REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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DATE
SIGNATURE

Case No.: 20243/21

In the matter between:

MATARAPRO (PTY) LTD Applicant

And

MASHALA RESOURCES (PTY) LTD Respondent

Coram: Dlamini J

Date of hearing: 11 April 2022 – in a 'virtual Hearing' during a videoconference on Microsoft Teams digital platform.

Date of delivery of reasons: 08 September 2022

The reasons hereunder are deemed to have been delivered electronically by circulation to the parties' representatives via email and shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

[1] This is a provisional liquidation application.

[2] In its notice of motion the Applicant sought the following relief;-

2.1 That the Respondent be placed in provisional liquidation

2.2 That a *rule nisi* be issued in terms of which the Respondent or any affected party, be called to appear and show cause, if any, why the provisional liquidation should not be confirmed.

2.3 That the rule nisi in paragraph 2 above be published in the Government Gazette and Citizen newspaper.

2.4 That the rule nisi be served on the Respondent at its registered address

[3] It is a trite principle of our law that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds[1]. If on the other hand, the respondent's indebtedness has been prima facie established, the onus then shifts to the respondent to show that his indebtedness is indeed disputed on bona fide and reasonable grounds[2].

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[1] Badenhorst v Northern Construction Enterprise (Pty) Ltd [1956] (2) SA 346 (T)

[2] Kalil v Decotex (pty) ltd and another 1988(1) SA 943(A)

[4] The Applicant is Mataropro (PTY) Ltd, a private company with limited liability, duly incorporated in accordance with the company laws of the Republic of South Africa.

[5] The Respondent is Mashala Resources (PTY) Ltd, a company with limited liability and duly incorporated in accordance with the company laws of the Republic of South Africa.

[6] The Applicant testify that the basis of the Respondent's indebtedness to the Applicant emanates from a written agreement dated 2019 (compensation agreement). In terms of this agreement, a company called Lateozest (Pty) Ltd (Lateozest) and the Respondent agreed jointly and severally to compensate the Applicant for services rendered in the amount of R13 800 000.00 (Thirteen Million Eight Hundred Thousand Rand).

[7] This amount was payable in 60 monthly installments of R200 000.00 (Two Hundred Thousand Rand) plus VAT. The first installment was payable on or before 30 August 2019 and thereafter on or before the last of each succeeding month.

[8] The Applicant says that the Respondent would only become liable for payment of the aforementioned upon the granting of consent by the Minister of Minerals and Energy in terms of section 11 of Act 28 of 2022.

[9] On 18 February 2020, the Respondent obtained the final letter of consent from the Minister of Minerals and Energy.

[10] The Applicant avers further that as at 31 March 2020 the Respondent and Lateozest failed to honour the terms of the compensation agreement and are indebted to it in the sum of R14 300 0013.46 (Fourteen Million Three Hundred Thousand and Thirteen Rand and Forty Six Cents).

[11] The Applicant testify that on 9 February 2021, it issued a notice in terms of section 345 of the Companies Act,[3] (the Act) which was served on the Respondent by the sheriff. A copy of this notice was also emailed to the Respondent's attorneys of record.

[12] The Applicant notes that the Respondent obtained the final letter of consent from the Minister of Minerals and Energy on 18 February 2020. As a result, the Applicant avers that the Respondent has become liable for the full indebtedness as of 18 February 2020.

[13] Finally, the Applicant submits that due to the Respondent's failure to make payment in terms of the compensation agreement it launched this application.

[14] The Respondent testify that on 20 November 2014 it was placed in compulsory business rescue through an order of the court. That it only ceased to be on a business rescue on 30 June 2020. That Mr. Trevor Murgatroyed and Mr. Petrus van den Steen were appointed as joint business rescue practitioners (the BRPs).

[15] The Respondent says that on 8 November 2018 a company called Steel Eye Trading (Steel Eye concluded a sale and purchase agreement with Continental Coal (represented by the business rescue practitioners for the purchase of 100% (hundred percent) shareholding and claims held by Continental Coal Ltd in the Respondent (the first sale agreement). However, this agreement was subject to the condition precedent that required consent in terms of Section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (for the transfer of shares to be obtained by 1 April 2019).

[16] However, this agreement lapsed as consent was not obtained on or before 11 April 2019.

[17] On 5 December 2019 Steel Eye Continental Coal and Mashala concluded the second sale of shares agreement for the purchase of 100% (hundred percent)

[3] Act 61 of 1973

shareholding and claims held by Continental Coal and Mashala (second sale of shares agreement). This agreement was subject to a condition that Steel Eye Continental Coal provides the business rescue practitioners with the rehabilitated guarantee for environmental liabilities and that the Section 11 consent was obtained on or before 20 December 2019. A final Section 11 consent acceptable to all parties was obtained on 18 February 2020.

[18] The Respondent avers that at the time of the conclusion of the compensation agreement, the signatory acting on its behalf Mr. Kurt Herman, was not a director of the Respondent and was not employed by Mashala in any manner or form. That it was in business rescue, therefore the full management, and control of Respondent vested in the appointed BRPs.

[19] The Respondent contends that the compensation agreement was void, in that the agreement was concluded while the Respondents was in business rescue as the BRPs did not approve the conclusion of the agreement.

[20] The Respondent avers that although, its board of directors was initially willing to consider the ratification of the compensation agreement, however, due to some differences between the parties its board of directors did not ratify the agreement.

[21] The question to be answered is whether the compensation agreement is void under the provisions of Section 137 of the Act.

[22] The Section provides as follows;-

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

[23] The Applicant submits that the compensation agreement does not fall within the purview of Section 137 of the Act. That the Respondent have failed to show that the conclusion of the compensation agreement falls within the

purview of the taking of any action on behalf of the company that requires the approval of the BRPs. For this proposition, the Applicant relies on the decision of the court in **Mahomed Mahir Tayob and Another v Shiva Uranium**[4], where the court defines the function a business rescue practioner with reference to the provisions of section 140(1)(a) of the Act, namely that being in charge of or running of a company on a day to day basis. That any function of a director of a company that falls outside the ambit of Section 140 cannot be subject to the approval of a practitioner.

[24] The Applicant further submits that it is apparent from the sale of shares agreement that the risk and benefit in the shares of the Respondent and as result the management thereof would pass after the conditions precedent to the sale are fulfilled. Accordingly, submit the Applicant, that the compensation agreement does not fall within the scope and purview of Section 137 (4).

[25] The Applicant further submit that the Respondent's liability was made subject to the granting of the Section 11 consent. That it is apparent from the sale of shares agreement that the risk and benefit in the shares of the Respondent and as a result the management thereof would pass after the conditions precedent to the sale are fulfilled.

[26] The Respondent submit that Mr. Herman was not duly authorized and had no authority to conclude the compensation agreement on its behalf as he was neither a director nor an employee of the Respondent.

[27] Further that the compensation agreement was concluded while the Respondent was in business rescue and is therefore void as the BRPs did not approve the conclusion of the agreement. On this ground alone the Respondent submits that this application should be dismissed.

[28] I agree with the Respondent's submission that the Applicant's reliance on the **Shiva** decision is with respect misplaced. In that case the question to be

[4] SCA case number 336/2019

considered was whether board of directors of a company in business rescue could appoint the BRPs following the removal of the previous practioners.

[29] The Applicant was aware that the compensation agreement was signed without the consent of the BRPs. In the letter written on 19 June 2020 by the Applicant's legal representative to the Rspondent in part. The letter says;-

"*We hereby record the statement of Mr. Laher, that Mr. Kurt Hermann signed the agreement on 20 August 2019 on behalf of Mashala Resources (PTY) Ltd without the knowledge or consent of the Business Rescue Practitioners*". From this letter, it is clear that the compensation agreement is void as same was signed without the consent of the BRPs.

[30] Following this letter, various attempts were made to try and ratify the compensation agreement. A draft ratification agreement was drawn up by the Applicant and circulated between the parties. It appears that negotiating around the signing of the ratification agreement collapsed. In the end, the BRPs did not sign the ratification agreement.

[31] In my view, the compensation agreement falls within the purview of Section 137(4) of the Act. The conclusion of the compensation agreement in the present circumstances constitutes and is part and parcel of the Respondent's business operations. Unless it was signed by the BRPs the agreement is void. Further, even if the agreement had to be ratified, the ratification agreement was never signed by the BRPs.

[32] It is apparent therefore that the Applicant is launching this application to enforce the terms of a void agreement.The indebtednees of the Respondent to the Applicant has not been established On this ground alone this application should fail.

ORDER

The order that I signed on 11 April 2022 is made an order of this court

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DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	14 April 2022
For the Applicant:	Adv P Nel
Email:	pietnel@gkchambers.co.za
For the Respondent:	Adv N Cassim SC & Adv. A Vorster
Email:	ncassim@law.co.za & law@avorster.co.za