IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2025/001669

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) NO REVISED: ~~NO~~

6 February 2026 [redacted]

DATE SIGNATURE

In the matter between:

WHITE RIVERS EXPLORATION (PTY) LTD	**First Applicant**
LEXINGTON GOLD LTD	**Second Applicant**
LEXINGTON GOLD SOUTH AFRICA (PTY) LTD	**Third Applicant**
MARK GARETH CREASY	**Fourth Applicant**
YANDAL INVESTMENTS (PTY) LTD	**Fifth Applicant**
SUNSWELL HOLDINGS (PTY) LTD	**Sixth Applicant**

and

POLSUN LIMITED	**Respondent**

Summary:

Application for security of costs in respect of proceedings brought by former peregrine shareholder of a company previously under business rescue and business rescue had been terminated, seeking to set aside cancellation of its shares to invalidate the business rescue process and to be reinstated as a shareholder.

Court assessing prospects of success in a main application and holding that:

1. Section 137 of the Companies Act 71 of 2008 read with section 152(6) expressly authorises a business rescue practitioner to cancel shares in accordance with a duly adopted business rescue plan;
2. Constitutional challenge founded on section 25(1) of the Constitution impermissible in the light of section 137;
3. Since business rescue proceedings had terminated in terms of sections 132(2)(b) read with section 132(2)(c)(ii) with the result that relief sought was incompetent, no extant business rescue to be set aside and nothing capable of implementation;
4. Statutory structure and legislative requirements of Chapter 6 of Companies Act in relation to procedure in business rescue proceedings discussed. Finality of business rescue plan on adoption under section 152(4) and termination of proceedings once substantial implementation has occurred discussed;
5. Reliance on section 172(1)(a) of the Constitution (if available) without any engagement of the just and equitable remedial framework contemplated in section 172(1)(b) inappropriate given the fact that business rescue process was fully implemented and the lapse of time to institution of the main application;
6. Failure to join interested shareholders and creditors fatal.

JUDGMENT

FINE AJ:

INTRODUCTION

[1] The present application for security for costs arises as an adjunct to a substantive application instituted by the respondent (**Polsun**), a foreign peregrini of this court and former minority shareholder of WRE, in which it sought the following relief, namely:

a The cancellation of the shares in the first respondent (WRE) pursuant to the business rescue plan prepared by the second and third respondent (the BRPs) is declared unlawful and unconstitutional; (**the first issue**)

b The business rescue of the first respondent (WRE) is set aside; (**the second issue**)

c The first respondent (WRE) is ordered to effect the necessary changes to the share register and share certificates so as to reflect the shareholding in the first respondent (WRE) as it was prior to the cancellation of shares in the first respondent pursuant to the business rescue plan prepared by the BRPs. (**the third issue**)

(**the main application**)[1]

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1 In the main application, WRE is the first respondent, the business rescue practitioners of WRE, the second to fourth respondents (BRPs), the fifth respondent was Lexington Gold Ltd (**Lexington Gold**), the sixth respondent is Lexington Gold South Africa (Pty) Ltd (**Lexington Gold SA**), the seventh respondent is Mark Creasy (**Creasy**), the eighth respondent Yandal Investments (Pty) Ltd (**Yandal**), the ninth respondent is Sunswell Holdings (Pty) Ltd (**Sunswell**). There were other respondents but they are not implicated in the present proceedings and it is therefore not necessary to refer to them.

[2] The application for security of costs does not arise in isolation. Proper appreciation of both the issues in this application and the justification for security is best understood or approached after identifying the key role players, outlining the background to the business rescue and considering the salient features of the business rescue and the issues which arose in relation thereto.[2]

BACKGROUND, HISTORICAL EVENTS AND THE GROUP STRUCTURE OF WRE

[3] The principle business of WRE prior to its business rescue was mineral exploration and development. It held substantial tenement interests on the Witwatersrand gold fields extending over a large piece of land which were estimated to contain significant potential gold resources suitable for exploration and development. Those tenement interests comprised prospecting rights, all of which constituted valuable assets with significant value to the potential exploration company.

[4] WRE's share capital was divided into Class A and Class B shares.[3]

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2 The identities and roles of the respective parties in both the main application and the security for costs application will be addressed later in this judgment insofar as the role of any of the parties is relevant to the outcome of this application.

3 The Class A shares were held by Creasy and a company Silver Meadow Trading 2005 (Pty) Ltd; the B Class shares were held by Cornelius Pieters, Steven Timothy O'Shea, Native Exploration (Pty) Ltd, Insingizi Minerals (Pty) Ltd, the Tahlia Family Trust, Polsun, Yandal, the Warburton Super Annuation Fund and the Warburton Family Trust. The A and B Class shareholders are collectively referred to as **the shareholders.**

[5] On 6 January 2023, the board of directors of WRE adopted a resolution in terms of section 129(1) of the Companies Act[4] (**the Companies Act**) placing WRE under business rescue.

[6] The course of the business rescue proceedings is neither controversial nor in dispute. The convening of meetings of creditors, shareholders and employees, the circulation of the explanatory statement and the voting process culminating in the adoption of the business rescue plan are all expressly recorded in the plan itself and the documents before the court. There is no challenge to the procedural regularity of those steps. On the contrary, the common cause facts demonstrate full compliance with the statutory framework, and that the plan was duly adopted in accordance with the prescribed majorities. It is equally clear from the plan itself that WRE was financially distressed and incapable of continuing on a solvent basis absent intervention. The plan expressly records a need for a restructuring of WRE's affairs together with an immediate capital injection. Provision is accordingly made for fresh funding through the payment of a capital sum of £300 000[5], to be used to pay existing creditors and other parties referred to in the plan. These facts are not disputed and form the basis upon which the plan was proposed and approved.

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4 71 of 2008
5 which is defined in clause 2.1.2 of the plan as "the capital sum"

[7] A central and indispensable feature of the plan was the cancellation of all the existing issued shares of the shareholders and the allotment and issue of 100 new ordinary shares to the proposer coupled with the agreed capital contribution. That mechanism lies at the very heart of the restructuring and constitutes the commercial *quid pro quo* for the funding required to rescue WRE. The fate of existing shareholders is therefore squarely addressed in the plan presented to all affected parties prior to the vote.

[8] In short, the plan adopted in April 2023 occurred with the requisite statutory majorities and following compliance with the procedural mechanisms prescribed in Chapter 6 of the Companies Act.

[9] Pursuant to the adopted plan and in accordance with the process, all shares held by the erstwhile shareholders of WRE, including Polsun, were cancelled and 100 new shares were issued and allotted in favour of Lexington Gold South Africa. In effect, there was a recapitalisation facilitated by the payment of a capital sum of £300 000 as provided for in the business rescue plan dated 31 March 2023[6] which was used to pay creditors, employees and SARS.[7]

[10] In the main application, Polsun challenged the constitutionality of this cancellation, relying on section 25 of the Constitution[8] and contends that section

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6 The capital sum defined in clause 2.12 of the plan.
7 Clause 18.5 of the plan
8 The Constitution of the Republic of South Africa, Act 108 of 1998

137 of the Companies Act – which permits "an alteration in the classification or status of any issued securities of the company other than by way of transfer of securities in the ordinary course of business, either on direction of the court or contemplated in a business rescue plan" – does not authorise the cancellation of the Polsun shares (and indeed all the other shares) by the BRP.

[11] On that basis, Polsun contends that it is entitled to the relief sought in the notice of motion as outlined earlier in this judgment.

THE CONDUCT OF THE BUSINESS RESCUE PROCEEDINGS

[12] The outcome of the business rescue proceedings is central to an understanding of the issues presently before the Court in the main application and this application. The relief sought by Polsun is premised on a wholesale undoing of the consequences flowing from a duly adopted and implemented business rescue plan. Any assessment of Polsun's prospects of success in the main action therefore necessarily begins with the statutory architecture of Chapter 6 of the Companies Act and the structure of sequence of events it prescribes from commencement through to adoption of the plan to implementation and termination of the rescue and the chronological structure it prescribes.

[13] Against that backdrop, it is convenient to set out the legislative sequence, mechanics and consequences of business rescue as prescribed in Chapter 6. This framework demonstrates both the finality accorded to an adopted plan and

the limited scope for collateral challenge once implementation has occurred. It also provides the necessary prism through which Polsun's claims must be evaluated including whether a legally cognisable basis exists to disturb the completed rescue proceedings and whether the main proceedings discloses any realistic prospects of success.

[14] In broad outline, the Companies Act establishes a structured sequential process which confers defined rights and obligations on affected parties at each stage, culminating in a binding collective outcome once the prescribed majorities are achieved. An appreciation of the framework is essential because the remedies available to aggrieved parties are circumscribed and the consequences of adoption, implementation and termination of business rescue are dispositive of the main contention advanced in this application.

[15] Business rescue commences either by way of board resolution in terms of section 129 or by a court order under section 131 whereupon a business rescue practitioner is appointed in terms of section 138 and assumes full management of the company under section 140. From that point in time, the Companies Act establishes a structured statutory process designed to balance competing interests while facilitating either the rehabilitation of the company or a better return for creditors than liquidation as contemplated in section 128(1)(b).

[16] Once appointed, the practitioner investigates the company's affairs (section 141), convenes meetings of affected persons including creditors and

shareholders in accordance with section 147 and 148. These meetings are integral to the statutory architecture and allows affected persons to participate meaningfully in shaping the proposed business rescue plan.

[17] The BRP must publish a business rescue plan within the prescribed period (section 150) which is then presented to affected persons at a duly convened meeting under section 151. At that meeting, creditors and shareholders debate the plan and vote in their respective classes. Adoption requires the majorities stipulated in section 152(2) ensuring that the outcome reflects a collective commercial decision.

[18] If the required majorities are achieved the plan is adopted and becomes binding on the company and all affected persons in terms of section 152(4) whether or not they supported it. At that point, the statutory process is intact and the adopted plan replaces prior rights and claims with a new regime created by the plan.

[19] Importantly, once the business rescue plan has been adopted in terms of section 152(4), the rights and obligations of all affected persons are thereafter regulated exclusively by the statutory regime. That outcome accords not only with the express wording of section 152(4) but also with a foundational principle of company law, namely that by becoming a shareholder and, in particular, a minority shareholder, one accepts that properly constituted decisions of the majority will prevail.

[20] In *Sammel and Others v President Brand G.M. Co Ltd*[9], at pg. 678 G-679 C, the following was stated:

> "Those summarised views are now more fully expounded. First, some general principles that are relevant. By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those H decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder (cf. secs. 16 and 24). That principle of the supremacy of the majority is essential to the proper functioning of companies. Thus, in Levin v. Felt & Tweeds Ltd., 1951 (2) S.A. 401 (A.D.), it was contended (p. 411H) that the rights of the ordinary shareholders were being altered by the reconstruction of capital of the company, because, when they invested money in it, they relied on the fact that the capital of the company was as it then was, and that any reduction of capital therefore adversely affected their rights.
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> "The answer to this contention (said CENTLIVRES, C.J., at p. 412A) is that when the ordinary shareholders invested their money in the company they must be taken to have known that under the Companies Act the Court may confirm a reduction of capital voted for by three-fourths of the shareholders

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9 1969 (3) SA 629 A

and that on such a reduction of capital the preference shareholders are entitled to be paid out first (i.e. before the ordinary shareholders)."

The same view was expressed by EVERSHED, M.R., in answer to a similar contention in Greenhalgh v. Arderne Cinemas, (1951) Ch. 286 (C.A.) at p. 292, which is quoted later in this judgment. Similarly in the present case, when the minority shareholders became members of Saai- B plaas, they must be taken to have known that the prescribed majority of shareholders, if at any time it appeared to them to be necessary or desirable, could and might resolve that the company should take some action, even some unusual action as in the present case, which might adversely affect their rights as shareholders, but they undertook to be bound by any such decision if lawfully arrived at, and by the Court's confirmation of it, if that were also required by law.

[21] The business rescue framework gives legislative effect to the aim, purpose and scope of business rescue which is the rehabilitation of an insolvent company in the public interest.

[22] Once the plan is implemented and the BRP files a notice of substantial implementation, business rescue terminates by operation of law in terms of section 132(2)(c)(ii) read with section 132(2)(b). That termination marks finality and as such the completed process is not susceptible to retrospective undoing.

SECURITY FOR COSTS, DISCRETIONARY NATURE AND ESTABLISHED PRINCIPLES

[23] It is well established under South African law that the grant or refusal of an order for security for costs lies within the discretion of the court. That discretion is a narrow or true discretion exercised judicially upon a consideration of all relevant facts and circumstances. No single factor is determinative. Rather, the enquiry is fact-specific, requiring a balancing of competing considerations in the particular case.[10]

[24] Moreover, the Constitutional Court in *Giddey NO v H C Barnard and Partners*[11], has stated that the enquiry is no longer confined to the traditional common law considerations arising from litigation between and incola and peregrinus. The Constitutional Court emphasised that the discretion involves a constitutionally infused balancing exercise: on the one hand the potential prejudice and inconvenience to the incola, including the practical difficulty of enforcing an adverse costs order; on the other, the peregrinus' fundamental right of access to court under section 34 of the Constitution. The outcome turns on a fact-

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10 *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 SCA at paras 13 and 14 and the cases therein referred to.

11 2007 (5) 525 CC

intensive weighing of these competing contentions, neither of which are afforded primacy.[12]

[25] As recognised in *Giddey NO v H C Barnard and Partners supra,* the discretion to order security for costs requires a balancing exercise, and the mere risk that an incola may not recover its costs is insufficient to justify such relief.

[26] An enquiry into the merits of the claim is required to determine whether the proceedings are vexatious or amount to an abuse but only where it is practicable to assess the prospects of success.[13]

[27] The principle was clearly articulated in *Zietsman v Electronic Media Network Ltd and Others*[14] where the court stated:

> *"[21] I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case."*

[28] In the present case, that enquiry does not require a resolution of contested factual issues. It turns primarily on questions of statutory interpretation and the

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12 See also Boost Sports supra at para 15 where the SCA again emphasised that in terms of the common law the mere inability by an incola (should be peregrinus) to satisfy a potential costs order is insufficient to justify an order for security and that something more is required.

13 Boost's case supra at paras 16-19

14 2008 (4) SA 1 SCA at para 21

application of those principles to largely common cause facts, rendering it both appropriate and necessary for this court to have regard to the merits of the proposed application in the proper exercise of the discretion.

[29] Against this legal framework, the following facts are common cause.

a First, Polsun is a foreign peregrini and holds no assets within the jurisdiction of this court.[15] WRE, the BRPs, and Lexington Gold South Africa are incolae of this court.[16]

b Second, Polsun holds no assets within the jurisdiction of this court and has failed to disclose its financial position;

c Third, Polsun has failed to disclose its financial position whether by way of audited financial statements or otherwise and has provided no evidence whatsoever of its ability to satisfy an adverse order for costs;[17]

d Fourth, Polsun has not explained how the present litigation, which seems to be extensive and complex, is funded. In the absence of any disclosure in this regard, it remains an open question whether Polsun would be able to furnish security for costs if so directed or to fund the litigation.[18]

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15 WRE, the BRPs and Lexington Gold South Africa are incolae of this court whilst Lexington Gold, Creasy and Sunwell are peregrini of this court.

16 The fact that the other applicants for security are peregrini is irrelevant.

17 *Equitable Trust and Insurance Company of SA Ltd v Registrar or Banks* (T) 1957 (1) SA 689 T, where the court held that in an application resisting the furnishing of security the ordinary and accepted course is for a company is to place a balance sheet before the court.

18 See Boost, supra

[30] These considerations are important but not decisive in the exercise of a discretion and it is now both appropriate and necessary to have regard to the merits of the main application, the projected outcome of which would constitute an important factor in the exercise of a discretion.

THE CONSTITUTIONAL CHALLENGE (THE FIRST ISSUE)

[31] The constitutional challenge is formulated in Polsun's heads of argument in terms which differ slightly from its articulation in the answering affidavits. In essence, it is advanced on the following basis:

a First, there is no legislation or other law of general application which authorises the cancellation of shares pursuant to a business rescue plan;

b Second, reliance is placed on section 25 of the Constitution which provides that no one may be deprived of property except in terms of a law of general application and that no law may permit arbitrary deprivation of property[19];

c Third, it is contended that the cancellation of Polsun's shares pursuant to the adopted business rescue plan accordingly constituted an unlawful deprivation of property;

d Fourthly, it is asserted that even if cancellation is authorised by the Companies Act, cancellation without compensation is arbitrary and thus

19 Section 25(1)(a) of the Constitution provides that "No one may be deprived of property except in terms of the law of general application and no law may permit arbitrary deprivation of property."

unconstitutional – the implicit contention being that if section 137 of the Companies Act is of application it is itself unconstitutional.

SECTION 137

[32] Section 137 of the Companies Act regulates the effect of business rescue on the shareholders and directors of a company. Given its centrality to the dispute between the parties, the section is quoted in full below.

"*137 (1) During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent -*

(a) that the court otherwise directs; or

(b) contemplated in an approved business rescue plan."

[33] Section 137 cannot be read in isolation. It must be interpreted in the context of the Companies Act and Chapter 6 read as a whole. Of particular importance is section 152(6), which reads as follows:

"*(6) To the extent necessary to implement an adopted business rescue plan -*

(a) The practitioner may, in accordance with the plan, determine the consideration for, and issue any authorised securities of the company, despite section 38 or 40 to the contrary."

[34] Section 152 sets out the statutory requirements applicable to the consideration of the business rescue plan and provides the mechanism by which the plan acquires binding force by empowering the business rescue practitioner to implement the reorganisation of the company's authorised and issued share capital. Properly construed, section 152(6) is the operative bridge between the approval of the plan and the exercise of the practitioner's powers under section 137.

[35] It is now convenient to ascertain the proper meaning of the phrases as employed in section 137, an exercise which engages the established principles of statutory interpretation under South Africa law, as set out in Capitec.[20] The point of departure remains the language of the provision itself but the enquiry does not end there. The words must be construed purposively and contextually having regard to the aim, purpose and scope of the business rescue regime created under section 6 of the Companies Act.

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20 *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 SCA

a Classification refers to the class or type of security and the rights attaching to it such as ordinary as contrasted with preference shares, voting contrasted with non-voting shares, redeemable contrasted with non-redeemable shares. An alteration in classification therefore would encompass any change to the nature of the security itself or the rights inherent in that class;

b Status by contrast appears to be broader and concerns the legal position of a holder/owner of shares including whether or not that person remains a shareholder at all and encompasses changes to the shareholder's relationship with the company, not merely a variation in the incidence of that class of shareholder.

[36] In my view, the cancellation of the shares (of all existing shareholders in WRE) together with the issue and allotment of new shares falls squarely within the scope of section 137. Section 137 must be interpreted purposively against the backdrop that business rescue is invoked only in circumstances of acute financial distress, where the very object of the process is the injection of new funding to rescue the company either as a going concern or to provide a better dividend for creditors.[21] It follows axiomatically that any genuine rescue will

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21 In *Limbouris and Others v Du Toit and Others* 2025 (1) SA WCC at 71, the court there summarised and adopted with approval the summary in Henochsberg on the Companies Act dealing with the nature, purpose and intended duration of business rescue. This summary properly accords with the developing case law and constitutes a fair summary of the authorities and correctly emphasises both the element of immediacy inherent in business rescue and the central requirement of a capital injection whether to rehabilitate the company as a going concern or failing that, to achieve a better rate for creditors than will result in liquidation. This would inevitably require a recapitalisation which is indispensable.

require a fresh infusion of capital. Absent purposive interpretation, a business rescue practitioner would be hamstrung in the performance of his/her statutory duties by an unduly narrow reading of the words "classification" and "change in status". It is contrary to commercial reality to suppose that an external investor would inject funding into a financially distressed company absent a capital restructuring or a restructuring of the existing shareholding.

[37] The views expressed in this judgment accord with the finding of Meyer J (as he then was) in *Moodley*[22] in which Moodley had contended that cancellation of shares was not authorised by the Companies Act. These contentions were authoritatively dealt with by Meyer J in a single paragraph where he said the following:

> *"[50] Moodley's contention that the provisions of s 114 of the Companies Act were contravened is founded on the premise that the ODM rescue plan does not contemplate a cancellation (the buy-back procedure used) and re-issue of shares. The premise is wrong. There was no contravention of s 114. Moodley's contention that the practitioner failed to comply with sections 46 and 48(8) of the Companies Act, is also wrong. The provisions of s 48(2), requiring compliance with the liquidity and solvency requirements of s 46, are inapplicable to business rescue proceedings where the company in*

22 *Moodley v On Digital Media (Pty) Ltd and Others* 2014 (6) SA 279 (GJ). Paragraphs [13]-[53] have been excised from the main judgment but the full text is to be found in SAFLII (20456-214) [2014 ZAGPJHC137]

business rescue is under the control of a business rescue practitioner and not its board. Moreover, sections 137(1) and 152(6) of the Companies Act give express recognition to the business rescue practitioner's power to effect the issue of securities, and the alteration in the classification or status thereof, in accordance with the business rescue plan. Clause 2.4(4) of the ODM memorandum of incorporation also specifically provides for the practitioner's power to-

"...in terms of section 152(6)(b) amend this Memorandum of incorporation to authorise, and determine the preferences, rights, limitations and other terms of any securities that are not otherwise authorised, but are contemplated to be issued in terms of the business rescue plan..."

[38] In short, Meyer J rejected the contention that the statutory scheme precluded cancellation in the context of business rescue holding in substance that section 137 read together with section 152(6) expressly empowers the practitioner to implement an adopted a business rescue plan including an alteration of the shareholders' rights through the cancellation and reissue of securities. Moodley's case confirms the inseparable link between sections 137 and 152(6), and makes it clear that once a business rescue plan has been adopted, the practitioner is empowered to give effect to it in accordance with section 152(6), which includes the cancellation and reissue of shares where required by the plan. This is so even absent an amendment to the memorandum of

incorporation, since there exists a statutory right to effect cancellation of the shares in order to implement a duly adopted plan.[23]

[39] It follows in my view that the contention of Polsun in relation to the proper interpretation and application of section 137 is ill-conceived.

THE ANCILLARY RELIEF (THE SECOND AND THIRD ISSUES), LEGAL IMPOSSIBILITY AND FINALITY

[40] It is convenient to deal with the second and third issues together.

[41] The second and third forms of relief sought – namely the setting aside of the business rescue and the alteration of the share register - are on any view legally untenable and practically impossible to implement when considered against the undisputed factual matrix and the Chapter 6 legislation.

[42] There is no dispute that all the procedural requirements prescribed by Chapter 6 were complied with. Meetings were properly convened, resolutions duly adopted. Polsun was represented through the business rescue process by an experienced attorney.

[43] The business rescue plan was approved by 100% of both creditors and shareholders. The plan was adopted in April 2023 and on 7 September 2023 the business rescue practitioner filed a notice of termination in terms of section

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23 I am in respectful agreement with the statement by Meyer J in Moodley's case.

132(2)(b). Accordingly, even if in principle, the constitutional challenge is assumed to be sustainable (which it is not) there is no foundation either as a matter of fact or law for the ancillary relief sought. On the terse formulation set out in the notice of motion, the court will effectively be required to set aside a business rescue process which no longer exists and which is legally and factually impossible.

[44] The relief sought ignores the reality that business rescue has been fully implemented, payments have been made to creditors and other parties under the plan, the rights and obligations of shareholders have been fundamentally restructured and a new shareholding arrangement has been put in place. No attempt is made to explain how these completed transactions are to be unwound, who would be responsible for implementing such relief or how the position of third parties and erstwhile shareholders is to be addressed.

[45] The application is further silent on what is to happen to WRE is if the business rescue is set aside and why such course would be appropriate more than two years after implementation of the plan, or how the extensive commercial consequences flowing from the business rescue proceedings during the period are to be accommodated.

[46] Moreover, it is neither stated nor addressed why these issues were not raised during the course of business rescue proceedings themselves at a time when Polsun was legally represented and actively participated in the process and

where the valuation of the shares was expressly in issue.[24] More particularly, no explanation is offered as to why the alleged unconstitutionality of the cancellation of the shares was not raised contemporaneously, notwithstanding that the cancellation mechanism was clearly and extensively addressed in the business rescue plan. The present constitutional challenge emerges only *ex facto* after a full implementation of the plan and in circumstances where Polsun elected not to pursue available remedies at the appropriate time.

[47] In these circumstances, the relief is not merely inappropriate, it is conceptually incoherent and legally incapable of implementation.

NON-JOINDER

[48] It is not in dispute that eight of the shareholders and nine creditors who have a material interest in the outcome of the main application and whose rights would be materially affected by the outcome of the relief sought in the main application have not been joined. They are obviously parties who have a material interest in the main application and for reasons which remain unclear, have not been joined.[25]

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24 Valuation of the shares enjoyed a great deal of time and attention both during the course of business rescue, in the affidavits filed in this application and during the course of oral argument. In my view however it is not relevant to the outcome of this application, nor can it impact on the outcome in the main application.

25 There was no dispute that all interested parties have not been joined both in relation to shareholders and creditors. The contention which was advanced was that this could take place in due course, a matter which I will deal with later in this judgment. The same applies in relation to employees

[49] Polsun fairly accepted that these parties had not been joined but contended that the non-joinder was not fatal to the outcome of the main application since it constituted a mere technicality which could be cured at a later stage.[26]

[50] In my view, that proposition is wrong for two reasons.

a First, the SCA has on two separate occasions authoritatively held that affected persons must be joined to application of this nature.[27]

b In ABSA Bank, the SCA emphasised that if creditors are not joined, their position would be prejudicially affected because any business rescue plan that they had voted for would be set aside and the money they would receive would not be paid or in the present instance might have to be paid.[28] Clearly in the present case, the shareholders and creditors who have not been joined have a material legal interests in the relief sought in the main application.

c Secondly, the possibility that such parties may be joined at some future stage is legally and factually irrelevant. The court must assess the matter on the basis of the position as it presently stands and on that footing, the main application is fundamentally defective and for that reason alone ill-fated.

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26 It is important to note that the identity of all the shareholders and all creditors was set out in the business rescue plan, a matter which appears to be common cause.

27 *ABSA Bank v Naude and Others* 2016 (6) SA 540 SCA at paras 10-11 and Golden Dividend 339 (Pty) Ltd v ABSA Ltd [2016] SASCA 79

28 In *Reiscor 2 (Pty) Ltd (in business rescue) v Anheuser-Busch Imbev Africa (Pty) Ltd and Others* 2025 (1) SA H, Opperman J albeit it obiter, with reference to ABSA and Golden Dividend, stated that the failure to join an interested party was not a mere technicality but fatal to the outcome of the application.

[51] It follows in my view that *prima facie* the main application is fatally defective.

THE CONSTITUTIONAL CHALLENGE IS DEFECTIVE

[52] It is also my view that the constitutional challenge is procedurally defective for a number of reasons. First, constitutional validity has not been pleaded in compliance with the well-established requirement that a party advancing such a challenge must clearly identify the precise constitutional infringement and set out the material basis and relevant information required for determination of the impugned provisions.

[53] *In Prince v President Cape Town Law Society and Others*[29], the Constitutional Court stated the following:

> *"Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to*

29 2001(2) SA 388 GJ at para 22

meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal."

[54] In the present case, that repeatedly stated requirement has been observed in breach rather than adherence. There is simply no information before the court explaining why it is contended that section 137 is unconstitutional nor is there any articulation of the legal basis upon which such invalidity is asserted. It is impermissible to state mere conclusions of law without pleading the facts or circumstances giving rise to the conclusion of law.[30]

[55] Second, once it is accepted that section 137 of the Companies Act is a law of general application authorising the cancellation of the shares, constitutional subsidiarity requires any deprivation complaint to be directed at that provision and Polsun must demonstrate that section 1367 is unlawful or unlawfully applied. A freestanding reliance on section 25 is impermissible. In *My Vote*

30 *Arthur E Abrahams and Gross v Cohen and Others* 1991 (2)-SA 301C, pg. 309

Counts NPC v The Speaker of National Assembly and Others [31], the Constitutional Court said the following:

> "[52] *But it does not follow that resort to constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first.*
>
> [53] *These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.*"

[56] That requirement has not been observed or followed in the present case.

[57] Third, the attempt to invoke section 172 while leaving section 137 intact is legally incoherent. If section 137, properly interpreted, authorises the cancellation complained of, the deprivation is by a law of general application and the only

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31 2016(1) (132 CC)

cognisable challenge is to the statute itself. It seems to me that if section 137 does not authorise cancellation, the issue is rather one of unlawfulness and not constitutional invalidity.

[58] Fourthly, even assuming (contrary to what has previously been found) that section 172 is properly engaged, Polsun has ignored the remedial consequences. Section 172 does not mandate an automatic setting aside[32] since the court is required to fashion a remedy which is just and equitable, taking into account legality, certainty and the interests of third parties. This is not optional. It is an integral part of constitutional adjudication.

[59] Fifthly, the Constitutional Court has repeatedly declined to unravel completed transactions even where unlawfulness was established precisely because of the just and equitable enquiry. This principle is trite and has been repeatedly affirmed by the Constitutional Court in cases such as *Bengwenyama Minerals (Pty) Ltd v Genorah Resources and Others*[33], *Kirland Investments*[34], *Asla*[35] and *Gijima*[36]. In each of these cases, the court emphasised that invalidity does not inexorably entail setting aside and that the remedial discretion must be exercised with careful regard to practical justice and constitutional consequences.

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32 In casu the business rescue and the issue of shares
33 2011 (4) SA 113 CC at 85
34 *MEC for Health v Kirland Investments (Pty) Ltd t/a Eye Lazer Institute* 2014 (3) SA 468 CC at para 46
35 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 CC at para 96
36 *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA CC

[60] In the present case, no attempt whatever has been made to engage this issue, particularly in circumstances where Polsun is unable to articulate what is to occur if the constitutional challenge is successful. It expressly, fairly concedes that: "It is not possible for it to propose how to reverse the situation". That is, of course, no answer given that the business rescue terminated in September 2003.

[61] There are, apart from these considerations, further factors which in my view materially impact the relief sought in the main application and militate against the prospects of success. It is in any event impossible to give effect to the proposed relief sought without materially affecting the rights of third parties. It has not been indicated how what is to happen if the business rescue is set aside both as a matter of law and practicality, for example what is to happen to creditors who have already been paid under the plan? To erstwhile shareholders? And in particular what is to happen to WRE once business rescue is set aside?

[62] More fundamentally it is wholly unclear on what basis the court will be invited to reverse the business rescue process in the absence of any evidence whatsoever as to WRE's present financial position. There has been interregnum from at least September 2023 until January 2025 when the main application was launched – during which the restructuring was implemented and WRE's affairs necessarily evolved. No financial information in relation to WRE is placed before

the court. In these circumstances, the relief is not only speculative but legally untenable.

[63] A court cannot be asked in the abstract and without current financial information (even if the relief was attainable which it is not) to unwind the completed rescue process particularly where, as I have emphasised, third party rights are affected and there is no coherent proposal as to how the clock is to be turned back or what the commercial consequences would be.[37]

[64] In the result, the main application has in my view limited prospects of success. Both in substance and effect, Polsun seeks to reopen a concluded business rescue process long after implementation and in circumstances where meaningful, remedial relief is neither pleaded with precision nor is realistically attainable. Allowing the main application to proceed on this basis would result in WRE and the other parties being put to an expense which is neither fair nor justified. Objectively assessed, it falls within the approach articulated by the SCA in Boost[38]. There is no reason why the applicants should be required to engage in what would appear to be lengthy litigation where there are limited prospects of success and without proper security being furnished.

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37 It is neither necessary nor prudent for the purposes of this judgment to engage in the contention based on section 11 of the Mineral and Petroleum Resources Development Act, 28 of 2022, particularly given the complexity of the provisions and the fact that this was not fully ventilated, nor was it necessary for me to determine the issue of waiver.

38 at paras 17-19, 26 and 27

[65] In the circumstances, and in the exercise of my discretion, and taking into account all these circumstances, I am of the view that the applicants are entitled to security for costs in an amount to be determined by the registrar and that further proceedings in the main application be stayed depending the furnishing of such security and I make the following order:

a Polsun must furnish security in an amount determined by the Registrar;[39]

b The main application is stayed pending the furnishing of security;

c Polsun must pay the costs of this application including the costs consequent upon the employment of two counsel on scale C.

[redacted]

DM FINE AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING : 26 January 2026

DATE OF JUDGMENT : 04 February 2026

39 The parties were in agreement with the amount of security is to be fixed by the Registrar.

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