IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : 20/18130

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: 13.08.2020 SIGNATURE:

In the matter between:

THE TRUSTEES FOR THE TIME BEING	
OF THE GAMSY FAMILY TRUST BEING:	
DENNIS GAMSY N.O., GILLIAN GAMSY N.O.	
AND ROB VELOSA N.O.	First Applicant
MICHAEL JAMES MILLER	Second Applicant
ALISTAIR COLLINS	Third Applicant
ULRICH BESTER	Fourth Applicant
And	
MINE RESTORATION INVESTMENTS LTD.	First Respondent
COMPANIES AND INTELLECTUAL	
PROPERTY COMMISSION	Second Respondent
DANIEL TERBLANCHE	Third Respondent
RICHARD TAIT	Fourth Respondent
QUINTON GEORGE	Fifth Respondent
CHRISTIAN ROED	Sixth Respondent

SYD CADDY Seventh Respondent

JUDGMENT

BHOOLA A J:

Introduction

[1] The applicants have approached this court on an urgent basis in an application to set aside a resolution taken by the fourth, fifth, sixth and seventh respondents ("the respondent directors") of the first respondent placing it in business rescue.

[2] The first applicant is the largest independent creditor of MRI, totalling 66% of non-trade creditors and having loaned approximately R 11 million to the first respondent ("MRI") as at 29 February 2020. It is an affected person in terms of section 128 (1) (a) (i) of the Companies Act, 71 of 2008 ("the Act"). The second, third and fourth applicants are directors of MRI ("the applicant directors"). The fourth and fifth respondents ("Tait" and "George" respectively) were removed as directors on 24 July 2020.

Urgency

[3] In urgent proceedings before the merits are dealt with the applicants need to firstly satisfy the court that the application warrants enrolment on the grounds of urgency. In this regard Uniform Rule 6(12) (b) provides: *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.*

[4] Applicants rely on *East Rock Trading 7 (Pty) Ltd and Another v Eagle*

Valley Granite (Pty) Ltd and Others[1] and Wepenaar J's judgment *In re several matters on the urgent court roll 18 September 2012* and submitted that they have set out averments relating to why they will not be able to obtain substantial redress at a hearing in due course, should the matter not be enrolled as urgent.

[5] These averments are in essence that MRI is in business rescue as a result of a round robin resolution taken on 14 July 2020 by the respondent directors ("the resolution"). Applicants seek to set aside the resolution and they allege that these proceedings are urgent because if the resolution is not set aside and the business rescue proceedings continue, MRI will lose the opportunity to act on a significant share-swap offer from Langpan Mining Co (Pty) Ltd ("Langpan"), which will result in it being forced into liquidation. MRI has until 15 August 2020 to take advantage of the Langpan offer, failing which it will lapse. This is the second offer it has received, the first having lapsed, it submits on account of the conduct of the respondent directors. MRI thus has a second opportunity to exercise its options but this must be done before 15 August 2020, i.e. within four days.

[6] Applicants submit that the only hope for MRI's survival at this stage is the share-swap agreement offered by Langpan. This agreement is conservatively valued at R550 million but its true value lies between R600 million and R1.1 billion. If it is concluded, MRI will be solvent and be in a position to settle all of its liabilities. If the agreement is not concluded, then MRI will in all probability be delisted from the JSE AltX exchange and will have to be liquidated. This will be to the undoubted prejudice of its creditors, including the first applicant.

[7] The respondents do not challenge the urgency on the grounds of abridged time periods. It is clear to me on the facts averred that the applicant will not enjoy substantial redress at hearing in due course (i.e. should the business rescue continue) as it is very likely that should the reconstituted

[1] (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

board of directors not decide before the Langpan offer lapses on 15 August 2020, MRI faces a real risk of liquidation and delisting. It is not likely to be able to set aside the business rescue in due course, as the respondent directors submit. I am therefore satisfied that the matter warrants enrolment as an urgent application.

Grounds for setting aside a company resolution

[8] Section 130 (1) of the Companies Act makes provision for objections to a company resolution. It provides that *"[s]ubject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—*
(a) setting aside the resolution, on the grounds that—
(i) there is no reasonable basis for believing that the company is financially distressed;
(ii) there is no reasonable prospect for rescuing the company; or
(iii) the company has failed to satisfy the procedural requirements set out in section 129.

[9] The applicants rely on the grounds listed in section 130(1) (i) and (iii). They allege firstly that there is no reasonable basis for believing that MRI is financially distressed. Secondly, they submit that there was no compliance with the procedural requirements of section 129 (1) and (3) of the Act. In regard to section 129 (1) they allege that the resolution was vitiated by *mala fides* and was a sham, in that it was taken for selfish reasons, including, *inter alia* trying to deal with a dysfunctional board, seeking to re-price the Langpan offer and diverting attention away from the misconduct of two respondent directors, Tait and George. In relation to section 129(3) the applicants allege that even if the resolution is found to have been validly taken in terms of section 129(1), it lapsed on 21 July 2020 in accordance with the provisions of

section 129(5)[2] of the Act, thus rendering the business rescue proceedings a nullity.

Is MRI financially distressed?

[10] Section 128(1)(f) of the Companies Act 71 of 2008 defines ''*financially distressed''* to mean that—
"(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall 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;"

[11] The applicants submit that there is no reasonable basis at all to believe that MRI is financially distressed. The mere fact that the liabilities of a company exceed its assets does not constitute financial distress. MRI is not a trading entity but is a cash shell and as such can continue to exist even for a significant period of time while its liabilities exceed its assets. Thus, they submit that it is not enough for the respondent directors to allege, as they have, that MRI has liabilities that it is not able to pay at the present moment. They must show that (a) the debts are currently due and payable, or shall become due and payable within the ensuing six months; and (b) MRI is unable, or shall be unable, to pay those debts as they become due and payable within the ensuing six months.

[12] The respondent directors submit that there is a dispute of fact as to whether MRI is in financial distress, and have made averments to the contrary on the liabilities of MRI. In this regard the applicants submit, relying on *Wightman v Headfour (Pty) Ltd*[3] that the disputes of fact raised by the respondent directors are neither genuine nor *bona fide*, and that many of the averments made by them are vague or ambiguous and do not demonstrate

[2] Section 130 (5) provides that " If a company fails to comply with any provision of subsection (3) or (4)—(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity.
[3] 2008 (3) SA 371 (SCA) at paragraph 13.

the standard of knowledge that one would expect of a director.

[13] In this regard the applicants submit that at present there is no demand from any of MRI's creditors that it make payment of its debts immediately. In particular while MRI may have a liability towards SARS, this is being addressed with SARS. There is nothing before this Court to suggest that SARS requires its liability to be settled forthwith. In addition, the so-called agreement with Tertain Investments (Pty) Ltd is unlawful and does not constitute a debt that is enforceable against MRI. Even if that were the case, Tertain has given MRI time to enter into the share- swap agreement with Langpan, and there is no requirement that MRI settle its debt, if any, immediately. Furthermore, Langpan has indicated that it is prepared to settle its debt to MRI by way of payments of R300 000 per month until the debt is paid in full. Even if MRI was in financial distress, those payments would be sufficient to ensure that MRI is able to pay all of its debts as and when they fall due.

[14] In any event, the applicants submit, it is common cause that at this moment MRI has the Langpan share-swap agreement open to it and is valued conservatively at R550 million. The total liability of MRI, even including the so-called “syndicated” loans, which it submits should be invalidated, is approximately R20 million. The share-swap agreement will therefore result in MRI’s assets massively exceeding its liabilities by more than twentyfold. Once the transaction is concluded MRI will without any doubt be able to settle all of its debts as and when they fall due. Applicants accept that that Langpan’s operations carry a degree of risk, but submit that the risk is ameliorated by the fact that the share-swap agreement will be evaluated by an independent valuator.

[15] I agree that even if there is a dispute as to whether or not MRI is in financial distress, it does appear that the Langpan transaction it is the panacea to address its future viability, if of course the reconstituted board votes in to proceed with it. This at least does not seem to be in dispute.

Was there compliance with section 129?

[16] Applicant submits that the resolution approving the business rescue of MRI was taken by way of round robin by the respondent directors acting *mala fide* to exclude the applicant directors. Hence it did not constitute a decision of the board of MRI as contemplated in section 129 (1) of the Companies Act. It was a sham and therefore invalid, rendering the business rescue proceedings a nullity.

[17] Applicants rely in this regard on the email from the sixth respondent ("Roed") on 14 July 2020 to the MRI Board of directors, in which he noted that the four respondent directors, including himself, had held a discussion regarding a motion to enter MRI into business rescue and had reached a unanimous decision. Applicants make various averments about the motives behind the adoption of the resolution and the hasty process by which it was adopted. Applicants rely on the fact that it was clear from all of the facts that the decision was in fact not taken by way of a genuine, *bona fide*, round robin resolution, but had in fact been taken by the four respondent directors to the exclusion of the applicant directors. Roed's email makes it clear, they submit, that the respondent directors were "*unanimous"* in their decision; that Caddy had already been appointed to administer the business rescue process, and that a business rescue practitioner (Terblanche) had already been nominated. It was a *fait accompli.*

[18] Applicants concede however that section 74 of the Companies Act and clause 6.6.2 of MRI's Memorandum of Incorporation permit the MRI Board of Directors to adopt a resolution by way of a round robin resolution. However, they say that these provisions obviously contemplate a genuine and *bona fide* round robin process, not an attempt to mask a unilateral decision by the majority of the board to the exclusion of the other directors. I agree however, with the respondent directors that there is no basis for this contention. The resolution appears to have been validly taken in accordance with section 74 of the Act and clause 6.6.2 of the Memorandum of Incorporation. It was sent to

all of the directors and the applicant directors did not, save for Collins (who replied with a cryptic message), reply thereto or engage the respondent directors. As the respondent directors submit, section 129 (1) simply requires a resolution from the company's board of directors. Such a resolution, in the instant case, is capable of being adopted by way of a round robin and a majority vote carries the day.

Did the resolution lapse on 21 July 2020?

[19] Having determined that the resolution was validly taken under section 129(1) I turn to consider whether it nevertheless lapsed. In this regard section 129(3)(a) of the Companies Act provides:
"Within five business days after a company has adopted and filed a resolution, as contemplated in sub-section (1), or such longer time as the commission, on application by the company, may allow, the company must publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded". Furthermore, section 129(5)(a) of the Act provides that if the above deadline is not met, then *"its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity".*

[20] The applicants submit that the date upon which the resolution was adopted and filed with the second respondent ("CIPC") was 14 July 2020. The date upon which the notice contemplated in section 129(3)(a) was published is 24 July 2020. Hence, the notice was filed three days out of time and in terms of section 129(5) (a) it lapses and is a nullity.

[21] Respondent directors submit however that it is clear from the notification from CIPC dated 17 July 2020 that CIPC was only satisfied that the resolution complied with the prescribed form on 17 July 2020. The Companies Act defines the word "*file"* (when used a verb) as "*to deliver a document to the commission in a manner and form, if any, prescribed for that document".* It is clear from the definition, they submit, that the date for filing of

the resolution is when the resolution has been delivered and accepted by CIPC in the manner and form required. The consequence must be that a resolution is only filed with CIPC when it is finally accepted as such. This puts paid, they submit, to the applicants' contention that the five-day period referred to in section 129(3) commenced as of 14 July 2020 and that there was accordingly non-compliance with section 129(3). I do not agree. Section 129(3) is unequivocal: the five-day period within which the notice must be given begins not after any objections have been resolved, but rather after the resolution is adopted and filed. The face of the notice is moreover clear that the date of filing is 14 July 2020.

[22] In any event even if the respondent directors are correct, it appears that they may have resent the necessary documents to CIPC on 16 July 2020. This would mean that they had until 23 July 2020 to publish the necessary notice. The notice was published on 24 July 2020, which is inescapably still out of time. The delay is fatal to adoption of the resolution and it accordingly lapsed and is a nullity. This in my view is sufficient to dispose of the matter in its entirety.

Order

[23] In the circumstances, I grant the draft order marked "X" save for my amendment in regard to costs

U. BHOOLA

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: Heard on 11 August 2020 by videoconference as per agreement between the parties in terms of the Judge President's extended Consolidated Directive of 11 May 2020 extended to 15 August 2020.

Date of judgment: Judgment handed down electronically by circulation to the parties' legal representatives by email on 13 August 2020.

Appearances:
Counsel for the Applicants: Adv Reg Willis with Adv Ori Ben-zeev
Instructed by: Dev Maharaj & Associates, Johannesburg

Counsel for the Fourth to Seventh Respondents: Adv B J Manca SC
Instructed by: Edward Nathan Sonnenbergs Inc, Johannesburg