THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 104/15

In the matter between:

NEWTON GLOBAL TRADING (PTY) LTD
(Under Business Rescue) **Appellant**

and

EDDIE DA CORTE **Respondent**

Neutral citation: *Newton Global Trading (Pty) Ltd v Da Corte* (104/15) [2015] ZASCA 199 (02 December 2015)

Coram: Mpati P, Lewis, Cachalia, Saldulker and Dambuza JJA

Heard: 10 November 2015

Delivered: 02 December 2015

Summary: Company Law - Business rescue proceedings - resolution to commence business rescue in terms of s 129(1) of Companies Act 71 of 2008 - non-compliance by company with requirements of s 129(3) and (4) - whether *locus standi* of business rescue practitioner may be challenged when resolution not set aside.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie J, sitting as a court of first instance) judgment reported *sub nom Newton Global Trading (Pty) Ltd v Da Corte & another* 2015 (3) SA 466 (GP).

1 The appeal succeeds with costs, which shall include the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'The point *in limine* is dismissed with costs.'

3 The matter is remitted to the court below for it to deal with the other defences and/or the merits.

JUDGMENT

Mpati P (Lewis, Cachalia, Saldulker and Dambuza JJA concurring)

[1] At issue in this appeal is the effect of non-compliance with the provisions of s 129 of the Companies Act 71 of 2008 (the Act) which relate to business rescue proceedings. The appellant is a registered company that conducts the business of chrome processing. Its chrome processing plant is situated on certain leased properties known as Portion 49 (a portion of Portion 4) of the farm Bokfontein 448 Rietfontein Division JQ, Province of North West, and Portion 50 (a portion of Portion 17) of the same farm (the leased premises). Because of financial difficulties the appellant, by resolution dated 31 May 2013, commenced voluntary business rescue, under supervision, in terms of s 129(1) of the Act. According to the minutes of the meeting at which the resolution was adopted Mr Re-Marius Hamel was appointed as the business rescue practitioner.

[2] On 10 July 2014 the appellant launched an urgent application in the Gauteng Division of the High Court, Pretoria, against the respondent seeking an order interdicting the latter, or any person in his employ, from entering the leased premises and prohibiting them from 'removing any mineral related material or any tangible object' from it. In terms of the order sought the respondent 'and all persons relating to [him]' would also be prohibited 'from operating any part of the Chrome processing plant' on the leased premises. These prayers were contained in Part B of the Notice of Motion. In Part A the same order was sought, which, together with other ancillary relief, would operate on an interim basis pending a return date.

[3] The application was opposed, mainly on the ground that on 8 May 2014 a close corporation named Macla Logistics CC (Macla Logistics) purchased the leased premises and took occupation on the same date. In addition, two points *in limine* were raised in the respondent's answering affidavit. The first related to a non-joinder of certain parties. It was alleged in the answering affidavit that the entity that undertakes operations on the leased premises, namely Macla Transport (Pty) Ltd (Macla Transport) and Macla Logistics that had spent a huge amount of money in getting the chrome plant operational and had, as purchaser, stepped into the shoes of the original lessor, Mr Stols, should have been cited as respondents in the application.

[4] The second point *in limine* related to the appellant's alleged lack of *locus standi* to institute the application proceedings. The parties agreed before the court below (Fourie J) that the second point *in limine* be adjudicated upon first as they believed it was dispositive of the matter. The basis upon which the appellant's *locus standi* was challenged was an alleged failure by the appellant to comply with the provisions of s 129 of the Act. The consequence of the alleged failure to comply with the provisions of s 129, so it was alleged in the answering affidavit, was that the business rescue proceedings were a nullity and the appointed business rescue practitioner, who deposed to the founding affidavit, lacked the necessary standing to act on behalf of the appellant. The court below found in favour of the respondent on the second point *in limine* and dismissed the application, with costs, including the

costs of two counsel. It subsequently dismissed the appellant's application for leave to appeal. The appeal is with the leave of this court.

[5] The relevant parts of s129, namely subsecs (3) and (4), read:

'(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must –

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded, and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)*(b)*, a company must –

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.'

The appellant's resolution voluntarily to commence business rescue and to appoint Mr Hamel as the business rescue practitioner was adopted on 31 May 2013 and filed with the Companies and Intellectual Property Commission (Commission), on 5 June 2013. From the Commission's date stamp affixed on it, the notice of the appointment of the business rescue practitioner, in terms of s 129(4)*(a)*, appears to have been filed on 11 June 2013, three days out of time. It was submitted in the respondent's heads of argument that the appellant had failed or omitted to publish a copy of the notice of Mr Hamel's appointment as business rescue practitioner, as is required in terms of s 129(4)*(b)* of the Act, and omitted to publish a notice of the resolution to commence business rescue in terms of s 129(3)*(a)*. The appellant, therefore, did not strictly comply with the relevant provisions of the Act.

[6] Section 129(5) provides that if a company fails to comply with any provision of subsecs (3) or (4) 'its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity'. In his heads of argument counsel for the respondent, in supporting the judgment of the court below, relied on certain decisions of the Gauteng Division of the High Court.[1] In *Madodza* the court said (para 23):

'The applicant argued that business rescue proceedings remain in effect until a court with competent jurisdiction orders otherwise. The wording of sec 129(5) is clear, if there is no compliance the business rescue proceedings are a nullity.'

In that matter the applicant, which was under business rescue, brought an urgent application to prohibit the Sheriff from removing several vehicles from its possession until the business rescue proceedings had come to an end. However, it was common cause that the applicant had failed to appoint a business rescue practitioner within five days after the business rescue proceedings had commenced. There was therefore non-compliance with the provisions of s 129(3)*(a)* of the Act. In addition to the application failing on a ground not relevant for present purposes, it also failed on the basis that the business rescue proceedings were a nullity for its (the applicant's) failure to appoint a business rescue practitioner within the required time period.

[7] In *Panamo Properties (Pty) Ltd & another v Nel & another NNO* [2015] ZASCA 76i 2015 (5) SA 63 (SCA), this court (Wallis JA, in a unanimous judgment), said the following on this very issue (para 28):

'It is helpful to start with what the Act says about the termination of business rescue proceedings. The relevant provision for present purposes is s 132(2)*(a)*(i), which provides that business rescue proceedings end when a court sets aside the resolution that commenced those proceedings. In other words, when a court grants an order in terms of s 130(5)*(a)* of the Act, the effect of that order is not merely to set the resolution aside, but to terminate the business rescue proceedings. *A fortiori* it follows that until that has occurred, even if the business rescue resolution has lapsed and become a nullity in terms of s 129(5)*(a)*, the business rescue commenced by that resolution has not terminated.

[1] See *Madodza (Pty) Ltd v Absa Bank Ltd & others*, [2012] ZAGPPHC 165; *Homez Trailers and Bodies (Pty) Ltd v Standard Bank of South Africa Ltd*, [2013] ZAGPPHC 465; and *Vincemus Investments (Pty) Ltd v Louhen Carriers CC & another*, [2013] ZAGPPHC 520.

Business rescue will only be terminated when the court sets the resolution aside. The assumption underpinning the various high court judgments to the effect that the lapsing of the resolution terminates the business rescue process is inconsistent with the specific provisions of the Act. None of those judgments referred to s 132(2)*(a)(*i).' (footnote omitted.)

And later (para 29):

'If there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity and is liable to be set aside under s 130(1)*(a)*(iii). In all cases the court must be approached for the resolution to be set aside and business rescue to terminate.'

It follows that in the present matter the business rescue proceedings have not terminated and the appointment of the business rescue practitioner remains extant until the resolution to commence business rescue has been set aside.

[8] Counsel for the respondent submitted, however, that the present matter is distinguishable from *Panamo* on the facts. He contended that unlike in *Panamo* where the applicant, who sought to have the resolution to commence business rescue set aside, was an 'affected person',[2] the respondent in this matter is not. He is the sole member of Macla Logistics and an innocent party who had had arms-length dealings in relation to the leased premises. And, the argument continued, once it was established that he is not an 'affected person' it follows that he was not barred by the provisions of s 130 of the Act[3] from challenging the appellant's *locus standi.* This must be so, the argument proceeded, because otherwise the Act does not afford any protection to a person who is not an 'affected person'.

[9] In my view, these submissions are fallacious. What is clear from *Panamo* is that as long as the resolution to commence business rescue has not been set aside,

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[2] See s 128 for the definition of an 'affected person'.

[3] Section 130(1)*(a)* reads: '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) the company has failed to satisfy the procedural requirements set out in section 129, . . .'

the standing of the business rescue practitioner appointed on the strength of that resolution cannot be challenged on the ground of non-compliance with the procedural requirements set out in s 129 of the Act. And the fact that the respondent is not an 'affected person' cannot alter that position. Moreover, it could never have been in the Legislature's contemplation that a non-affected person could be in a better position than an affected person. It follows that the appeal must succeed.

[10] There is one disturbing matter that needs mentioning. The appellant's heads of argument were filed in this court on 17 July 2015 together with a copy of this court's decision in *Panamo*. The respondent's heads were filed on 3 August 2015, but no reference whatsoever was made to the *Panamo* decision, a copy of which had been made available to the respondent's legal representatives. The argument advanced in this court relating to the respondent being a non-affected party was not foreshadowed in the respondent's heads of argument. Both the court and the appellant's legal team were taken by surprise. True, the point was one raised as a point of law, which may be raised at any time. However, having had a copy of the *Panamo* judgment since at least July 2015, which, on the face of it, decisively dealt with challenges to business rescue proceedings based on non-compliance with the time periods (specified in s 129), one would have expected an indication from the respondent of the basis upon which the present matter would be said to be distinguishable from it. Counsel's explanation for the respondent's failure to do so was that he had thought of the point only the previous evening and therefore had no time to prepare supplementary heads of argument covering it. It is regrettable that the members of the court had not been afforded an opportunity to prepare for the argument raised by counsel for the respondent, which was the only argument in the appeal.

[11] As to the question of costs, counsel for the respondent contended that since the point *in limine* at issue was a good one at the time that it was raised before the court below, a fair order would be one where the costs were to be costs in the main application. In my view, the point could not be a good one simply because it had been upheld in more than one decision in the Gauteng Division. It has now been

held not to be a good point. I can find no reason why the costs should not follow the result.

[12] In the result the following order is made:

1 The appeal succeeds with costs, which shall include the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'The point *in limine* is dismissed with costs.'

3 The matter is remitted to the court below for it to deal with the other defences and/or the merits.

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L Mpati

President

APPEARANCES

For the Appellants:	G C Muller S.C (with M S Mangolele) Instructed by: Hamel Attorneys, Pretoria Symington & De Kok, Bloemfontein
For the Respondent	F W Botes SC (with L W De Beer) Instructed by: Stemela & Lubbe Incorporated, Pretoria McIntyre & Van Der Post, Bloemfontein