REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28760/21

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE DATE 9/11/2021

In the matter between:

BLUE NIGHTINGALE 709 (PTY) LTD	Applicant
and	
NKWE PLATINUM SOUTH AFRICA (PTY) LTD (IN BUSINESS RESCUE)	First respondent
NKWE PLATINUM LIMITED	Second respondent
LIEBENBERG DAWID RYK VAN DER MERWE N.O.	Third respondent
COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	Fourth respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. The applicant in this matter, Blue Nightingale Trading 709 (Pty) Ltd (Nightingale) is a minority shareholder in the first respondent, Nkwe Platinum South Africa (Pty) Ltd (Nkwe SA). The second respondent, Nkwe Platinum Limited (Nkwe Ltd), is the majority shareholder. On 27 April 2021 Nkwe SA adopted a resolution placing it into business rescue under s 129 of the Companies Act 71 of 2008 (the Act). The third respondent, Mr van der Merwe, was appointed as the business rescue practitioner (the BRP). He has published a business rescue plan. However, on 25 July 2021 Nightingale was granted urgent interim relief. That relief interdicted the proposed meeting of creditors convened by the BRP for purposes of voting on that plan, pending the outcome of the present application before me.

2. In this application, Nightingale seeks the following relief:

   2.1. An order declaring that the resolution placing Nkwe SA into business rescue is void (the first prayer).

   2.2. Alternatively, an order setting aside the resolution in terms of s130(1)(a) of the Act (the second prayer).

   2.3. Further alternatively, an order declaring that the business rescue lapsed on 2 June 2021 (the third prayer).

2.4. An order declaring that Nightingale is entitled to nominate directors to the board of Nkwe SA and that those persons so nominated should hold office from the date of their nomination. Alternatively, ordering Nkwe SA to convene a meeting of shareholders for the purposes of appointing a new board of directors or at least two new directors nominated by the applicant (the fourth prayer).

3. Nkwe SA and Mr van der Merwe oppose the relief sought, as does Nkwe Ltd. No relief is sought against the fourth respondent, the Companies and Intellectual Properties Commission, and, unsurprisingly, it has not engaged in the litigation.

BACKGROUND

4. Nkwe SA was incorporated under the previous Companies Act, with its articles of association having been adopted in 2002. It is common cause that as it did not adopt a memorandum of incorporation, under the Act it is bound by its articles, which are deemed to be its memorandum of incorporation (MOI).

5. In May 2006 Nkwe Ltd, Nkwe SA and Nightingale concluded a BEE transaction in terms of which Nightingale would be issued with 30% of the issued share capital in Nkwe SA. The terms of this agreement were recorded in a shareholders' agreement (the SHA). The terms of both the MOI and the SHA are key to certain of the prayers sought in the Notice of Motion. I will deal with these relevant terms in more detail later in this judgment when it is more appropriate to do so.

6. The 2006 transaction took place in a broader context. This involved Nkwe Ltd acquiring a prospecting right in relation to certain property from another South African company, which is not a party to this litigation. The prospecting right asset was subsequently assigned by Nkwe Ltd to Nkwe SA. According to Nkwe Ltd this

was for financial reporting purposes. A loan, equal to the acquisition costs, was created in favour of Nkwe Ltd. The latter entity refers to this loan as the "equity loan". The term is useful as it serves to distinguish this loan from others that were extended by Nkwe Ltd to Nkwe SA. The equity loan was initially recognised in the balance sheet of Nkwe Ltd as a financial liability. In the 2018 annual financial statements it was reclassified as an equity. It was similarly treated in the 2019 annual financial statements. As will become clearer later, Nightingale takes issue with this reclassification.

7. In addition to the equity loan, Nkwe Ltd advanced funds to Nkwe SA for the ongoing daily operations of that company. These loans (the funding loans) are recorded as a financial liability in the annual financial statements of Nkwe SA. In April 2021 Nkwe Ltd resolved to withdraw all funding to Nkwe SA and to cease providing it with any further financial support. It also resolved to request part payment of the funding loans in the amount of Australian Dollars (AUD)15 600 000. 00. Nkwe Ltd gave formal notice to Nkwe SA of these resolutions. It was this situation that led to the adoption of the business rescue resolution by Nkwe SA. In the sworn statement filed by Nkwe SA under s 149(3) of the Act, it was stated that, as a result of the cessation of funding from Nkwe Ltd:

> "The Company has no other financial means to support its continued operations, working capital or creditor obligations."

8. Nightingale takes issue with the conduct of both Nkwe Ltd and Nkwe SA regarding the cessation of funding and demand for repayment of the funding loans. It points to a Letter of Guarantee (the guarantee) issued by Nkwe Ltd to Nkwe SA on 13 February 2017. It is common cause that this letter constituted a contract for the benefit of Nkwe SA's creditors, and that it comprised an undertaking by Nkwe Ltd in the following terms:

> "We do hereby confirm that we will ensure that (Nkwe SA) is or will be put in a position to meet its financial obligations as they fall due and that (Nkwe SA) will duly perform and comply with all its financial obligations. In this respect, we undertake to provide (Nkwe SA) as our subsidiary, with the funding and/or other support needed to make it possible for (Nkwe SA) to meet its financial obligations."

Nightingale questions the lawfulness of Nkwe Ltd's decision to cease providing funding in light of this undertaking. However, as I later explain, the guarantee included other important provisions. The respondents contend that based on these provisions, the guarantee is no longer enforceable.

9. As I explain in more detail later, the SHA provides for up to four Nkwe Ltd nominated members on the board of directors, and up to two Nightingale nominated members. It is common cause that at the time that the business rescue resolution was adopted there were only two registered directors, being Mr Fan and Mr Zheng. They were both nominated by Nkwe Ltd. The deponent to Nightingale's affidavits in the matter, Mr Pandor, was a Nightingale-nominated director until March 2021, when he resigned. It is also common cause that both Mr Fan and Mr Zheng are also directors of Nkwe Ltd.

10. At the time Mr Pandor resigned, there was something of a stand-off between Nightingale and Nkwe SA. Nightingale wrote to Nkwe SA in January 2021, in a letter signed by Mr Pandor, expressing its displeasure that the company had not convened an annual general meeting or shareholders' meeting in accordance with the MOI. It demanded, in terms of s 61(3) of the Act, that the board convene a special shareholder's meeting to present reports on various topics. While the board agreed to hold a meeting to consider this request, it declined to do so on the date identified by Nightingale, citing that this would be impossible. The Board took issue with Mr Pandor penning letters to it on behalf of Nightingale while he was a member of the board.

11. Further communications between the parties did not allay the standoff. The board resolved to refuse the request for a special shareholders' meeting. Mr Pandor's reaction was to resign as a director of the board. He says that the decision to refuse to hold the shareholders' meeting was "*astounding*" and rejected the reasons provided by the board. These were that the purpose of the meeting was to discuss issues arising from documents to which shareholders were not entitled under the Act.

12. As Mr Pandor was the only Nightingale-appointed director, under the SHA Nightingale was entitled to nominate up to two replacement directors. It wrote a letter identifying two replacement directors, which it said it was "*appointing*", which appointment was "*effective immediately*". The board rejected the validity of this appointment and declined to act on it. The impasse over Nightingale's appointment was not resolved before the resolution was taken by the remaining members of the board to place Nkwe SA into business rescue under s 129.

13. In his sworn s 149(3) statement filed on behalf of Nkwe SA in support of the commencement of business rescue, Mr Fan stated that he was a director and the managing director of Nkwe SA. As part of the information provided to demonstrate that the company should be placed in business rescue, he recorded that:

    13.1. Nkwe SA conducts contracting mining services and related activities to Nkwe Ltd.

    13.2. It had historically been reliant on receipt of funding from Nkwe Ltd, which has provided financial support in the form of interest-bearing and non-interest-bearing loans.

13.3. Nkwe Ltd had notified Nkwe SA on 24 April 2021 that it would immediately cease providing any further financial support with immediate effect.

13.4. Nkwe SA had no other financial means to continue its operations.

13.5. The effect of this is that Nkwe SA would have no funds available to pay its liabilities, as and when they became due for the foreseeable future. In addition, Nkwe Ltd had demanded repayment of an amount of over AUD15 million in funding loans.

13.6. The assets, liabilities and payment obligations for the following six months were as provided in the summary included in the statement.

13.7. Nkwe SA was in financial distress within the meaning of s 128 of the Act. Although it was not factually insolvent on its balance sheet, it would not be able to raise sufficient working capital from third parties or from its shareholders to provide working capital to pay all its debts as they fell due in the next six months.

13.8. The board of Nkwe SA nonetheless believed that there was a reasonable prospect of rescuing the company, through pursuing various listed options.

14. *Prima facie*, then, it was the decision by the majority shareholder, Nkwe Ltd to cease financing Nkwe SA and to call up part of the latter's debt that precipitated the company entering into business rescue. Nightingale disputes that Nkwe Ltd acted *bona fide* in doing so. Nightingale says that the resolution to enter into business rescue was part of a well-planned stratagem to get rid of it, as the minority shareholder.

ISSUES RAISED BY NIGHTINGALE

15. In support of the relief it seeks, Nightingale relies on the following broad contentions:

15.1. It contends that the issue of whether Nkwe Ltd was entitled to call up its debt and cease funding Nkwe SA should be referred to oral evidence. Linked to this is the related issue of the reclassification of the equity loan in Nkwe SA's annual financial statements. Nightingale gave notice in its replying affidavit that it would seek the necessary referral at the hearing. I refer to it as the oral evidence issue.

15.2. Nightingale avers that the board meeting at which the resolution was adopted to place Nkwe SA into business rescue was not quorate, and that the resolution, and the business rescue proceedings flowing from it are invalid. This is the referral to quorum issue.

15.3. It contends that the resolution placing Nkwe SA into business rescue was not taken in good faith and that it constitutes an abuse of the statutory scheme. Nightingale says that the purported financial distress of the company is a sham, aimed solely at removing the minority shareholder from the business of the company. This contention encompasses a number of issues, including the conduct of the remaining directors of Nkwe SA, the reclassification of the equity loan in the annual financial statements, and the entitlement of Nkwe Ltd to cease funding in light of the guarantee. This is the bad faith issue.

15.4. Finally, Nightingale takes issue with the extension of time afforded to Mr van der Merwe to publish the business rescue plan. Although this issue was dealt with in the affidavits and in written heads of argument, no oral

submissions were made by counsel. However, it was made clear to me that Nightingale had not abandoned the point. I refer to this as the extension issue.

16. If Nightingale is correct in its contention that the board was not quorate when it took the business rescue resolution, this will be dispositive of the application, and it will not be necessary to consider the other issues raised. Nightingale will be entitled to the relief it seeks in the first prayer.

17. If Nightingale is not successful on the quorum issue, I will need to consider the oral evidence issue. The inquiry in this regard overlaps with that involving the bad faith issue, and Nightingale's entitlement to relief in the form of the alternative second or third prayers in the Notice of Motion. If Nightingale succeeds here, it will not be necessary to consider the extension issue.

18. As to the fourth prayer for relief, which is the declarator regarding Nightingale's entitlement to nominate shareholders, its fate will depend on whether Nightingale succeeds in reversing the business rescue process on any of the bases discussed above. If Nightingale fails to do so, this relief would not be compatible with a company under business rescue, and it should be refused.

19. The logical place to start is with the quorum issue.

THE QUORUM ISSUE

20. Nightingale's contention that the board was not quorate when it resolved to place Nkwe SA into business rescue is based on the terms of the SHA. Necessarily, the inquiry also involves a consideration of the MOI, and whether there is a conflict between the two. This is because in terms of s 15(7) of the Act:

"*The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency*."

21. The relevant provisions of the SHA are to be found in clause 3(a), which says:

> "(Nkwe Ltd) shall be entitled to nominate a maximum of four directors to the Board and Blue Nightingale 709 shall be entitled to nominate a maximum of two directors to the Board of (Nkwe SA). Subject to the provisions of clause 4, at any meeting of directors of (Nkwe SA), each director shall have that percentage of the total votes of all directors which corresponds to the percentage shareholding in the entire issued shareholding of (Nkwe SA) held by the shareholder which nominated such director, divided by the number of directors nominated by such shareholder. Each shareholder will be entitled to remove any director so appointed and replace any such director who is removed or who ceases for any reason to be a director of (Nkwe SA). Directors will not be entitled to receive any remuneration. <u>The quorum shall be one director present nominated by each of (Nkwe Ltd) and (Nightingale)</u>. If no quorum is present at a duly convened meeting of the Board or shareholders within thirty minutes after the scheduled time for commencement, the meeting shall be adjourned for two days at the same time and venue. The shareholders or directors present at this second meeting will comprise a quorum. Any director appointed by a party whose shareholding reduces to less than 5% of the issued shares in (Nkwe SA) shall immediately resign his/her office as a Director of (Nkwe SA)." (My underlining)

22. The MOI deals with quorum in article 75, which provides:

> "The quorum necessary for a transaction of the business of directors, unless there is only one director, may be fixed by the directors, <u>and unless so fixed, shall, when the number of directors exceeds three, be three (and) where the number of directors does not exceed three shall be two</u>." (my underlining)

23. It is common cause that the directors never fixed a quorum different to that provided for in clause 75. As I stated earlier, it is also common cause that at the time the business rescue resolution was adopted there were only two registered directors, both nominated by Nkwe Ltd. Under article 75 then, the quorum at the time the resolution was adopted was two. The parties do not dispute this in principle.

24. Article 77 is also relevant. It states:

> "The continuing directors may act notwithstanding any vacancy on their body but, if and for so long as their number is reduced below the number fixed by or pursuant to (the MOI)[1] as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number or of convening a general meeting of the company but for no other purpose."

[1] The original text reads "these articles", and not "memorandum of incorporation". For reasons explained, under the Act, Nkwe SA's articles of association effectively became its memorandum of incorporation.

25. At face value, clause 3(a) of the SHA is inconsistent with article 75 of the MOI. Whereas the SHA specifies that a quorum must be comprised of one director present nominated by each of the respective shareholders, the MOI makes no such specification: it simply requires a quorum of two (in circumstances where the number of directors does not exceed three).

26. Nightingale submits that this is not a conflict as envisaged in s 15(7) of the Act, and that the MOI should not prevail. It says that all clause 3(a) does is to qualify the quorum of two required under the MOI. In other words, under the MOI two directors constitute a quorum and read with the SHA, of these two, one each must be nominated by the respective shareholders. Nightingale's case is that on a proper interpretation of the two provisions, they are consistent, and not in direct conflict with, each other. On this basis, according to Nightingale, the SHA remains enforceable and, as neither of the two directors present was nominated by Nightingale, the meeting of directors was inquorate when the business rescue resolution was adopted.

27. Nightingale relies on the Supreme Court of Appeal judgment in *Gihwala v Grancy Property (Pty) Ltd*[2] in support of its submissions. In particular, paragraph 54 of that judgment, where the Court held as follows:

> "A shareholders 'agreement of this type, dealing with the right to be appointed as a director and operating to nullify a provision in the 1926 Companies Act that provided for the removal of directors, was enforced in *Stewart v Schwab*. That judgment has been cited on a number of occasions in provincial divisions. Its correctness was assumed by Trollip JA in *Desai*. Such agreements are frequently entered into in cases where investors wish to regulate their relationship *inter se* when the investment is to be made through the medium of a company. Mr Narotam and Mr Mawji expected that Mr Gihwala would cause such an agreement to be prepared. The email of 21 February contemplated such an agreement and one was prepared in Mr Gihwala's legal office but never signed. Until such an agreement was prepared and signed, the parties were bound by the express terms of the agreement and any tacit terms that formed part of it. Such an agreement does not alter or vary the company's founding documents. It is an agreement between the parties thereto in terms of which they agree as to the

[2] 2017 (2) SA 337 (SCA); [2016] 2 All SA 649 (SCA)

> manner in which, and the purpose for which, the powers of the company and its directors will be exercised. There is no reason why such an agreement should not ordinarily be given effect and no reason why it should not be given effect in this case. Section 15(7) of the 2008 Act expressly provides that this is to be the situation. The qualification that the shareholders 'agreement may not be inconsistent with the Act and the Memorandum of Incorporation deals with situations where there is a direct conflict between them, not with a qualification in the shareholders 'agreement on the manner in which general powers are to be exercised, which may constrain the exercise of those powers." (my underlining, case references excluded)

28. Nightingale submits that the present case is on all fours with that under consideration in *Gihwala*, and that the underlined dictum is directly applicable. It says that the quorum requirement inherent in clause 3(a) of the SHA is in the nature of a qualification that governs the general manner in which the powers of the company and its directors are to be exercised, as envisaged by the SCA. It is not one that is in direct conflict with the MOI, and thus on an application of the principle laid down in *Gihwala*, clause 3(a) must be enforced.

29. Obviously, I am bound by the principles in *Gihwala*. However, the principles must be applied to the facts of each case. It does not follow, simply as a matter of course, that because the provisions at issue in *Gihawala* were found not to be in direct conflict with the MOI, the same conclusion will necessarily follow in this case. I must determine whether, on a proper interpretation, clause 3(a) merely qualifies, or whether, instead, it is in direct conflict with, the relevant provisions of the MOI. Indeed, in *Gihwala*, the Court noted, in paragraph 53 that:

> "I see no conflict between the suggested tacit terms and the memorandum and articles of association of SMI. They do not alter those provisions in any way."

30. The question, then, is whether the terms in the SHA in this case alter or amend the MOI. Mr van der Merwe and Nkwe SA contend that Nightingale is wrong in its submissions. They submit that the SHA does amend the terms of the MOI and that, unlike in *Gihwala*, a direct conflict is established between clause 3(a) and article 75, and/or article 77, and/or the Act. I deal with their particular submissions during the course of my discussion below.

31. The principles applicable to the interpretation of documents is well established. The provisions in question must be read in light of the document as a whole, and of the circumstances attendant on its creation. Consideration must be given to the language used in light of the ordinary rules of grammar and syntax. The context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production must also be considered. If more than one meaning is possible, each meaning should be weighed in light of all of these factors. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The interpretive process is an objective, and not a subjective one. Judges should be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.[3]

32. Commencing with the language used, as I noted earlier, there is an obvious inconsistency between the minimum quorum of two in the MOI and the SHA which requires that the minimum quorum of two must be comprised of one each nominated by the respective shareholders. Reading further, this inconsistency becomes more pronounced. Under article 75, the minimum quorum of two only applies in circumstances where the number of directors is three or less. When the number of directors is more than three, the quorum required under this article is three. The SHA pegs the maximum number of directors at six, and the MOI does not restrict the maximum number of directors. Article 54 only says that the number of directors "*shall be not less than one*".

33. What this means is that it is envisaged and perfectly possible, that under both the SHA and the MOI the number of directors will be more than three. Once this is

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18

understood, it is plain that clause 3(a) of the SHA alters the MOI and is in direct conflict with it. This is because under clause 3(a), regardless of how many directors are appointed, the quorum will be two, comprised of one each nominated by the respective shareholders. Under the MOI on the other hand, if there are more than three, the quorum is three: the effect of clause 3(a) of the SHA is to alter this provision. Contrary to the submissions made by Nightingale, the two provisions are irreconcilable in this regard. Applying s 15(7), and in line with the principles espoused in *Gihwala*, the SHA must yield to the MOI on the quorum issue.

34. There are further indications that this must be so. As the BRP and Nkwe SA pointed out in their submissions, there are further conflicts between the SHA and the MOI insofar as each document deals with the question of the quorum issue. Under clause 3(a) of the SHA, the number and composition of the quorum is fixed. The company, through its directors cannot alter this quorum. However, under article 75 of the MOI, it is the directors who are given the primary power to fix the quorum. It says that "*(t)he quorum necessary for a transaction of the business of directors … may be fixed by the directors, and unless so fixed …*" and then it prescribes a quorum of two if there are three or less directors and three if there are more than three. The phrase I have underlined expressly gives the directors the power to set the number required for quorum.

35. While it is common cause that the directors in this case had not fixed a different quorum, this does not detract from the fact that at the level of interpretation, there is a manifest direct conflict in this respect between the SHA and the MOI. The SHA alters the MOI by removing the power of the directors to fix the number required to establish a quorum for the transaction of company business.

36. A further conflict arises between the two provisions in that under the SHA the shareholders are restricted in terms of how many directors may be appointed. Nightingale may appoint a maximum of two and Nkwe Ltd a maximum of four, establishing an upper limit of six directors in total. As I noted earlier, the MOI does not make any provision for such limitations. Again, a direct conflict is apparent. While this is not an aspect of the dispute before me, it illustrates, for interpretive purposes, and taking into account the full context of each of the relevant provisions, that in more ways than one the SHA alters the MOI.

37. This is apparent, too, if one considers the quorum requirement in article 75 of the MOI together with article 75. The latter article expressly gives the continuing directors the power to act "*notwithstanding any vacancy on their body*". The only limitation to this is if "*their number is reduced below the number fixed by or pursuant to (the MOI)*".

38. It is not disputed that both Mr Fan and Mr Zheng were the two registered directors at the time the business rescue resolution was adopted. Under article 77, then, they had the power to act, despite Mr Pandor's resignation. This is because the "*number fixed by … the (MOI)*" was two. Clause 3(a) of the SHA alters these powers of the directors. It removes the power of the two directors to continue the business of the company by prescribing that one of them must be nominated by Nightingale. It further alters the MOI by rendering it subsidiary to the SHA. This is in direct conflict with the MOI, which determines that it is the MOI, and nothing else, which must be considered for purposes of determining whether the number of directors is below that required to establish a quorum.

39. Consequently, if one looks at article 75, together with article 77, as one must as part of the interpretive exercise, there is a manifest direct conflict between article 3(a) of

the SHA and these provisions. Under s 15(7), the MOI must prevail. This means that the quorum under article 75 was met when two continuing directors resolved to place Nkwe SA into business rescue, and accordingly they were empowered under article 77 to adopt that resolution.

40. The BRP and Nkwe SA made further submissions regarding the conflict between the SHA and the Act. Under s 73(5)(b) of the Act:

> "(5) Except to extent that the company's Memorandum of Incorporation provides otherwise-
> …
> (b) a majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors;"

41. This is an alterable provision, within the meaning of the meaning of s 1 of the Act. An alterable provision is a provision of the Act:

> "in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's Memorandum of Incorporation."

The point here is that under the Act, it is only the MOI, and not the SHA that may alter or amend the default provisions regarding the quorum necessary before a vote may be called. If the shareholders wanted lawfully to amend the MOI to alter the quorum requirement, they would have had to follow the process outlined in s 16 of the Act.[4] It is common cause that this was not done. Accordingly, clause 3(a) is in conflict with the Act insofar as its effect is to amend the quorum requirements.

[4] Section 16 provides is follows:

> "A company's Memorandum of Incorporation may be amended-
> (c) at any other time if a special resolution to amend it-
> …
> (i) is proposed by-
> (aa) the board of the company; or
> (bb) shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution; and
> (ii) is adopted at a shareholders meeting, or in accordance with section 60, subject to subsection (3)."

42. In summary, if one considers the language of the respective provisions, read in context, and together with other relevant provisions, one cannot escape the conclusion that there is a direct conflict between the SHA and the MOI on the issue of quorum.

43. Considering the purpose of the respective provisions, one can accept that the purpose of clause 3(a) was to ensure that both shareholders were represented for purposes of establishing a quorum. The MOI reflects no similar purpose. The purpose of article 75 read with article 77 is to facilitate keeping the business of the company going where there is a vacancy, even where that vacancy may mean that one of the shareholders is not represented in the quorum.

44. The MOI clearly places its terms above those of the SHA in these key respects. This is in accordance, too, with the broad statutory scheme of the Act. In its transitional provisions set out in s 3A of Item 4 of Schedule 5 of the Act, a SHA in respect of a pre-existing company would be effective regardless of s 15(7) of the Act for a period of two years after the effective date. However, after this two-year period, the SHA would be effective "*to the extent that the agreement is consistent with this Act and the company's Memorandum*".[5] It is common cause in this case that the two-year period referred to in s 3A has lapsed, and that the shareholders did not seek to amend the MOI to align it with the terms of the SHA. Had the shareholders wanted to ensure that the purpose of clause 3(a) would be served under the MOI, which took precedence after the lapse of the two-year period, then

[5] Section 3A provides:

"(3A) If, before the general effective date, the shareholders of a pre-existing company had adopted any agreement between or among themselves, under whatever style or title, comparable in purpose and effect to an agreement contemplated in section I5(7), any such agreement continues to have the same force and effect-

(a) as of the general effective date, for a period of two years, despite section I5(7), or until changed by the shareholders who are parties to the agreement; and

(b) after the two-year period contemplated in paragraph (a), to the extent that the agreement is consistent with this Act and the company's Memorandum of Incorporation."

they had to take steps to amend the latter. Their failure to do so means that, under the broader statutory scheme, the intended purpose of clause 3(a) can no longer be met.

45. I conclude, then, that there is a clear conflict between clause 3(a) of the SHA, which requires a quorum comprising of two directors, with one each nominated by the respective shareholders, and article 75, which includes no such qualification. There is a related conflict between clause 3(a) and article 77 of the MOI, and between that clause and the Act. These are direct conflicts, involving alterations to the MOI. As such, under s 15(7), and applying the dicta of the SCA in *Gihwala*, the provisions of the MOI prevail. The effect of this is that article 3(a) is not enforceable. As the board was quorate at the time that it resolved to place Nkwe SA into business rescue, that resolution was valid. It follows that there is no merit in Nightingale's contentions regarding the quorum issue, and it is not entitled to the relief it seeks under the first prayer of the notice of motion.

THE ORAL EVIDENCE AND THE BAD FAITH ISSUES

46. In order to understand these issues properly, we need to start with Nightingale's founding affidavit. There, Nightingale contended that even if the business rescue resolution was not susceptible to being set aside on the basis of the quorum issue, it should be set aside under s 130(1) of the Act. This was for the following reasons:

46.1. Nkwe SA was not actually financially distressed because Nkwe Ltd was not entitled to call up its loans. It was still bound by the guarantee, and the directors of Nkwe SA ought to have insisted that Nkwe Ltd comply with its obligations under it.

46.2. The directors were conflicted in that they were also directors of Nkwe Ltd. In fact, the notice from Nkwe Ltd to the effect that it would cease funding Nkwe SA was not *bona fide* but was "*part of a scheme concocted to place Nkwe SA into business rescue so that its business could be transferred to another entity to the detriment of Nightingale.*" It was a "*strategy to get rid of the minority shareholder*".

46.3. Even if the demand for repayment of loans by Nkwe Ltd could not be legally challenged, Nkwe was not just financially distressed, but was hopelessly insolvent.

46.4. Accordingly, the resolution to place Nkwe SA into business rescue was not taken in good faith.

47. The relevant parts of s 130(1) of the Act provide as follows:

> "130(1) Subject 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 … ."

48. Section 130(5) is also relevant. It states, in relevant part:

> "(5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may-
> (a) set aside the resolution-
> (i) on any grounds set out in subsection (1); or
> (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so; …"

49. Nightingale says that on the basis of its submissions referred to earlier, it has established a case for the business rescue resolution to be set aside on all of the grounds under s 130(1)(a), alternatively, on s 130(5)(ii). Of course, this latter submission has no merit, as the Supreme Court of Appeal in *Panamo Properties*

has authoritatively determined that the "*or*" used to separate ss 130(5)(a)(I) from ss 130(1)(ii) is to be read conjunctively as "*and*". Thus, ss 130(5)(a)(ii) is not a separate substantive ground for setting aside a resolution under s 129. In addition to establishing one of the grounds under ss 130(1)(a), an applicant must also satisfy the court that it would be just and equitable to set aside the resolution and termination of the business rescue proceedings.[6]

50. In the founding affidavit Nightingale makes a number of assertions aimed at establishing that Nkwe SA was not in financial distress and that the cessation of funding by Nkwe Ltd in April 2021 in reality was simply a scheme to rid Nkwe SA or Nkwe Ltd of the minority shareholder. It has to be said that there is very little evidence in the founding affidavit, if any, to back up the assertions. In the main, Mr Pandor's statements are broadly stated conclusions that he draws from various events that occurred. So, for example, he refers to the refusal by the board to recognise Nightingale's appointment of two substitute directors as evidencing "*a scheme to bypass*" Nightingale so that Nkwe Ltd "*could simply reap the benefits from the operations of the mine without our participation*". It is highly doubtful whether Nightingale could simply appoint new directors to the board with immediate effect, as it attempted to do. The board's rejection of the attempt to do so is hardly evidence of the scheme asserted to exist by Nightingale.

51. Another event identified in the founding affidavit as evidencing this scheme is the decision by Nkwe Ltd to cease funding and to call up part of the funding loans. As I have already explained, part of Nightingale's case in this regard is that the guarantee remained binding on Nkwe Ltd, and it was not legally entitled to cease funding. Linked to this, Mr Pandor referred in the founding affidavit to the 2019

[6] *Panamo Properties (Pty) Ltd & Another v New & Others NNO* 2015 (5) SA 63 (SCA) at paras 31 and 32

annual financial statements, and the reclassification of the equity loan as an asset. Mr Pandor referred to the auditors' note, relating to the reclassification, and said that it appeared to suggest that the equity funding was not a loan, even though it was still recorded as a loan. He said that:

> "IAS 32 (International Accounting Standards 32) establishes the principles for presenting financial instruments as liabilities or equity and for offsetting financial assets and liabilities. A copy of IAS 32 is annexed hereto marked 'SJP6". This debt cannot be classified as equity because it was initially recognised as a loan. A financial instrument is an equity instrument only if, inter alia, the instrument includes no contractual obligation to deliver cash or another financial asset to another entity. This is not true in respect of this shareholder loan."

52. On this basis, Mr Pandor stated that the 2019 annual financial statements were misleading when they recorded that Nkwe SA's assets exceeded its liabilities. This was because the equity loan had been incorrectly reclassified, thus misleadingly increasing the assets of the company so that they exceeded the liabilities. This averment was important for Nightingale's case that Nkwe Ltd remained obliged to continue to fund Nkwe SA's operations under the guarantee. This is because of what is stated in paragraph 5 of the guarantee:

> "5. These undertakings will remain of full force and effect as long as the liabilities (including contingent liabilities of (Nkwe SA) exceed its assets, fairly valued, and will lapse forthwith upon the date that the assets of (Nkwe SA), so valued, exceed its liabilities… and will not be reinstated if, at any time thereafter, the liabilities of (Nkwe SA) again exceed its assets unless there is a further undertaking in writing by us."

53. Nightingale's case in the founding affidavit was that because the reclassification was, in Mr Pandor's opinion, incorrect, Nkwe SA's assets did not really exceed its liabilities and therefore Nkwe Ltd retained its obligation to continue to fund the company's operations. This fed into Nightingale's broader case that Nkwe SA was not in financial distress, that the purported financial distress was a sham, and that the board had not acted in good faith, and had breached their fiduciary duties to Nkwe SA, by placing the company into business rescue.

54. Mr Pandor did not claim to have any expertise as a chartered accountant, or to have any expert knowledge of the workings of IAS. Nor did he attempt to refer to particular provisions in the copy of the IAS attached to the founding affidavit in support of his assertion that the reclassification was incorrect. His conclusion that the reclassification of the equity funding as an asset was incorrect lacked evidentiary substance.

55. Not surprisingly, the respondents denied Mr Pandor's assertion forcefully. They pointed out that the reclassification had already been effected in the 2018 annual financial statements, which Mr Pandor had himself signed, and which had been adopted by resolution of the board with his concurrence. This revelation produced a difficulty for Nightingale's timeline of events. It took the reclassification a year back, before the events of 2020 which, according to Nightingale ultimately culminated in Nkwe Ltd achieving its goal of excluding it as a minority shareholder through the business rescue resolution

56. But this was not the only problem that the answering affidavits caused for Nightingale. How did Mr Pandor explain how he had signed off on the reclassification not only once, in the 2018 annual financial statements, but again in the 2019 statements, where the reclassification was retained? A further problem is that the respondents annexed to their answering affidavits two documents, from experts, which explained the reclassification, and verified its correctness.

57. The first was a letter from Nkwe SA's auditors, EY, which was attached to Nkwe Ltd's answering affidavit. It explained in detail the basis on which it had evaluated, and confirmed the reclassification of the equity loan, and its audit opinion that in all respects the annual financial statements were free from any material misstatement.

It is not necessary to go into the details of the letter, for reasons that will appear shortly.

58. The second document was attached to the BRP's answering affidavit. It was an affidavit from a registered chartered accountant, Mr Izak van der Merwe. He had regard to the founding affidavit, EY's letter and the annual financial statements. Without going into the detailed reasons given in the affidavit, Mr Izak van der Merwe concluded that: "*… the reclassification was not only appropriate but, from a financial accounting and reporting perspective, a requirement*."

59. In the face of these explanations in the answering affidavits, Nightingale upped the ante in its reply. For the first time, Nightingale formally sought to have the issue of the reclassification referred to oral evidence on the basis that there were material disputes of fact on the issue. To support its case in this regard, it relied on a memorandum, confirmed on affidavit by a chartered accountant, Mr Mazhindu, to counter the evidence contained in the answering affidavits. Mr Mazhindu concluded that "*the loan agreements*" are written contracts and thus fall within the scope of IAS 32. The critical consideration, according to him, of determining whether the loan should be correctly classified as a liability or whether it could be classified as equity, is whether the terms of the loan permit Nkwe SA an unconditional right to avoid delivering cash to settle its contractual obligations. Mr Mazhindu concluded that the terms indicate that "*the loan amount is payable on demand*". He concluded, on this basis that it could not be classified on the basis of IAS 32 as equity.

60. Nightingale's request for the reclassification issue to be referred to oral evidence came late in the day, and it was largely based on evidence contained in the replying affidavit, rather than in the founding affidavit. The respondents are correct in saying

that these two features of Nightingale's case on their own present serious difficulties for Nightingale's request for a referral to be granted.

61. However, even apart from these difficulties, there is an additional insurmountable obstacle for Nightingale. As Nkwe Ltd pointed out in argument at the hearing of the matter, Mr Mazhindu's opinion was based on the wrong loan agreement. He did not consider the terms of the equity loan agreement between Nkwe SA and Nkwe Ltd. Instead, he looked only at, and based his opinion on, the funding loans agreement, which dealt with the ongoing operational loans made by Nkwe Ltd to Nkwe SA over the years. It was the funding loans, not the equity loan, that were repayable on demand. The entire substantive basis for Mr Mazindu's opinion falls away because of this fundamental error.

62. In addition, the BRP submitted that Mr Mazindu's opinion was based on a further, related factual error. Mr Mazhindu accepted that Nkwe Ltd had obtained South African Reserve Bank (SARB) approval to lend capital to Nkwe SA to fund the exploration operations. The BRP correctly pointed out that this was not correct: there was no SARB approval for the R1.2 billion equity loan, and hence Mr Mazingu's conclusion that the loan was repayable was not repayable. In other words, it was not a financial liability.

63. These material misdirections by Mr Mazingu were not disputed by Nightingale at the hearing. It conceded that there were problems with its expert opinion, and it conceded further that it could not establish its case on the affidavits without a referral to oral evidence.

64. In these circumstances, is a referral to oral evidence justified?

65. It is trite that the first step in this inquiry is to determine whether there is a material dispute of fact. Unless this is done, a party may be able to raise fictitious disputes of fact and thus delay the hearing to the prejudice of the other party.[7] Vague and insubstantial allegations are insufficient to raise the kind of dispute that should be referred to oral evidence.[8] A real, genuine and *bona fide* dispute of fact exists only where the court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the fact said to be disputed.[9] Litigants are required to seriously engage with the factual allegations they seek to challenge and to furnish not only an answer but also countervailing evidence.[10] The test for referring a matter to oral evidence is a stringent one and is not easily satisfied.[11]

66. It is plain on the facts before me that Nightingale has failed to establish that there is a real, genuine and *bona fide* dispute of fact on the question of the reclassification of the equity funding. It has produced no evidence to support its contention that the reclassification was incorrect. For the reasons traversed above, it is clear that Mr Mazindu's opinion does not provide any evidence to this effect. Without it, Nightingale is left with the opinion of Mr Pandor, who is not an expert, and who actually signed off on the reclassification. It follows that the request for a referral to oral evidence must be refused.

67. This, then, leaves me to determine the bad faith on the affidavits before me. I must do so on the basis of the test laid down in *Plascon-Evans*.[12] In short, insofar as

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[7] *Peterson v Cuthbert & Co Ltd 1945* AD 420
[8] *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E) at 156I-J
[9] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13
[10] *Wright v Wright & Another* 2012 (4) SA 22 (SCA) para 17
[11] *National Scrap Metal (Cape Town) v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at 307F
[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635

there are any disputes of fact remaining, I can only grant a final order if the facts averred in Nightingale's affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify the order.[13]

68. Nightingale has conceded that, in the absence of a referral to oral evidence, it cannot establish that the reclassification of the equity funding was incorrect. Without this keystone aspect, the entire edifice of its case crumbles.

69. In any event, it is the respondents' averments that carry the day, unless these are palpably implausible, far-fetched or so clearly untenable as to warrant their rejection.[14] The respondents deny that the resolution to place Nkwe SA into business rescue was made in bad faith or was an abuse of the statutory scheme. They point out that as a matter of fact, Nkwe Ltd cannot meet its trading liabilities, which are extensive, in the next six months. This cannot be, and is not, denied. From the figures provided by the respondents, it is plain that Nkwe SA is in financial distress. What supports the respondents' denial that the resolution was part of an abusive scheme is that it is common cause that Nkwe SA has always been dependent on Nkwe Ltd to fund its operations. This is why in the 2018 and 2019 annual financial statements the auditors expressed caution about the company's ability to continue to function as a going concern. It is unsurprising that this risk came to pass. On the respondents' version, which I must accept, as must Nightingale in light of its concession, the decision to cease funding was not contrary to the guarantee. Whatever Nkwe Ltd's motive was for ceasing to fund Nkwe SA, it was well within its rights to do so. This is not demonstrative of a scheme to oust the

[13] *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290F
[14] *Plascon-Evans*; *DPP v Zuma*, above

minority shareholder. It is simply a question of commercial reality, which Nightingale may see as harsh, but which is not uncommon.

70. The alleged conflict of the board members of Nkwe is also without any substance. It is not uncommon for directors to hold that position in different companies within a broader group, as in the present case. The mere fact that Mr Fan and Mr Zheng were directors of Nkwe SA and Nkwe Ltd does not in itself constitute a conflict. Nor does their adoption of the business rescue resolution signify a want of respect for their fiduciary duties to Nkwe SA. They were faced with a situation in which funding had been stopped, and yet the company had ongoing operational financial obligations. Mr Fan correctly points out that had they not taken steps to place the company in business rescue they would have been in breach of their fiduciary and statutory obligations.

71. The averment that Nkwe SA is hopelessly insolvent and thus that there exists a ground to terminate the business rescue process under ss 130(1)(a)(ii) is without merit. As the BRP attests, the averment ignores the purpose of business rescue, which is to allow for a restructuring of the company's affairs to that it can recommence trading was a solvent company, or to deal with the assets in order to achieve a better return than in a liquidation. The BRP has published a plan which, he says, is designed to achieve these ends. He says that under either scenario presented in the plan, all creditors, or at the very least all pre-business rescue creditors, would be paid in full. The alternative of liquidation would yield only 4.46 cents in the rand for creditors and would leave employees without employment. There is no basis on which to reject these factual averments as palpably implausible, far-fetched or untenable. On the contrary, they appear to me to be sound and reasonable.

72. It follows that the applicant has failed to establish that there was no genuine case for the company to be put into business rescue. Nightingale's assertions that the resolution was adopted as part of a bad faith, abusive scheme to oust it as a minority are without any substantive merit. It has not established a basis for an order under s 130 to set aside the resolution and to terminate the business rescue proceedings. Its application for that relief must fail.

THE EXTENSION ISSUE

73. Under s 150(5) of the Act, a business rescue plan must be published within 25 business days on which the BRP is appointed. It is common cause that in this case the date for publication was 2 June 2021. On the 1 June 2021, the BRP addressed a notice to all creditors seeking an extension of the publication date. It stated that: "*failure to provide us with a signed copy of this letter will be deemed to be consent to this extension*". Nightingale says that s 150(5)(b)[15] requires express consent from creditors for an extension, and that the BRP was not entitled to assume that silence meant consent.

74. The BRP in his affidavit attaches letters confirming the express consent of four creditors, representing 96.31% of the voting interests in the business rescue, in favour of the extension. An express approval by Nkwe Ltd for a further extension was given on 25 June 2021. Nkwe Ltd represents 95.93% of the voting interests. Clearly, the requirements of s 150(5)(b) were satisfied in that in each instance, the extension was approved by the holders of a majority of creditors' voting interests.

[15] Section 150(5) states:
"The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by-
(a) the court, on application by the company; or
(b) the holders of a majority of the creditors' voting interests."

There is no merit in Nightingale's case in this regard, and counsel was well advised to refrain from addressing it in his oral submissions.

75. This was the final attack on the validity of the business rescue process. Its failure means that that process must continue. This being the case, for reasons I stated earlier, it is not necessary to consider the final prayer for relief.

CONCLUSION AND ORDER

76. It follows that there is no merit in any of the bases relied upon by Nightingale to assail the business rescue process.

77. I make the following order:

"The application is dismissed with costs, such costs to include those of two counsel, one being senior counsel."

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 09 November 2021.

KEIGHTLEY J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date Heard (Microsoft Teams):	20 August 2021
Further written submissions received:	30 September 2021 and 1 October 2021
Date of Judgment:	09 November 2021
On behalf of the Applicant:	Adv. Stephen Vivian SC

	Adv. L Hlalethoa
Instructed by:	MNCEDISI NDLOVU & SEDUMEDI INC
On behalf of the First & Third Respondent:	Adv. MM Antonie SC Adv. MJ Cooke
Instructed by:	WERKSMANS ATTORNEYS
On behalf of the Second Respondent:	Adv. D Fine Adv. CAA Louw
Instructed by:	ENS Africa