HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 38308/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 6/5/2019
SIGNATURE

In the matter between:

ATLANTIS MINING (SA) (PTY) LTD	First Applicant
NUNGU LTD	Second Applicant
CENTAUR ASSET MANAGEMENT LTD	Third Applicant

and

IPC COAL (PTY) LTD	First Respondent
ETTIENE NAUDÉ N. O.	Second Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA	Third Respondent
LUKE SAFFY N.O.	Fourth Respondent
MADELEINE ABRAHAMS N.O.	Fifth Respondent

JONATHAN MONTAGU ERSKINE Sixth Respondent

JUDGMENT

DAVIS, J

[1] Introduction

This is an application by three Applicants who claim to be creditors of the First Respondent ("IPC Coal") for the setting aside of a resolution to voluntarily commence business rescue proceedings.

[2] The parties

2.1 The First Applicant ("Atlantis Mining") is a South African Company and the Second and Third Applicants are foreign Companies ("Nungu" and "Centaur") respectively.

2.2 The First Respondent is IPC Coal, a South African commodities and coal mining company and the Second Respondent is its Business Rescue Practitioner (the "BRP").

2.3 The Third Respondent is the Companies and Intellectual Property Commission of South Africa (the "CIPC") who, apart from having been cited as a party, played no role in these proceedings.

2.4 The Fourth and Fifth respondents had been appointed as IPC Coal's provisional liquidators.

2.5 The Sixth Respondent appears to be the sole director of IPC Coal (referred in hereafter as "Mr Erskine")

[3] The triable issues:

The issues to be decided are whether the Applicants have the necessary locus standi as creditors of IPC Coal to have launched the present application. Once this has been established the next question to be determined is whether the resolution to voluntarily place IPC Coal in business rescue has been validly taken. Lastly, if the resolution has validly been taken, is it, in the circumstances of this matter, just and equitable that the business rescue proceedings be set aside or not.

[4] The Applicants' status as creditors

In both these proceedings and in business rescue proceedings referred to more fully hereunder, as well as in response to the Applicants' counter-application for the winding-up of IPC Coal – yet another application to which I shall refer to more fully hereunder, Mr Erskine, with apparent authority of IPC Coal and its BRP, disputes the Applicants' status of creditors of IPC Coal. I shall now evaluate whether there are genuine factual disputes on this score or whether the Applicants' claims are disputed on bona fide and reasonable grounds.

4.1 Atlantis Mining

A summary of the position to be gleaned from the papers is the following: Atlantis Mining was the company which did the actual mining at the two coal mines in which IPC Coal was involved. In respect of first mine, the Elandspruit Mine, a company by name of Nungu Trading 341 (Pty) Ltd (not the "Nungu" who is the Second Applicant) held the mining rights. It contracted IPC Coal to "attend to the mining" (Mr Erskine's words). IPC Coal, in turn contracted Atlantis Mining to do the actual work. In respect of the

second mine, Kromdraai Mine, the mining rights were held by a party whom Mr Erskine declined to mention and a company Blue Nut Trading (Pty) Ltd ("Blue Nut") was supposed to do the mining. Again, IPC Coal was to "manage the mining" which was, again actually performed by Atlantis Mining. Mr Erskine alleges that Atlantis Mining was paid all that was due to it in respect of the Elandspruit mine. At some stage, Blue Nut came into financial difficulties and was eventually liquidated. Prior to its liquidation, IPC Coal reached "an agreement" with Atlantis Mining, that the latter would submit certificates of the work done at the Kromdraai Mine to IPC Coal (irrespective of how its initial invoices were made out), and IPC Coal would pay Atlantis Mining. When Blue Nut was liquidated, Atlantis Mining was of the view that both it and IPC Coal, jointly and severally were indebted to the tune of some R15 million to Atlantis Mining. Hence the pursuance of Atlantis Mining's claims in this amount in both the winding-up of Blue Nut and against IPC Coal. In view of this, Mr Erskine's denial of IPC Coal's indebtedness was not as unequivocal as counsel on his behalf argued. This much is apparent from his answers in an interrogation in an enquiry in terms of Section 417 of the "old" Companies Act in Blue Nut's winding-up as appears from the following portions of the record thereof (which were produced with the written consent of the Master):

"Mr Van Velden: Did I understand you correctly that you were not invoiced by Atlantis Mining?

Mr Erskine: At that time when all hell broke loose and all the contracts were cancelled, I do not know the exact time, but when it was we would have owed Atlantis Mining money because we would

pay them 30 days in arrears, so there should be a claim with Atlantis Mining...

Mr van Velden: Do you agree that IPC Coal was also indebted to Atlantis Mining?

Mr Erskine: Yes, they did the work

Mr van Velden: An it was stated in the founding affidavit that they ... issued statements, but not tax invoices because then they had to pay tax on money, VAT on money they did not receive.

Mr Erskine: Yes, I mean I think Atlantis Mining only invoiced us once we had funds to be able to pay because it was just messing up their books because we paid very irregularly.

Mr van Velden: But that does not detract from the fact that IPC Coal was indebted to Atlantis Mining?

Mr Erskine: That does not, Ja.

Hereafter Mr Erskine referred to a subsequent novation or settlement agreement, of which he had no particulars and neither a copy or knowledge of the details thereof. To date, no particulars of any settlement of Atlantis Mining's aforementioned admitted indebtedness have been produced. The allegations of a possible payment of this debt by way of profits from the Kromdraai "project" are so vague that they are rejected out of hand (see: Fakie NO v CCII System (Pty) Ltd 2006 (4) SA 326 (SCA) at [55]).

4.2 Nungu and Centaur

These two companies were funders of IPC Coal's mining operation. In his answering affidavit, Mr Erskine put it as follows:

"During the insolvency enquiry I simply admitted to the fact that in the past both the Second and Third Applicants had loaned sums to the First Respondent and a related company, IPC Mining (Pty) Ltd. I deny having admitted that any amounts were still owing by the First Respondent to either the Second or Third Applicants".

What Mr Erskine actually testified at the enquiry (the said "insolvency enquiry") in this regard is the following:

"*Mr van Velden: And does the name Centaur Asset Management Ltd ring a bell to you?*

Mr Erskine: yes, Centaur ...

Mr van Velden: And what was the nature of the business dealings?

Mr Erskine: Well, they loaned money to IPC, well it is actually to IPC Mining, was first to IPC and then it was changed to IPC Mining for profit share and they would get out of the mining business.

Mr van Velden: And is IPC Coal Indebted to this company?

Mr Erskine: Yes, because it is, it borrowed the money. Yes it is

Mr van Velden: And the amount of the indebtedness?

Mr Erskine: I think it is R25 million I believe that they sent. I need to be correct, but I think it was R25 million at the time

Mr van Velden: Add then – well at the time. So you know what it is currently?

Mr Erskine: I need to double check what it is at the time, but we made some payments back but the interest has accumulated as well

...

Mr van Velden: And then the name Nungu Ltd

Mr Erskine: Yes

Mr van Velden: When I speak of Nungu I speak of the company which is associated with Centaur.

Mr Erskine: Okay

Mr van Velden: Does IPC Coal also owe money to this Nungu?

Mr Erskine: I think the answer is yes because Centaur that lent the money to IPC Coal at the beginning and then when it lent the money to IPC Mining it Became Nungu out of Dubai. So I believe that it is owed that way, yes.

Mr van Velden: But do you believe that IPC Coal owes money to Nungu, which is the Dubai based company?

Mr Erskine: Ja, Nungu/centaur. It is the same people".

4.3 Mr Erskine's counsel conceded in Heads of Argument on his behalf that his answers were not a model of clarity but it goes further than that. In Wightman t/a Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) the Supreme Court of Appel has affirmed the principle that, if a person has specific knowledge of a fact and is confronted with a question or assertion in respect thereof and such person does not deal with the issue clearly and unambiguously, then his or her response does not create a real or bona fide dispute of fact. I find that that is the position in respect of the Applicant's assertions that they are creditors of IPC Coal. Mr Erskine, insofar as it is argued that his answers referred to in paragraph 4.2 above do not amount express admissions of those allegations, then he has not dealt with a denial thereof with

any degree of certainty. I therefore find that the Applicants have the necessary locus standi to act as such in this application. Their combined claims, converted to South African Rands, appear to be in the region of some R 130 million.

[5] Had the business rescue resolution of 28 March 2017 been validly adopted?

Section 129 (2)(C) of the Companies Act, 71 of 2008 (the "Act") expressly prohibits business rescue proceedings by way of a resolution in circumstances where winding-up proceedings have already been initiated by or against the company. As there was some debate as to whether this was the case, due to a plethora of litigation and, as with most things in life "timing is everything", it is necessary to give a brief chronological exposition of the facts as they enfolded:

6 September 2016 – Another of IPC Coal's Creditors, Aztec Energy, Coal & Chemicals CC ("Aztec") launched a winding-up application against IPC Coal out of the Kwa-Zulu Natal Local Division, Durban under case no 8823/2016 (the Aztec winding-up application").

4 November 2016 – Aztec obtained a provisional winding-up order of IPC Coal.

17 November 2016 – The Fourth and Fifth Respondents to this application were appointed as provisional liquidators

29 November 2016 – Mr Erskine launched an application in terms of section 131 of the Act in the Kwa-Zulu Natal local Division, Durban in case no 12334/2016 to place IPC Coal under business rescue ("the Business Rescue Application").

1 December 2016 – As a result of the Business Rescue Application, Aztec's liquidation proceedings were suspended by an order of court. Hereafter, the provisional liquidation order was extended from time to time.

15 February 2017 – Atlantis Mining, Nungu and Centaur launched an application to intervene in the Business Rescue Application together with a counter-application for the winding-up of IPC Coal ("the Atlantis Mining winding-up application").

16 February 2017 – Atlantis Mining, Nungu and Centaur were granted leave to intervene in the Business Rescue application, based on their application of 15 February 2017. This was by consent. Mr Erskine and IPC Coal were ordered to respond thereto by 6 March 2017.

6 March 2017 – Mr Erskine and IPC Coal delivered their replying/opposing affidavits.

13 March 2017 – Aztec issued a notice of withdrawal of its liquidation application. The practice in the

Kwa-Zulu Natal Divisions is that a provisional order remains in force in such circumstances until formally discharged by a court.

24 March 2017 – IPC Coal (and Mr Erskine) issued instructions to their attorneys to issue a notice of withdrawal of the Business Rescue Application (contrary of Rule 41 (1)(a)).

On the same day Mr Erskine took a resolution to launch voluntary Business Rescue proceedings of CIPC Coal. This is the resolution which forms the subject matter of the present application.

28 March 2017 – CIPC accepts the Business Rescue resolution.

What were left of the Business Rescue Application of 29 November 2016 and Atlantis Mining's counter-application for winding-up were postponed sine die.

30 March 2017 – The BRP accepted his appointment.

4 April 2017 – Mr Erskine's notice of withdrawal of his Business Rescue Application is issued and served.

15 May 2017 – The BRP rejected Atlantis Mining's claim.

21 June 2017 – Aztec's provisional winding-up order was extended to 11 August 2017 at the instance of Atlantis Mining, Nungu and Centaur for purposes of consolidation with their own counter-application for winding-up of 15 February 2017.

11 August 2017 – Aztec's provisional winding –up order was extended to 1 June 2018 whereafter it was extended to 4 December 2018 when it was apparently postponed sine die.

[6] In the meantime the BRP has not preceded with any business rescue plan or any further rescue proceedings. He initially indicated his intention to oppose the present application but, upon advice of senior counsel, withdrew his opposition. He then proceeded to file a substantive affidavit, wishing to bring "certain facts" to the Court's attention. One of these were his reasons for having rejected Atlantis Mining's claim. Others related to the abovementioned chronology, none of which bear any weight as a ground of opposition. Lastly, he referred to a proposal to sell a stockpile of overburden removed during the mining operations on the Elandspruit mine. I shall deal with this aspect more fully hereunder.

[7] It is clear that, at the time when Mr Erskine took the resolution on 24 March 2017 (as either the sole director of IPC Coal or the only director present at the meeting – he is coy about these particulars) to voluntarily place IPC Coal in Business Rescue –

1) Winding-up proceedings had not only already been "initiated" by Aztec, but a provisional winding-up order had been obtained which

had not yet been discharged. The consequence hereof was that the powers of the board of IPC Coal had been suspended until the order had been discharged and no valid resolutions could be taken by the board/ Mr Erskine. See inter alia Firstrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd 2012 (4) SA 266 (KZD) at para [17] and Standard Bank of South Africa Ltd v A-Team Trading CC 2016 (1) SA 503 (KZP) at [64].

2) Even if Aztec's notice of withdrawal of 13 March 2017 is taken as a termination of its winding-up proceedings (without a discharge of the provisional order or discharge of the provisional liquidators), then at the time of the purported resolution, to the knowledge of Mr Erskine, the counter-application for winding-up by Atlantis Mining, Nungu and Centaur had already been "initiated" and was pending.

The prohibition against such a resolution prescribed in section 129(2)(c) of the Act and as dealt with in the abovementioned judgments has clearly been breached and the resolution should be set aside on this ground alone.

[8] In order to escape the above consequences, Mr Erskine contended that the winding-up application of Atlantis Mining et al is not valid since at the time it was issued there was a general moratorium in terms of Section 133 of the Act which precluded the issuing of such an application. Section 133 of the Act provides that:

> "*133(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*". (my emphasis).

Mr Erskine's argument can be dispensed with as follows:

1) A general moratorium against legal proceedings is only applicable during business rescue proceedings.

2) Section 132 of the Act which deals with the duration of business rescue proceedings, sets out when business rescue commences and when it ends. According to Section 132(1)(c) of the Act business rescue proceedings commence when "a court makes an order placing a company under supervision during the course of liquidation proceedings ...".

3) Since a provisional liquidation order had already been issued against IPC Coal, Section 132(1)(c) was applicable. Therefore, business rescue proceedings, for purposes of the general moratorium to kick in, would, only have commenced once a court granted Mr Erskine's Business Rescue Application. This never happened. Consequently, there was no moratorium in place preventing the Applicants from issuing their winding-up application.

[9] In addition hereto, insofar as a moratorium may have operated, the proviso contained in Section 133(1) of the Act has also been met as the leave to intervene in the Business Rescue Application by way of a counter-application clearly constituted the necessary consent of the court as envisaged in the said section.

[10] There was accordingly no bar in place at the time when the Applicants' (counter) application for winding-up of IPC Coal had been initiated

which, once initiated, pre-dated and barred Mr Erskine from validly taking the impugned resolution.

[11] Should the resolution be set aside?

Even if I were to be wrong in the aforementioned conclusions, there are sufficient grounds to find that it is just and equitable that the resolution of Mr Erskine be set aside as contemplated in Section 130 (5)(a)(ii) of the Act. These are the following:

11.1 Our courts have previously expressed concerns that business rescue proceedings might be used by obstructive debtors to avoid inevitable liquidation of a corporate entity. See e.g Investec Bank Ltd v Bruyns 2012 (5) SA 430 (WCC) and Blue Star Holdings v West Coast Oyster Growers CC 2013 (6) SA 540 (WCC).

11.2 A resolution therefore not taken in good faith, will be at risk of being set aside. See: Griessel and Another v Lizemore and Others [2015] 4 All SA 433 (GJ)

11.3 In the present instance, the facts are that once Aztec had obtained a provisional winding-up order, within four weeks thereafter Mr Erskine launched the Business Rescue Application. In doing so, he purposely omitted to give notice thereof to Atlantis Mining, Nungu and Centaur. When they found out about his application and sought and obtained leave to intervene, he settled with one of IPC Coal's creditors, Aztec, resulting in it wishing to withdraw its application for winding-up against IPC Coal. Once this intention was expressed, Mr Erskine gave instruction to his own attorneys to in turn withdraw his Business Rescue Application. If Mr Erskine had bona fide believed that business rescue was what IPC Coal had

needed, no cogent reason had been furnished as to why he did not proceed with his application for it. Instead, and, before even waiting for the withdrawal of his application to be served he, took a (separate) resolution for voluntary business rescue and sent it off to the CIPC the same day. Accompanying the resolution, Mr Erskine deposed to an affidavit wherein he stated that he "believed the notice of withdrawal had been filed" (it was not, it was only signed and delivered on 4 April 2017) and further stated that there were no applications or actions against IPC Coal. This statement was, to his knowledge, false. His actions were clearly not bona fide and a blatant attempt at avoiding the consequences of the Applicants' counter-application.

11.4 The contents of Mr Erskine's affidavit supporting his resolution and the alleged basis of his contention that IPC Coal could be saved by way of business rescue is also without foundation: in IPC Coal's contract with the mining rights holder of the Elandspruit mine, IPC Coal agreed to carry out its functions in accordance with all applicable laws, environmental legislation and good industry practices. Various commitments were included in the environmental and mining works programmes regarding the "overburden" removed during the open cast mining. This included the use thereof for creating visual berms around the pits and backfilling: The duty to do so was described as follows:

> "*The open cast mining reserve will be mined by conventional truck and shovel mining methods using the latter roll-over technique. Soil, overburden and underlying coal will be removed in sequence, so that soils and overburden being*

removed from a section being excavated are used to backfill the previous section. A maximum of 3 strips will be open at any one time."

11.5 Contrary to the above and contrary to the obligations of rehabilitation, which required that overburden be used to reprofile the landform to its pre-mining form to achieve pre-mining land-capability, IPC Coal had dumped 400 000m³ of overburden on an adjacent landowner's property. Mr Erskine proposed that this be sold (the BRP subsequently also stated that in December 2018 he was made aware that this could be sold as part of an IDC upgrade of infrastructure in a project amounting to some R240 million). Mr Erskine estimated IPC Coal's gain from this to be R47 million. When IPC Coal's entitlement to the stockpile of overburden (extracted from a mine belonging to a third party, in terms of an agreement with the mining rights holder, subject to environmental prescripts and dumped on a neigbour's land) was questioned, Mr Erskine relied on a legal opinion obtained by him and IPC Coal as justification for this far-fetched proposal. He dealt with it as follows in his answering affidavit in the present application:

"*I omit annexing a copy of the opinion to this affidavit as it is inappropriate to do so. Furthermore, that a copy of the opinion has not been furnished to the Applicants is irrelevant. A substantial amount of money was paid for this opinion and there is no duty on the First Respondent (IPC Coal), Second Respondent (the BRP) or I to furnish a copy of the opinion to the Applicants. They can pay for their own opinion if they want it.*"

> This answer and Mr Erskine's attitude lack bona fides. A bona fide director of companies, if he believed that a legal opinion justified the company of which he is at the helm to sell overburden obtained from an open cast mine in order to save itself, would flaunt, rather than hide such an opinion and would definitely not refuse to play open cards with a court, particularly when challenged on this aspect. The consequence of this is, if IPC Coal has no overburden it can legally sell, the whole proposed business rescue plan is totally flawed. There will then also be no reasonable prospect of rescuing the company on this basis as contemplated in section 130(1)(a)(ii) of the Act.

[12] I find that the resolution in question was, both in the manner in which it was taken (including the timing thereof) and having regard to its content, not taken with the requisite bona fides. In the context of the facts of this case, I find it just and equitable that the resolution be set aside on this ground as well.

[13] The BRP initially opposed the application but thereafter withdrew his opposition and authorized Mr Erskine to depose to an affidavit on behalf of IPC Coal. Mr Erskine not only proceeded to do so, but opposed the present application by all possible means. The Applicants argued that costs be awarded against Mr Erskine on a punitive basis. Based on Mr Erskine's lack of bona fides, both in the taking of the resolution in question and in the manner of his opposition to this application, I find, in the exercise of the court's general discretion, that he should be liable for the Applicants' costs on the scale as between attorney and client.

[14] Order:

1. The resolution taken on 24 March 2017 to voluntarily commence with business rescue proceedings of IPC Coal (Pty) Ltd and any proceedings taken in consequence of the said resolution, are set aside.

2. The Sixth Respondent is ordered to pay the Applicants' costs of the application on an attorney and client scale.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 20 March 2019

Judgment delivered: 10 May 2019

APPEARANCES:

For the Applicants:	Adv. M. P van der Merwe SC together with Adv A. P. J Els
Attorney for Applicants:	VZLR Inc., Pretoria
For the Sixth Respondent:	Adv. S Hoar
Attorney for Sixth Respondent:	Etienne Naude Attorneys, Pretoria