THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1325/2019

In the matter between:

COOPERATIVA MURATORI CEMENTISTI – CMC Di RAVENNA Società Cooperativa a Responsabilita Limitata	**First Appellant**
LIEBENBERG DAWID RYK VAN DER MERWE NO	**Second Appellant**
CHRISTOPHER RAYMOND REY N.O.	**Third Appellant**

and

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**First Respondent**
ESOR CONSTRUCTION (PTY) LTD	**Second Respondent**
ABSA BANK LTD	**Third Respondent**
STEFCOR CONSTRUCTION (PTY) LTD	**Fourth Respondent**

Neutral citation: *CMC v CIPC and Others* (1325/2019) [2020] ZASCA 151 (20 November 2020)

Coram: PONNAN, WALLIS and MOLELMELA JJA and EKSTEEN and MABINDLA-BOQWANA AJJA

Heard: 9 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 09h45 on 20 November 2020.

Summary: Companies Act 71 of 2008 – business rescue – whether external company can enter business rescue – recognition of foreign composition among creditors approved by Italian court – who may apply and basis for recognition.

ORDER

On appeal from: Gauteng Division, Pretoria of the High Court (Potterill J, sitting as court of first instance):

1 The application to lead further evidence on appeal is dismissed with costs on the scale as between attorney and client, including the costs of two counsel.

2 The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Wallis JA (Ponnan and Molemela JJA and Eksteen and Mabindla-Boqwana AJJA concurring)

[1] The central issue in this appeal is whether a company incorporated in a country other than South Africa is entitled to take advantage of the business rescue provisions of the Companies Act 71 of 2008 (the Act). That issue arose in the following circumstances. The Appellant, Cooperativa Muratori & Cementisi-CMC Di Ravenna Societá Cooperativa a Responsibilita Limitata (CMC), is a long-established company incorporated in Italy and active in the construction industry internationally. It is registered as an external company in terms of the Act. In the latter stages of 2018 CMC internationally encountered a cash flow crisis and significant financial difficulties. This caused it to lodge with the Court of Ravenna, Bankruptcy Section, a preventive application for admission to the procedure for the arrangement with creditors pursuant to article 161 of the Italian Bankruptcy Law. On

7 December 2018 the Court of Ravenna issued an order assigning CMC sixty days within which to file a proposal for composition with its creditors; ordered it to submit to possible authorisation requests and to furnish monthly reports; and appointed three judicial commissioners to oversee these functions.

[2] Not content with these proceedings in its country of incorporation, the board of directors of CMC resolved on 14 December 2018 that the company was financially distressed as contemplated in s 129(1) of the Act and should be placed under supervision. Pursuant thereto, Messrs Van der Merwe and Rey, who have played no active role in this litigation, were appointed as business rescue practitioners (BRPs) to CMC. However, on 15 February 2019 Mr Rey was advised by the first respondent, the Companies and Intellectual Property Commission (CIPC), that because CMC is an external company it could not be placed under business rescue in terms of the Act. That precipitated the present application, brought as a matter of urgency on 7 March 2019, for an order declaring that CMC was under business rescue in terms of the Act, alternatively declaring that the order issued by the Court of Ravenna was enforceable in South Africa.

[3] The CIPC was cited as the sole respondent in that application. However, Esor Construction (Pty) Ltd (Esor), the second respondent; Absa Bank Ltd (Absa), the third respondent; and Stefcor (Pty) Ltd (Stefcor), the fourth respondent, sought leave to intervene in the proceedings. Esor and Stefcor delivered affidavits in opposition to the relief sought. Stefcor also sought an order for the provisional winding up of CMC.

[4] The application came before Potterill J in the Gauteng Division of the High Court, Pretoria. She dismissed CMC's claims and Stefcor's counter-application. The appeal by CMC is with her leave. Only Esor opposed the appeal. Absa played no active role in the litigation and Stefcor has indicated that it abides the decision of this court on the appeal.

Was business rescue available to CMC?

[5] Business rescue is defined in s 128(1)(*b*) of the Act as meaning proceedings to facilitate the rehabilitation of a company that is financially distressed. It does this by placing the company's affairs under temporary supervision by a BRP; granting a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and making provision for the approval of a plan to rescue the company by restructuring its affairs. In terms of s 129(1) the board of a company may resolve that the company voluntarily begins business rescue proceedings and place the company under supervision. Any such resolution must be lodged with the CIPC and the company must appoint a BRP to undertake the supervision of the business rescue. This is the route that CMC followed and it appointed Messrs Van der Merwe and Rey as BRPs.

[6] Business rescue is available only to a company. That is defined in s 1 of the Act as meaning:

'A juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date—

(*a*) was registered in terms of the —

(i) Companies Act 1973 …, other than as an external company as defined in that Act; or

(ii) Close Corporations Act 1984 …, if it has subsequently been converted in terms of Schedule 2;

(*b*) was in existence and recognised as an 'existing company' in terms of the Companies Act 1973 …; or
(*c*) was deregistered in terms of the Companies Act 1973 …, and has subsequently been re-registered in terms of this Act.'

[7] Whether business rescue was available to CMC depended on it being a company in terms of this definition. In argument it was accepted that it is not a company in terms of any of the three sub-sections of the definition. Although it was registered as an external company in terms of the Companies Act 61 of 1973 (the old Act), sub-section *(a)* expressly excludes an external company registered under the old Act and it was never a close corporation. A company existed and was recognised under the old Act if it existed and was recognised in terms of the 1926 Companies Act, 46 of 1926, but CMC was not such a company and does not qualify under sub-section *(b)*. Finally, it was not deregistered under the old Act so it does not qualify under sub-section *(c)*.

[8] CMC attempted to circumvent this in the following way. The definition of a 'foreign company' under s 1 of the Act means 'an entity incorporated outside the Republic' irrespective of whether it is a profit or non-profit entity, or carrying on business or non-profit activities within the Republic. The definition of 'juristic person' includes a foreign company and the definition of an 'external company':
'Means a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2).'

[9] The argument proceeded as follows. The definition of 'company' commences by saying that it is 'a juristic person incorporated in terms of this Act'. A juristic person includes a foreign company and where that is carrying on business or non-profit activities within the Republic it is an

external company that is required to register in terms of s 23 of the Act. The expression 'incorporated in terms of this Act' must therefore be construed as including a foreign company that had registered in terms of s 23 of the Act.

[10] There is no merit in this argument, which flies in the face of the language of the Act. Incorporation and the legal status of companies is dealt with in Part B of Chapter 2 of the Act. Incorporation takes place in terms of s 13(1) by the completion and signing of a Memorandum of Incorporation and filing a Notice of Incorporation with the CIPC. As soon as possible after accepting the Notice of Incorporation the CIPC assigns a unique registration number to the company and enters the prescribed details in the register.[1] From the date of registration the company is a juristic person and exists thereafter until its name is removed from the register.[2] CMC has not been incorporated in terms of this process.

[11] Section 23 of the Act dealing with the registration of foreign companies is in Part C of Chapter 2 of the Act dealing with 'Transparency, accountability and integrity of companies'. That places it firmly outside the provisions of the Act dealing with the incorporation of companies. A foreign company registered as an external company is not incorporated 'in terms of this Act' as required by the definition of 'company', because it has not been incorporated under the provisions of the Act that deal with the incorporation of companies.

[12] The final nail in the coffin for this argument is provided by sub-section *(a)* of the definition of 'company', which expressly excludes a

[1] Section 14(1) of the Act.
[2] Section 19 of the Act.

foreign company from being a 'company' under the Act, notwithstanding that it was registered in terms of the old Act. That shows clearly that foreign companies were only to be required to register in South Africa for limited purposes. Where a foreign company is required to comply with the same provisions of the Act as a domestic company, which is the case where it wishes to make a public offering of securities in this country in terms of Chapter 4 of the Act, there is special provision for this. Thus s 95(1) provides a special definition of 'company' by saying that:

In addition to the meaning set out in section 1, also includes a foreign company.'

That extended definition includes both external companies, that is foreign companies doing business in South African and registered under the Act, and any other foreign company that seeks to make a public offer of securities to the South African public. This is to ensure that any such offer complies with South African requirements in regard to disclosure and the like in the making of any such offer. The special definition reinforces the conclusion that elsewhere in the Act when there is reference to a company it means a company as defined in s 1. The inevitable conclusion is that an external company may not be placed under business rescue and the views of the CIPC that led to this application were correct.

The Italian proceedings

[13] In the alternative to a declaratory order that the company was in business rescue, CMC asked for an order in the following terms when these proceedings were launched in March 2019:

'3.1 the order issued by the Court of Ravenna (Bankruptcy Office) in Italy dated 6 December 2018, granting the Preventative Arrangement sought by the first applicant in the composition proceedings; ('the Italian order') is hereby recognised in the Republic of South Africa;

3.2 it is declared that the Italian order is enforceable in the Republic of South Africa.'

[14] In the English translation annexed to the founding affidavit the order in question read:

'Assigns the applicant company a deadline of 60 days to file the agreement with creditors proposal, the certification statement and documentation pursuant to article 161, sections 2 and 3 of the Bankruptcy Law, or alternatively, the possible restructuring agreement and the report prepared by the professional certifier, referred to under section 1 of article 182 bis of the Bankruptcy Law.

Orders the company to submit possible authorisation requests pursuant to article 161, section 7 of the Bankruptcy Law to the court, and on a monthly basis send a summarised report, specifying the ordinary and extraordinary magnitude deeds performed and the payable and receivable transactions that occurred, accompanied by the bank statements for the relevant period.'

Three individuals were named as judicial commissioners for the purpose of 'performing the functions referred to in the motivation and any additional and eventual functions that may become necessary'.

[15] A brief explanatory memorandum by an Italian lawyer indicated that the process under which the order was made involves an endeavour by the company to reach an arrangement with its creditors that will enable it to continue in business. The period of 60 days was directed at enabling the terms of a proposal to be prepared for submission to creditors. During that period there appears to be some kind of moratorium on enforcement of legal claims against the company. On 6 February 2019 the Court of Ravenna extended the sixty day period until 6 April 2019.

[16] By the time the application was heard by Potterill J matters had moved on considerably. A plan was lodged with the court on 8 April 2019 and on 12 June 2019 the court granted an order (a) admitting

the company to the pre-insolvency arrangement procedure; (b) appointing a delegated judge and judicial commissioners; (c) directing that the pre-insolvency arrangement be communicated to creditors by 31 July 2019; and (d) providing for a meeting of creditors to be convened by no later than 13 November 2019 to consider the arrangement.

[17] These changed circumstances did not prompt CMC to amend the relief it was seeking, namely, the recognition of the order of 6 December 2018. The fact that everything that the Court of Ravenna had directed should happen in terms of that order had happened and that further and different orders had been granted was disregarded. It is an understatement to say that this introduced an air of unreality into the proceedings.

[18] That air of unreality became even more mystifying after Potterill J handed down her judgment and granted leave to appeal, because in its notice of appeal to this court CMC said that, if its argument in regard to business rescue was not upheld, it would seek in the alternative an order recognising the order of 6 December 2018. By this stage, as we now know, the creditors' meetings had taken place and the proposed composition with creditors approved. This was reflected in CMC's heads of argument which said that it intended to seek the leave of the court to adduce further evidence apprising it of the progress of the proceedings in Italy and the fact that a plan had been approved by the requisite majority under the Italian Bankruptcy Law. That was on 30 June 2020. The need for such evidence became clamant when Esor's heads of argument were filed on 29 July 2020 as they said that they would seek leave to adduce further evidence that on 29 May 2020, following hearings on

11 and 25 March 2020 the Court of Ravenna had finally approved the composition on 29 May 2020. In fact they did not do so.

The application to lead further evidence

[19] Notwithstanding the manifest urgency of any application to adduce further evidence on appeal, nothing was forthcoming until Friday, 6 November 2020, three days before the appeal was to be argued on Monday, 9 November 2020. This revealed that Esor was correct in saying that the composition had been approved by a court order granted on 29 May 2020. The composition allegedly dealt with CMC's assets and liabilities worldwide and the worldwide claims of creditors including those in South Africa. On 7 August 2020 the Chancellor's Office of the Court of Ravenna certified that there was no appeal against the order approving the composition.

[20] The only explanation for this delay was a single paragraph in the affidavit filed in support of the application, reading as follows:

'In August the courts in Italy are closed for the summer holidays. As a result of this the decree granted by the Court in Ravenna on the 7th August 2020 was only received in early September 2020. In addition because of the Covid emergency, obtaining an appointment for the translation of the decree took some time. Ultimately, the translation of the decree was only obtained on the 16th October 2020. It was for this reason that the launch of this application was delayed.'

[21] This explanation was wholly unacceptable as was the delivery of 100 pages of affidavits and annexures in the middle of a court term and three days before the hearing of the appeal. Describing the explanation as cursory is to flatter it. The judgment approving the composition reflects that the president of the court in Ravenna twice directed expedited hearings in the light of the Covid-19 epidemic and hearings were held

with the use of personal protective equipment and the application of social distancing guidelines. The judgment showed that the judicial commissioners supported the composition and only a handful of creditors expressed objections. These were addressed at a hearing on 20 May 2020 and the judgment approving the compromise was handed down on 29 May 2020. It was translated into English immediately; the translator's certificate being dated 6 June 2020. This court was not given the elementary courtesy of it being recognised that adducing additional evidence required similar urgency from the litigants and their legal representatives. When this was raised with counsel we were not even favoured with an apology.

[22] It is inexcusable that this information was not brought to this court's attention simultaneously with the delivery of the heads of argument. Instead the heads of argument were inaccurate in saying only that the creditors had voted in favour of the composition and not mentioning that it had been approved by the court. There is a cryptic statement in para 122 of the heads of argument for CMC that CMC is entitled in its alternative prayer to an order 'recognising the court ordered arrangement with creditors, granted by the court of Ravenna on 7 December 2018'. It is unclear whether this was possibly hinting at the order of 29 May 2020. We have no affidavit from the South African attorney explaining his instructions to counsel and, if they did not refer to the order of 29 May 2020, why this important information was not included. Nor do we know whether he was advised by counsel to bring the application urgently and, if not, why not.

[23] The excuse quoted above in para 20, that the certificate that there were no appeals pending was only issued on 7 August, when the courts

were closed for the summer holidays, is not born out by the certificate. That shows that it was issued at the specific request of CMC's lawyer, a Mr Fabrizio Corsini, on 7 August 2020. It is dated and signed on 7 August and bears what appear to be revenue stamps of four euros. On the face of it, Mr Corsini had it in his possession on that day and certainly must have been aware of it. All the relevant information was in the possession of CMC and its Italian lawyer and should have been in the possession of its South African lawyer. There was no reason to wait until 16 October 2020 for the certificate to be translated in Italy. There are Italian translators in this country.[3] In any event this uncontroversial information could have been furnished to the court on the basis of information and belief in a short affidavit from the South African attorney.

[24] The additional evidence demonstrated in no uncertain fashion, what was apparent by the time the case came before the High Court, namely that the order sought in the original notice of motion and the notice of appeal had long since ceased to be of any relevance. There is nothing to recognise in that order. The period it gave CMC to produce a plan of composition with its creditors has passed and it has done just that. Everything that has happened since has happened in accordance with other court orders and provisions of the Italian Bankruptcy Code that have not been furnished to us.

[25] Mr Brett SC argued that the order of 7 December 2018 was a process akin to one of judicial management or a section 311 compromise under the old Act, or business rescue under the Act, and that we should treat the recognition of the order as a continuation of that process. That is

[3] The website of the Italian Consulate has a list of 18 sworn translators.

plainly wrong. An order giving a company a temporary moratorium from claims while it prepares a plan to place before its creditors is fundamentally different from an order convening meetings to consider a plan, or an order approving the adoption of the plan by a meeting of creditors. Under none of the three processes he identified would an initial order, for example, the appointment of provisional judicial managers or an order for meetings to be convened to consider an offer of compromise, be treated as encompassing the final judicial management order or the sanction of the compromise.

[26] The last, but by no means the least important, reason for not admitting this evidence is that, pursuant to it, CMC sought an order, the effect of which as explained in argument would be to impose upon South African creditors the terms of the composition approved by the Court of Ravenna, without their being cited or served or having had any opportunity to submit evidence or argument against an order having that effect. That would amount to a wholesale breach of their constitutionally guaranteed right of access to courts. It cannot be countenanced.

[27] The application to adduce further evidence must be dismissed. An appropriate penal order for costs should accompany its dismissal.

The alternative relief

[28] For the reasons already canvassed the prayer for alternative relief in the form of an order recognising the Court of Ravenna's order of 7 December 2018 was moot long before the appeal reached this court. The prayer was in any event fatally flawed and doomed from the outset to fail.

[29] In the first place there was nothing in the order of 7 December 2018 that was capable of being enforced or recognised in South Africa. CMC was given leave to prepare a plan for a composition with its creditors. It was required to submit certain authorisation requests and reports to the Court of Ravenna. Neither of those was in any way executable in South Africa and recognising the order in South Africa could not possibly have had any effect in this country.

[30] The purpose behind this request was twofold. It was claimed that a recognition order would put CMC's South African operations under the supervision of the Board of Commissioners appointed by the Italian court for so long as the process of securing approval of a composition with creditors continued in Italy. Second it was suggested that this would entitle CMC to the same moratorium against claims by creditors in this country as the Italian proceedings afforded CMC in Italy.

[31] The legal foundation for this was misconceived. Reliance was placed upon the decision of this court in *Jones v Krok*[4] to claim the enforcement of the Court of Ravenna's order in this country. But not all judgments by foreign courts are enforceable in South Africa solely on the grounds set out in that case. Judgments that determine a party's rights or status[5] are capable of giving rise to a cause of action in South Africa and *Jones v Krok* was concerned with that type of case. It was not concerned with the enforcement in this country of the statutes of other countries governing matters such as company law or insolvency. There the

[4] *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E; *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 445 (SCA) para 11, cited with approval in *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) para 38.

[5] LAWSA, Vol 7(1) 3ed (2019) para 369. The most usual cases involve monetary judgments and claims to specific property. Questions of status such as the grant of a decree of divorce will be more readily recognized than an order for the custody of a minor child where the interests of the child are paramount. *Righetti v Pinchen and Another* 1955 (3) SA 338 (D).

principle that foreign statutes have no extra-territorial effect comes into play. Absent recognition by our courts in appropriate proceedings the foreign trustee or liquidator has no authority to deal with assets in this country and any moratorium operating elsewhere will not bind South African creditors. [6]

[32] In dealing with issues involving foreign liquidators and similar persons acting in terms of the legislation governing insolvency or bankruptcy or the winding-up of companies, the established principle is for the foreign liquidator to apply for recognition in this country. Without recognition in this country they are not entitled to bring proceedings in a court in South Africa.[7] The court granting recognition will then make an appropriate order including that they furnish security and will distribute the assets in this country in accordance with the law of this country.[8] Such recognition is granted on terms that protect the position of local creditors holding security for their claims under domestic law and the powers to be exercised by the foreign liquidator will be dealt with in the recognition order.[9]

[33] If anyone were to seek recognition in this country of the order of the Court of Ravenna it would have to be the Judicial Commissioners, who appear from the sparse information in the founding affidavit to play some kind of oversight role in relation to the process of arriving at and securing the approval of a composition. But they do not appear to hold a position similar to a trustee or liquidator who is charged with the

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[6] *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179D-J.
[7] *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation)* 1990 (1) SA 954 (A) at 959E-960 C.
[8] *Donaldson v British South Africa Asphalt and Manufacturing Co Ltd* 1905 TS 753 at 756-757,
[9] *Re African Farms Ltd* 1906 TS 373.

possession of the assets of the company and owes a duty to creditors to deal with their claims. Judging by the judgment of 29 May 2020, which is the only source available to us, their role is to report to the court on the fairness of the composition. Nevertheless, if anyone was to apply for recognition in this country it would be them and they have brought no such application. On the face of it the claim that the order of the Court of Ravenna be recognised in this country is brought by a party (CMC) that has no right to seek such an order.

[34] For those further reasons the application for the alternative order was as misconceived as the application for the main order.

Result

[35] Both the application to lead further evidence and the appeal must be dismissed. To show the court's disapproval of the manner in which the application to lead further evidence was brought, its dismissal will be accompanied by an order that it pay the costs on an attorney and client scale. The following order is made;

1 The application to lead evidence on appeal is dismissed with costs on the scale as between attorney and client, including the costs of two counsel.

2 The appeal is dismissed with costs, including the costs of two counsel.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	JJ Brett SC (with him D Mahon)
Instructed by:	Terry Mahon Attorneys, Sandton;
	Webbers, Bloemfontein
For second respondent:	WG La Grange SC (with him AC Russell)
Instructed by:	Tiefenthaler Attorneys Inc, Rivonia;
	Honey Attorneys Inc, Bloemfontein.