IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 56620/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: YES

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SIGNATURE **DATE**

In the matter between:

LSO CONSULTING ENGINEERS (PTY) LTD FIRST APPLICANT

PHATWE CONSULTING ENGINEERS CC SECOND APPLICANT

and

AVIWE NTANDAZO NDYAMARA FIRST RESPONDENT

UMSO CONSTRUCTION (PTY) LTD SECOND RESPONDENT

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSIONER THIRD RESPONDENT

ALL OTHER CREDITORS OF THE BUSINESS RESCUE
AS REFLECTED IN ANNEXURE "B1" 4TH TO 154TH RESPONDENT

FULL REASONS FOR THE ORDER GRANTED ON 8 DECEMBER 2021

BASSON J

NATURE OF THE PROCEEDINGS

[1] This was an urgent application for an order declaring the purported amendments to a business rescue plan published and dated 25 October 2021 to be unlawful and invalid and for an order setting the plan aside.

THE PARTIES

[2] The two applicants (LSO Consulting Engineers (Pty) Ltd and Phatwe Consulting Engineers CC) were appointed by the second respondent (UMSO Construction (Pty) Ltd) to render consulting engineering services in respect of the design and construction of the Rustenburg Rapid Transport System.

SEQUENCE OF EVENTS

[3] Following a dispute between the parties and an arbitration that was decided in favour of the applicants, the second respondent was placed in business rescue on 22 June 2020. In terms of the arbitration award, the second respondent was ordered to make payment to the applicants of an amount in excess of R10,5 million, with interest and costs. The first respondent (Mr. Aviwe Ndyamara) was appointed as Business Rescue Practitioner (the BRP).

[4] On 21 September 2020 the BRP circulated a proposed business rescue plan to be voted on at a meeting scheduled for 2 October 2020.

[5] The scheduled meeting was held on 2 October 2020. The plan was introduced for consideration by the creditors as contemplated by section 152(1) of

the Companies Act[1] (the Act). 75% of the creditor's voting interest voted to approve the *final adoption* of the plan. One of the issues relevant to these proceedings is that the adopted plan allowed "*for settlement of pre-commencement, unsecured creditors 100c in the rand, a better dividend than in the liquidation.*"

[6] On 26 April 2021 the BRP issued a further circular to creditors. Attached hereto was a proposed amendment to the business rescue plan. The meeting did not take place on the scheduled date (3 May 2021) and was postponed and later cancelled.

[7] On 11 October 2021 the BRP circulated yet a further notice of a proposed amendment to the business rescue plan. This further proposed amendment proposed a payment of 15c in the rand to concurrent creditors.

[8] This proposed amendment would therefore amend what was decided at the initial creditors' meeting and the initial business rescue plan in terms of which the BRP proposed that all creditors would be paid 100c in the Rand.

[9] On 18 October 2021 the creditors' meeting took place. 62,4% of the creditors that held voting interest at the meeting resolved to adopt the amendments. When the minutes were published it now appeared that concurrent creditors' claims would therefore comprise to *"0.15 cents to the Rand"* instead of 15 cents in the Rand as indicated in the written proposal. Clarification was sought from the BRP but no reply was received.

[10] The minutes further reflected that the amendments were adopted with the *"prerequisite of majority of percentage voting interest of all creditors required for approval of the Plan in terms of Section 152(2) of the Companies Act 2008."*

[11] The amendments to the business rescue plan was therefore approved by the creditors who held a majority voting interest – in other words more than 50% – but not 75% of the voting interest. This is, at first glance, at odds with the provisions of

[1] 71 of 2008.

section 152(2)(a) of the Act which requires 75% (in other words a 2/3 majority vote) for approval of a plan on a preliminary and/or final basis.

SUBMISSIONS

[12] The BRP essentially relied on two arguments: Firstly, he relied on clause 28.1 of the business rescue plan which provides that the BRP shall have the ability, in his sole and absolute discretion, to amend, modify or vary any provisions of this plan. Secondly, despite the fact that the Act does not provide for a procedure to amend the business rescue plan, the respondents submitted that the BRP may do so taking into account the scheme of the Act. The respondents contend that the plan can provide for an amendment of the plan as such provision would also serve the purpose of business rescue as provided for in section 7(k)[2] of the Act which is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all stakeholders. The respondents further submitted that such an amendment should be effected in terms of the procedure provided for in section 145, 146 and 152 of the Act.

[13] The applicants contended that this provision is legally invalid and contrary to the scheme of the Act including section 145 and 152 of the Act. The applicants also submitted that, despite the fact that provision is made for the unfettered discretion of the BRP, the Act does not allow for such an amendment once the plan had been approved which approval constitutions "*the final adoption of that plan*" as provided for in section 152 (3)(b) of the Act. And, as will be pointed out, the parties were *ad idem* that the Act does not provide for a procedure to effect an amendment to the final business rescue plan.

[14] The primary submission on behalf of the applicants was that the scheme of the Act does not provide that a proposed plan, that had been adopted at a meeting of the creditors and which constitutes the "*final*" plan, can be subsequently amended. Once a company goes into business rescue, the BRP is required to investigate its financial circumstances and, within 10 days from the date of his appointment, must convene and preside over a first meeting of creditors. At this meeting the BRP will

[2] Section 7(k): "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders;"

usually receive proof of claims by creditors (section 147(1) of the Act). Thereafter the BRP is required to prepare a rescue plan "*for consideration and possible adoption*" at a meeting of creditors and affected parties held in terms of section 151(1) of the Act.

[15] In the alternative, the applicants submitted that a mere majority vote – in excess of 50% but less than 75% – casted at the meeting of creditors held on 18 October 2021 in favour of the proposed amendment to the plan was, in any event, not valid.

SECTION 133 OF THE COMPANIES ACT

[16] Before turning to the merits, a preliminary issue first had to be decided namely whether leave should be granted in terms of section 133 of the Act to the applicants to proceed with legal proceedings during business rescue proceedings. The provisions of section 133 are clear: no legal proceeding, 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, except with the leave of the court.

[17] Although the consent so required in terms of section 133(1) is not a jurisdictional fact in the sense that it is a condition precedent for the proceedings to commence or proceed, section 133(1) of the Act does place a procedural limitation on a creditor: Whilst this section does not place an absolute bar on a litigant against institution of proceedings, a creditor can initiate proceedings with the written consent of the BRP or with leave of the court.[3]

[18] Divergent views are expressed in various judgments about two issues: Firstly, the issue whether the provisions of section 133 require a separate prior application to be made for leave to commence or to proceed with legal proceedings and/or whether such leave may be sought in the same proceedings in respect of the issue to be dealt with in the main proceedings. Secondly, and more importantly, whether or not proceedings pertaining to the *implementation* of a rescue plan are covered by the terms of section 133 and also require, either the prior consent of the BRP, or the

[3] *Chetty t/a Nationwide Electrical v Hart NO & Another* 2015 (6) SA 424 (SCA) ad paras 40 – 42.

leave of the court to proceed. The North Gauteng Division in *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another*[4] followed the approach that section 133 finds no application in legal proceedings against a company in business rescue and its business rescue practitioner in connection with the business rescue plan including the interpretation and execution towards *implementation*. In essence the court held that applications such as this do not constitute either "*enforcement action*" against the company, nor legal proceedings "*in relation to any property belonging to the company*" as contemplated by the section 133(1)(b) of Act.

[19] I am in agreement with the submission on behalf of the applicants, that it is not necessary for this court to engage in this debate in circumstances where a court is of the view that a proper case has been made out that leave should be granted to proceed with the proceedings. In the present matter, I am satisfied that the applicants have made out such a case. In this regard I am also in agreement with the approach followed by the court in *Booysen* where the court exercised its discretion and granted leave to the applicants to proceed with their urgent application:

> "[53] Finally, it must be stated that one of the principal objectives which the court should have in mind is to protect and give effect to the business rescue process and to advance it, rather than to stifle or retard it. To this end, the provisions of s 133 are not to be understood to be a 'shield behind which a company not needing the protection may take refuge to fend off legitimate claims'. So, where, in a matter such as the one at hand, the purpose of the proceedings against the company for which leave of the court is sought is to implement and give effect to a rescue plan which was properly adopted, the court should, in my view, be slow to refuse such leave and should be alive to the danger of putting unnecessary formalistic obstacles in the path of the achievement of such purpose.
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> [54] Thus, in my view, the consequence of all these interpretative strands as laid out in the various judgments I have referred to is that it would be wrong to hold that, in each and every matter in which leave of the court is required, such leave needs to be sought and obtained by way of a formal application; nor, in my view, would it be correct to hold that such leave must, of necessity, always be sought by way of a separate, prior application. In my view, there is no one-size-fits-all approach to be

[4] 2017 (4) SA 51 (WCC) (*Booysen*).

followed and what will be required, and what will be sufficient, will depend on the circumstances of each particular matter. It will in each case be a matter for the court's discretion, which, as was held recently in *Arendse*, is to be exercised judicially on the basis of considerations of convenience and fairness, and what will be in the interests of justice.

[55] … One must, in my view, also have regard to the fact that there may be instances where it is necessary to proceed for relief as a matter of urgency, and it will thus be necessary to launch proceedings immediately, …

[62] In the circumstances, in my view, applying a purposive and contextual interpretation to the language used in the provisions in question, there is nothing in s 133(1) which excludes the leave of the court being sought and obtained, in appropriate circumstances, either together with or subsequent to the launch of the principal proceedings or action in question. Similarly, in my view, applying a purposive interpretation with the aim of promoting the efficient, timeous and expeditious rehabilitation of a company according to its business rescue plan, where legal proceedings concern the implementation of such plan the leave of the court can and should ordinarily be obtained by way of a substantive application, but, in order to avoid unnecessary expense and formalism, such application can properly be made as a part of the principal matter and can be heard in limine prior to the commencement thereof, without doing violence to the provisions of the section. To my mind, it makes little sense to compel an applicant seeking to obtain an order from a court simply directing the business rescue practitioner and company in rescue to implement the terms of a rescue plan which has been adopted, to obtain leave to do so by way of a separate and prior application and to do so would result in an unnecessary duplication of costs and would unnecessarily delay the rescue process." [5]

[20] Leave was therefore granted to proceed with this application.

SCHEME OF THE ACT REGARDING BUSINESS RESCUE PLANS

[5] See also *Moodley v On Digital Media (Pty) Ltd and Others* 2014 (6) SA 279 (GJ) and *Hlumisa Investment Holdings (RF) Ltd and Another v Van Der Merwe NO* 2015 JDR 2231 (GP).

[21] In terms of section 145(2) of the Act each creditor has the right to vote to amend, approve or reject the proposed rescue plan, in the manner contemplated in section 152 of the Act; and if the proposed business rescue plan is rejected, a further right to propose the development of an alternative plan, in the manner contemplated in section 153 of the Act; or present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153 of the Act.

[22] In terms of section 152 therefore, the following apply at a meeting convened in terms of section 151. The BRP must, *inter alia,* —

(i) introduce the proposed business plan for consideration by the creditors (section 152(1)(a));

(ii) call for a vote for preliminary approval of the proposed plan, as amended if applicable (section 152(1)(e)).

(iii) In a vote called in terms of subsection (1)(*e*), the proposed business rescue plan will be approved on a preliminary basis if (a) it was supported by the holders of more than 75**%** of the creditors' voting interests that were voted; and (b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted (section 152(2)).

(iv) If a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153**,** which deals with the failure to adopt business rescue plan and which is patently not applicable to the present case (section 153(3)(a)).

(v) If a proposed business rescue plan does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of section 152(2) constitutes also "*the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent*" (section 152(3)(b)).

(vi) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities (section 152(4)).

(vii) The company, under the direction of the practitioner, must, in terms of section 152(5), take all necessary steps to (a) attempt to satisfy any conditions on which the business rescue plan is contingent; and (b) implement the plan as adopted.

IS THE AMENDMENT TO THE BUSINESS RESCUE PLAN VALID?

[23] Although the parties were in agreement that, whilst the Act provides for the adoption of a business rescue plan, the Act does *not* provide for a procedure to amend a business rescue plan. The respondents nonetheless hold the view that this is of no consequence because, as already pointed out, the BRP had provided in the plan that he may amend and modify or vary the provisions of the plan (in terms of clause 28.1 of the plan) in his sole discretion. The amendment is therefore valid. In addition, the scheme of the Act allows for such an amendment.

[24] I am in agreement with the applicants that there is no merit in the respondents' arguments. In respect of the submission that the business rescue plan may, despite the fact that the Act does not expressly make provision for the amendment of a business rescue plan, provide for an amendment of the plan as it would serve the purpose stated in section 7(k) of the Act: This section does no more than to state the purpose of the Act. The provisions which give effect to this purpose provide for the adoption of the plan and other ancillary matters but does not provide for a procedure to amend the plan. This is significant. When the (Companies) Act was enacted to, *inter alia*, provide for business rescue proceedings, the legislature must have been aware of the fact that parties may well wish to amend a business rescue plan once (finally) adopted, but has clearly decided, in the scheme of the Act, not to provide for such a procedure. It simply does not lie within the competence of parties to read into the Act a procedure that is not there. Although in a different context, the court in *Phaladi v Lamara*[6] held that even a court does not have the inherent jurisdiction to read into an Act a competency not provided for by such an Act. The court explains the ambit of the court's inherent jurisdiction:

[6] 2018 (3) SA 265 (WCC).

> "[8] The High Court does indeed have an inherent jurisdiction, and in appropriate circumstances even a duty, to develop the common law taking into account the interests of justice. It also has an inherent jurisdiction to regulate its own procedures and processes — it was only that aspect of its powers that Corbett JA was speaking in *Universal City Studios* supra loc cit. In the area of law regulated or determined by statute, it is under a duty to interpret and apply legislative enactments in a manner that promotes the spirit, purport and objects of the Bill of Rights, but in striving to do so it cannot by Procrustean construction do violence to the language used by the legislature. Its powers do not extend to improving legislation by providing measures or remedies that the statutory enactments do not afford, merely because the court considers it would be just or equitable that they should be afforded. To purport to do so would be in effect to assume a legislative function and thereby trench impermissibly on the domain of the legislative branch of government. The powers exercisable in terms of s 172 of the Constitution to read down or read in provisions to render legislation constitutionally compatible, or to provide just and equitable interim relief following on a declaration of constitutional incompatibility, are quite distinguishable; as is the approach of the courts to strictly or narrowly interpret legislation that limits or curbs common-law rights. Any contemplation of the width of the superior courts' powers that fails to acknowledge and respect these limitations of their bounds is likely to lead to a fundamentally misconceived conception of their actual extent, and, if by judges, can result in their being exceeded."

[25] The respondents tried to circumvent this deliberate omission by relying on the procedures provided for in terms of sections 145, 146 and 152 of the Act. There is no merit in this submission. Section 145 provides for the participation of creditors in the business rescue proceedings. Section 146 provides for the participation by holders of company's securities and section 152 provides for the consideration and adoption of the business rescue plan but does not deal with the amendment of a plan that has been adopted. Once the plan has been adopted, the plan is binding on the company and each of the creditors of the company and every holder of the company's securities (section 152(4) of the Act). Further, in terms of section 152(5)(b) of the Act, the company under the direction of the practitioner must take all necessary steps to implement the plan as adopted.

[26] The Act does not provide for the amendment of a business rescue plan once adopted. The application must therefore succeed on this point.

[27] Regarding the alternative submission that the BRP may reserve the right to amend the business rescue plan, the court in *Booysen*[7] specifically considered whether a BRP may reserve for themselves the right to amend a business rescue plan after it had been adopted. The court held that the whole scheme of the relevant provisions of the Act are such that there is simply no room for a business rescue practitioner to reserve for himself the right to amend a business rescue plan. The control over the business rescue proceedings are exercised by the democratic majority vote of creditors and affected parties. The court further held that in doing so, the BRP would effectively circumvent the procedure set out in the Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force on the company once adopted:

> "[67] In the circumstances, the whole scheme of these provisions is such that there is, to my mind, no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan. By doing so, he would effectively circumvent the procedure set out in the Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force. Insofar as the second respondent thus sought in terms of the provisions of clause 2.4 of the plan to reserve to himself the right to amend the plan, such a right could, at best, only have been a right to amend the proposed — ie draft — plan prior to its adoption by the creditors in meeting, and not thereafter. Any other interpretation would make nonsense of the process provided for in the Act whereby control over the rescue proceedings is to be exercised by democratic majority vote of the creditors and affected parties, and would allow the business rescue practitioner to unilaterally reduce or compromise creditors' claims to their prejudice (or even perhaps to increase certain claims at the expense of others), thereby exposing the whole process to uncertainty and possible corruption. I point out that in any event, although on the papers before me there is a bare allegation that an amendment of sorts was affected to the applicant's claim, there is no proof that this was in fact done. There is not even an attempt to state when, in what manner, and in what amount this was done."

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[7] *Supra*.

[28] The alternative point, although not strictly necessary to decide, is equally good. If the Act requires a 75% majority vote to adopt a plan, it can hardly be accepted that a mere majority (more than 50% but less than 75%) would be able to amend an adopted business rescue plan (accepting for the moment for argument sake that a final business rescue plan may be amended which I have decided the Act does not provide for.)

CONCLUSION

[29] The applicants have therefore made out a clear case that the purported amendment to the business rescue plan, voted at a meeting of creditors on 18 October 2021, was legally invalid.

ORDER

[30] In the event, the following order is made:

1. Leave is granted to the applicants in terms of section 133(1)(b) of the Companies Act 71 of 2008 to proceed with this application.

2. The purported amendments to the Business Rescue Plan published by the first respondent on 14 October 2021 and purportedly adopted at a creditors' meeting held on 18 October 2021 are declared unlawful and invalid, and are accordingly set aside.

3. The second respondent is ordered to pay the costs of the application.

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AC BASSON

JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment 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 26 January 2022.

APPEARANCES

For the Applicants:	ADV A M HEYSTEK SC
Instructed by:	BRITS LAW INC
For the First and Second Respondents:	ADV L SIYO
Instructed by:	BOQWANA BURNS ATTORNEYS
Matter heard on:	8 December 2021
Date of reasons for judgment:	26 January 2022