



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

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 2 October 2023

Case No. 2023-079991

In the matter between:

WESCOAL MINING (PTY) LTD

First Applicant

SALUNGANO GROUP LTD

Second Applicant

and

PHAHLANI LINCOLN MKHOMBO NO

First Respondent

ARNOT OPCO (PTY) LTD

Second Respondent

NDALAMO COAL (PTY) LTD

Third Respondent

MASHWAYI PROJECTS (PTY) LTD

Fourth Respondent

Summary

Companies Act 71 of 2008 – Business rescue – Meaning of “creditor” for the purposes of business rescue in Chapter 6 of the Act – “creditor” where it appears in Chapter 6 means a creditor who was a creditor of the company in business rescue at the time that the business rescue proceedings commenced.

JUDGMENT

WILSON J:

- 1 The second respondent, Arnot, owns and operates a coal mine in Middleburg. The mine taps into the largest known coal reserve in Africa. Arnot's mine itself sits on 190 million tons of "thermal" coal – that is, coal that can be burned as fuel to power turbines, as opposed to metallurgical coal, which is used to produce coke for smelting iron and steel. These resources notwithstanding, Arnot is in business rescue, under the stewardship of the first respondent, Mr. Mkhombo.
- 2 The first applicant, Wescoal, and the second applicant, Salungano, are creditors of Arnot. Wescoal is also Salungano's wholly-owned subsidiary. The applicants approach me on an urgent basis to confirm that a business rescue plan voted on and adopted on a preliminary basis at a meeting called by Mr. Mkhombo on 28 July 2023 is valid, binding and enforceable. The substance of that plan is that Arnot (and the mine it controls) is to be sold to the third respondent, Ndalamo.
- 3 Ndalamo, while cited as a respondent, seeks leave to intervene as an applicant, and joins in the relief Wescoal seeks. Mr. Mkhombo, and, by extension, Arnot itself, oppose the application. The fourth respondent, Mashwayi, also opposes the application. Mashwayi is a cessionary of various of Arnot's creditors and a lessee of some of Arnot's rail allocation.
- 4 Wescoal and Salungano wish to enforce the plan presented to the 28 July meeting because they expect to derive a significant financial benefit from it. Ndalamo obviously wants the plan to go through because it wants to purchase

Arnot's mine. Mashwayi opposes the application because it expects to derive little or no benefit from that sale.

Urgency

5 The matter was placed on my urgent roll for Tuesday 19 September 2023. The record runs to 4000 pages (although this was compressed at my direction, and most of the material in the record turned out to be irrelevant to the issues I ended up having to decide). The applicants also make a far-reaching claim about the interpretation of the business rescue provisions of the Companies Act 71 of 2008 ("the Companies Act").

6 Ordinarily, given the size of the record and the complex legal issue at the heart of the dispute, I would have been reluctant to entertain this type of case on an urgent basis, and it is far from ideal that the factual and legal issues sought to be raised should be decided on straightened timeframes as part of a busy urgent roll. Still, counsel who appeared before me were agreed that the matter is urgent, insofar as the validity of the business rescue plan presented to the 28 July meeting must be determined as soon as possible, or at any rate before 15 October 2023, in order to prevent the collapse of any attempt to rescue Arnot as a going concern. The sums of money involved are staggering, and the well-being of hundreds, if not thousands, of people hinges on the outcome of the business rescue process.

7 It was on that basis that I decided to consider the matter on an urgent basis. I am grateful to counsel for their assistance in navigating the papers and for their understanding of the fact that it was not possible for me to absorb the

volume of material their attorneys and clients generated before the matter was heard.

The 28 July meeting

- 8 Section 152 (2) (a) of the Companies Act requires that, to be approved at a meeting called for that purpose, a business rescue plan must be supported by the holders of at least “75% of the creditors’ voting interests that were voted”. Votes are allocated according to the value of a particular creditor’s claim. That claim must be proved to, and accepted by, the business rescue practitioner before the commencement of the meeting at which the plan is considered.
- 9 At the 28 July meeting, a business rescue plan was proposed, involving the sale of Arnot to Ndalamo. There was a vote. It initially appeared as though the statutory threshold of 75% had been reached, and the plan was declared to have been adopted. In the days following the meeting, however, Mr. Mkhombo began to fear that a mistake had been made, and that the tally of votes for and against the adoption of the plan had not been properly calculated. As those calculations were quite complex, Mr. Mkhombo had the vote tally forensically re-evaluated. The upshot of that exercise was that, in fact, the votes cast in favour of the plan did not reach the 75% threshold. Mr. Mkhombo accordingly revoked the earlier declaration that the plan had been adopted, and sought to make arrangements for a further meeting to reconsider a business rescue plan. Although the further meeting has been pushed back a number of times, I am told that Mr. Mkhombo now intends to hold the meeting on 15 October 2023.

- 10 Everybody accepts that the initial tally of votes was erroneous, and that the revised figures demonstrate that the 75% threshold was not achieved. All things being equal, therefore, the plan failed, and the business rescue process ought to continue in terms of section 153 of the Companies Act, which deals with what happens when a plan is rejected after a vote held in terms of section 152 (2).
- 11 Other things, though, are not equal. The applicants contend that (a) Mashwayi's votes against the plan should not have been counted in the first place and that (b) if Mashwayi's votes are excluded from the tally, the business rescue plan did achieve the 75% threshold, even on the revised calculations Mr. Mkhombo had performed.
- 12 The central dispute in this case accordingly concerns whether Mashwayi's votes should have been counted. There is no dispute, though, that, if Mashwayi's votes should not have been counted, the plan presented at the 28 July meeting would have been adopted by at least 75% of the creditors' voting interests that were voted.
- 13 Mr. Botha, who appeared together with Mr. Mohapi for the applicants, originally contended that Mashwayi was not a creditor of Arnot at all, and so should not have been permitted to vote on that basis. That contention was based on arguments about interpretation of a lease agreement to which Arnot and Mashwayi are parties, and about whether the cessions of other creditors' claims to Mashwayi were valid and effective at the time of the 28 July meeting. These contentions were not ultimately persisted with, however.

- 14 The basis on which Mr. Botha ultimately pressed the applicants' case was that Mashwayi only became a creditor of Arnot after the business rescue process commenced. On a proper interpretation of the business rescue provisions of the Companies Act, so the argument goes, "post-commencement creditors" such as Mashwayi are not "creditors" with "voting interests" in the approval or rejection of a business rescue plan. As a matter of law, therefore, Mashwayi's votes should not have been counted.
- 15 It is not in dispute that Mashwayi is a post-commencement creditor (Mashwayi describes itself as such in its papers), but whether that means it may not vote in a meeting held under section 152 of the Act is hotly disputed. And it is to that issue that I now turn.

The status of post-commencement creditors in proceedings to approve a business rescue plan

- 16 Section 145 (1) of the Companies Act gives a "creditor" of a company in business rescue the right to participate in business rescue proceedings, the right to notice of every material decision or proceeding comprising the business rescue process, and the right to participate in court proceedings arising out of the business rescue process. Participation maybe "formal" or "informal". One formal mode of participation – set out separately in section 145 (2) (a) of the Act – is the casting of a vote to approve, amend or reject a business rescue plan called under section 152 of the Act.
- 17 Section 128 of the Companies Act defines a number of terms germane to business rescue proceedings. It does not, however, define the term "creditor". I cannot say why the drafters of the Companies Act decided not to define that

term. It seems a bit like passing a law that governs elections without bothering to say who is entitled to vote in them. Creditors are “affected persons” in section 128, but they are lumped together in that category with other classes of person, such as employees and shareholders.

18 The question that naturally arises is whether the Act intends to extend the rights enumerated in section 145 – including the right to vote in a meeting called under section 152 – only to the company’s existing creditors at the commencement of the business rescue process, or whether someone to whom the company under business rescue incurs obligations during the business rescue process also acquire section 145 rights, including a say in whether a business rescue plan should be adopted.

19 The question must be answered by an act of interpretation. The effect of the statute must be determined by a consideration of the ordinary grammatical meaning of its text, the context in which a particular provision appears and the purpose of that provision read in light of the overall purpose of the statute in which it appears (*Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC), paragraph 29). In a case like this, it is particularly important that the meaning ascribed to the statute is “sensible and businesslike”, but only if a sensible and business-like construction is consistent with the words actually used (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), paragraph 18).

20 It seems to me that, evaluated as a whole in conformity with these rules of interpretation, the business rescue provisions of the Companies Act assign voting interests under section 152 of the Act only to creditors who were

creditors of the entity under business rescue at the time the business rescue process commenced.

21 There are several indications of this in the text of the statute. The first is the definition of “affected persons” in section 128. By rolling creditors into a broader category of “affected persons”, it seems to me that the Act means to refer to creditors who have an interest in the business rescue process that is meaningfully comparable to those of other “affected persons”: unions, employees and shareholders. These are persons who are “affected” by the commencement of the business rescue process itself. The purpose of the statute seems to me to be to draw these affected persons into a process directed at the rescue rather than the liquidation of the company. While only creditors get a vote at a meeting called under section 152, the purpose of the statute is to encourage different classes of stakeholders affected by the commencement of the process to engage with each other to achieve, insofar as this is possible, the rescue or rehabilitation of the business.

22 This is in conformity with the overall purpose of business rescue: to preserve the social value of a business as a going concern and to avoid the destruction of that value that would come about if the company was liquidated. If just any creditor could vote an interest at a section 152 meeting (even a creditor who, like Mashwayi, appears to have come onto the scene on the eve of the meeting itself), there would be little to stop speculators or asset strippers preying on business rescue proceedings, blocking the adoption of appropriate business rescue plans, and forcing liquidations where they could be avoided. I do not for a moment ascribe these motives to Mashwayi, but I am keenly

aware that Mashwayi appears to have bought up debt from Arnot's other creditors at least in part to give it standing in the business rescue process. That, it seems to me, is inconsistent with the underlying purpose of the process and the statute itself.

23 Section 150 (2) (a) (ii) of the Act requires that a business rescue plan contains "a complete list of the creditors of the company when the business rescue proceedings began". The express exclusion of post-commencement creditors only makes sense if those creditors have no voteable interest in the plan. If post-commencement creditors were meant to have such an interest, there would surely have to be some attempt to account for them in the business rescue plan. There is no indication in the Act that there ought to be account taken of any type of creditor other than those who existed at the time the company went into business rescue. Post-commencement creditors are left out altogether. The plan is not required to say anything to or about them.

24 Where the Act could have made clear that post-commencement creditors may vote an interest, it fails to do so. Section 135 of the Act deals with post-commencement finance. Section 135 (3) of the Act provides that creditors that advance finance to a company in business rescue are accorded a preferent claim against the company. Under section 135 (4) that claim retains its preference even if the company is liquidated. Section 135 does not, however, provide for a post-commencement financier to vote an interest at a section 152 meeting. The implication seems to me to be clear: post-commencement finance creditors are rewarded with enhanced security, not a say in whether the business rescue plan should be adopted.

25 That purpose appears to have been carried through in section 152 (4) of the Act, which provides that a business rescue plan, once adopted, binds all the creditors of a company whether or not they attended the meeting, whether or not they voted at the meeting, and whether or not they proved their claim before the meeting. A business rescue plan will almost inevitably provide for the compromise of some creditors' claims. Sections 150 (2) (b) (i) and (ii) of the Act provide for the business rescue plan to include a moratorium on the fulfilment of a company's obligations and the complete release of a company from its obligation to pay at least some of its debts. It would make no sense to afford a post-commencement financier a preferent claim against the company under section 135 of the Act, if that claim could be suspended or extinguished under the business rescue plan. No sensible post-commencement financier would put up with that. What they would expect (and what the statute affords them) is a preferent claim against the company whatever the business rescue plan says. In other words, the business rescue plan serves as a reason why they can be confident that the company will be able to make good in its debt: not a basis on which the company can compromise its obligation to repay that debt.

26 It also strikes me that section 135 of the Act does not describe post-commencement financiers as "creditors" at all, but as "lenders". The word choice is significant. It indicates that post-commencement financiers are not to be treated as the type of "creditor" to which the business rescue provisions of the Act address themselves.

27 I would of course have liked more time to consider this issue, but that is a luxury I do not have. While the Constitutional Court has warned against finally deciding legal issues in urgent applications for interim relief, the court made clear that “this is not an invitation to judges considering urgent interim interdicts to avoid deciding legal questions which – with the necessary diligence – are capable of definitive decision” (*Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC), paragraph 250). This is, of course, an application for final relief, and I will leave it to others to assess my diligence. But, taken together, I think that the provisions I have explored and to which I have sought to give meaning place the issue beyond any serious doubt. Creditors who vote an interest at a section 152 meeting must be pre-commencement creditors. The Act, at least by necessary implication, places post-commencement creditors in a different category and, where it extends protection to their interests, it does so in a different way.

The validity of the 28 July meeting

28 Mr. Maritz, who appeared together with Mr. Viljoen for Mashwayi, contended that all of this is academic, because the 28 July meeting had been called unlawfully, and was a nullity for that reason. That contention rested on the requirement, under section 151 (2) of the Act, that the business rescue practitioner gives all affected persons notice of the date, place and time of the meeting, an agenda of that meeting, and a summary of the rights of affected persons to participate in and vote at the meeting. This must be done at least five days before the meeting.

29 It is common cause that Mr. Mkhombo did not accept proof of Mashwayi's claim until the day before the 28 July meeting. It follows, Mr. Maritz says, that Mashwayi did not have the statutory notice to which it was entitled.

30 The difficulty with this submission is that it does not follow from the fact that Mr. Mkhombo only accepted proof of Mashwayi's claim the day before the meeting that Mashyayi did not have five days' notice of it. If Mashwayi was an affected person, it was an affected person whether or not Mr. Mkhombo said so. My attention has not been drawn to any allegation that Mashwayi did not know the meeting was coming, or that it was not timeously placed in possession of the material required by section 151 (2). It is of course true that Mr. Mkhombo could not have sent the material to Mashwayi five days before the meeting, as the letter of the statute requires, because he did not accept that Mashwayi was an affected person at that point. But it seems plain on a conspectus of all the facts that Mashwayi must have known about the meeting five days in advance, and that the purpose of the statute was achieved. Plainly, then, there was substantial compliance with section 151 (2).

Joinder of *Ndalamo*

31 This brings me to Ndalamo's application for leave to intervene as the third applicant. Ndalamo is of course cited as the third respondent in these proceedings. As the prospective purchaser of Arnot under the terms of the business rescue plan, it plainly has a direct and substantial interest in the relief the applicants seek. That relief "cannot be sustained and carried into execution" without affecting Ndalamo's rights (*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 653).

32 I am not convinced, however, that Ndalamo would have had the standing to seek relief as an applicant in these proceedings had Wescoal and Salungano chosen not to do so. The question is not without some complexity, since the Act itself contains detailed provisions dealing with various categories of parties' standing in business rescue proceedings, and in litigation arising out of them. I prefer not to express a view on how the standing Ndalamo claims interacts with these provisions, and it seems to me that there is no need for me to do so. Ndalamo came to court and had its say, and the relief it would have sought as an applicant is being sought by two other parties, who have been substantially successful.

The relief to be granted

33 With the possible exception of Mr. Mkhombo and Arnot, the parties all flirted in argument with the proposition that decisions taken by a business rescue practitioner in terms of the Act constitute "administrative action" for the purposes of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). In the end, though, the parties were content for me to decide the matter without reference to PAJA.

34 I think that was wise. Even if PAJA turns out to apply to decisions taken in the context of business rescue proceedings, the central question in this case – whether the business rescue plan was adopted on 28 July 2023 by the qualified majorities of creditors entitled to vote that section 152 requires – does not seem to me to turn on any "decision" taken in terms of the Companies Act. It follows from my analysis of the facts and the Act that the plan was so adopted. This was not because of a "decision" anyone has taken, but because

of the common cause fact that, if Mashwayi's votes are discounted, more than "75% of the creditors' voting interests that were voted" favoured adoption of the plan.

35 Mr. Symon, who appeared together with Mr. Cremen for Arnot and Mr. Mkhombo, made a series of careful and helpful submissions on the relief that should flow from this. He criticised the applicants' conduct in seeking to short-circuit the business rescue proceedings and usurp the business rescue practitioner's power to determine the pace and progress of those proceedings.

36 Mr. Symon was particularly critical of the idea that I could reverse-engineer the outcome of the 28 July 2023 meeting by disqualifying Mashwayi and declaring what the result of the 28 July meeting would have been had Mashwayi's votes been discounted.

37 I had a great deal of sympathy for those submissions. Ultimately, however, it seems to me that my power to declare the law encompasses the power to declare what the proper consequences of the correct application of that law are. In other words, I am empowered – and I think bound – to give effect to the statute.

38 Were there any dispute about what the proper application of the statute as I have interpreted it meant for the outcome of the meeting, I would have simply declared that Mashwayi could not vote an interest at a meeting under section 152, and I would then have allowed Mr. Mkhombo to take whatever lawful steps are available to him in light of that declaration.

39 However, there is no such dispute. Everyone accepts that, but for Mashwayi's votes against it, the plan reached the required statutory threshold. I have found that Mashwayi's votes should not have been counted. It follows from this that on a proper application of the statute, the plan did reach the required statutory threshold. There is no reason why I should not say so, and make an order setting out the legal consequences which flow from that conclusion.

Order

40 For all these reasons –

40.1 The parties' non-compliance with the Uniform Rules concerning forms, service and time periods is condoned, and this matter is heard as one of urgency in terms of Uniform Rule 6 (12).

40.2 It is declared that "Option B" of the Business Rescue Plan placed before the meeting in terms of section 151 of the Companies Act 71 of 2008 held on 28 July 2023 ("the 28 July Plan") was duly approved and finally adopted in accordance with section 152 of the Act, in that –

40.2.1 it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and in that

40.2.2 the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests that were voted.

- 40.3 The third respondent's offer made in terms of Option B is declared to have been accepted.
- 40.4 The first respondent is ordered to implement the Business Rescue Plan and give effect to the third respondent's bid.
- 40.5 The second and fourth respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of this application, including the costs of two counsel.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 2 October 2023.

HEARD ON: 21 September 2023

DECIDED ON: 2 October 2023

For the Applicants: A Botha SC
SL Mohapi
Instructed by Mkhabela Huntley

For the First and
Second Respondents: S Symon SC
C Cremen
Instructed by Cox Yeats

For the Third Respondent: I Miltz SC
D Block
Instructed by Webber Wentzel

For the Fourth Respondent: NGD Maritz SC
JC Viljoen
Instructed by Liebenberg Malan Mofolo Inc