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

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

SIGNATURE DATE: 13 January 2023

In the matter between:

ENGEN PETROLEUM LIMITED	Applicant
and	
JAI HIND EMCC CC t/a EMMARENTIA CONVENIENCE CENTRE	First Respondent
IGOLKISSHORE RAGUNANDAN NO	Second Respondent
AFFECTED PERSONS IN THE FIRST RESPONDENT'S BUSINESS	Third Respondent

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JUDGMENT

WILSON J:

1 The applicant, Engen, approaches the court on an urgent basis seeking the postponement of a meeting of the first respondent's creditors. The first respondent is Jai Hind CC. The meeting was convened by the second

respondent, Mr. Ragunandan, to discuss, amongst other things, the adoption of a business rescue plan. The meeting was scheduled to proceed at 10am today. At 09h53 today, I dismissed Engen's application with costs, including the costs of two counsel, and indicated that my reasons for making that order would follow as soon as possible. These, briefly, are my reasons.

2 Engen is by far the biggest creditor of Jai Hind CC. It takes the view that Jai Hind CC is incapable of business rescue. It opposes the adoption of a business rescue plan, and is seeking the conversion of the business rescue procedure into a forced liquidation. Its application for that relief is due to be heard before my brother Vally J in his opposed motion court during the week of 16 January 2023.

Engen's fears

3 Engen brings its urgent application before me on the basis that the adoption of a business rescue plan will render its application enrolled before Vally J moot, because section 133 (1) (a) of the Act states that no litigation against a company in business rescue "may be commenced or proceeded with in any forum". That is why it seeks the postponement of the meeting at which the plan is to be discussed, and possibly adopted.

4 Engen accepts that, as Jai Hind CC's biggest creditor, it could ordinarily outvote all of Jai Hind CC's other creditors at the meeting and prevent the adoption of the plan. It fears, however, that it will be prevented from doing this. One of Jai Hind CC's other creditors, a Mr. Dhuki, who Engen alleges is also the controlling mind behind Jai Hind CC, has made a "binding offer", in terms of section 153 (1) (b) (ii) of the Companies Act 71 of 2008, to purchase

Engen's voting interest for an amount equivalent to the value of the return Engen could expect if Jai Hind CC was finally liquidated. The effect of that offer, if accepted, would be to exclude Engen from any decision on whether to adopt the business rescue plan.

5 The meaning of "binding offer" in terms of section 153 is that the offer is binding on the offeror, not the offeree (see *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers* (Pty) Ltd 2015 (5) SA 192 (SCA), paragraphs 15 to 25). This means that Engen is free to reject Mr. Dhuki's offer and to continue to vote against the adoption of a business rescue plan. If its does so, no business rescue plan can lawfully be adopted.

6 That notwithstanding, Engen's case is that, knowing all of this, Mr. Ragunandan intends to proceed with the meeting, to take Engen as bound to accept Mr. Dhuki's offer, to divest Engen of its voting rights and to adopt a business rescue plan over Engen's objections. Once that is done, Engen says that the business rescue plan, though unlawfully adopted, would still have legal and factual consequences that could not be ignored unless the plan were reviewed and set aside.

7 One of those consequences is that Engen's litigation to convert the business rescue process into a forced liquidation will be automatically suspended, and Vally J will not be able to entertain that application next week.

No facts to support the relief sought

8 I have grave doubts about every step in Engen's argument, but Engen's failure to allege and prove that it reasonably apprehends that Mr. Ragunandan will

act in the manner Engen fears is dispositive of its case. If Mr. Ragunandan were to proceed in the manner that Engen fears, he would have to act unlawfully and intentionally. And he would have to have planned to do so as part of a bad faith strategy to improperly divest Engen of its voting rights. There is nothing on Engen's papers that comes close to demonstrating that there is such a stratagem, and that Mr. Rangunandan seriously intends to carry it out.

9 These being interim interdict proceedings, Engen does not have to establish on a balance of probabilities that Mr. Rangunandan will act as it fears. It must instead establish that it has, at least on the face of it, a reasonable apprehension that Mr. Rangunandan is about to act pursuant to the unlawful scheme that Engen alleges.

10 But even *prima facie* fears have to be grounded in some facts. All Engen is really able to demonstrate is that Mr. Rangunandan has called a meeting at which a business rescue plan might be adopted, knowing full well that Engen opposes the adoption of that plan. I accept Engen might view the "binding offer" on the table with some suspicion. But there is a great deal of ground to be covered between the existence of that offer – which Mr. Dhuki was legally entitled to make – and the existence of an unlawful scheme to enforce it. That ground is simply not traversed in Engen's papers.

11 That conclusion is sufficient for me to have dismissed Engen's application. However, I am not convinced that, even if Engen's fears are realised, the unlawfully adopted business rescue plan Engen seeks to nip in the bud would have any legal consequences injurious to Engen. It is well established that invalid administrative acts generally have factual and legal consequences until

they are reviewed and set aside. But there are exceptions to that rule. One exception applies where a person is sought to be compelled to do something, or to be restrained from doing something, on the basis of a substantively invalid act (see *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA), paragraph 32).

12 Even assuming (with some hesitation) that the adoption of a business rescue plan is administrative action, or has similar binding consequences despite its illegality, it is not clear to me, even *prima facie*, that Engen could not simply continue with its litigation before Vally J on the basis that the business rescue plan is invalid, and does not for that reason engage the general prohibition on litigation in section 133 (1) of the Act.

13 Finally, even if I am wrong about all of this, section 133 (1) (b) of the Act permits a court to grant leave to proceed against a company in business rescue on "any terms the court considers suitable". I find it hard to imagine the basis on which a court could refuse such leave in the face of the brazen illegality Engen fears might come to pass. That in itself saves Engen's pending application from mootness.

14 It follows from all of this that Engen established neither a *prima facie* right to the relief it sought, nor a reasonable apprehension of irreparable harm in the event that the relief is not granted. Its application had to fail.

Costs

15 In the event that I reached that conclusion, Mr. Solomon pressed for costs on the attorney and client scale. I am not persuaded, however, that Engen's fears

were so far-fetched as to warrant a punitive costs order. Costs on the ordinary scale sufficed.

S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or 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 13 January 2023.

HEARD ON:	13 January 2023
DECIDED ON:	13 January 2023
For the Applicant:	S Aucamp R Tshetlo Instructed by DM5 Inc
For the Respondents:	R Solomon SC A Raw Instructed by Des Naidoo and Assocaites