

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



Case number: 56620/2021

DELETE WHICHEVER IS NOT APPLICABLE

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

23.03.2022

DATE

SIGNATURE

In the matter between:

LSO CONSULTING ENGINEERING (PTY) LTD

First Applicant

(First respondent in the application for leave to appeal)

PHATWE CONSULTING ENGINEERS CC

Second Applicant

(Second respondent in the application for leave to appeal)

V

AVIWE NTANDAZO NDYAMARA

First Respondent

(First applicant in the application for leave to appeal)

UMSO CONSTRUCTION (PTY) LTD

Second Respondent

(In Business Rescue)

(Registration number: 1996/015450/07)

(Second applicant in the application for leave to appeal)

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSIONER**

Third Respondent

**ALL OTHER CREDITORS IN THE BUSINESS RESCUE
AS REFLECTED IN
ANNEXURE “B1”**

Fourth to One Hundred and Fifty Fourth Respondents

**JUDGMENT
(APPLICATION FOR LEAVE TO APPEAL)**

BASSON J,

INTRODUCTION

[1] This is an application for leave to appeal to the Supreme Court of Appeal (“SCA”) in terms of Rule 49 of the Uniform Rules of Court against the order and judgment of this court in terms of which it was ordered:

- 1.1 That 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.
- 1.2 That 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.
- 1.3 The second respondent is ordered to pay the costs of the application.

[2] The respondents (the first and second applicants in the application for leave to appeal) argued that there are reasonable prospects of success on appeal, more in particular in light of the importance of the matter to the parties and the relative complexity of the facts and legal principles at issue. It was further submitted that the administration of justice will be advanced through a hearing before the Supreme Court

of Appeal.

[3] The applicants (in the main application and the respondents in this application for leave to appeal) submitted that there are no prospects of success. The applicants also noted that it is curious that the business rescue practitioners (who act under the direction of the creditors) saw it fit to file this application for leave to appeal in circumstances where not a single creditor has opposed the application brought by the applicants. The contention that this matter is of importance to the business rescue practitioners is also disputed by the applicants. It is further disputed that the facts and the legal principles in this matter are complex and submitted in this regard that the facts are mostly common cause and the legal principles involved are not “*complex*”.

APPLICABLE TEST: LEAVE TO APPEAL

[4] Section 17 of the Superior Court Act¹ (“Superior Court Act”) states that:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[5] The threshold for granting leave to appeal against a judgment of a High Court has thus been raised by the Superior Courts Act.² The use of the word “*would*” in the Superior Courts Act indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. A court should thus

¹ Act 10 of 2013.

² The former test was whether there was a reasonable prospect another court *might* come to a different conclusion.

consider the prospects of an intended appeal and consider whether the appeal would have a *reasonable prospect of success*.³

RESPONDENTS' GROUNDS OF APPEAL

First Ground: Section 133(1)(b) of the Companies Act

[6] The respondents submitted that this court erred in relying on the *Booyesen*⁴ decision in terms of which this division endorsed the approach that section 133 finds no application in legal proceedings against a company in business rescue and its business rescue practitioner in respect of the business rescue plan, including the interpretation and execution towards implementation.

[7] It was further submitted that this court's approach to accept that the proceedings may be commenced (firstly) without the leave of the court and (secondly) that leave to do so may be sought as part of the relief in the main application is inconsistent with the working of the section. More in particular, it was submitted that this approach defeats one of the purposes of the moratorium which is to afford the company and the business rescue practitioner space and time to deal with the rescue of the company without having to deal with litigation by creditors. It was further submitted that the applicants have failed to set out the reasons why the litigation against the respondents were necessary.

[8] I am not persuaded that there is any merit in any of the arguments advanced in support of this ground of appeal. More in particular, I am not persuaded that another court *would* come to a different conclusion regarding this court's exercise of a discretion to allow the proceedings to proceed. I do not intend to again deal with the submissions advanced on behalf of the parties regarding this point. Suffice to reiterate: Firstly, the issue whether or not this court should grant permission to proceed with the application was fully canvassed on the papers and in argument. Secondly, having regard to the provisions of section 133 of the Companies Act, the application that

³ *The Mont Chevaux Trust v Tina Goosen & 18 Others* LCC14R/2014 (Reportable) para 6; Applied in *Daantjie Community & others v Crocodile Valley Citrus Co (Pty) Ltd & another* (75/2008) [2015] ZALCC 7 para 3.

⁴ *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC).

served before this court did not constitute either “*enforcement action*” against the company, nor legal proceedings “*in relation to any property belonging to the company*”, as contemplated by the said section. Put simply, it cannot be said that the applicants were seeking to institute “*a claim*” against the company. In this matter the applicants purely sought to attack the conduct of the respondents in the business rescue proceedings. Sufficient grounds therefore existed for the exercise by this court of its discretion. Lastly, I am also not persuaded that there is merit in the submission advanced by the respondents (with reliance on the decision in *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd*)⁵ that the applicants have failed to fully set out the reasons why legal proceedings against the respondents was necessary. In this regard it was submitted that the applicants have failed to allege and prove, *inter alia*, the effect that the grant or refusal of leave would have on the second respondent’s rights as opposed to other affected persons and relevant stakeholders and the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health and whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Act. These issues have been fully dealt with not only on the papers but also in argument.

[9] Lastly, section 133 is only a procedural limitation and not a bar in itself to proceedings against a company in business rescue. The Supreme Court of Appeal in *Chetty*⁶ held that the requirement of consent from the practitioner or leave from the court is not a jurisdictional fact or condition precedent for such legal proceedings, and the legislature did not intend to invalidate or nullify such proceedings if they were brought without the requisite prior consent or leave having been obtained.

Second Ground: Amendment of Business Rescue Plan

[10] The respondents submitted that this court erred in granting the following order: 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 is declared unlawful and invalid and is accordingly set aside.

⁵ 2013 JDR 1019 (GST) *ad para* [67].

⁶ *Chetty t/a Nationwide Electrical v Hart NO & Another* 2015 (6) SA 424 (SCA) par [28]

[11] On behalf of the respondents the argument was reiterated that it is clear from a plain reading of Chapter 6 of the Companies Act that there is no statutory prohibition in this Act that precludes the amendment of an adopted Business Rescue Plan by creditors and submitted therefore that there is no reason why the amendment could not be effected particularly because it was not in dispute between the parties that the amendment was done with the approval of the *majority* of the creditors in compliance with clause 28.2 of the Business Rescue Plan: Control over the rescue proceedings is therefore to be exercised by democratic majority vote of the creditors and affected parties.

[12] It was further submitted that the mere fact that the Companies Act does not expressly make provision for the amendment of the Business Rescue Plan does not mean that such amendment is precluded. It is also permissible for the Business Rescue Plan to provide for an amendment of the plan. Such a provision would also serve the purpose of business rescue stipulated in section 7(k) of the Companies Act, which is the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.

[13] And lastly, the business rescue practitioner has an obligation to act in the interests of the entire body of creditors and not only the applicants, even in circumstances where the Business Rescue Plan may be unacceptable to the applicant.

[14] These submissions were already fully dealt with in the judgment. I am not persuaded that another court *would* come to a different conclusion than the one reached by this court: The conspicuous absence from the Companies Act of any procedure to amend a plan that has been “*finally*” adopted at a meeting convened in terms of section 151 of this Act, cannot be ignored. And to reiterate, the scheme of the Act is that business rescue proceedings are supposed to end within a reasonable short time. There are strict time limits and procedures that must be followed for the development and implementation of a business rescue plan. Unless a court otherwise permits, it must end within three months. It is therefore simply inconceivable that a situation can arise where the business rescue practitioner fails to implement the plan

as adopted and then proceed to seek an amendment of the plan a year or more after its *final* adoption.

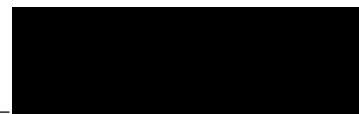
[15] Whilst the respondents fully recognise in their heads of argument the legal principle that courts may not supplement an omission in law as this would be the function of the legislature, the respondents nonetheless persist with the argument since there is no statutory prohibition in the Companies Act that precludes the amendment of an adopted business rescue plan, such an amendment would be “*permissible*”. I have indicated in my judgment why this is not permissible and why I do not agree with the respondents’ submissions in this regard.

[16] Lastly, regarding the submission that the creditors have voted by majority in favour of an amendment. I am not persuaded that another court *would* come to a different conclusion in respect of this court’s finding: There is simply no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan.

[17] On a proper interpretation of the Act, I am likewise not persuaded that another court *would* come to a different conclusion.

Order

[18] The application for leave to appeal is dismissed. The second applicant (in the application for leave to appeal) to pay the costs.



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 23 March 2022.

Case number : 56620/2021

For the Applicants

(in the application for leave to appeal) : ADV L SIYO

Instructed by : BOQWANA BURNS ATTORNEYS

For the Respondents

(in the application for leave to appeal) : ADV A M HEYSTEK SC

Instructed by : BRITS LAW INC