IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: Yes/
OF INTEREST TO OTHER JUDGES: Yes/
REVISED: Yes/
____31/01/22_____
DATESIGNATURE

Case number: 52832/2021

In the matter between:

RONICA RAGAVAN	**First Applicant**
RAVINDRA NATH	**Second Applicant**
ASHU CHAWLA	**Third Applicant**

and

OPTIMUM COAL TERMINAL (PTY) LTD	**First Respondent**
(In Business Rescue)	
JUANITO MARTIN DAMONS N.O.	**Second Respondent**

(In his capacity as Joint Business Rescue Practitioner of Optimum Coal Terminal (Pty) Ltd)

KURT ROBERT KNOOP N.O. **Third Respondent**

(In his capacity as Joint Business Rescue Practitioner of Optimum Coal Terminal (Pty) Ltd)

ALL AFFECTED PARTIES TO OPTIMUM COAL TERMINAL (PTY) LTD AS REFLECTED IN ANNEXURE A TO THE NOTICE OF MOTION

Fourth Respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fifth Respondent (In Business Rescue)

JOHAN LOUIS KLOPPER N.O. **Sixth Respondent**

(In his capacity as Joint Business Rescue Practitioner of Tegeta Exploration and Resources (Pty) Ltd)

KURT ROBERT KNOOP N.O. **Seventh Respondent**

(In capacity as Joint Business Rescue Practitioner of Tegeta Exploration and Resources (Pty) Ltd)

ALL AFFECTED PARTIES OF TEGETA EXPLORATION AND RESOURCES (PTY) LTD AS REFLECTED IN ANNEXURE B TO THE NOTICE OF MOTION

Eighth Respondent

JUDGMENT

Summary – Business Rescue Practitioners rather than the directors of a company in business rescue have the right to vote at a s 151(1) meeting of a related company in business rescue – The bright line between Chapter six rights of Business Rescue Practitioners and the Directors of a company in business rescue on voting rights.

VICTOR J

Introduction

[1] There are few things more important for the business rescue industry than certainty and clarity. Where the Companies Act [1] does not draw a bright line between powers of the Directors sitting on the Company Board and the powers and ambit of Business Rescue Practitioners (BRPs), it is left to the courts to develop the jurisprudence and lend greater clarity and certainty if necessary.

[2] A fundamental element of the business rescue process is that independent professionals become involved, and it is a far more nuanced process than liquidation where the only interests are essentially those of the creditors. In business rescue a more holistic approach is adopted to assess not only the demands of creditors but an assessment of whether the company can be saved and with that goes the issue of job losses and other important elements.

[3] This case is illustrative of what at first glance may seem like a grey area in the Companies Act where clarity is needed to resolve the tension between Directors who still want to be in control and view matters subjectively and the BRPs who have a more holistic view of what is good for the Company in business rescue and want to do things their way and are armed with statutory powers. [2] This is where in the perceived uncertainty in the Companies Act needs to be addressed. The applicants assert that there is tension between the proper interpretation of s 137 and s 140. The BRPs take over full management control of the company in business rescue, in substitution for its board of directors and pre-existing management. The BRP is tasked with developing and then implementing a business rescue plan which is in the best interests of all affected parties, which includes creditors, employees, trade unions and shareholders.

[1] No 71 of 2008

[2] By Quintin Sam Van den heever University of Pretoria. The powers of Directors and Limitations States "Since director's duties are only partially codified and the common law is not specifically excluded, the rules contained in the common law remain relevant and of utmost importance. Moreover, it is submitted that the common law is the best vehicle for the future development of company law. The courts have a duty placed upon them to develop the common law to enable individuals enjoy the rights and ideals established by the Act. As a result, courts may quickly and efficiently adapt the common law to close any shortfalls in the Act without going through the lengthy amendment process. This grants great flexibility should the need arise. However, it is submitted that the courts should take care with this power and exercise it conservatively lest the well-established company common law become diluted or lose efficacy because of a new interpretation."

All the while the Board of Directors retain obligations in terms of the Companies Act while the BRPs take full control.

[4] The role of governance versus management requires analysis in the business rescue process. In essence, *outside* of the business rescue context, governance by the Board involves the strategic aspects of the company, while management attends to the running of the company. The duties and responsibilities of management are quite different from those of the Directors. Where Chapter six of the Companies Act applies those duties and responsibilities of the Directors has to be interpreted within the overarching purpose of Chapter six. Whilst Chapter six does not spell in minute detail the different roles of directors and BRPs there is sufficient certainty in the provisions of Chapter six to enable an interpretation within the business rescue context that suggest the Directors must yield to the BRPs. In essence, therefore, the ultimate result is not as vague or confusing as the applicants claim.

[5] The purpose and goal of business rescue is described in s128(1)(b) of the Companies Act and was adopted in *FirstRand Bank Ltd v KJ Foods CC* as the

> "development and implementation of a plan to rescue an entity by restructuring its affairs, business, property, debt and other liabilities in a manner that maximises the likelihood of the entity continuing in existence on a solvent basis. If it is not possible for the entity to so continue in existence, the plan must be developed and implemented in a manner that results in a better return for the entity's creditors or shareholders than would result from its immediate liquidation."[3]

Parties

[6] The applicants are the directors of Tegeta Exploration and Resources (Pty) Ltd the fifth respondent (In Business Rescue). The relevant respondents are Optimum Coal Terminal (Pty) Ltd (OCT) in business rescue. The second and third respondents are the business rescue practitioners of OCT. The fourth respondent are all parties affected by the business rescue process in OCT. Only one of the fourth respondents has filed an answering affidavit, Liberty Energy Pty Ltd (Liberty). The fifth respondent is Tegeta Exploration and Resources (Pty) Ltd in business rescue. The sixth and seventh respondents are the business rescue practitioners of Tegeta.

[3] *FirstRand Bank Ltd v KJ Foods CC* 2017 (5) SA 40 (SCA) para 68

Issues

[7] The applicants seek a declarator to the effect that:

7.1 the applicants as directors of Tegeta should vote on behalf of OCT at any s 151(1) meeting of creditors in respect of OCT.

7.2 the applicants may only exercise their vote as set out above upon receipt of a mandate in terms of an adopted business rescue plan of Tegeta alternatively that the practitioners of the Tegeta may only exercise a vote at any s 151(1) creditors meeting in respect of OCT upon receipt of an adopted business plan of Tegeta

Relevant background facts

[8] Tegeta is a major creditor of OCT. There was to be s151(1) meeting on 10 November 2021 to vote on the business plan. In Part A, this Court interdicted the holding of that meeting pending the determination of Part B. The BRPs of Tegeta have not published a business plan yet as they await the outcome of the OCT business plan. Tegeta is the holding company owning 100% of the shares in OCT, Optimum Coal Mine (OCM) and Koornfontein all in business rescue. OCT has as its sole asset 7.8% of the shares in Richards bay Coal Terminal RBCT. The value of the OCT shares is substantial and worth hundreds of millions of rand. Tegeta holds a claim in OCT in excess of R47million.

[9] Between the grant of Part A and the hearing today, the applicants introduced a plethora of new facts in various affidavits all of which resulted in a flurry of affidavits including a supplementary founding affidavit by the applicants introducing new material relating to the alleged conflict of interest by the sixth and seventh respondents. The new material included disputing that the meeting of OCT was necessary where the BRPs claimed calamitous consequences if the meeting did not go ahead. The new material dealt with a dispute about suspension of the Richards Bay Coal Terminal (RBCT) for OCT and the question of the urgent need to hold the s151 (1) meeting for OCT. The applicants advised that OCT as shareholder in RBCT could not be refused berthing facilities and this removed the urgency of the s151(1) meeting of OCT. They also dealt with the alleged conflict of interest where certain BRPs were

removed pursuant to a ruling of the Constitutional Court in the matter of *Shiva Uranium.* [4] There is also an assertion introduced that the business rescue plan in OCT would result in the transfer of the OCT business leaving no funds for distribution.

[10] Further new material was introduced relating to the change in Tegeta's right of veto. At the time Part A was launched Tegeta was the major creditor and had in excess of 25% of the claims against OCT and consequently held the right of veto of any business rescue plan. By the time part B was heard, Liberty became the major creditor in the amount of R95 million and held 65% voting power at a s151(1) meeting. In the result Tegeta's position at the time of the hearing of Part A to the hearing of Part B changed as it would no longer have a veto right. Liberty's claim was comprised in the form of post commencement finance in terms of s135 of the Companies Act.

[11] The applicants contend that this post commencement finance was foisted on OCT and was not in the interests of OCT and was a stratagem to undermine Tegeta's position.

[12] Initially the BRPs and the applicant were agreed that the applicants in their capacities as directors of Tegeta would vote at the s 151(1) meeting of OCT. This changed when the BRPs received an opinion that this was wrong. The opinion advised that it was only the BRPs who could vote on behalf of Tegeta at the OCT meeting. This resulted in a dispute between the applicants and the BRP's on the right to vote.

[13] The applicants have been of the view for some years that there may be a better business plan for OCT but they were unable to present that to the BRPs for consideration. The applicants contended that they were being hindered by the business rescue situation and the disputes and therefore did not search the markets to find other buyers. In the new material, the applicants put up a better offer in the amount of R275 000 000 from a Mauritian based for company. They now challenge

[4] *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others* (CCT 305 of 2020) [2021] ZACC 40

the valuation the BRP's have placed on the shares of OCT and assert that they are significantly undervalued.

[14] The applicants contend that without a business plan in Tegeta their residual powers, functions and management duties cannot be properly exercised. They assert that because there are three subsidiaries in Tegeta, OCM, OCT and Koornfontein, all the plans should have been coordinated and not dealt with on a piece meal basis.

[15] Further new material relates to the fact that the NDPP will seek a preservation order in March 2022 whereby all the assets of the Tegeta and its subsidiaries will be taken into preservation if the NDPP is successful. After the hearing of Part A and when it came to light that the NDPP would seek preservation orders in respect of Tegeta and a number of other companies, I raised this with the parties through my clerk. I was assured in writing by the respondents that this application would not be affected. At this hearing Adv Chaskalson SC appeared on behalf of the NDPP on a watching brief. It was not necessary for him to make submissions since Part B is a point of law which will not affect any further steps the NDPP's may wish to take to protect their interests.

[16] It is noted that these additional affidavits have been filed without leave from the Court except when Liberty filed its answering affidavit as an affected person to which the applicants were entitled to reply. It is in the replying affidavit to the Liberty answering affidavit and the supplementary founding affidavit that the avalanche of new matter was introduced. The applicants also allege that Liberty and the BRPs have made false claims about the long term contract with Transnet to transport coal to RBCT. The applicant's affidavit extended challenges to clarify the said misrepresentation.

[17] All in all, what now emerged is a far cry from what was intended when Part A relief was granted. This is relevant to the question of costs in this application.

The Liberty affidavit

[18] The affidavit of Liberty explained that through its cession agreement it had advanced to OCT various amount totalling R95 557 477. The cession agreement was executed and became unconditional in its terms and implemented. It claims a statutory right to participate in the application. The affidavit explained how the amount was made up and claims to be the largest creditor. Liberty claims that the relief sought is academic since its claim is the largest. It also disputes that the Companies Act provides for a mandate situation. The delay in the adoption of the business rescue in OCT was emphasised. Liberty point out that if the OCT plan fails it will have disastrous consequences since it is linked to the OCM plan, and it will go into liquidation and job losses may occur and it will affect community redevelopment and will also affect many small business enterprises, suppliers and business in the area. They also refer to the long term plan between OCM, OCT and Transnet. Liberty claims that it was not in dispute and in a last minute flurry of affidavits it turns out that the agreement was not signed by Transnet and this adds to the incremental number of the disputes in this matter.

[19] This matter should not be allowed to morph into a case which it did not start off as and it is important not to lose sight of the essential issues which this Court must determine.

The legal framework

[20] The issues in this case require an interpretative exercise of the Companies Act relating to the powers and duties of the Board and the full management role of the BRPs.

Mr Louw SC submitted that the new Companies Act underwent a sea change on the question of statutory powers conferred on the Directors and their responsibilities to manage the business and the affairs of the Company. The Companies Act through section 66 introduced a director-cantered concept as compared with their historical role. The Directors are no longer the agents of the shareholders. The Directors have original powers and duties.

[21] In the case of *Kaimowitz vs Delahunt* [5] Davis J had to determine the power of a director where a claim was brought by one of five directors. The other directors had curtailed his role and his participation in the day to day management of the company. Davis J held that the overall supervision and management powers resides in the Board of Directors but found that a Director was not as of right entitled to participate in the day to day management of the company. In an article [6] analysing the *Kaimowitz* case, the author opined that whilst s 66 of the Companies Act introduced the powers of the Board of Directors to both the business and the affairs of the company, there were still limitations on their role.

[22] Section 66 in relevant part provides for the source of Director powers"

> "66. Board, directors and prescribed officers
>
> (1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

[23] Of importance is the underlined portion for emphasis. Whilst the principle of director-centred powers is settled, there is an express carve out where other sections of the Companies Act *provide otherwise*. This of course is highly relevant in relation to Chapter 6 rights, powers and duties in the context of business rescue.

[24] Prior to the new Companies Act, the Board of Directors held no original powers. Now statutorily the power of directors are no longer delegated powers. The business and affairs of a company must be managed by or under the direction of its Board. As confirmed in a number of cases ultimately the power rests with the Directors and not with the shareholders. The author describes that the position of directors has moved away from a "contractarian model to a division of powers model." The power of the Board to manage the business and the affairs of the company introduces a broader role for the Board and s 66 provides for the power of the directors to control the *business* of the company and the power to control its *affairs*. These are two different concepts.

[5] 2017 (30 sa 201 (WCC).

[6] The right of a director to participate in the management of the Company: Kaimowitzv Delahunt 2017(3) (WCC) by Ms Reahan Cassim senior lecturer at the University of South Africa (2018)30 SA Merc14

[25] A year prior to the promulgation of the new Companies Act, Didcott J in *ex parte Russlyn Construction* [7] already held that the affairs of a company are distinct from the business of the company and that the affairs of a company is a much wider concept.

[26] The authors in Henochsberg also support the conclusion in *Russlyn* that 'affairs' is wider than 'business'. Professor Delport one of the authors of Henochsberg states that 'business' refers to dealings between the company and outsiders and that 'affairs' is a wider concept which refers to both the internal relations of a company and its existence.[8]

[27] The authors of Henochsberg postulate that there are internal and external aspects and these two distinct concepts may overlap. While there is not an express statutory provision cataloguing the differences, the internal and external qualification is important since it serves as proof that, in the very least, 'business' and 'affairs' are two distinct concepts which may overlap.

[28] The applicants submitted that the concept of internal and external relations is an unhelp analysis of a director's powers. Both the respondents and Liberty contend the contrary. In a further article [9] in discussing the powers of directors and their limitations the author points to a number of inbuilt limitations in the Companies Act such as s 76 of the Companies Act. The director's powers are not unbridled and importantly the directors owe a fiduciary obligation to the Company. I find the internal and external structure suggested by Henochsberg a help tool in analysing the distinction between the powers of Directors and BRPs. In my view, the limitations set out in Chapter six also point to very definite limitations of Directors and these limitations are perfectly consistent with the purpose of business recue.

[29] It is clear that there are overlapping areas between managing the business of the company and the affairs of the Company in the ordinary course. While there are

[7] *Ex Parte Russlyn Construction (PTY) LTD* 1987 (1) SA 33 (D) 1987(1) SA pages 36-37
[8] Henochsberg on the Companies Act 71 of 2008 pages 482(56) onwards
[9] by Quinten Sam van der Heeve, University of Pretoria

no exacting statutory definitions within the context of business rescue detailing the minutiae of the different roles I find that the provisions of Chapter six are clear and there is not much overlap. The respective roles are clear.

[30] Having analysed in some detail the source of the Directors powers, it is necessary to consider their limitations as defined in Chapter six of the Companies Act relating to Business Rescue jurisprudence. The answer to the legal question raised in this application as to who is entitled to vote requires a logical application of the provisions of Chapter 6 to the dispute. It is in this area of the Companies Act that the solutions must be gleaned as to the different powers and an analysis of the relevant sections in Chapter six make it glaringly obvious that the powers of the Director are limited in business rescue proceedings and there is a legal transfer of power to the BRPs. On a proper construction of Chapter six, the powers of directors clearly become substantially curtailed.

Section 140

[31] The genesis of the BRP's power are clearly set out in s 137 and s140 of the Companies Act. S 140 prescribes the general powers and duties of practitioners.

"s140 (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter- (a) has *full* management control of the company in *substitution* for its board and pre-existing management; (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company; (c) may- (i) remove from office any person who forms part of the pre-existing management of the company; or (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and (d) is responsible to- (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and (ii) *implement* any business rescue plan that has been adopted in accordance with Part D of this Chapter"

[32] This section is unequivocal and provides that the BRP has *full* management control of the company *in substitution* for its board and pre-existing management and has the power to *implement* the business plan. Once BRPs have to implement a plan then that must include collecting the debts in accordance with the business plan. Full management and control of the company in substitution for its board could not be clearer. The Companies Act introduces a very clear limitation on the role of Directors

in clear terms. It does not require speculation about theoretical scenarios as to where the powers vest in business rescue proceedings. The respondents also refer to the fact that the word power of directors as referred to in s 66 does not appear in s 140. This argument too has merit in considering the limitation of the Directors powers. In particular, the word Directors powers would have been present in s140 as well.

Section 142(1)

[33] A further very clear indication on the limitation of the directors' powers is found in s 142 of the Companies Act and which requires the Directors of the company in business rescue to co-operate with and assist the BRPs.

Section 142 (1) provides in part that:

> "as soon as is practicable after business rescue proceedings begin, each director of a company must deliver to the practitioner all books and records that relate to the affairs of the company inform the whereabouts of the books and records relating to the company are being kept and the directors of a company must provide the practitioner with a statement of affairs containing, at a minimum, particulars of the following: (a) Any material transactions involved the company or the assets of the company, and occurring within 12 months immediately before the business rescue proceedings began; … (e) any debtors and their obligations to the company; and (f) any creditors and their rights or claims against the company."

[34] The Directors are obliged to comply with providing the necessary information of the core affairs of the company to the BRP.

Section 137

[35] Section 137 (2) of the Companies Act prescribes in very clear terms the effect Business rescue has on shareholders and directors.

"(2) During a company's business rescue proceedings, each director of the company— (a) must continue to exercise the functions of director, *subject to the authority of the practitioner*; (b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;"

[36] The italics marked up for emphasis makes it clear that although the Directors continue to exercise their functions, it is all subject to the authority of the BRP.

[37] A further example of the BRP role and authority is defined in s 137(3). It is peremptory that the directors must attend to the requests of the BRP at all times.

(3) During a company's business rescue proceedings, each director of the company *must attend to the requests of the practitioner at all times,* and provide the practitioner with any information about the company's affairs as may reasonably be required.

[38] The BRP even have the power to void a transaction executed by the directors in business rescue if it is not approved by them:

"(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that *action is void unless approved by the practitioner*."

[39] In terms of 137(5) the BRPs can apply to court to remove a Director on various grounds such as impeding the business rescue process. [10]

[40] In summary therefore the directors' powers are significantly limited within the framework of chapter 6.

Evaluation

[41] In analysing the position, it is clear that whilst the general principle allows the Director to be included in management functions as per s 66, in s 137(2) it provides for the distinction that whilst the Director performs the functions qua director, the management powers and functions are transferred in law to the practitioner. Henochsberg refers to the distinction between internal functions which directors continue with such as calling board meetings and company meetings whilst the management powers of the directors are externally based. It is their view that it is the management powers that allows for interaction with the outside world and that would be the role of the BRPs. It follows therefore that if the internal acts are subject to restrictions or conditions in respect of the Directors then the powers exercised by the

[10] 137(5) At any time during the business rescue proceedings, the practitioner may apply to a court for an order removing a director from office on the grounds that the director has— (a) failed to comply with a requirement of this Chapter; or (b) by act or omission, has impeded, or is impeding— (i) the practitioner in the performance of the powers and functions of practitioner; (ii) the management of the company by the practitioner; or (iii) the development or implementation of a business rescue plan in accordance with this Chapter. (6) Subsection (5) is in addition to any right of a person to apply to a court for an order contemplated in section 162.

BRPs in terms of s 141(1) are exclusive powers for the BRPs. Thus all actions to the outside must be conducted by the BRP. This includes debt collecting and voting at meetings convened in terms of s151(1). The respondents submit that if this were not so, then there would be confusion with directors countermanding the acts of the BRPs and vice versa. This in my view is the proper approach having regard to the purpose of Chapter six. The decision on whether to the adopt or not a business plan is an external function where the BRPs interact with creditors at the s151(1) meeting

[42] It is the case of the respondents and Liberty, that debt collecting and making decisions on the structuring of the company is solely within the remit of the BRPs. It follows therefore that the principles set out in the case *Shiva Uranium* are distinguishable. It is not the BRPs who appoint BRPs or their successors, it the company who does so and this in my view falls within the internal functions and must be carried out by the directors. It is the company that appoints BRPs. Moreover, in *Uranium Shiva* the BRPs had resigned, so it would not have been legally competent in any event for them to appoint their successors.

[43] The purpose of a s 151(1) meeting is to consider the business rescue plan which of necessity must include the collection of debts. In conclusion, on this aspect it is clear that the BRPs play a lead role in the business rescue proceedings with substantial restrictions on the directors at this time in the life of the company. This would include making decisions as to who must vote at a s151(1) meeting. The directors retain governance function which on a proper interpretation of the Act will not be impeded during business rescue and these include presenting annual financial statements, issuing of shares, scheduling of shareholders' meetings, proposing resolutions and holding of board meetings. These functions are really internal in nature.

Mandate

[44] The applicants contend even if it is accepted that the BRPs can vote then they can only do so in in terms of a mandate adopted after the Tegeta business rescue plan has been adopted. In this case Tegeta is a creditor of OCT. The applicant's case in Part A of the application was that the mandate issue could be resolved as a point of law. This then evolved and the applicants submitted that the mandate issue was

factually based and they needed to file a further affidavit and then did so. The respondents submit that the Companies Act does not provide for a mandate issue in the creditor company before a vote can take place at a s151(1) meeting. It other words there is no provision in the Companies Act on which Tegeta can rely for this prior mandate issue. This is correct, there is no order of mandates provided for in the Companies Act which requires that approved business plans must be in existence before BRPs can vote at a creditors meeting. The respondents and Liberty submit that while the BRPs of Tegeta and the directors resolve their internal differences it would delay the adoption of the plan in OCT indefinitely. In this case the delay in resolving the dispute between creditors and the BRP of Tegeta may take years to resolve. It means that the affairs of OCM and OCT must remain in limbo indefinitely. Both parties agree that business rescue proceedings should be conducted speedily. In this case there will be inordinate delays caused by disputes between parties if the creditor company in business rescue like Tegeta have to wait years to allow for the litigation to run its course and this would defeat the purpose of Chapter 6.

Furthermore, in this instance where the Tegeta business rescue plan can only be decide upon after the acceptance of the OCT plan. The Companies Act does not provide for the order of mandate issues as there too many variables as discussed above. I therefore find that there does not have to be a duly accepted mandate in Tegeta before the BRPs can vote at the OCT meeting.

Conclusion

[45] The relief sought in Part A was granted as a holding position pending two concise legal points being determined in part B. The conduct of the applicants post the granting of part A escalated into introducing new matter wholly irrelevant to what was foreshadowed in Part A.

[46] Even if the Court were to consider all the new material introducing factual matters pertaining to the determination of the legal issues raised in part B, none of those facts go towards resolving the question of who has the right to vote at a s 151(1) meeting where a business rescue plan is to be considered and whether a prior mandate is necessary.

[47] Upon a proper interpretation of the Chapter six rights and duties of the BRPs it is clear that this chapter introduced significant limitations of the rights of directors. Instead, the BRPs are given full management control. The distinction then of internal and external functions of a company facilitate the proper interpretations of the different functions directors and BRPs have when a company is in business rescue. Governance functions remain for the directors but it is a neutral function far removed from full management control. Nothing of significance can be done by the Directors during business rescue proceedings without the authorisation by the BRP together with the other powers they have. These distinct functions and powers of the BRPs as defined in Chapter six then draws the bright line between the functions of the BRP and Directors. A proper statutory construction of Chapter six disposes of the two issues in favour of the respondents.

Costs

[48] The respondents and Liberty refer to the case of *Knoop NO* [11] on the barrage of litigation by the first applicant and those she is in cooperative relationship with. Wallis JA has analysed very carefully the barrage of litigation either initiated by Ms Ragavan and those with whom she cooperates.

[49] The respondents at the outset in these proceedings when Part A was argued referred the Court to this judgement where Wallis JA compiled a list of the barrage of litigation. Whilst the applicants urged the court not to place any weight on it as every party has a constitutional right to litigate, the analysis by Wallis JA however was never disputed. Wallis JA described the ease with which Ms Ragavan litigates even the ease with which the litigation is withdrawn. He stated that Ms Ragavan demonstrated a lack of cooperation within six weeks of the company going into business rescue. She refused access to premises and refused handing over computer servers. She systematically opposed the BRPs at every turn. Ms Ragavan played a major role in all this litigation. Sometimes it was brought in her own name and sometimes she deposed to the principal affidavit. In a few instances her role was merely supporting. The litigation was either directly or indirectly aimed at Messrs

[11] Knoop NO and another v Gupta and another 202 (3) SA 88 SCA

Knoop and Klopper in their capacities as BRPs and other companies in the Oakbay Group."[12]

[50] In this application the goal posts were ever moving in relation to Part B. Part A was an endeavour to stop the s 151(1) meeting of OCT based on what the applicants submitted were the protection of their rights as directors of Tegeta. It followed therefore that if they did not succeed on Part B, the costs of Part A would follow the result of part B. The contrary was not argued before me.

[51] Part B in my view justifies a costs order on the attorney client scale because of the conduct of the applicants as described. The question is whether Part A also justifies an order on the attorney and client scale. The conduct of the applicants in Part A was not as reprehensible as in Part B. Although the applicants placed the respondents under desperately short time limits they were able to persuade the Court of the importance of the determination of their rights as set out in Part B. Based on the view I take the scale of costs for Part A should be on the party and party scale.

It is ordered that:

1. Part B of the application is dismissed with costs on the attorney and client scale including the costs of two counsel.
2. The applicants are ordered to pay the costs of Part A on the party and party scale including the costs of two counsel.
3. The applicants are ordered to pay the costs of Liberty Energy (Pty) Ltd in respect of Part B on an attorney client scale including the costs of two counsel.

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Signed electronically and judgment handed down on an urgent basis.

Counsel for the applicants	Adv P Louw SC Adv L van Gass

[12] Id at paras 121-131

Counsel for the respondents	Adv G Wickens SC Adv L Van Tonder
Counsel for Liberty Energy (Pty) Ltd	Adv P Stais SC Adv J Brewer
Attorney for Applicants	Van der Merwe & Van der Merwe
Attorney for respondents	Smit Sewgoolam Inc
Attorney for liberty Energy (Pty) Ltd	Andersen

Date of Hearing: 14 January 2022
Date of Judgment: 18 January 2022