**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2015/24751**

In the matter between:

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| **GRIESSEL, QUINTIN JACO** | First Applicant |
| **ZEMAN, RONALD FRANK** | Second Applicant |

And

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| **LIZEMORE, EDWARD HENRY** | First Respondent |
| **SCHLECHTER, MATHEUS JOHANNES** | Second Respondent |
| **MINING AND SLURRY TECHNOLOGIES (PTY)LTD** | Third Respondent |
| **THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION** | Fourth Respondent |

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**JUDGMENT**

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## SPILG, J:

## APPLICATION

1. The first applicant is Quintin Griessel. He is the son of the original founder of the company, Jaco Griessel. The father will be referred to as Griessel and the son as Quintin.

The second applicant is Ronald Zeman who is also a shareholder in the company.

The applicants hold together 67% of the shareholding in Mining and Slurry Technologies (Pty) Ltd (*"the company"*), with Quintin the 34% shareholder.

The first respondent, Edward Lizemore, holds the remaining 33% of the company's issued share capital.

2. On 2 July 2015 Lizemore passed a resolution on behalf of the board of directors placing the company under business rescue pursuant to which Matheus Schlechter, the third respondent who is also a practicing attorney, was nominated by Lizemore and was subsequently appointed the business rescue practitioner (*'practitioner'*).

3. The practitioner relies on section 140(1)(a) of the Companies Act 71 of 2008 (*'the Act'* ) to represent the company in this litigation.

4. It is common cause that Lizemore passed the resolution without the knowledge of the other shareholders and despite a meeting of shareholders, held three days earlier on 29 June, which rejected his suggestion that business rescue proceedings be considered. Lizemore contends that he did not have to notify the other shareholders of his intention to pass the directors resolution, since at that time he was the sole director of the company and could unilaterally resolve to begin business rescue proceedings ('*business rescue* ') and place the company under supervision in terms of section 129(1) of the Companies Act 71 of 2008 ('*the Act* ').Reference to a section only will be to the Act.

   Unless the context otherwise requires the consequences of a section 129(1) resolution will simply be described as placing the company under business rescue.

5. After becoming aware that the company had been placed under business rescue the applicants brought the present application as a matter of urgency. The case was argued on 15 July and further argument was presented on 17 and 22 July. The following relief was initially claimed;

    a. declaring that the resolution to begin business rescue proceedings and to place the company under supervision has lapsed and is a nullity;

    b. setting aside the resolution passed by Lizemore in terms of which the company would begin rescue and be placed under supervision;

    c. alternatively, setting aside the appointment of the second respondent, Mr Schlechter as business rescue practitioner of the company;

    d. removing Lizemore as the director of the company and appointing the applicants as directors;

    e. directing Lizemore to return to the company all the plugs and patterns that he removed from its premises;

    f. directing Lizemore to pay the costs of the application and in the event of Schlechter opposing that he too be responsible for the costs jointly and severally.

6. Before setting out the background facts it is necessary to explain certain features of the answering affidavit.

7. Firstly the affidavit is filed on behalf of Lizemore, the practitioner and the company. They are all represented by the same attorney. The practitioner states that this is for convenience.

    The practitioner is the deponent to the main affidavit although conceding that he has no knowledge of the company's affairs, whether prior to or since his appointment. Lizemore has filed a standard confirmatory affidavit. According

to the practitioner they have done so also as a matter of convenience since it is their *"common purpose*" to effect a business rescue and because they are both cited as respondents. The second point is difficult to follow as the applicants only sought costs against the practitioner if he opposed the application.

It is evident that the practitioner has elected not to abide the decision of the court. He has actively engaged in opposing the application despite confirming that he has no independent knowledge of the company's affairs and relies exclusively on the say-so of Lizemore. The practitioner did not approach the applicants for their comments to Lizemore's version of events or regarding the financial position of the company and in particular an injection of funding by them whether by way of loan or equity. This is hardly surprising bearing in mind that the practitioner elected to use the same attorney who is advising a minority shareholder for whom business rescue is not necessarily an end in itself but possibly a means to an end. I will revert to this later. Suffice it that one would have expected both the practitioner, who is a practicing attorney, and the respondents' attorney to have appreciated the potentially conflicted position each was placing himself in.

It is also necessary to deal with this aspect more comprehensively when considering whether the company itself should be saddled with a costs order if the opposition is unsuccessful.

8. Finally the format adopted in putting Lizemore's version in the mouth of the practitioner as the main deponent requires elucidation.

   The answering affidavit generally follows the format of responding to a paragraph in the founding affidavit with the following preamble: "*I am advised by the first respondent as follows:'*

   The preamble is followed by a number of sub-paragraphs containing Lizemore's version and ending with a self-contained sub-paragraph reading: "*The remainder hereof is denied"*.

At first blush the general denial would appear to be that of Lizemore and the question is whether the practitioner adopted Lizemore's version and associated with the latter in denying everything that was not specifically admitted in the preceding subparagraphs.

It is however evident that the practitioner's opposition is based exclusively on Lizemore's allegations. This conclusion is derived from the practitioner's express opposition to the application, the general explanation provided in the opening paragraphs of the answering affidavit, the fact that the practitioner placed Lizemore in effective control of the company as his delegate and the failure to obtain any independent verification of certain crucial allegations made by Lizemore.

9. There is also cause for concern when one finds a passage in the answering affidavit of the practitioner which reads; *"I respectfully direct the court's attention thereto* (ie to a resolution of 8 May 2015) *that this resolution is signed by me, being the only remaining director of the company"* . This is the first person voice of Lizemore not the practitioner's.

**BACKGROUND**

10. The company manufactures pumps. The component parts are either manufactured at the company's own foundry or procured from outside suppliers.

11. The business was established in 2007 as a close corporation. In 2009 it was converted into a company with limited liability and operated profitably under Griessel until 2011. At one stage it had large cash reserves (the respondents disputing that it was larger than R 6 million).

12. However in 2011 Griessel encountered certain personal difficulties which prevented him from running or managing the company. According to the first and second respondents Griessel was for some time an unrehabilitated

insolvent and therefore could not be appointed a director of the company until his rehabilitation in 2014. The allegation is denied by the applicants. I will accept the respondents' version on this aspect.

13. This does not mean that the respondents' averments are accepted on all disputed matters. It will depend on an application of the well-known test laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C that;

> *It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the*

> papers *(see the remarks of Botha AJA in the Associated South African Bakeries case, supra at 924A).*
>
> (emphasis added)

In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 55 Cameron JA (at the time) distilled the occasions when a court *"should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order'*. They are an uncreditworthy denial, a palpably implausible version and "*allegations or denials that are so far-fetched or clearly untenable".* The court cautioned at para 56 that " *the limits remain, and however robust a court may inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence"* .

14. In 2011 Griessel sold 50% of his shares to First Africa Pumps and a certain Mr Down became a director and took over the management and running of the company. According to the respondents there was a fall out between the then directors which resulting in First Africa Pumps divesting.

15. Quintin subsequently took over his father's shares and became the sole shareholder. On 1 September 2011 Lizemore was engaged as the manager and was appointed a director. At the same time the second applicant, Zeman, became a 33% shareholder via a share swop involving East Rand Alloys(Pty) Ltd ('*ERA*') which also resulted in Quintin acquiring a 67% shareholding in that company. ERA owns the property on which the company's business premises are situated. It appears that Quintin and the second applicant effectively hold 80% of the shares in ERA.

16. The first respondent acquired a 33% shareholding in the company after he became managing director.

17. It is common cause that the company's profitability subsequently declined. The applicants claim that this was due to Lizemore employing too many administrative staff members, spending money on unnecessary and costly control systems and employing his children in the company at extravagant salaries. By contrast Lizemore contends that the company's profits declined because of the strained economy and overall difficult financial times.

18. The respondents assert that the "*appointment of persons by the company were done after the first respondent and Griessel had consulted with each other… and no appointment was made unless they both agreed…".* The statement is significant because it confirms that Lizemore was obliged to continue reporting to Griessel. It amounts to a statement against interest and confirms that management decisions had to be passed by Griessel even during the time when Quintin was appointed as the other director to Lizemore.

19. It is also common cause that during mid-2014 the shareholders received a preliminary offer from Tega Industries for both the land and the business. The applicant's claim that the amount offered was R35million of which R 18 million was for the property and R17 million was for the company. The first respondent however avers that Tega Industries offered $1 million for a 20% stake in the company. That may however be an error on the part of the respondents and I will therefore accept the applicants' lower net figure.

20. The first respondent agrees with the applicants' contention that on 8 April 2015 Griessel forwarded a signed handwritten note to the shareholders advising that he resigned from the company, that leave was still due to him and that he would return the company's vehicle and cellphone. The auditors were also instructed to transfer his shares to Quintin.

    On the same day Griessel prepared a directors and shareholders resolution which reads:

1. *It was resolved that the resignation of JACO GERHARD GRIESSEL, and the appointment of QUINTIN JACO GRIESSEL as directors of the Company be approved and confirmed with effect from 8 April 2015*

2. *It was RESOLVED THAT the transfer of 34 (thirty four) ordinary shares from JACO GERHARD GRIESSEL to QUINTIN JACO GRIESSEL be approved and recorded in the books of the Company with effect from 8 April 2015, being new share certificate number 8 .*

He signed and dated it in the spaces provided against his name. Lizemore's name was also typed in with spaces provided for him to sign and date.

21. The first respondent claims that Griessel had not discussed the transfer of his shares but simply sent the manuscript note mentioned earlier to the first respondent. He however confirms that he did not sign the resolution as presented. In the answering affidavit it is stated that:

> "*The first respondent did not agree that the first applicant was to be appointed as a director of the company. Such an appointment had to be done in accordance with the provisions of the Companies Act by the shareholders.*
>
> *…..Griessel had a resolution drafted which catered for the appointment of the first applicant as a director of the company, but the first respondent refused to sign it…. Further it was a condition of Multotec that all directors and senior management of the company would have to sign restraint of trade agreements and the first applicant did not want to be in a position where he would have to sign the same. He did not therefore want to be a director or senior manager of the company"*

22. Despite the ambiguous wording of the answering affidavit it is common cause that Lizemore did not in fact tell Griessel or Quintin that he disagreed with the

appointment of Quintin or that he had refused to sign the resolution as presented. On reading the answering affidavit as a whole it is apparent that Griessel and Quintin were quite unaware that the resolution given to Lizemore on 8 April had not been signed either in its terms or otherwise.

23. The reason why the first respondent did not sign the resolution in its terms or inform Griessel that he was not signing it is key to Lizemore's defence. Although the practitioner simply refers to Lizemore's version, he is compelled to adopt it since his own defence relies both on the regularity of the subsequent resolution signed on 2 July 2015 placing the company under business rescue which was signed by Lizemore as the sole director and also on Lizemore's *bona fides* in doing so. This is clear from the contents of paragraph 17 of the answering affidavit.

24. On the 8th of May 2015 the first respondent passed a resolution of the directors and shareholders of the company in identical terms to the resolution given to him on the 8th of April and signed by Griessel save that the words "*and the appointment of Quintin Jaco Griessel*" were omitted. The practitioner[1] relies on Griessel's letter of 8 April 2015 to constitute his resignation as director, thereby leaving Lizemore as the sole director in the absence of Lizemore signing the directors and shareholders resolution prepared and signed by Griessel of the same date.

25. The effect, according to Lizemore, is that Griessel was no longer a director but that Quintin was not appointed in his place thereby leaving the company with one director only.

26. The respondents in their answering affidavit claim that prior to Lizemore's resolution of 8 May but "*after Griessel resigned as director of the company the first respondent approached Multotec* (Multotec (Pty) Ltd) *to enquire whether it was interested in buying a share in the company or taking over the company as a whole"*. This led to a meeting on 10 April at which Lizemore,

[1] The relevant paragraph in the answering affidavit is advanced by the practitioner in his own right. See para 17.

Quintin and Zeman signed a resolution of shareholders that they would sell their respective shareholdings for a total of R15 million split equally between them. It is significant that Lizemore did not raise at this meeting his refusal to sign the resolution prepared by Griessel. It would have been a simple matter to do so, which presumably would then have been put to a shareholders vote[2] at some stage.

According to the respondents' affidavit the purpose of the resolution was to meet Multotec's requirement that it would only consider purchasing an interest in the company if the first respondent obtained confirmation from the shareholders that they were willing to sell their shares at R15 million.

27. The applicants claim that the company continued to be run by Lizemore as managing director and its cash flow and turnover continued to wane. The reply is elliptical and includes a general denial. On analysis this fact is not in dispute but, as stated earlier, Lizemore puts the blame on the economy.

28. The first respondent states that the purpose of the meeting on 11 May was to grant him authority to sign the documents relating to the due diligence investigation and report relating to Multotec's interest. For present purposes that is accepted. However it is common cause that the meeting was held at the offices of the applicants' attorneys and that Mr Berkowitz of that firm attended the meeting. It is also evident from the explanation contained in the answering affidavit, and the inadequacy of the bald denial in respect of allegations not dealt with, that the purpose of the meeting was to discuss the issues between the shareholders but that they agreed to await the outcome of the Multotec negotiations before any definite decision was taken.

29. It is evident that at this meeting Lizemore did not disclose that he had refused to sign the Griessel resolution of 8 April or that he had passed his own resolution of 8 May which had the effect of leaving him as the sole director.

[2] See sections 66(4), as to the provisions that must be contained in a Memorandum of Incorporation *('MOI')*.See also section 68(1) and section 70(3) read with section 60(3) as to voting in a director unless the MOI provides for a direct appointment as envisaged by section 66(4)(a)(i). Section 66(7) sets out when an appointment becomes effective.

30. *Adv Wesley* for the respondents made two points with regard to the meeting of 11 May; that the resolution passed gave Lizemore the power to sign documents relating to the due diligence to be undertaken by Multotec and also that it described him as the sole director. It was submitted that the applicants could not be serious about wishing to remove Lizemore as director if they were authorising him to continue negotiations on their behalf and that from the resolution they must have known that Lizemore had not signed the Griessel resolution of 8 April appointing Quintin as director.

31. I am satisfied having regard to the complaints leveled against Lizemore that the question of his continued directorship was held over together with all the other issues pending the outcome of a bid by Multotec. Lizemore had brought the suitor and was facilitating negotiations. It would be equivalent to killing the goose ….. It is also evident from the decision not to resolve the issues of concern that a combined front was likely to result in a better offer.

    On the second point: The submission was made from the bar. However nowhere in the affidavit does Lizemore state that he at any stage informed the applicants or Griessel that he was not going to sign the Griessel resolution but had in fact signed his own resolution removing reference to the appointment of Quintin. It should also be borne in mind that Quintin was already recognised as far back as the 10 April meeting as the shareholder in place of Griessel.

32. It is one thing to await the formal notification to the Companies and Intellectual Property Commission ( '*the Commission*') of a change in directors. It is quite another for a remaining board member and shareholder not to expressly disclose a refusal to sign a resolution that had been presented. In this regard it is evident from the application and answering affidavits that Zeman supported the appointment of Quintin as director. Moreover in its terms the resolution does not refer to Lizemore as the sole director. It provides:

> *"… Lizemore being the only active director is authorised to sign all documents relating to the Due Diligence to be undertaken by Multotec in his capacity as Managing Director…"*

While the term "*active director*" is used by the Commission, it is not suggested that the reason for using the term was anything other than the need for it to receive the formal documentation of Quintin's appointment from the auditors. Although it is accepted that the matter was brought urgently, the respondents were in fact afforded two full days to respond. Moreover the issues of the entitlement of Lizemore to ignore the resolution presented to him by Griessel on 8 April, in respect of the appointment of Quintin as his replacement on the board, and whether he ever raised this with Griessel loom large.

33. It is also evident that the applicants' contention that the relationship between the parties had deteriorated significantly is supported by the purpose of holding the meeting on 11 May 2015 and the agreement to leave the issues between the shareholders in abeyance pending the outcome of the Multotec negotiations.

34. By mid-May Tega Industries reared its head again and made a preliminary offer to acquire the shares of the company for R19.5 million. According to the respondents the purchase price excluded taking over the company's debt. In addition Griessel and the second applicant obtained an agreement in principle from the company's bankers to borrow R8 million with the property as collateral. As appears later it is common cause that by at least the subsequent meeting of 29 June Lizemore was aware of the approach to the bank and its favourable response.

35. On 26 June at just before 15h00 Multotec advised Lizemore directly that they would not be pursuing an offer. Within three quarters of an hour Lizemore addressed an email to the company's auditors recording that Multotec was no longer interested in the company, that he was under pressure from Quintin to draw a huge salary and enquired about the steps that would be necessary in order to put the company under business rescue on a very urgent basis. The

reasons given were an outstanding court case and that several creditors were knocking at the door. This communication was not forwarded to either of the applicants or Griessel.

Lizemore offers no explanation as to why he did not engage either of the applicants or Griessel, whether prior to or at the time the email was sent, nor inform them that he had approached the company's auditors at a time when according to him the relationship between them had not yet deteriorated (although it is to be noted that according to the applicants it had already deteriorated by April 2015).

36. On 29 June Quintin convened a meeting between Zeman, Lizemore, Griessel, Berkowitz and himself to discuss a way forward so that the company could run profitably. According to the applicants the turnover for June was R2.67 million while its debtors' book was R5.6 million.

Despite Lizemore claiming that the book was approximately R6.6 million as of 9 July he confirms that turnover up to 9 July was just short of R361 000[3]. This is to be compared with the March turnover of just over R8 million, the April turnover of some R5.45 million and the May turnover of R4.56 million. Once again Lizemore attributes the declining figures to a general downward trend in the economy. The applicants contend that there is no rational explanation for such a significant downturn and conclude that the only reasons were the actions or failures of Lizemore.

37. Lizemore states that he objected to the presence of Berkowitz and Griessel because the meeting had been convened as a shareholders meeting.

He disputes that they had agreed to the appointment of Griessel as managing director but admits that he told the meeting that *"… he would be willing to resign as director… and to sell his shareholding … in the sum of approximately R2.5 million."* Lizemore adds that the draft agreement was forwarded to Berkowitz but confirms that it was never concluded.

[3] Para 45.2 of the answering affidavit.

38. Lizemore also admits that it was agreed at the meeting that Griessel and Zeman would assist the company in applying for further financing either by using the company's bankers directly or through ERA's bankers and utilising the property as collateral for a loan which would be used, according to the applicants founding affidavit, "*for paying the company's creditors and overcoming the cash flow difficulties the company was experiencing"*. The applicants believed that the cash flow difficulties arose because the company was overstaffed and was not being run economically. The cash flow injection would enable the company to meet the cost of retrenching unnecessary staff and to purchase supplies and raw material thereby also bringing about higher monthly turnover.

    While the applicants claim that the company could generate a turnover of some R12million a month Lizemore claims that the figure never exceeded R8million and for present purposes I accept his averment.

39. Lizemore confirms that at the meeting held on 29 June he mooted the possibility of business rescue and that the others *"said that they thought that it was not a good idea".* The following is also said by the respondents;

> "*by the time that the meeting happened the first respondent had already obtained legal advice from MVS (ie his attorney of record) concerning business rescue and his duties and obligations as the board of the company. And he knew that he had the duty to act as required by s129 of the Companies Act…. In fact, the first respondent had already sought advices regarding business rescue from the company's auditor on 26 June 2015 because he was already at that point in time concerned about the matter."*

    During argument Adv Wesley confirmed that, on the papers, the first respondent never mentioned any of this to the applicants or Griessel either before or at the meeting of 29 June. Lizemore fails to explain why he kept quiet about his concerns or apprise those present of his obligations as a

director, bearing in mind his claim that he was alive to all relevant facts when he attended the meeting. This brings into question his reason for approaching the auditors prior to the meeting and his motive and purpose in signing and submitting, not more than three days after the meeting, the resolution complete with all the accompanying documents and affidavits necessary to place the company under business rescue.

I therefore agree with the applicants' contention that Lizemore's conduct at the meeting of 29 June should be considered against the background that the respondent had already taken legal advice regarding his interests. The applicants further contend that business rescue is a strategy by Lizemore for his personal benefit. I will consider this later.

40. Finally, with regard to the meeting of 29 June, Lizemore denies that he actually advised those present that he was there and then resigning as director. He also denies that when leaving the premises after the meeting he informed Mr Matlou, who is the chief financial officer ('*CFO')*, that he had resigned his position with the company.

41. It is apparent from Lizemore's version that his resignation as director was dependent on being paid out an amount of some R2.5 million. According to the applicants the resignation was not dependent or conditional upon payment of this amount. They also rely on an unsolicited email sent at 07h00 the following morning by Lizemore which reads:

> "*I think there is a misunderstanding on our arrangement of yesterday. I made it clear that I will resign a (sic) agreement in writing to pay my loan account or alternatively my shares, notice period and relieve me from all the sureties I signed. Until then I remain a director of MST The contract for the above is being drawn up by my attorney and he will have it ready for signature this afternoon. Only on receipt of the signed document will I resign"*

The email provided the contact numbers of both his attorney and the company auditors should there be any queries. It is apparent from the Commission's records that the erstwhile auditors had been replaced by the present auditors at the time when or after Lizemore took over *de facto* management control of the company.

It is therefore evident from the email that it was sent after he had consulted his attorney (Koos Bernadie) and that he sent the email on advice because of a concern that he had led those present at the meeting, which included the applicants' attorney, to believe that he had resigned.

42. In the meanwhile Griessel claims to have assumed control of the company on 29 June and immediately after the meeting. It is alleged that he generated within the next few days some R4million in orders. Lizemore disputes that any orders were secured by Griessel. Neither party produced the proof they claimed would demonstrate the veracity of their version. While Lizemore could not dispute that Griessel took over actual control, he disputes that the latter became an employee.

43. The next material event is an email sent by Lizemore's attorneys to the applicants' attorneys on 1 July 2015 attaching a copy of the draft settlement agreement they had prepared regarding Lizemore exiting the company. They also refer to Lizemore's instructions that he was prevented from entering the company's premises and demanded that he be given unfettered access.

44. In response the applicants' attorneys sent a letter the following day denying on behalf of their clients that access had been denied. They then proceeded to set out, on instructions received, the grounds upon which Lizemore directly and through his family members and close associates was alleged to have breached his fiduciary duties as a director and shareholder as well as employee. If true, the allegations are serious.

The letter also required Lizemore, by no later than 13h30 on the following day, to tender his resignation as director with immediate effect and then to remedy certain of the alleged breaches. The letter concluded that a failure to accede to the demands would result in an urgent court application. Objection was also taken to the attorneys representing Lizemore on the grounds that they were the company's attorneys and most of the demands made by the applicants in the letter sought to protect the company's interests that were alleged to have been prejudicially affected by Lizemore's actions.

45. It is apparent, although not disclosed to the applicants or Griessel, that on 2 July Lizemore passed the resolution in his capacity as sole director of the company placing it under business rescue, nominating Schlechter as the practitioner and lodging all the relevant documents with the Commission.

46. The first occasion the applicants became aware that the company had been placed under business rescue was on the following day, 3 July. It was contained in the reply by Lizemore's attorneys. In the letter exception was taken to the claim that they could not represent the company and Lizemore and the threat to report them to the Law Society. However the allegations against Lizemore were not addressed. Instead they attached correspondence from Copper Lake Business Rescue Practitioners whose sole member is Schlechter. The correspondence confirmed that the company had been placed under business rescue since the previous day. That being so it was contended that no point would be served in resolving the disputes as matters relating to the company would be overseen by the practitioner.

47. Griessel claims that on taking over the company on 29 June he discovered a number of irregularities which were set out in the founding affidavit and included in the letter of 2 July mentioned earlier. It is unnecessary to deal with all. Among the accusations are that;

    a. On the 16th June public holiday Lizemore together with his son and some close associates (who are all employees of the company) removed all the plugs and patterns utilised for the casting of parts in

the manufacture of the pumps. This resulted in the laying of a criminal charge.

b. Also on 16 June Lizemore and his son accessed the company server and removed all drawings relating to the manufacture of the pumps and transferred them to a portable hard drive which was taken off-site. It was contended that employees access the company's server to obtain drawings during the manufacturing process. Lizemore's son subsequently returned the portable hard drive after pressure was put to bear on him. The applicants claim that they were unable to determine at that stage whether any data had been removed.

   According to the applicants, the removal of the plugs, patterns and drawings contributed to the turnover plummeting to R2million for June, which was a quarter of the norm.

   The applicants however acknowledge that Lizemore purported to explain in an email of 1 July to the CFO the removal of the plugs and patterns by reference to an email between himself and his son of 11 June. The applicants claim that there are contradictions between the two emails and contend that no justification existed for suddenly removing these items as there had been no reason to do so before.

c. Various company vehicles had been sold which included a number of forklifts and a truck that collectively had been written down in the company's books to R180 000 but which were sold for R25 000, for which the company only received R16 000, the balance being paid in cash to Lizemore personally.

d. Substantial amounts were taken out of company funds to pay for Lizemore's personal expenses in respect of a Toyota Land Cruiser motor vehicle, repairs to a fishing boat and for family holidays. Moreover certain items were not included in the list of assets compiled

for the due diligence, Lizemore having claimed that they were his personal property.

e. Lizemore had procured a firm, which is owned by his friend, to supply profile cuttings. The firm has charged substantially more per kilogram than the original supplier. The overall excess cost is alleged to be substantial because some 25 000kilograms of profile cuttings are ordered monthly.

48. In the answering affidavit Lizemore attaches the affidavit he prepared for the police to meet the complaint lodged regarding the plugs and patterns. He states that the plugs had previously been stored with a patternmaker and were returned to the company because the patternmaker required space. However an accompanying email confirms that the plugs were not returned to the company. In the email of I July which Lizemore addressed to the applicants' attorneys he tenders return of the plugs and in the affidavit to the police tenders return of the patterns.

49. Despite Lizemore's tenders the practitioner does not claim that the relief for return of the plugs or patterns is moot whether because Lizemore has implemented his tender or because the practitioner in the performance of his duties has accepted the tender. On the contrary the practitioner contends that the applicants' relief for return of these items to the company is not competent by reason of section 133(1) of the Act.

**50.** Lizemore disputed that the drawings had been removed from the computer server and denied that they are accessed on screen in the manufacturing process. He however concedes that hard copies are produced from the server as and when they are needed in the manufacturing process. The applicants replied by denying Lizemore's version but claimed that even on that version the actions in transferring and copying the data were unnecessary and inexplicable.

51. The response to the alleged fire-sale of certain of the company's vehicles is that during the due diligence an appraiser queried why they were still at the company. Lizemore claims that he was unaware that they were reflected as assets in the books and explains that they had been earmarked to be cut and sold as scrap metal or had little or no intrinsic value. The applicants in reply relied on evidence to demonstrate that the forklifts were being used and had been driven under their own power onto the vehicle that carted them away. They also aver that the truck was in the process of being rebuilt.

52. While it was disputed that the holidays were charged to the company, Lizemore stated that the boat repairs and the vehicle costs were debited to his loan account. The reply was that the amounts are not reflected in his loan account.

53. Lizemore explained that the necessity to find a new profiling supplier arose because the existing one had put the company's account on hold. In reply the applicants demonstrated *inter alia* that the original supplier was prepared to continue doing business with the company and that the new firm was charging some 40% more for the same job.

54. It is unnecessary to decide which version to accept on paper. The point is that the practitioner was alive to the issues. He was aware that Lizemore had tendered return of the plugs and patterns yet the practitioner took no steps to recover them.

    Moreover the practitioner, through the attorney common to Lizemore, would have been aware of the serious allegations made regarding Lizemore's conduct but has no difficulty in putting the latter in control of the company without conducting even the most cursory of enquiries to ascertain if Lizemore did in fact breach his fiduciary and other obligations. These observations are relevant to the applicants' persistent claim that the practitioner is conflicted.

55. At this stage it is also necessary to mention four matters which on a reading of the papers as a whole require some consideration because of the picture they appear to paint.

The first is the statement made by the respondents' attorneys in a letter of 3 July 2015. They claim that;

> *'We have been acting on behalf of MST* (the company) *as there has been a dispute between the existing shareholders and a possible sale of the business that we were facilitating.*"

The second is the contents of paras 8 and 9 of the affidavit signed by Lizemore on 2 July and lodged on the same day with the Commission. It reads:

> "*Mining and Slurry is conducting business on a daily basis and would be able to pay a dividend to its creditors that would be higher than a liquidation dividend if it is able to come to an arrangement with its creditors, as provided for in the Act*
>
> *Negotiations have already been initiated that will see the assets and/or stock and/or business of Mining and Slurry be sold and in so doing keep its 120 employees employed"*

The third is the allegations, albeit responded to in the form of a confession and avoidance, that certain assets and drawings were removed and office computers tampered with.

Finally there is the allegation by Lizemore that on 29 June there were still two others interested in acquiring the company aside from Multotec. They are named as a company with ties to France and an individual. There is no suggestion that these persons had been mentioned to the applicants or Griessel. They certainly were not mentioned in the email to the auditors when Lizemore enquired how the company could be put under business rescue

urgently. It will be recalled that he sent the email within the hour of Multotec informing him that they were no longer interested.

56. The concern is that according to the attorneys they were already engaged in facilitating a possible sale of the business or its assets and that according to Lizemore's statement these remained on-going despite his claim on 26 July that Multotec was no longer interested. The concern it raises at this stage is whether the purpose of initiating business rescue is commensurate with that provided for in the Act or whether it is a strategy to benefit the interests of a would be purchaser or that of Lizemore to remain in the company or both.

    The concern arises because as a fact the practitioner put Lizemore in control of the company during business rescue, claims to have no information regarding the prospects of the company (despite his own attorney claiming to know of would be investors) Lizemore referring to continuing negotiations and also the fact that since business rescue proceedings the company has in fact closed its gates and does not conduct business.

    I will return to this when considering whether the company should remain under business rescue and the issue of potential conflict of interests.

**EVENTS SINCE BUSINESS RESCUE**

57. On 2 July Lizemore passed a resolution as the sole director of the board to place the company under business rescue. He also deposed to an affidavit regarding the company and the grounds on which the board adopted that resolution. In para 4 of the affidavit Lizemore claims that the company was financially distressed which in terms of the section 128(1)(f) definition means that;

*(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or*

*(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;*

No mention was made of the shareholders seeking finance against ERA's property.

Lizemore also nominated the second respondent as business rescue practitioner and a Notice of Beginning of Business Rescue Proceedings was filed at the Commission on 2 July

58. The parties held a without prejudice meeting on 6 July which could not resolve any issues and the respondents stated that they would not withdraw the business rescue proceedings.

59. On the same date the Commission gave notice of the appointment of the second respondent as business rescue practitioner. On the following day the practitioner notified the applicants of his appointment and advised that he had taken full management control of the company in substitution of the board. The practitioner also advised that under his powers he had delegated Lizemore "*as part of the board and pre-existing management"* to take charge of all business activities and the day to day running of company.

60. On 8 July and after Lizemore gained access to the company's premises he was advised that ERA as landlord was cutting off the supply of electricity for

non-payment of outstanding rentals. The electricity supply was cut off at about 07h00. As a result Lizemore sent the staff home. However the applicants claim that they appreciated that they could not spoliate and the electricity was restored within three hours.

61. The practitioner sought to use the brief power cut as the basis for obtaining an extension of five days from the Commission to publish the section 129 notices to affected parties. He undertook that the company would publish the notices by no later than Tuesday 14 July 2015. No explanation was tendered as to the failure to have sent the notices on the previous days or why the practitioner, who was not at the premises, was unable to do so or access the server.

    The Commission however granted an extension to 18 July but only in respect of section 129(3).

62. On 8 July one of the company's employees obtained a restraining order *ex parte* against Lizemore and staff members signed a grievance letter against Lizemore alleging physical assault, verbal abuse and racism amongst other things. The respondents contend that Griessel had concocted the grievances and compelled staff members to sign, although the basis for this statement is not set out.

63. It is however the respondents' case that on the following day, 9 July, the employees, who are apparently members of NUMSA, protested at the company's premises. Lizemore attributes this to unrest, insubordination and an incitement to strike. He claims that the situation turned ugly when he attempted to deliver notices of suspension to employees and that the shop

stewards took the letters and burnt them. The applicants allege that strike action occurred because workers were told that they were being reduced to half-pay. For the purposes of the case I accept the respondents' denial.

Lizemore alleges that the situation deteriorated rapidly with employees threatening to burn down the premises. The police however did not seem to take the issue that seriously as they refused to attend the scene. Lizemore concedes that the situation calmed down and the workers left. He then locked the gates to the premises. This was done with the sanction of the practitioner. The company has not opened its gates since.

64. It is clear that no attempt was made by the practitioner to address the grievances of employees. Moreover it should have been apparent to the practitioner that his intervention was required if he was to fulfil the alleged ground of placing the company under business rescue, as set out in Lizemore's affidavit purportedly on the company's behalf; namely to keep the company running so as to protect the workforce from the consequences of closure while negotiating with potential investors to take over the business or sell the assets thereby improving the dividend that creditors could expect. This again brings into question the real purpose of placing the company under business rescue and why Schlechter failed to take any steps, even to the extent of establishing the reason for the grievances, re-considering the advisability of retaining Lizemore as his delegate in running the company or taking any other steps short of closing the business down; which is what he in fact did.

65. In the most material way he, as a competent practitioner, would know that his inaction and decision to simply shut down the business, less than a week from the date of his appointment, was likely to achieve the very antithesis of what Lizemore claimed the business rescue proceedings would achieve. The practitioner provides no explanation and it is difficult to fathom why the spectre of actual conflict of interest, let alone potential conflict, was not apparent to the attorney and the practitioner.

66. It was only on 14 July that the practitioner attempted to give notice to affected parties including the union representing the employees, to non-unionised employees and to creditors. He claims that he was thwarted from doing so by the obstructive behaviour of the applicants and Griessel. This was the basis on which an extension was requested from the Commission. The respondents do not explain why they were unable to access the company's server.

67. On 15 July 2015 the second respondent received a list of the company's creditors from the first respondent and the Commission informed the practitioner that the period for compliance with the provisions of both sections 129(3) and (4) would be extended to 22 July 2015 in terms of Regulations 166(1) and (2).

68. A peculiar feature of the Commission's correspondence is that there is no suggestion that any representations were made in addition to those which resulted in the decision to only extend the time period to comply with the section 129(3) requirements and that the time period was only until 18 July. Nor did the Commission's notification refer to a request for extension beyond

that already granted. One would have expected that a request for any extension would have to be properly and formally motivated if regard is had to the Act and Regulations aside from what I would have considered to be the overarching requirement of administrative transparency.

**THE ISSUES**

69. The applicants had drafted their papers in reliance on a number of cases which were overruled by the Supreme Court of Appeal decision delivered in May of *Panamo Properties (Pty) Ltd v Nel and another NNO* 2015 ZASCA 76. The effect of the decision is that even if there has been non-compliance with section 129(4) (b) business recue proceedings have commenced and must be set aside by a court even if the resolution has lapsed and is a nullity under section 129(5)[4]. The applicants then attempted to remedy the situation. This also necessitated amending the relief claimed. The initial relief did not deal with the grounds provided for in section 130(5)(a)(ii), namely that it is just and equitable to set the resolution aside

70. The respondents contend that the attempts to remedy the situation were inadequate and raised the following preliminary points;

    a. Schlechter should have been cited in his nominated capacity, not personally;

    b. The applicants failed to give notice of the application to affected persons including creditors and trade unions or employees as required under sections 130(3)(b), 144(3)(a) and 145(1)(a) of the Act;

    c. The applicants had not relied on the substantive ground, as required under section 130(5)(a)(ii), that it is otherwise just and equitable to set aside the resolution which placed the company under business rescue;

[4] *Panamo* at para 31

d. The *locus standi* of the applicants to seek an order for return of the company's assets.

71. The issues regarding the merits are:

a. Whether the Commission can grant an extension of time for compliance with section 129(4), it being common cause that the practitioner had failed to publish a copy of the notice of his appointment to affected persons within the five business day period provided for in that subsection. If the Commission cannot grant an extension then one of the grounds for applying to set aside the resolution will be met (namely that contained in section 130(1)(a)(iii) as read section 130(5)(a)(i) ;

b. Whether there were other failures to comply with the requirements of section 130(1) and in particular whether there was any reasonable basis for believing that the company is financially distressed and whether there was no reasonable prospect of saving the company in terms of section 130(1)(a)(i) and (ii) respectively as also read with section 130(5)(a)(i) ;

c. Whether having regard to all the evidence it is just and equitable to set aside the resolution as required under section 130(5) (a) (ii).

72. It is evident from both the contents of the respondents' affidavits and Adv Wesley's submissions that there is no defence to the claim for return of the plugs and patterns other than the point taken regarding the applicants' standing.

73. Prior to dealing with the issues it is advisable to consider the applicable provisions of Chapter 6.

**THE TWO OBJECTIVES OF BUSINESS RESCUE UNDER SECTION 128(1)(b)**

74. It is unnecessary to trace the genesis of the business rescue provisions or its rationale. They are set out in a number of reported cases. For present purposes it is only necessary to consider whether a director is required to act in good faith when passing a resolution placing a company under business rescue and if so what that means in the context of Chapter 6.

75. The primary objective of the introduction of Chapter 6 was to afford a company that is in financial difficulties (and satisfies the threshold requirement of being '*financially distressed*'[5]) a period of time to regain viability by being allowed to formulate and implement a rational plan to rehabilitate itself. However the Act also contemplates business rescue if the company cannot continue in existence but can obtain a better return for creditors or shareholders than if the company was immediately liquidated.

76. In the course of argument Adv Wesley contended that obtaining a better return is to be construed as an alternative main objective of business rescue proceedings to the rehabilitation of a company through the development and implementation of a business plan to secure the continued existence of the company on a solvent basis.

77. In order to address this argument it is necessary to set out the definition of the term *'business rescue'* contained in section 128(1)(b);

> *'business rescue' means 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*

[5] See para 57 supra

> *(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 maximises 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;*

78. The primary objective is to to prevent a viable company from closing down by allowing it an opportunity to regain solvency through the mechanism of business rescue provided it can be achieved within a reasonable time. In particular the preamble to the definition speaks of rehabilitating the company.

79. In my view the words "*or, if it is not possible for the company to so continue in existence"* qualify when the alternate objective of providing a better return may be relied upon. In other words it is for the person who wishes to place a company under business rescue on this alternative ground to satisfy three criteria;

    a. that the company is financially distressed as required under section 129(1)(a);

    b. that it is not reasonably likely (or perhaps possible)for the company to be rehabilitated and continue in existence on a solvent basis as contemplated in section 128(1)(b)(iii). (It was not necessary to argue the appropriate threshold test); and

    c. that the development and implementation of a plan to rescue the company would result in a better return for creditors or shareholders than would occur from its immediate liquidation.

80. If the second ground for business rescue is not a qualified alternative to the first then the interests of employees will be ignored. The reason is that, if

unqualified, the second ground is only concerned with determining whether creditors and shareholders will receive a better return under business rescue than on liquidation, leaving out of the equation the employees' interests in retaining jobs via rehabilitating the company. Such a result would be inimical to one of the fundamental paradigm shifts provided for in the new Act; the recognition of the rights and interests of employees alongside those historically accorded to shareholders, directors and creditors in matters affecting the affairs of a company both internally and externally.

It could hardly have been the intention of the legislature to permit the interests of employees to be by-passed in cases where a dividend return under business rescue through say asset stripping would be better for only creditors or shareholders than liquidation without first considering whether the survival of the company as a going concern was feasible (given a reasonable time). By giving full weight to what in any event is couched as a qualification, the interests of employees in the continued existence of the company (whether under original or new control), are properly taken into account.

81. Moreover, in order to give content to the purpose of business rescue it is necessary to establish, before considering the paying out of creditors or shareholders in the form of a dividend through a business rescue plan, whether the company has access to investor funding that may tide it over or whether creditors are prepared to support the rehabilitation of the company instead of closing it down. There may be sound commercial reasons why suppliers within the manufacturing and service industries would wish to support the continued existence of a company (and possibly under existing ownership) in order to avoid the knock-on effect to their own commercial viability if a major manufacturer to whom they supply and have given credit, or from whom they receive essential components or product for on-sale, closes down.

**GOOD FAITH**

82. The various requirements for placing a company under business rescue and when it will be taken out of business rescue presuppose, in the case of a directors resolution under section 129(1), that the resolution is taken in good faith. This arises from a number of considerations which are dealt with in the following paragraphs.

83. The most obvious is the requirement that there must be a legitimate business purpose in resolving to place the company under business rescue. Moreover a requirement of good faith is implicit in the scheme of Chapter 6 which seeks to balance the interests of affected parties including creditors and employees. The requirement for good faith is expressly mentioned in the context of a director who may be liable for costs under section 130(5) (c) if the directors resolution placing the company under business rescue is set aside and he fails to satisfy the court that he acted in good faith when claiming that the company was financially distressed[6] . It is also mentioned in the case of a director who seeks to set aside a resolution he had supported under section 129 which placed the company under business rescue[7] .

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[6] Section 130 (5): When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may-

(a) …

(b) …

(c) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including-

(i) … ; or

(ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76 (4) and (5).

[7] Section 130(2): An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of-

(a) subsection (1) (a) to set aside that resolution; or

(b) subsection (1) (b) to set aside the appointment of the practitioner appointed by the company,

unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.

84. In my view bad faith will be demonstrated if, for instance, the intention of the directors in passing a section 129(1) resolution is found to be an abuse. This would be considered in conjunction with other factors such as the attitude of major creditors, whether the company has assets, whether there are other sources of funding and, depending on the circumstances of the case, whether there was an intention to implement a business plan that meets the avowed objectives of the Act and a reasonable prospect of the plan being implemented.

    The corollary is that a company should not be placed under business rescue as a litigating strategy or to prevent or discourage a creditor from enforcing a claim to the full extent. This brings into focus the intention of the party seeking business rescue and whether that person genuinely seeks to attain the objectives of Chapter 6. Good faith, or rather the lack of it, is therefore an essential element in determining what is just and equitable under section 130(5) (a) (ii).

85. There is a further reason why want of good faith should be relevant in determining whether it is just and equitable to set aside a section 129 resolution under section 130(5) as read with section 130(1). It provides the necessary basis to distinguish the type of case such as *Panamo*, where the facts cried out for the continued operation of business rescue despite the failure to comply with the procedural requirements of section 129(3), from those cases where the passing of a section 129 resolution by directors of a company is used for an ulterior purpose including personal advantage.

86. While good faith does not necessarily mean that a resolution will be saved from being set aside, want of good faith while not the sole factor to be taken into account should certainly play a significant, if not determinative, role in weighing up whether it is just and equitable to set aside the resolution. For the purposes of this case it is unnecessary to consider the full scope of the term *"just and equitable*" in the context of business rescue where there are different groups of affected parties (as defined) whose interests do not necessarily

coincide and where both micro- and broader socio-economic implications informed the introduction of Chapter 6.

87. This conclusion is reinforced by the complimentary provisions of section 76(3) which deal with the standards of conduct required of a director. The section provides that subject to subsections (4) and (5) a director must exercise his powers and perform his functions in that capacity in good faith and for proper purpose. In addition he must do so in the best interests of the company[8]

88. I proceed to deal with the preliminary points taken.

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[8] Section 76 (3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company-

(a) will have satisfied the obligations of subsection (3) (b) and (c) if-

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either-

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and

(b) is entitled to rely on-

(i) the performance by any of the persons-

(aa) referred to in subsection (5); or

(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4) (b), a director is entitled to rely on-

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters-

(i) within the particular person's professional or expert competence; or

(ii) as to which the particular person merits confidence; or

(c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

**CITATION OF THE PRACTIONER**

89. The point of the incorrect citation of the practitioner was not raised in argument. It is however apparent that the real bone of contention was that Schlechter should only be before the court in his official capacity as the duly appointed practitioner.

90. Once again the issue arises because prior to *Panamo,* the judgment of Fabricius J in *Advanced Technologies and Engineering Company(Pty) Ltd v Aeronautique et Technologies Embarquees SAS (*unreported but referred to in *Panamo* at para 17*)* was generally followed in this Division. There the court held that a failure to comply with either section 129(3) or (4) resulted in the resolution being null and void *ab initio*, thereby incapable of sustaining business rescue proceedings.

91. The decision in *Panamo* which was only handed down on 27 May, and which may not have been readily accessible save on the Supreme Court of Appeal website at the time the application was drawn, held that both sections 129(3) and (4) requirements are procedural as that term is applied in section 130(1)(a)(iii) and therefore in order to end business rescue under the Act (as provided for in section 132(2)(a)(i)) it is necessary for a court determination through the mechanism of a section 130(1) application; which in turn requires the court to be satisfied that the requirements set out in section 130(5) are met before considering whether a court, in the exercise of its discretion, should set aside the resolution.

However inelegantly formulated, the intervention of a court is necessary and although the order is granted under section 130(1) to set aside the resolution, by reason of section 132(2) (a)(i) business rescue comes to an end *ex lege*. At paras 28 and 29 of the judgment Wallis JA said;

> *[28] It is helpful to start with what the Act says about the termination of business rescue proceedings. The relevant provision for present*

*purposes is s 132(2) (a) (i), which provides that business rescue proceedings end when the court sets aside the resolution that commenced those proceedings. In other words, when a court grants an order in terms of s 130(5) (a) of the Act, the effect of that order is not merely to set the resolution aside, but to terminate the business rescue proceedings. A fortiori it follows that until that has occurred, even if the business rescue resolution has lapsed and become a nullity in terms of s 129(5)(a), the business rescue commenced by that resolution has not terminated. Business rescue will only be terminated when the court sets the resolution aside. The assumption underpinning the various high court judgments to the effect that the lapsing of the resolution terminates the business rescue process is inconsistent with the specific provisions of the Act. None of those judgments referred to s132(2)(a)(i).*

*[29] Once it is appreciated that the fact that non-compliance with the procedural requirements of s 129(3) and (4) might cause the resolution to lapse and become a nullity, but does not terminate the business rescue, the legislative scheme of these sections becomes clear. The company may initiate business rescue by way of a resolution of its board of directors that is filed with CIPCSA. The resolution and the process of business rescue that it commenced, may be challenged at any time after the resolution was passed and before a business rescue plan is adopted on the grounds that the preconditions for the passing of such resolution are not present. If there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity and is liable to be set aside under s 130(1) (a) (iii). In all cases the court must be approached for the resolution to be set aside and business rescue to terminate. That avoids the absurdity that would otherwise arise of trivial non-compliance with a time period, eg the appointment of the business rescue practitioner one day late as a result of the failure by CIPCSA to licence the practitioner timeously in terms of s 138(2) of the Act, bringing about the termination of the business rescue, but genuine*

*issues of whether the company is in financial distress or capable of being rescued having to be determined by the court. There is no rational reason for such a distinction.*

(See also paras 20, 21, 23, 24, 27 and 31 of the judgment)

92. The present matter came by way of urgency and, applying *Panamo*, the company remains in business rescue under the practitioner in his official capacity.

93. However the issue regarding the practitioner does not end there. The case made out by the applicants is that he was conflicted and should never have been appointed. The case is also made out that Lizemore acted in bad faith and for an ulterior and self-serving purpose in placing the company under business rescue.

94. In terms of section 130(5)(c)(ii) a director who voted in favour of the section 129 resolution may be personally liable for costs if its requirements are satisfied and the director did not act in good faith.

95. If it is found that the practitioner effectively aligned himself with the interests of Lizemore in circumstances where Lizemore is to be held liable for the costs, there is no good reason for the company to be saddled with his costs of opposition when he simply had to bring to the courts attention such facts as he knew and abide the decision. If it is found that he descended into the litigation, not qua practitioner[9] then the company should not be responsible for his costs. I do not read section 140(3) (c) as depriving the court of its ordinary power to deal with costs on a *de bonis* basis when warranted.

[9] Ie; that in actually litigating rather than playing a passive role by assisting the court with information, he acted in a manner inconsistent with the duties and obligations of a practitioner as set out in section 140 and other provisions in Chapter 6 such as section 152(1)(b)

**COMPLIANCE WITH SECTIONS 130(3) (b), 144(3) (a) and 145(1) (a)**

96. The applicants produced proof that they had given notice of the application to all affected persons including the union and shareholders, save that in the case of creditors the applicants could only give notice to those whose names they were able to procure. Notice was given to a substantial number, including the main creditors.

97. None of the applicants have access to the company and they were dependent on the co-operation of the respondents. The inability to identify the balance of the creditors was due to the obstructive conduct of the latter. Moreover it hardly lies in the respondents' mouths to complain that notice was not given to all creditors when the practitioner had yet to give notice to any or, as conceded by the respondents, to have approached any creditor (save for Lizemore).

98. Nonetheless I am satisfied that there has been compliance with the requirements of notice to the unions, employees and shareholders and that there has been substantial compliance, in all the circumstances, with notice to creditors by number and certainly by value and importance.

**FAILURE TO RAISE '*JUST AND EQUITABLE*' IN FOUNDING AFFIDAVIT**

99. The respondents seek to rely on *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T).

100. There is an acceptable explanation for not expressly identifying the just and equitable requirement of section 130 (5) (in order to end business rescue by a court order setting aside the section 129 resolution).

101. *Swissborough* is not necessarily a panacea for respondents where there are enough facts set out in the founding affidavit to support a legal

argument and where the basis of the legal argument is then corrected in reply; (which in turn would overcome any concern that the respondents were unaware of the legislation upon which the applicants relied).

102. In the present case; as soon as the applicants were made aware of *Panamo* they rectified the situation and the respondents dealt fully with the allegations contained in the founding affidavit on which the applicants subsequently relied to support the just and equitable argument. The respondents also filed further affidavits and therefore had the opportunity to add any further facts relevant to the just and equitable issue.

**STANDING IN RESPECT OF RETURN OF COMPANY PROPERTY**

103. The respondents contend that section 133(1) provides for a moratorium which precludes the applicants from seeking to enforce return to the company of its own property.

The section provides:

> *133 General moratorium on legal proceedings against company*
>
> *(1) During business rescue proceedings, no legal proceeding, 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;*

104. In my view the section is intended to protect the company from claims or recovery of assets against it. It does not in its terms deal with orders that seek to protect or recover company property for its benefit.

105. In any event, on the facts, the practitioner has adopted a supine attitude and despite the tender to return the items in question has done nothing about it. For reasons that appear later, the applicants could not expect the practitioner to divorce himself from the interests of Lizemore; at least for as long as they shared the same attorney. If it was necessary I would have had no hesitation in granting leave to the applicants under subsection (b) if they had requested it. The urgency of the matter and the lack of any defence to the merits of the claim for return (which is hardly surprising considering the tenders made but not implemented) justify the court in acceding to the relief sought under this part.

**SECTION 129(4)**

106. The respondents contend that the Commission can grant an extension to the company for complying with the time periods under section 129(4). They initially placed reliance on section 129(3) which allows the Commission to grant a longer time for compliance.

107. The difficulty confronting the respondents is that the dispensation is contained in section 129(3) and deals with the Commission's power to extend the period within which the company must appoint a practitioner and publish a notice of the section 129(1) resolution to every affected person.

108. A similar power is not to be found in section 129(4) in relation to either publishing a copy of the notice of appointment of the practitioner to each affected person or to the filing of a notice of the practitioner's appointment.

109. In my view if the legislature intended to provide in section 129(4) a similar dispensation to that in subsection (3) it would have said so. Consistency of application would require the legislature to have followed the same formula in successive subsections if the Commission was also to have the power to grant an extension under subsection (4). The subsections are

sufficiently proximate that the possibility of a *casus omissus* may be disregarded.

110. Adv Wesley sought to then rely on Regulations 166(1) and (2) which concerns the extension of time limits under the Act. In my view the regulations do not cover the situation under consideration. If it were otherwise a regulation which constitutes delegated legislation would trump an express primary statutory provision, which is not possible.

**SECTIONS 130(1) (a) (i) and (ii)**

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111. The question is whether in addition to the failure to comply with section 129(4) there was no reasonable basis for believing that the company is financially distressed or there was a reasonable prospect of saving the company.

112. The applicants set out the steps taken to procure funding from the banks and how it would be utilised[10]. It is common cause that Lizemore was aware of this before he passed the resolution. Moreover he nowhere sets out a basis as to why the company was unable to pay all its debts as they became due within the immediately ensuing six months. On the contrary the applicants had a plan that would see the exit of Lizemore and cut costs as well as regain orders. Finally Lizemore confirmed that there were still other suitors interested in acquiring the company as a going concern. The figures that were mentioned indicate that provided the landlord subordinated its claim (as it clearly was doing) the company had good value and its turnover was in the millions of Rand.

113. There is no concrete evidence placed before the court by the respondents to demonstrate that the company would be unable to pay all its debts when they became *due* (which term would exclude subordinated debt) within six months particularly as it was in the process of obtaining funding

[10] See para 38

from its bankers, a fact which the respondents could not gainsay. In turn this impacts on their inability to demonstrate that it was reasonably likely that the company would become insolvent within the immediately ensuing six months.

114. In my view a particularly telling fact is that, two weeks into business rescue, the practitioner could not produce one creditor or other affected party aside from Lizemore who supported business rescue[11]. On his own say so he had not spoken to any of the major creditors to establish their views. Since the time of his appointment, and by his own showing, the practitioner adopted a supine attitude and failed to take any of the steps one would expect of a practitioner in such circumstances. His appointment of Lizemore does not appear to be anything more than keeping the latter in management. This is no longer the de facto position since the business was closed by the practitioner.

**JUST AND EQUITABLE**

115. I have already mentioned that the resolution of 8 April was signed by Griessel and, accepting the respondents' version, was given to Lizemore for signature. Lizemore claimed that he had refused to sign that resolution because of the interest being shown by Multotec to acquire the company, it being a condition (if such transaction was to take place) that all directors and senior managers would have to sign a restraint of trade agreement. Lizemore stated that Quintin did not want to be in a position where he would have to sign such a restraint and therefore Quintin did not want to be a director or senior manager in the company. The first respondent did not give any details regarding where or when such a conversation might have taken place. In the replying affidavit it is clear that the first applicant had agreed to take over as director of the company from his father who held the majority shares in the company.

[11] The need to demonstrate major creditor support does not lose its significance because the company itself passes a resolution to place itself under business rescue; on the contrary it is more likely to gain relevance. See *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 (3) SA 273 (GSJ) at para 49 (point no.7) which was upheld on appeal (upheld on appeal 2013 (4) SA 539 (SCA)) and applied in Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd 2012 (5) SA 497 (WCC) at para 60.

116. Quintin's averments are significant. In para 22 of the founding affidavit he claims that Lizemore;

a. had him sign certain documentation and forms for the purpose of appointing him as a director;

b. held a meeting with the entire staff compliment indicating that Quintin was to be appointed as director in the place of Griessel;

c. agreed to arrange the filing of the necessary documents with the Commission so that Quintin would be registered as a director.

Unlike the other paragraphs, the respondents' reply was not contained in a self standing paragraph. It was combined with a reply to another paragraph. Although the contents of the other paragraph were purportedly addressed, the first respondent contented himself with a bald denial to the entire contents of this paragraph to the founding affidavit. That is inadequate in circumstances where a specific allegation is made that the necessary forms were signed by Quintin to the knowledge of Lizemore and that he had introduced Quintin to staff as the new director. Allegations of this nature, bearing in mind the general nature of the defence raised, require to be addressed specifically. A bald denial in the circumstances does not suffice.

117. There is another aspect. The document prepared by Griessel in its terms provided for his replacement by Quintin as director; not as severable and unrelated events[12].

118. Nowhere does Lizemore claim that there would be only one director or that the majority shareholders would relinquish their seat on the board.

[12] See the terms of the first resolution supra and the fact that there was to be a simultaneous transfer of shares.

A difficulty facing Lizemore is that the 8 May resolution purports to be of both the directors and shareholders of the company. However only he signed it. None of the other shareholders did.

119. There is a further difficulty with Lizemore's 8 May resolution. It is clear from the papers, and it is conceded by the respondents counsel , that Lizemore did not inform Griessel that the resolution had not been signed in the form prepared by the latter or that Lizemore would redraft the resolution and omit the appointment of Quintin; nor did he otherwise precognise Griessel or Quintin that he would effectively refuse to sign the resolution in its form or frustrate the majority shareholders' appointment of their chosen director to the board.

120. There is also a damaging statement by Lizemore. He states that "*after Griessel resigned as director of the company the first respondent approached Multotec to enquire whether it was interested in buying a share in the company or taking over in the company as a whole.* (emphasis added)

This statement is significant because it contradicts the first respondent's claim that Quintin did not want to become a director because of a requirement by Multotec that a restraint be signed; however Multotec only entered the picture, according to Lizemore's statement, after Griessel had resigned.

121. The applicants did not raise the question of whether Lizemore could in fact competently pass the resolution of 8 May when the resolution placed before him, the board and shareholders (ie the resolution of 8 April) was a composite resolution that required consideration. This issue may in turn disentitle Lizemore from being able to represent the board as its sole director, thereby rendering the subsequent section 129 resolution a nullity on ordinary principles. The point was not argued and I therefore make no finding on it.

122. Nonetheless, in the context of just and equitable, it is evident that the section 129 resolution was taken behind the back of the co-shareholders and

when Lizemore knew that they, as majority shareholders, were entitled to have a director on the board and would not have approved business rescue.

123. There are in addition important factors which cumulatively, and together with the stealing of a march, favour setting aside the resolution on the grounds that it is just and equitable to do so. They are based on the facts set out earlier which demonstrate, on the respondents own version ( save where I have expressly rejected that version on identified grounds), that;

a. Lizemore was prepared to resign on 29 June and ostensibly had no further interest in the running of the company aside from being paid out. There was no reason for him to have a genuine interest in the company ;

b. He never pertinently raised his concerns that the company was financially distressed. Despite access to the books of the company the answering affidavit essentially contains only submissions without concrete facts. This despite the fact that Lizemore had already sought advice on how to put the company under business rescue. Together with the picture painted by the facts set out earlier it is evident that Lizemore was using business rescue to suit his personal interests and not in a bona fide way. In particular he was aware that the shareholders were raising substantial funding to cover debt and increase turnover. He was also aware that there were suitors who did not require a business rescue process before showing interest. It is also evident that creditors were happy to assist the company once approached without the necessity of business rescue.

c. The practitioner, working hand in glove with Lizemore, effectively abdicated his responsibilities to Lizemore. He failed to consult with creditors or the other shareholders. He has been supine and within a week of his appointment closed the business. He failed to engage the workers and the work force are now unemployed despite the very reason for business rescue, according to Lizemore's affidavit of 2 July,

being to protect jobs. This again demonstrates that Lizemore could not have been *bona fide* but was abusing business rescue for his own ends.

124. Lizemore and the practitioner are represented by the same attorneys. The business practitioner does not consider this problematic. And therein lies the rub since it is difficult to appreciate how the attorney dealing with the matter can represent Lizemore, to whom he has given advice and clearly has strategised the business rescue, while at the same time is representing another party who is obliged to bring a very different set of considerations to bear on the matter. This is not only a criticism of the attorney but also of the Schlechter. Schlechter must bring an independent mind to bear on the question of whether there are reasonable grounds to believe that the company is, was not, or is no longer financially distressed as provided for in section 141.

125. There is no Chinese Wall that I am aware of which renders the *same* attorney in the same firm impervious from being conflicted in a case of this nature; a case where to the attorney's knowledge the practitioner has conducted no independent investigation and is only provided with Lizemore's version.

126. The practitioner effectively precludes himself from adopting anything other than a supine position because on his own say-so he knows nothing about the affairs of the company, has not asked the main shareholders and funders whether they have a plan nor has he approached any of the main creditors to establish their views and has allowed the business to simply close.

127. There are other features that should have given cause for concern to the practitioner. This was not a case where his appointment was pursuant to a court order or a decision of the board supported by the shareholders. It would have been evident from the most cursory enquiry as to how Lizemore came to sign the resolution without taking his co-shareholders into his confidence. He

should also have scrutinized the resolution that Griessel had prepared to satisfy himself that Lizemore was not stealing a march and looking after his self-interest.

128. The failure to engage creditors or establish what the shareholders had in mind for re-financing simply adds grist to the mill. Instead the practitioner only sought extensions of time to notify creditors. If he engaged creditors and the shareholders it would have been evident that the first respondent had stolen a march. He was supine and effectively shut down the company within a week of his appointment. His conduct has achieved the very opposite of the grounds relied upon by Lizemore for placing the company under business rescue. Business rescue is intended to be engaged with sufficient vigour by the practitioner in order to facilitate the rehabilitation of a company by engaging affected parties or, where that cannot be attained, to avoid liquidation by expeditiously facilitating a deal which will yield a better return. The conduct of the practitioner in this case falls far short of this and he effectively did little or nothing to pursue the objectives of business rescue.

129. The only interests not yet taken into account are those of Lizemore. I however have found that his motive is self-serving. The employees are clearly better off by having the company open its gates, which will not occur under Lizemore or the practitioner.

130. In all the circumstances it is also just and equitable to set aside the resolution.

I am therefor satisfied that each of the requirements to set aside the resolution in terms of section 130(5)(a) read with 130(1)(a)have been met.

131. The effect of setting aside the resolution under section 130(1)(a) means that the business rescue proceedings have ended. It is however appropriate that the effect be contained in the order as it will be disseminated to affected parties who may be laypersons and unaware of the consequence

of setting aside such a resolution. I accordingly redrafted para 2 of the order so as to explain this.

**REMOVAL AND APPOINTMENT OF DIRECTORS**

132. In terms of 163(2)(f) oppressive or prejudicial conduct entitles the court to appoint directors in place of or in addition to those in office.

133. I am satisfied on the facts that the requirements for invoking its provisions are satisfied. The facts supporting this ought to be clear from what has been set out earlier.

134. The applicants sought an order removing Lizemore and placing themselves on the board.

135. In my view Lizemore should be allowed to protect his shareholding interests by remaining on the board. He is unlikely to disrupt its day to day functioning as he will be in the minority. The applicants can always approach the court again should he frustrate the proper operation of the board and act in a manner that does not have regard to the company's best interests. They are also at liberty to invoke the proper machinery under the Act if they wish to remove him.

**COSTS**

136. The legislature in allowing the business rescue proceedings to commence, even where the resolution was a nullity for want of compliance with section 129(4), has opened the door to a practitioner being entitled to charge the company for remuneration and expenses in terms of the prescribed tariff as provided for in terms of section 143(1) as read with subsection (6). It also appears that no provision is made for the forfeiture of remuneration; only a reduction as provided in the circumstances set out under section 143(4).

137. There is no order sought to preclude the practitioner from recovering from the company remuneration under the tariff or setting aside any agreement that may have been concluded, certainly none was disclosed.

Accordingly that issue was not before me and this judgment does not prevent the applicants from challenging the practitioner's right if the latter seeks to raise, or has raised, any amount of remuneration against the company or has recovered any such amount from it.

138. However in so far as litigation costs are concerned, Adv Wesley did not suggest that the first respondent should not be responsible for the costs even if I should find in favour of the applicants. I was not referred to section 130(5)(c)(ii) which provides that in the circumstances enumerated in the subsection the court will order costs against a director unless satisfied that the director acted in good faith and on the basis of information he was entitled to rely upon in terms of section 76(4) and (5).

139. It appears that the legislature was concerning itself with a specific situation which it considered required addressing, not that it is the only situation where costs may be awarded against the director personally. Nonetheless this certainly is the situation which prevailed in the present case and I am satisfied that the first respondent did not act in good faith let alone that he actually relied on information supplied by others as envisaged by sections 76(4) and (5). Quite the contrary. I am satisfied for reasons set out earlier that the first respondent acted in bad faith knowing full well that a properly constituted board of director's would not have passed the resolution. Moreover he was director in name only when signing the resolution but he did so as part of a stratagem to look after his self-interests; not those of the company, its creditors or employees.

140. I would in any event consider that the overall conduct of the first respondent was not in good faith when he passed the resolution behind the back of his co-shareholders in circumstances where he knew he was not entitled to. He also failed to tell them that he had not co-signed the

appointment of Quintin as director thereby leading them to believe, until it was too late, that he could not act without their concurrence; or at least forewarning them of his proposed actions as director. Moreover he signed the resolution placing the company under business rescue despite the matter being raised at the meeting of 29 June and being rejected and despite Griessel informing him that they would provide funding for the company utilising the property as collateral.

**COSTS**

141. The applicants did not ask for any special order for costs against the first and second respondents. There is however the consideration that the company should not be obliged to bear any of the costs whether directly or indirectly of the business rescue proceedings.

**ORDER**

142. I accordingly granted an order, which was since revised by introducing in para 2 the clarification mentioned earlier for the benefit of any interested party, in the following terms;

1. *In terms of section 129(5) read with section 129(4) of the Companies Act 71 of 2008 ('the Act') it is declared that the resolution to begin business rescue proceedings and place the company under supervision ('the said resolution') has lapsed and is a nullity.*

2. *In terms of section 130(5)(a) of the Act the said resolution is set aside on the grounds set out in terms of section 130(1)(a)(i) and (iii) read with 129(4) and it being just and equitable to do so as contemplated in section 130(5)(a)(ii) thereof; with the result that, as a matter of law under section 132(2)(a)(i) of the Act, the business rescue proceedings are ended.*

3. *In terms of section 163(2)(f) of the Act the first and second applicants are appointed directors of the company in addition to the first respondent.*

4. *The first respondent is directed to forthwith return to the company all the plugs and patterns that he removed from the company's premises, and failing compliance within five days of this order the sheriff or his lawful deputy is authorised and instructed to require the first respondent to point out where such items are and to there and then seize them and return them to the company.*

5. *The first and second respondents are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.*

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SPILG J

**POSTEA: 1 September 2015**

**SPILG, J:**

1. This is an application for leave to appeal.

2. I have again considered my judgment in light of the grounds raised by the respondents in their application.

3. While issue may have been taken with my application of *Plascon-Evans* in respect of one or two findings it does not militate against the overwhelming

considerations that led me to set aside the section 129 resolution under section 130 of the Companies Act 71 of 2008 and grant the order I did.

4. Furthermore, insofar as setting aside the section 129 resolution is concerned I exercised a discretion in granting the order and consequently the scope for appeal is limited. So too in regard to the appointment of the applicants as additional directors pursuant to the exercise of the court's discretion under section 163(2). In my view the threshold requirements for appealablity have not been satisfied.

5. That leaves the order for return of assets to the company. Since the first respondent had tendered return but failed to deliver and raised no defence on the merits an appeal would serve no purpose.

6. I do not wish this judgment to be construed as an acceptance that the order setting aside the resolution and thereby ending the business rescue proceedings is appealable in cases where a court has acted within the four corners of the legislation (which would distinguish *Panamo Properties (Pty) Ltd v Nel and another NNO* 2015 ZASCA 76).

7. There are certain features of the business rescue process which may be construed as precluding an appeal in cases where the court has acted *intra vires* the legislation when setting aside the resolution.

8. Setting aside the resolution may not be of final effect as it does not preclude creditors or any affected party from immediately bringing their own application before a court. The effect of the order is only to preclude the company, through its board of directors from doing so again within a period of three months; and even then it would be permissible prior to that date if good cause is shown. See section 129(5)(b).

9. Since the point was not argued and only occurred to me when preparing judgment, I leave it open as I am satisfied that even if the decision to set aside the resolution is appealable that leave should be refused on the grounds that it does not have a reasonable prospect of success and there is no other

compelling reason why the appeal should be heard. I therefore also do not have to consider whether my decision falls within the ambit of section 16(2)(a).

10. Once again the costs are not to be borne by the company.

11. Accordingly leave to appeal is refused with costs, the first and second respondents to pay such costs personally and jointly and severally, the one paying the other to be absolved.

SPILG, J

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| DATES OF HEARING: | 15, 17 and 22 July 2015 |
| | (Leave to Appeal: 28 August 2015) |
| DATE OF ORDER: | 31 July 2015 |
| DATE OF JUDGMENT: | 26 August 2015 (revised 28 August) |
| | (Leave to Appeal: 1 September 2015) |
| LEGAL REPRESENTATION: | |
| FOR APPLICANTS: | Adv LAVINE |
| | JM BERKOWITZ INC |
| FOR 1st-3rd RESPONDENTS: | Adv CP WESLEY |
| | NEL VAN DER MERWE & SMALMAN INC. |