applicant.

[14] The interim relief sought has thus become irrelevant. The notice of motion does not contemplate the institution of other court proceedings pending the finalisation of which proceedings interim relief is sought. This is the return day for the final determination of this application. The respondents who oppose the application have filed their answering affidavits and the applicant his replying affidavit. The application is voluminous comprising almost a thousand pages and was argued over two court days.

[15] It is convenient to dispose of prayer 5 of the notice of motion before turning to the relief claimed in prayers 3 and 4 thereof. The applicant claims that the company and its business rescue practitioner be directed to implement the business rescue plan in its terms and consistently with the Companies Act. This relief is impermissibly wide and should for this reason be refused. I have referred to the provisions of the Companies Act that deal with the binding nature (on the company, its creditors and holders of its securities) of a business rescue plan that has been adopted, the obligation on the business rescue practitioner to implement the business rescue plan and that of the company, under the direction of the practitioner, to take all necessary steps to implement the plan as adopted.[8] An order in terms of prayer 5 of the notice of motion would merely direct the company and its business rescue practitioner to do what the relevant provisions of the Companies Act in any event prescribe them to do. An interdictory order of court, such as the one in question, must inform the party against whom or against which it is given in clear and precise terms what that party is enjoined to refrain from doing or compelled to do. It is the infringement of the specific right that has been established which is interdicted, either by means of a prohibitory or a mandatory interdict.

[16] The factual matrix within which the issues to be decided in this application arose, is essentially

uncontroversial. The first respondent, On Digital Media Proprietary Limited (ODM), was formed to operate a satellite pay television service (a multi-channel subscription television broadcasting service). The Independent Communications Authority of South Africa (ICASA) issued the required licence to ODM. It began broadcasting by offering a satellite television service to subscribers, under the brand name of 'TopTV', on 1 May 2010.

[17] ODM required substantial funds to commence and undertake its broadcasting operations. It is stated in the answering affidavit of the fourteenth respondent, Development Bank of Southern Africa Limited (DBSA), that the '[t]he total project cost for ODM based on a 36 month construction funding period was estimated at R1 billion, split into R800 million equity and R200 million debt from the DBSA.[1] DBSA provided a loan in that amount to ODM. It is the only secured creditor of ODM and holds a general notarial bond over all the movable property of every description owned by ODM.

[18] According to DBSA its '... investment in ODM was motivated by Government's drive to widen the competitive landscape in the Pay TV market, increase consumer choice and more importantly make Pay TV accessible to those previously excluded from watching Pay TV because of prohibitive pricing.' It states that '[t]he increased competition would help reduce the costs of Pay TV services to the consumer thereby unlocking financial resources which would augur well for the consumer.'

[19] Shareholders' funding was either by way of direct loans or preference share subscription. The eighth respondent, Industrial Development Corporation of South Africa (IDC), made direct and indirect loans to ODM and it also provided funding to the fourth respondent, First Aone Trade and Invest 12 Proprietary Limited (Aone), the sixth respondent, Redgold Investment 16 Proprietary Limited (Redgold), and the ninth respondent, First National Media Investment Holdings Proprietary Limited (FNMIH), to enable them to acquire shares in ODM.[9] IDC and these entities acquired shares in ODM and those of Aone, Redgold and FNMIH were pledged to IDC as security for the loans IDC advanced to them.

[20] According to IDC the rationale for its investment of substantial amounts of money in ODM was to support the establishment of a second pay-tv operator in the country, thereby creating a choice for South African consumers in a market dominated by MultiChoice. Furthermore, an extremely important factor in creating a second operator was to widen the market for local film production.' It states that '[t]he IDC has found, in its market research, that there is a significant demand for pay-tv services in the lower end of the market, consisting of the poorer people of South Africa' and that '[t]his is the very market in which ODM is providing a competitive service.' This 'social need', it states '... is a major part of what motivated the IDC to invest substantial funds into ODM."

[21] The fifth respondent, the National Empowerment Fund (NEC), the seventh respondent, SES Global

Africa SA, a company registered in Luxembourg (SES), and the applicant, Mr AN Moodley ('Moodley') also acquired shares in ODM.

[22] ODM was unable to secure funding for its continued working capital requirements. The security which DBSA held under the notarial bond over the movable assets of ODM was perfected. On 29 October 2012, the board of ODM resolved to commence business rescue proceedings. This step was taken after it had become clear to the board that ODM was financially distressed (as contemplated in Chapter 6 of the Companies Act) but that it was capable of being rescued through the business rescue regime. The resolution adopted by ODM's board was filed with the tenth respondent, the Companies and Intellectual Property Commission (CIPC), on 31 October 2012, the effective date of the commencement of ODM's business rescue proceedings.[10] The second respondent, Mr PM van den Steen, was appointed as the business rescue practitioner of ODM on 5 November 2012 (the practitioner).

[23] The practitioner published a business rescue plan in respect of ODM on 17 April 2013. The support both at creditor and shareholder level in favour of adopting the business rescue plan was overwhelming. It was supported by the holders of more than 75% of creditors' voting interests that voted at the meeting, with at least 50% thereof representing independent creditors' voting interests. A vote of 93.9%, of which 52.9% represented independent creditors' voting interests, voted in favour of its adoption. It received the support of 100% of the preference shareholders and 99.3% of the voting rights of holders of other securities. Moodley, who held a 0.7% voting right, was the only shareholder who voted against its adoption. I refer to the adopted business rescue plan for ODM as the 'ODM rescue plan'.

[24] The offer of the third respondent, StarTimes Communications Technology Company Limited (StarTimes),[11] of becoming a strategic shareholder and of discharging the already reduced claims of creditors has been accepted by virtue of the adoption of the ODM rescue plan.[12] It is stated in the ODM rescue plan that-[13]

> 'StarTimes are already committed to the operation of subscription television in other countries in Africa. They operate digital television services (with packages of up to 140 channels) for 1.4 million families across 13 African countries. The stated aim of the President of StarTimes is to enable "... every African Family to afford, (have) access and watch good digital TV and build the firm into Africa's most influential digital TV operator".

[25] The ODM rescue plan envisages for creditors to receive higher dividends in respect of their claims compared to liquidation, for existing shareholders (excluding SES whose participation would cease after the business rescue) to remain with restructured equity interests in ODM, and for the preservation of jobs and the creation of job opportunities.[14]ODM is profoundly insolvent. Liquidation will be severely prejudicial to ODM, its creditors, employees (according to the practitioner, over 200 job losses and the loss of 150 employment opportunities) and shareholders. Upon liquidation, only DBSA, which has a secured claim pursuant to the perfection of its notarial bond in relation to its claim in excess of R200 million, will receive a dividend of R12.50 on its claim against ODM. No other creditor, nor any shareholder, preference or otherwise, will receive any benefit or dividend distribution on their rights or claims. Apart from the movable assets hypothecated and secured in favour of DBSA, ODM owns no other assets. IDC's exposure to risk of loss is almost R900 million and that of NEF, R120 million.

[26] Clauses 4.1 to 4.6 of the ODM rescue plan oblige StarTimes to pay an amount of R30 million to DBSA and to offer it an equity opportunity of 1.99% of the issued share capital in a new company that is to be incorporated (NEWCO); an amount of R37,5 million to all creditors (other than DBSA, preference shareholder claims and shareholder claims), which amount is subject to monthly escalation depending on when the implementation date occurs; an amount equivalent to 3.45 cents in the Rand, subject to a maximum amount of R9, 332 million, in discharge of preference shareholder claims; and an amount equivalent to 2.25 cents in the Rand, subject to a maximum amount of R21, 596 million in discharge of shareholder claims. StarTimes is to acquire 20% of the shares in ODM and 20% of the equity interest in NEWCO.[15]

[27] Provision is made for a two-tiered management and ownership structure, with ODM's shareholding being altered and the incorporation of NEWCO, which new company is intended to be a parallel company to ODM with a different shareholding and management structure. Other agreements are also envisaged to be concluded between NEWCO and ODM.[16] NEWCO's operations as a trading entity are to be regulated under the NEWCO shareholders' agreement.[17] NEWCO is to take transfer from ODM of its licence issued by ICASA as well as the transmission fixed assets infrastructure.[18] Clause 4.6 provides that the amounts paid to shareholders in terms of the ODM rescue plan are to '... be reinvested by way of a subscription by the NEWCO shareholders.' 'NEWCO shareholders' are defined in clause 2.1 as '... the initial shareholders of NEWCO as listed by name and percentage of equity interest in Appendix D\ Appendix D lists StarTimes (65%), FNMIH (2.31%), NEF (1.45%), Aone (1.19%), Redgold (2.38%), ÍDC (5.67%), Moodley (0.001%), New BEE (20%) and DBSA (1.99%).

[28] Clause 4.12.3 of the ODM rescue plan is central to the issues that have arisen between the parties. It contemplates the restructuring by way of reduction of the shares belonging to the shareholders of ODM and the acquisition of these shares by StarTimes and a new black economic empowerment investor. The twelfth

respondent, 2012/200078/07 (South Africa) (Pty) Ltd, and the thirteenth respondent, Diduscan (Pty) Ltd, are the new BEE shareholders who are to hold 65% shares in ODM. Clause 4.12.3 reads as follows:

> '4.12.3 StarTimes will acquire 20% of the Shares of the Company on the Implementation Date, with the remaining shares to be held as follows-
>
> > 4.12.3.1 as to 15% between IDC, the NEF and other Shareholders of the Company at the BR Commencement Date (other than SES SA);
> >
> > 4.12.3.2 as to 65% by a new black economic empowerment investor whose shareholding, economic interest and control is held directly or indirectly by persons or categories of persons who are historically disadvantaged persons.

[29] 'Shareholders' in terms of clause 2.1 of the ODM business rescue plan 'means the shareholders of the Company [ODM] at the BR Commencement Date [31 October 2012] as listed by name and percentage of Shares held in the Company in Appendix F'. Appendix F lists SES (14.7%), FNMIH (20.4%), NEF (11.4%), Aone (7.3%), Redgold (14.7%), IDC (30.8%) and Moodley (0.7%). These shareholders, other than SES, are the shareholders referred to in clause 4.12.3.1 (the ODM commencement date shareholders). IDC has exercised the pledges in its favour of the shares of Aone, Redgold and FNMIH in ODM as security for the loans advanced to them and IDC is accordingly the beneficial owner of 73.2% of the ODM shareholding. Moodley ceded his shareholder loan claim against ODM to MSG Afrika Proprietary Limited 'for value received' and he ceded his present and future right, title and interest of any nature whatsoever to all distributions and amounts standing to the credit of his shareholder's loans in ODM to IDC. He consequently divested himself of the economic benefits of his shareholding in ODM.

[30] The ODM rescue plan is subject in its entirety to the fulfillment or waiver, as the case may be, of the suspensive conditions listed in clause 5.3. Presently relevant are the following suspensive conditions contained in clauses 5.3.2.6, 5.3.27, 5.3.2.8, 5.3.2.10 and 5.3.2.11:

> '5.3.2.6 StarTimes shall acquire 20% of the Shares from the Shareholders;
>
> 5.3.2.7 StarTimes and the other shareholders identified in clause 4.12.3 shall enter into a shareholders' agreement in respect of the Company to regulate *inter alia* -
>
> 5.3.2.7.1 the new shareholding in the Company with effect from the Implementation Date;
>
> 5.3.2.7.2 the ability of StarTimes to participate in 65% of the profits of the Company such that the effective economic interest of StarTimes in the Company shall be equal to 65%;

5.3.2.7.3 the ability of the group of shareholders in clause 4.12.3.1 to between them and in such proportions as they may agree to participate in 15% of the profits of the Company such that their effective economic interest in the Company shall be equal to 15%;

5.3.2.7.4 the ability of the shareholders in clause 4.12.3.2 to participate in 20% of the profits of the Company such that the effective economic interest of the Shareholder in the Company shall be equal to 20%;

5.3.2.7.5 the right of StarTimes and other shareholders of the Company to appoint directors to the Company,

5.3.2.7.6 the right of StarTimes to nominate the Chief Executive Officer of the Company, such person to be a former employee of StarTimes and his appointment to be on terms and conditions agreed upon in an employment agreement to be concluded.

5.3.2.8the Company shall adopt a memorandum of incorporation on terms consistent with what is set out in clause 5.3.2.7;

5.3.2.9 ...

5.3.2.10 StarTimes and the other shareholders identified in clause 4,12.3 shall enter into a shareholders' agreement in respect of NEWCO providing for-

5.3.2.10.1 the operation of NEWCO as a trading entity allowing it to invest in setting up the transmission network, providing TV signal transmission services to subscribers in South Africa and the rest of Africa and charging a fee to the Company for such services;

5.3.2.10.2 the collection of subscription fees from the Company subscribers and charging a fee for such service;

5.3.2.10.3 the shareholding and distribution of effective economic interest as set out in clause 5.3.2.7.2 and 5.3.2J.4 (both inclusive);

5.3.2.11 NEWCO shall adopt a memorandum of incorporation on terms consistent with what is set out in clause 5.3.2.10 and to the satisfaction of StarTimes;'

[31] The waiver provisions are contained in clause 5.6 of the business rescue plan. It reads as follows:

'5.6 It is specifically recorded that the Suspensive Conditions -

5.6.1 are stipulated for the benefit of StarTimes who alone shall be entitled, in writing only (by way of written notice to that effect addressed to the BR Practitioner and Bowman Giffillan Inc. prior to the Implementation Date) to waive compliance with the Suspensive Conditions or extend the date by which any of them are to be fulfilled;

5.6.2 are separate, divisible and distinct from one another;

5.6.3 are to be fulfilled (unless waived by StarTimes in the manner stipulated in clause 5.6.1) and if the Suspensive Condition remains unfulfilled and fulfillment thereof is not waived by StarTimes in the manner stipulated in clause 5.6.1 then the BR Plan shall not come into force or effect.'

[32] After StarTimes had reached agreement with NEF, IDC and DBSA, shareholders' agreements in respect of ODM and NEWCO were concluded amongst those parties. It is common cause that Moodley did not participate in the negotiation and conclusion of any such shareholders' agreements. (He was precluded as a result of mistrust of his motives.) Once the shareholders' agreements were concluded amongst the major shareholders, StarTimes waived the conditions of implementation contained in clauses 5.3.2.7 and 5.3.2.10 requiring it to conclude shareholders' agreements with all the shareholders. The written waiver occurred on 17 June 2014.

[33] The ‘transactions’ in respect of which Moodley seeks declaratory and interdictory relief in terms of prayers 3 and 4 of the notice of motion are those 'as defined in paragraph 56.1 of the founding affidavit’. The transactions relate to ODM only and are defined in paragraph 56.1 of the founding affidavit to be a share buy-back, an issue of new shares and the adoption of a new memorandum of incorporation and a draft subscription agreement.[19]

[34] On 30 April 2014, the practitioner’s attorneys inter alia submitted for consideration to all the shareholders (including Moodley) written shareholders’ resolutions authorising the cancellation of the existing memorandum of incorporation of ODM in its entirety and, in its stead, adopting a new memorandum of incorporation for ODM, authorising the buy-back and cancellation of existing ODM shares, authorising the issue of new shares in ODM ‘as per the business rescue plan and the shareholders’ agreement’ and the shareholders were requested to sign the subscription agreement in relation to the subscription of new shares in ODM. The subscription agreement inter alia records that there will be 1 000 000 new issued shares in ODM in classes A to E and that Moodley is to receive 1 230 class E shares, which translates into a shareholding of 0.123% in ODM as reconstituted pursuant to the ODM rescue plan.

[35] Moodley did not vote in favour of the adoption of any of the resolutions. He was notified on 2 May 2014 that the resolutions had been adopted. The resolutions received the support of all the other shareholders. He was furnished with copies of his new share certificates which reflect the position as envisaged in the shareholders’ resolution, subscription agreement and memorandum of incorporation of ODM. He was informed that the new memorandum of incorporation for ODM had been lodged at the CIPC. He was also informed that the ‘... business rescue of ODM is in its final stages and final implementation of the BR Plan is imminent’. (In his answering affidavit the practitioner states that the business rescue plan is now '... on the brink of implementation’.)

[36] The actions of the practitioner in preparing and circulating the resolutions for consideration and adoption by the shareholders, Moodley contends were unlawful actions, contrary to the provisions of the ODM rescue plan and in breach of certain provisions of the Companies Act, including those requiring implementation of a business rescue plan, as adopted.[20] He contends that the ODM rescue plan, read as a whole, contemplates that the ODM shareholders are to *negotiate* their new shareholding and economic interest in the restructured ODM. He complains that he has been excluded from the process and his shareholding percentage and other rights have been determined by the majority shareholders without his participation or agreement.

[37] Moodley asserts that he has a right to the proper implementation of the ODM rescue plan and a right not to have his shareholding altered except in strict compliance with the plan. It is his right not to have his shareholding of 0.7% in ODM altered other than by negotiation and agreement amongst all the shareholders, which Moodley asserts has been infringed. He states that there is no way of knowing what economic interest

would have been allocated to him had he participated in the negotiation of the ODM shareholders' agreement and that he would never have agreed on a shareholding and economic interest of only 0.123% in the restructured ODM. In his replying affidavit he states that had he participated in the shareholders' agreement, he could have negotiated a greater economic benefit and shareholding, and he could have secured appropriate minority protections.[21]

[38] The ODM rescue plan, Moodley argues, does not itself fully regulate the restructuring of the shareholding in ODM, but leaves it to all the shareholders and StarTimes to reach an agreement acceptable to them all in terms of clauses 5.3.2.7 and 5.3.2.10. It is only unanimous shareholders' agreements as contemplated in those clauses, he argues, which may deal with the issues enumerated in them, such as the regulation of the new shareholding in the restructured ODM, the ability of StarTimes to participate in 65% of the profits of ODM, and the proportions in which the ODM commencement date shareholders are to participate in 15% of the profits of ODM, the appointment of directors and the nomination of the chief executive officer.

[39] A memorandum of incorporation, his argument continues, may not be used to circumvent the provisions of clauses 5.3.2.7 or 5.3.2.10 and, '... to the extent that it purports to regulate the aspects which should properly be regulated under the shareholders' agreement', is contrary to the ODM rescue plan and unlawful. Moodley argues that clauses 4.3.2.8 and 5.3.2.11 imply that the memoranda of incorporation of ODM and NEWCO can only be concluded after (and not at all in the absence of) the conclusion of the shareholders' agreements. If fulfillment of the condition included in clause 5.3.2.7 is waived, the business rescue plan, he argues, '... must either be implemented without the benefits conferred under that clause or, if it is incapable of implementation without the fulfillment of that condition, then the Plan must be changed or fail'. The ODM rescue plan, on Moodley's interpretation, cannot be implemented, irrespective of the waiver of the conditions contained in clauses 5.3.2.7 and 5.3.2.10, unless and until he has been included in negotiations and agreement in respect of his participation in the post-rescue level of shareholding in ODM.

[40] I disagree with Moodley's interpretation of the provisions of the ODM rescue plan to which I have referred. It is not correct that the ODM rescue plan does not in its own terms regulate the post-rescue level of shareholding or that the restructuring of the shareholding, or indeed any other matters referred to in clauses 5.3.2.7 or 5.3.2.10, can only be determined by way of a shareholders' agreement to which all the shareholders have agreed. There is also no basis for the contention that memoranda of incorporation cannot be lawfully adopted in terms of the ODM business rescue plan in the absence of shareholders' agreements being concluded pursuant to clauses 5.3.2.7 and 5.3.2.10.

[41] Clause 4.12.3, on a proper interpretation in accordance with the approach laid down in *Natal Joint Municipal Pension Fund*,[22] provides for a proportional reduction of the percentage shareholding of the ODM

commencement date shareholders in order to accommodate the 20% and 65% shareholdings to be acquired by StarTimes and the new black economic empowerment investor respectively Their reduction in shareholding must by necessary implication be proportional: shareholders are to be treated fairly and equally, unless otherwise agreed. Importing the words 'pro rata' or 'proportional' into clause 4.12.3.1 accords with the test ordinarily applicable in the determination whether a proposed unexpressed term forms part of a contract, which test was thus concisely stated by Brand JA in *City of Cape Town (CMC Administration) v Bourbon-Leftleyh and Another NNO* 2006 (3) SA 488 (SCA):

> 'A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would *necessarily* have agreed upon such a term if it had been suggested to them at the time.'

[42] In the absence of a shareholders' agreement binding Moodley, his economic interest is represented by his right to dividends payable to him from the profits of ODM in his capacity as a shareholder. The reduction of his shareholding pursuant to clause 4.12.3.1 necessarily reduced his economic interest in ODM concomitantly Clause 5.3.2.7 contemplates that the ODM commencement date shareholders may agree on their rights *inter se* to participate in 15% of the profits of ODM in a manner which does not reflect their respective shareholdings. Because Moodley has not entered into such an agreement, his economic interests are reflected by his shareholding. Not being permitted to participate in the negotiation and conclusion of the shareholders' agreement did not adversely affect his economic interests.

[43] Clause 5.3.2.8 includes a condition that ODM '...shall adopt a memorandum of incorporation on terms consistent with what is set out in clause 5.3.2.7' and clause 5.3.2.11 includes a similar condition in respect of NEWCO. The requirements of clauses 5.3.2.8 and 5.3.2.11 are accordingly that the memoranda of incorporation must be consistent with the items set out in clauses 5.3.2.7 and 5.3.10 respectively. It is not required that the memoranda of incorporation must be consistent with the provisions of the shareholders' agreements envisaged in clauses 5.3.2.7 and 5.3.2.10. Clause 5.6.2 provides that all the conditions 'are separate, divisible and distinct from one another.' There is nothing in the ODM rescue plan which limits the matters which may be dealt with in the memoranda of incorporation envisaged in clauses 5.3.2.7 and 5.3.2.10. It follows that the memoranda of incorporation may validly deal with any matter provided for in s 15 of the Companies Act, including the aspects enumerated in clauses 5.3.2.7 and 5.3.2.10, whether or not the requirements of unanimous shareholders' agreements contemplated in clauses 5.3.2.7 and 5.3.2.10, have been waived. A memorandum of incorporation is, in terms of s 15(6)(b) of the Companies Act, binding 'between or among the shareholders of the company'.

[44] The shareholding and the rights attaching to the holders of the different classes of shares, and indeed all the matters enumerated in clause 5.3.2.7, are dealt with in the ODM memorandum of incorporation.

Moodley's shareholding and economic interest in ODM are reflected as being 0,123%. This is the percentage contemplated by clause 4.12.3.1. Also the adoption of the ODM memorandum of incorporation, therefore, has not prejudiced any of his rights.

[45] The condition that StarTimes concludes shareholders' agreements with the other ODM shareholders (clause 5.3.2.7) or NEWCO shareholders (clause 5.3.2.10) is accordingly not a necessary precondition to the effectiveness of the ODM rescue plan. Otherwise the ODM rescue plan, in clause 5.6, would not have provided that these conditions are stipulated for the sole benefit of StarTimes nor would the conditions have been made capable of waiver at the exclusive election of StarTimes. If these conditions are waived, the aspects that would otherwise have been regulated by the shareholders' agreements contemplated therein will be regulated in accordance with the other provisions of the ODM rescue plan, viz clauses 4.12.3, 5.3.2.8 and 5.3.2.11, supplemented insofar as may be necessary by certain provisions of the Companies Act.

[46] Moodley's assertion, which is fundamental to his claim in this application, that his shareholding cannot be ascertained in the absence of his participation in the negotiation and conclusion of shareholders' agreements, is, therefore, wrong. The relative holdings of the shareholders in ODM and NEWCO after implementation of the ODM rescue plan is regulated by the ODM rescue plan, without the necessity of any unanimous shareholders' agreements being concluded.

[47] Moodley also raises other alleged failures by the practitioner to comply with the ODM rescue plan and certain provisions of the Companies Act. With reference to clause 4.12.3, read with clause 2.1, he contends that the ODM rescue plan contemplates the acquisition by StarTimes of 'existing' shares from the commencement date shareholders and not a buy-back of the existing shares and the issue of newly created classes A to E shares. A buy-back and issue of newly created classes of shares, he contends, could only have been achieved in terms of a unanimous shareholders' agreement contemplated in clause 5.3.2.7. The buy-back of the shares, he contends, also contravened the provisions of sections 46, 48(8) and 114 of the Companies Act. There is no merit in these contentions.

[48] The ODM rescue plan expressly provides for the cancellation of existing ODM preference shares and shares and for the re-issue of shares in accordance with the percentage shareholdings contemplated in clause 4.12.3. It is also clear from the provisions of clauses 5.3.2.7 and 5.3.2.8 as well as those of clauses 5.3.2.10 and 5.3.2:11 that the ODM rescue plan was adopted on the basis that the effective economic interest of StarTimes and of the BEE investors would not equate their shareholdings. Clauses 4.5 and 4.6 provide that the preference shareholder and shareholder claims shall be discharged inter alia on the basis that the preference shares (clause 4.5.4) and the shares (clause 4.6.4) are to be cancelled on the implementation date. Once cancelled, new shares have to be issued in order to give effect to the dictates of the ODM rescue plan.

[49] The practitioner states that the buy-back of existing ODM shares and the issue of new ODM shares is the only practical manner in which to give effect to the cancellation of shares. Even if the restructuring of the shareholding in ODM could be achieved in some manner other than the buy-back and issue process chosen by the practitioner, that would not render the procedure adopted by him invalid. It was merely a mechanism used in order to implement the cancellation and new shareholding requirements of the ODM rescue plan. Moreover, Moodley's position as a shareholder has not been shown to have been adversely affected by the use of such mechanism.

[50] Moodley's contention that the provisions of s 114 of the Companies Act were contravened is founded on the premise that the ODM rescue plan does not contemplate a cancellation (the buy-back procedure used) and re-issue of shares. The premise is wrong. There was no contravention of s 114. Moodley's contention that the practitioner failed to comply with sections 46 and 48(8) of the Companies Act, is also wrong. The provisions of s 48(2), requiring compliance with the liquidity and solvency requirements of s 46, are inapplicable to business rescue proceedings where the company in business rescue is under the control of a business rescue practitioner and not its board. Moreover, sections 137(1)[23] and 152(6)[24] of the Companies Act give express recognition to the business rescue practitioner's power to effect the issue of securities, and the alteration in the classification or status thereof, in accordance with the business rescue plan. Clause 2.4(4) of the ODM memorandum of incorporation also specifically provides for the practitioner's power to-

> "...in terms of section 152(6)(b) amend this Memorandum of incorporation to authorise, and determine the preferences, rights, limitations and other terms of any securities that are not otherwise authorised, but are contemplated to be issued in terms of the business rescue plan..."

[51] Moodley contends that the business rescue plan does not afford a power of nomination to StarTimes and that its nomination of Hantex to hold its shareholding is accordingly unlawful. This contention disregards the fact that the nomination of Hantex is permissible in terms of s 56(1) of the Companies Act, which reads:

> 'Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person.'

Clause 3.4 of the ODM memorandum of incorporation specifically preserved the provisions of s 56(1) of the Companies Act. Clause 4.3 provides that-

> '[t]he authority of the Board to allow the Company's issued securities to be held by, and registered in the name of, one person for the beneficial interest of another person, is not restricted or varied by this Memorandum of Incorporation.'

[52] A further point raised is that there had been a change in the economic interests and shareholding percentages of StarTimes or its nominee, Hantex, and the BEE shareholders after their negotiations and agreement to which Moodley was not privy. Moodley argues that 'a change in one shareholder's percentage has an effect on all' and in particular that the ownership of ODM by historically disadvantaged South Africans will as a result of the variation be less than the 30% requirement of ICASA and its 'foreign control' greater than the legally prescribed restriction of 20%. This contention is premised on the bold assertion that the ownership and control requirements 'obviously require both formal and substantive ownership (in the

form of economic interest)'. This assertion (and therefore that ownership and control do not depend on the voting rights attached to the shareholding) and how an unanimous shareholders' agreement would have made any difference to the local ownership minimum requirement and foreign control restriction, are matters, apart from any discernable adverse impact on Moodiey's rights as a shareholder, that have not been established.

[53] Moodley contends that the shareholders' agreement concluded by the other shareholders is invalid and unenforceable and does not qualify as a shareholders' agreement envisaged under s 15(7) of the Companies Act. He also avers that the memorandum of incorporation of NEWCO was adopted without prior notice to him and that its adoption is consequently irregular and falls to be set aside. I need not decide these issues. The shareholders' agreement and the NEWCO memorandum of incorporation, even though they may have been referred to in the documents and correspondence annexed to the founding affidavit, are not amongst the transactions 'defined in paragraph 56.1 of the founding affidavit' and therefore not included in the declaratory and interdictory relief sought in terms of prayers 3 and 4 of the notice of motion.[25]

[54] In conclusion, as far as the declaratory relief is concerned, not one of the 'transactions' included in prayer 3 of the notice of motion has been shown to be unlawful, and, as far as the interdictory relief is concerned, [26] no right that has been infringed has been established. Moodley has no right to more or a different class of shares than those allotted to him in terms of the ODM memorandum of incorporation and he has, by virtue of StarTimes' waiver of clause 5.3.2.7, no right to negotiate for more shares or a higher percentage economic interest in ODM. His shareholding was proportionately reduced in exactly the same manner as that of all the other ODM commencement date shareholders.

[55] Finally, the matter of costs. Moodley and the opposing respondents, except the fourteenth respondent, were all represented by two counsel. No reason is advanced why the costs of two counsel for each of the opposing respondents {other than the fourteenth respondent) should not be allowed. I consider the employment of two counsel by Moodley and the opposing respondents to be prudent and not over-cautious or extravagant. The opposing respondents further seek punitive costs orders against Moodley. Although cogent reasons have been advanced in support of higher costs awards, I nevertheless consider it just to award costs on the usual party and party scale. The issues raised in this application are substantial.

[56] In the result, the following order is made:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the first and second respondents, of the third and eleventh respondents, of the fifth and the eighth respondents, and of the fourteenth respondent, such costs in each instance, other than the fourteenth respondent, to include the costs consequent upon the employment of two counsel.

P.A. MEYER

JUDGE OF THE HIGH COURT 11 July 2014

Date of Hearing: 25-26 June 2014

Date of Judgment: 11 July 2014

Counsel for Applicant: Adv AE Franklin (with him Adv AC Botha)

Attorneys for Applicant: Webber Wentzel, Johannesburg

Counsel for 1st and 2nd Respondents: Adv DM Fine SC (with him Adv J McNally SC) Attorneys for 1st and 2nd Respondents: Bowman Gilfiltan, Johannesburg

Counsel for 3rd and 11th Respondents: Adv CDA Loxton SC (with him Adv G Goedhart Attorneys for 3rd and 11th Respondents: ENSAFRICA, Johannesburg

Counsel for 5th and 8th Respondents: Adv R Hutton SC (with him Adv TB Hutamo) Attorneys for 5th Respondent: Hogan Lovells (South Africa)

incorporated as Routledge Modise Inc, Johannesburg

Attorneys for 8th Respondent: Werksmans Attorneys, Johannesburg

Counsel for 14th Respondent: Adv P Daniels SC

Attorneys for 14th Respondent: Baker & McKenzie, Johannesburg

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1 The application is opposed by the first and second respondents, the third and eleventh respondents, the fifth and the eighth respondents and the fourteenth respondent.

2 *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* 18486/2013 14 June 2013 (GSJ).

3 Kgomo, J said the following:

'[70] Section 133(1) of the Act calls for a complete moratorium in the clearest and unambiguous terms. During the moratorium no legal proceedings, including any enforcement action concerning the business under the rescue plan is countenanced. The only exceptions allowed are set out in the provisos (a) to (f) of subsection (1) of section 133 as quoted above. One of the objects and/or objectives of the new Companies Act in this regard are to provide for efficient rescue of *f* nancially

distressed companies in an atmosphere that is not hindered or cluttered with or by litigation.

[71] Only in exceptional circumstances may a Court permit litigation against a business rescue plan or related thereto. I have listened attentively to the submissions made before me by counsel for the applicant. I am not persuaded that the applicant has made out a cogent case for such leave to litigate. It is my further finding that the application for leave of the Court to litigate here was not sufficiently motivated to convince this Court to indulge the applicant

4 Vol 1 at 478(5)

5 Para 18.

6 Clause 6.5.17 of the adopted business rescue plan.

7 The effect of an arbitration clause concisely stated by LTC Harms *Amler's Precedents of Pleadings* (7th Ed) thus:[7]

'An agreement to arbitrate does not deprive the court of its jurisdiction over the dispute covered by the agreement. Therefore, sn arbitration agreement is not an automatic bar to legal proceedings in ordinary courts. Should a party institute proceedings in a competent court, in spite of the arbitration agreement, the defendant has one option: either:

(a) apply for a stay of the proceedings in terms of section 6, which application must be brought before the delivery of any pleadings by the defendant or the taking of any other step in the proceedings; or

Conress (Pty) Ltd v Gallic Construction (Pty) Ltd [1981] 3 All SA 337 (W), 1981 (3) SA 73 (W)

(b) pray in a special plea in the nature of a dilatory plea for the stay of the proceedings pending the final determination of the dispute by the appointed arbitrator.

Yorigami Maritime Construction Co Ltd v Nissho-iwai Co Ltd [1977] 4 All Sa 733 (C), 1977 (4) SA 682 *(C)GK Breed*

(Bethlehem) (Edms) Bpk v Martin Harris S Seuns (OVS) (Edms) Bpk 1984 (2) SA 66 (0)'

8 Para 8 supra.

9 The shareholding in these entities are owned by historically disadvantaged individuals.

10 Section 129{2)(b) of the Companies Act.

11 StarTimes is a Chinese company.

12 Clause 3.4.1 of the ODM rescue plan.

13 Clause 3.4.2 of the ODM rescue plan.

14 It is stated in clause 1.5 of the ODM rescue plan that:

'1.5 StarTimes intends to compromise the Claims of Creditors, restructure the Shares of the Sharehgolders and inject the Company with sufficient capital to enable it to implement a complete restructuring of the Company's affairs, business, debt and equity in a manner that will-

1.5.1 give Creditors a better return than would result from a liquidation of the Company;

1.5.2 maximise the likelihood of the Company continuing in existence on a solvent basis after the Impfementation Date, á result that will be beneficial to Creditors and Employees going forward; and

1.5.3 preserve jobs and create a sustainable platform for further job opportunities,'

15 Clause 5.2.5 of the business rescue plan.

16 Clauses 5.3.2.13 and 5.3.2.14 of the business rescue plan.

17 Clause 5.3.2.10 of the business rescue plan.

18 Clause 5.3.2.12 of the business rescue plan.

19 Paragraph 56.1 of the founding affidavit reads as follows:

'BG's [Bowman Gilfillan's] correspondence of 25 April, 30 April and 2 May 2014, as well as the documents attached to this correspondence ("tie Documents and Correspondence[1]'), appear to contemplate a share buy-back, an issue of new shares, and the adoption of a new Mol and a draft subscription agreement, all purportedly in terms of the BR Plan:'

20 Para 8 supra.

21 The allegation-that he could have secured appropriate minority protections is not only unsubstantiated, but does not form

part of the case made out in the founding papers. See: *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369A-B; *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 177G-H; *Le Roux v Direkteur-Generaal van Handel & Nywerheid* 1997 (4) SA 174 (T) at 185B-C.

22 Para 6 supra.

23 Section 137(1) reads as follows:

'During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of transfer of securities in the ordinary course of business, is invalid except to the extent-

(a) that the court otherwise directs; or

(b) contemplated in an approved business rescue plan,'

24 Section 152(6) reads as follows:

'To the extent necessary to implement an adopted business rescue plan-

(a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 40 to the contrary; and

(b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3)(c), the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms of the business resue plan, despite any provision of section 16,36 or 37 to the contrary,'

25 Joffe, J, in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T), at 324F-H, said this:

'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essenoe of our established practice would be destroyed. A party would not know what case must be met. See *Lipschitz and Schwarz NNO v Markowitz* 1976 (3) SA 772 (W) at 775H and *Port Nolloth Municipality v Xahalisa and Others; Luwalala and* Others *v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111B--C

26 The requisites to be established for the granting of a final interdict are trite: an infringement (actually committed or reasonably apprehended) of á clear right with resultant prejudice and the absence of another adequate remedy. *LAWSA* Vol 11 (First Reissue) paras 307-313.