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

22/8/14

Case No: 50816/14

In the matter between:

NEWTON GLOBAL TRADING (PTY) LTD
(under business rescue) Applicant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
22/8/14
SIGNATURE

and

EDDIE DE CORTE First Respondent
LOUIS ADRIAAN STOLS Second Respondent

JUDGMENT

FOURIE, J:

[1] This is an urgent application in terms of which the applicant applies for an interim interdict prohibiting the first respondent from entering certain chrome processing premises and from removing mineral related material from the premises.

[2] The applicant is a company which appears to be under business rescue in terms of section 129 of the Companies Act, No 71 of 2008. The deponent to the founding affidavit is acting in his capacity "as the nominated and appointed business rescue practitioner" of the applicant. According to him the business rescue plan has already been adopted and

is in the process of being implemented. It must also be pointed out that, according to the deponent, the director of the applicant, a certain Soekoe, has no further interest in the matter. The legal practitioner further maintains that he is legally accountable for the affairs of the applicant and that he has the overall responsibility of safeguarding the interests of creditors.

[3] The application is opposed by the first respondent. In his answering affidavit he has raised two points *in limine*. During argument counsel for the first respondent has indicated that he will rely on the second point *in limine* only, i.e. lack of *locus standi*. As the proceedings before me were confined to this issue only (save for an interim application for a postponement of the main application to which I shall later refer again), it is not necessary to consider the merits at this stage.

[4] It is the first respondent's case that the applicant has failed to comply with the provisions of section 129(3) and (4) of the Act and therefore the applicant's resolution (to begin business rescue proceedings and place the company under supervision) is a nullity.

[5] Section 129(4)(a) and (b) provide that after appointing a practitioner, the company must file a notice of the appointment within two business days after making the appointment and publish a copy thereof to each affected person within five business days after the notice was filed. The verb "file" means to deliver a document to the Commission in the

prescribed manner and form (section 1). Subsection (5) provides that if a company fails to comply with any provision of subsection (4) "its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity".

[6] It is alleged in the founding affidavit that on 31 May 2013 the applicant has passed a resolution in this regard. According to a copy thereof, it was resolved that "with effect from 31 May 2013 the company voluntarily begins business rescue proceedings" and that the deponent "is appointed as the business rescue practitioner of the company". The date stamp indicates that this document was delivered to the Commission on 5 June 2013.

[7] A copy of the notice of the appointment of a business rescue practitioner has also been attached. According to this document the applicant commenced business rescue proceedings on 5 June 2013 (date when the resolution was filed) and the deponent has been appointed as the business rescue practitioner. This notice is dated 11 June 2013 and according to the date stamp, it was also delivered to the Commission on 11 June 2013. Save for a reference to the deponent's registration certificate dated 10 June 2013, no other allegations have been made in the founding affidavit with regard to the requirements set out in section 129(4) of the Act.

[8] The first respondent's answering affidavit was served and filed on 16 July 2014. In paragraph 5 thereof the issue in question has been raised as follows:

> *"I humbly content that the business rescue proceedings relevant to the applicant, is a nullity for want of compliance with inter alia the provisions of section 129 of the Companies Act. As such, the deponent lacks the necessary authority to represent the applicant in these proceedings."*

[9] In paragraphs 11 and 12 of the answering affidavit the issue has been dealt with in more detail. Compliance with the prescribed formalities has been denied and the applicant was challenged "to provide all relevant documents in order to establish such compliance". The first respondent also alerted the applicant by referring specifically to the provisions of section 129(4) and (5) of the Act. He then concluded by putting the applicant "to the proof that it is under business rescue and that Mr Hamel is its duly appointed business rescue practitioner" (par 14).

[10] The deponent on behalf of the applicant has in his replying affidavit referred to the provisions of section 130 of the Act, suggesting that the first respondent should have applied for an order setting aside the applicant's resolution and the appointment of the business rescue practitioner. It is also alleged that the first respondent has no *locus standi* to attack the business rescue that has already been approved by the creditors. Notwithstanding the

invitation to produce proof of proper compliance with the provisions of section 129(4), no further attempt was made to address the issue.

[11] Counsel for the first respondent has pointed out, with reference to the notice of appointment filed on 11 June 2013, that the applicant failed to comply with the provisions of subsection (4)(a), as the notice was not filed within two business days after 5 June 2013. Also, no explanation was given or any documents were attached with regard to the requirements of subsection (4)(b). Therefore, so it was argued, the resolution to begin business rescue proceedings has lapsed and is a nullity.

[12] Counsel for the applicant has argued that, although there was not strict compliance, there was nevertheless substantial compliance. In my view there is no merit in this submission. First, the provisions of section 129(4)(a) and (b), read with subsection (5)(a), appear to be peremptory. Second, the sanction for non-compliance is serious, i.e. a nullity which usually takes effect *ex tunc* (from the beginning). That is why subsection (5)(b) makes provision for the possibility to file a further resolution contemplated in subsection (1). Third, having regard to the period of only two business days as referred to in subsection (4)(a) and only five business days as referred to in subsection (4)(b), it seems to me that the Legislature intended that time should be of the essence. This is to prevent an abuse of this process and to protect the interests of affected persons. Therefore, in my view, substantial compliance is not compatible with the wording of these subsections or with the way in which section 129 has been formulated.

[13] Counsel for the applicant has also contended, with reference to section 130, that the first respondent should have applied for an order setting aside the applicant's resolution and the appointment of the business rescue practitioner. In my view, also this submission is without any merit. In terms of section 130(1) an affected person may apply for an order setting aside the resolution, whereas in terms of section 129(5) the mere failure to comply renders the resolution a nullity. Therefore, a company or business rescue practitioner who relies on the provisions of section 129, must make out a case in the founding papers that there was proper compliance with the provisions of that section. This is part of the cause of action. However, even if I have misdirected myself in this regard, I find no indication that a respondent may not raise this as a defence (which is not the same as applying for an order in terms of section 130 of the Act).

[14] It was also argued that the applicant has in any event *locus standi* to apply for the relief set out in the notice of motion. I do not agree with this submission. In this matter litigation was commenced by the applicant as a company which is under business rescue. Business rescue proceedings affect, at least to a certain extent, the status of a company. It is under temporary supervision, there is a temporary moratorium on the rights of claimants against the company and the business rescue practitioner has full management control of the company. If there was no compliance with the provisions of section 129(4), the status of the applicant would no longer be that of a company under business rescue and the authority of the business rescue practitioner to represent the company, would be without any legal

foundation. Once that authorization has been placed in dispute, the onus to establish that the business rescue practitioner was duly authorized to represent the company, rests upon the applicant. In my view the applicant has failed to discharge this onus.

[15] It should also be pointed out that during the proceedings before me counsel for the applicant, after having heard argument on behalf of the first respondent, applied for a postponement to enable the applicant to produce further evidence with regard to steps taken to comply with the requirements of section 129(4)(a) and (b). That application was refused, as the applicant did not disclose what the nature of the evidence would be, or, if allowed, that it would in all probability address the issue in question properly. The application was therefore ill-founded and could not be allowed.

[16] In the result I am of the view that the point *in limine* with regard to lack of *locus standi* should be upheld. It should be made clear that I only find the applicant has failed to make out a case in its founding affidavit that it is a company under business rescue and that the deponent is authorised to represent the applicant in his capacity as business rescue practitioner.

ORDER

[17] The application is dismissed with costs, which costs shall include the costs of two counsel as well as the costs pertaining to the interim application for a postponement.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 22 August 2014