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

Case Number: 48987/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

SIGNATURE

DATE

In the matter between:

PIETER HENDRIK STRYDOM N.O.

First Applicant

SOLOMON STANLEY ISAKA BOIKANYO

Second Applicant

(In their capacities as trustees of the Apie Van
Noordwyk Family Trust)

and

SEACREST INVESTMENTS 153 (PTY) LTD

First Respondent

(In Business Rescue)

ALICE AMANDA MARE N.O.

Second

Respondent

(In her capacity as the First Respondent's
Business Rescue Practitioner)

HEIDIE BARNARD

Third

Respondent

**THE FIRST RESPONDENT'S AFFECTED
PERSONS**

Third

Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Fifth

Respondent

JUDGMENT

COETZEE, AJ

INTRODUCTION:

[1] This is an opposed application brought in terms of section 130(1)(a) of the Companies Act 71 of 2008 ("the Act"). The First and Second Applicants are cited in their capacities as trustees of the Apie van Noordwyk Family Trust. The Applicants seek an order setting aside the resolution adopted on 16 September 2020 by the Third Respondent, in her capacity as sole director of the First Respondent, in terms of section 129 of the Act, placing the First Respondent under supervision and commencing business rescue proceedings.

[2] The Applicants further seek an order directing that the costs of this application be paid by the First Respondent, the Second Respondent (the business rescue practitioner, hereinafter "the BRP") in her personal capacity, and the Third Respondent,

jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client. The application is opposed by the First and Second Respondents, while the Third Respondent abides the decision of the Court.

[3] The Applicants contend that the resolution was adopted for an improper purpose, namely, to misuse the business rescue process in order to frustrate legitimate claims by creditors and to facilitate the payment of substantial fees to the Second Respondent without justification.

[4] The Second Respondent avers that she was cited only in her official capacity, denies any personal liability for costs, and maintains that the business rescue proceedings were lawfully and properly conducted. She further submits that the proceedings culminated in the sale of the First Respondent's only asset, an immovable property, in accordance with the adopted business rescue plan.

ISSUES FOR DETERMINATION:

[5] The issues for determination are:

[5.1] Whether the Applicants have the requisite *locus standi* to institute the application as affected persons in terms of the Act;

[5.2] Whether the resolution to commence business rescue proceedings was lawfully adopted and in compliance with the provisions of the Act, or whether it constitutes an abuse of process; and

[5.3] Whether a punitive costs order is justified, including one against the Second Respondent in her personal capacity.

FACTUAL BACKGROUND:

[6] The Applicants are the duly appointed trustees of the insolvent estate of the Apie van Noordwyk Family Trust. In case number 7520/2018 before this Court, the Applicants instituted action against the Third Respondent, Ms Barnard, in her personal capacity, claiming payment of R2,642,589.18 and R357,419.82. That litigation culminated in a settlement agreement concluded between the Applicants and the Third Respondent, both in her personal capacity and as the sole director of the First Respondent, Seacrest Investments (Pty) Ltd.

[7] In terms of that agreement, which was made an order of court on 10 February 2020 before the Honourable Madam Justice Van der Schyff, the Applicants were authorised to sell Erf 7[...] X[...] ("the Property"), registered in the name of Seacrest, and to retain the proceeds of the sale in full and final settlement of the estate's claims against the First Respondent.

[8] The Applicants caused the Property to be valued and cleaned, and appointed estate agents to market and sell it. Although an informal agreement was reached with the Third Respondent to delay the sale for six months, private treaty attempts were unsuccessful, and a public auction was scheduled for 17 September 2020 at 11:00.

[9] On 16 September 2020, the day before the auction, the Applicants received correspondence from the Third Respondent's attorneys advising that the First Respondent had been placed under business rescue and requesting an undertaking not to proceed with the auction.

[10] On the same date, the Third Respondent submitted the requisite documentation to the Companies and Intellectual Property Commission (CIPC), including a resolution adopting business rescue and appointing the Second Respondent as interim BRP. CIPC recorded the commencement of business rescue proceedings accordingly.

[11] Despite the request to halt the auction, the public auction proceeded on 17 September 2020, yielding an offer of R3,250,000.00. The Second Respondent was formally appointed as BRP on the same day.

[12] Notices pertaining to the business rescue were issued by the Second Respondent but not to the Applicants, despite their recognised interest in the Property and the court order.

[13] On 25 September 2020, the Applicants launched this application seeking, *inter alia*, the setting aside of the business rescue resolution; alternatively, leave to proceed with the sale; and further alternatively, the liquidation of the First Respondent.

[14] On 1 October 2020, both Seacrest and the Second Respondent opposed the application and filed answering affidavits. That same day, the first creditors' meeting was held in terms of sections 147(1) and 148(1) of the Act. The Applicants were not notified of this meeting.

[15] The Applicants' replying affidavit was filed on 2 October 2020. When the application was heard on 6 October 2020, it was struck from the roll for lack of urgency.

[16] On 9 October 2020, the Second Respondent prepared a business rescue plan. On 16 October 2020, the Property was sold to the same purchaser identified by the Applicants, for an amount of R3,400,000.00. The plan was published on 22 October 2020 and adopted on 3 November 2020. A notice of substantial implementation was filed on 10 November 2023.

[17] The Applicants were excluded from the process despite their vested legal and financial interest under the court-sanctioned settlement agreement. The First Respondent had no other assets, income, or employees. Yet, the Second Respondent received more than R2.2 million in remuneration.

[18] Requests for an accounting of the proceeds and breakdown of the business rescue costs were ignored or inadequately addressed. The Applicants allege that the BRP's fees are grossly disproportionate to the limited scope of her duties, being the sale of the Property.

APPLICANTS' CASE:

[19] The Applicants contend that the business rescue resolution was adopted to defeat enforcement of the court-sanctioned settlement. They submit that they are creditors with the requisite *locus standi* and that the Second Respondent relied on inadmissible hearsay to dispute the Third Respondent's authority. They allege deliberate exclusion from the process and misappropriation of proceeds through excessive fees.

FIRST AND SECOND RESPONDENTS' CASE:

[20] The Respondents argue that the Applicants lack *locus standi* as they are not shareholders, directors, employees, or creditors. They further argue that the application is moot due to adoption of the plan and transfer of the property. The Second Respondent opposes a personal costs order, claiming she was not properly cited in her personal capacity and not afforded a fair opportunity to address the issue.

LEGAL FRAMEWORK AND DISCUSSION:

[21] In terms of section 130(1)(a) of the Act, an affected person may apply to court to set aside a business rescue resolution. A creditor is included in the definition of an affected person in section 128(1)(a). The Applicants are creditors by virtue of the binding settlement order of 10 February 2020, entitling them to the proceeds of sale. The Respondents' challenge to their standing is without merit. The Third Respondent, as sole director, had the authority to act on Seacrest's behalf under the principle of unanimous assent.

[22] It is undisputed that the resolution was adopted on the eve of a public auction to execute a court order. At that time, the company had no operations, income, or employees. Even the BRP conceded there was no viable business to rescue. The business rescue proceedings were accordingly initiated in bad faith, amounting to an abuse of process.

[23] The exclusion of the Applicants from the process is a further irregularity. They were not informed of key meetings, not consulted on the plan, and were ultimately deprived of proceeds they were lawfully entitled to. Meanwhile, the BRP was remunerated extensively without a proper accounting.

[24] The criteria under section 130(1)(a) and section 130(5)(a)(ii) of the Act are satisfied: the company was not financially distressed, no reasonable prospect of rescue existed, procedural requirements were ignored, and it is just and equitable to set the resolution aside.

[25] The Supreme Court of Appeal in *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) confirmed that consent orders are binding, and the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) SA 185 (CC) reinforced the principle of legal certainty. The present matter reflects a deliberate circumvention of judicial authority under the guise of business rescue.

COSTS:

[26] It is trite that the awarding of costs lies within the discretion of the Court, to be exercised judicially with due regard to fairness and the circumstances of each case. A punitive costs order is justified where a party acts in bad faith or abuses the court process. Here, the Applicants were compelled to bring the application to enforce a binding court order and protect the estate's interests. The conduct of the Respondents, particularly the misuse of the business rescue mechanism, obstruction, and lack of

transparency, warrants censure. While the BRP was initially cited in her official capacity, she was aware that a personal costs order was sought and failed to adequately respond. While personal liability for costs is not lightly imposed, the circumstances here justify such an order.

ORDER:

1. The resolution adopted in terms of section 129 of the Companies Act 71 of 2008 to place the First Respondent under supervision and commence business rescue proceedings is hereby set aside in terms of section 130 of the said Act.
2. The costs of this application are to be paid by the First Respondent, the Second Respondent in her personal capacity, and the Third Respondent, jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.

**L COETZEE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, 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 the 3 June 2025.

Appearances:

On behalf of the Applicants:

Adv. S. Tsangarakis

Instructed by: Assheton-Smith Ginsberg Inc.

On behalf of the Second Respondent: Adv. N. Terblanche

Instructed by: Kruger & Co. Inc.

Date heard: 10 March 2025

Date of judgment: 3 June 2025