IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

12/12/2017

DATE SIGNATURE

CASE NO: 38424/2016

DATE: 12/12/2017

IN THE MATTER BETWEEN:

TOP TRAILERS (PTY) LTD	**First Applicant**
SIPHO SONO *N. O.*	**Second Applicant**
and	
KOTZE, JOHANNES PETRUS	**Respondent**

JUDGMENT

PHIYEGA (AJ):

1.

The First Applicant is Top Trailers (Pty) Ltd (hereafter "the First Applicant", or "Top Trailers" or "the company"), a company with its main place business at corner of Lamp and Latern Streets, Wadeville, Gauteng.

2.

The Second Applicant is Sipho Sono (*Nomino Officio*) (hereafter "the Second Applicant", "the business rescue practitioner" or "Sono") who acts in his capacity as the business rescue practitioner of the First Applicant.

3.

The First and Second Applicants are represented by the same attorneys and counsel in the current proceedings.

4.

The Respondent herein is Johannes Petrus Kotze, an adult male businessman resident in Ermelo. The Respondent will hereafter be referred to as "the Respondent" or "Kotze".

5.

The application is brought in terms of Rule 42(1) of the Rules of Court for the rescission and setting aside of an order granted by Justice Khumalo on 27 June 2016.The order granted by Justice Khumalo was for the setting aside of a resolution adopted by the directors of Top Trailers, on 13 August 2014, in terms of which Top Trailers was placed under business rescue.

6.

In the alternative the Applicants rely on the grounds that good cause exists for the rescission, and finally on the common law grounds of non-joinder of necessary parties.

7.

The application is vigorously opposed by Kotze .Kotze's opposition is based mainly on the grounds that the resolution which placed Top Trailers under business rescue was withheld from him as an affected person. Kotze argues that because the resolution placing Top Trailers under business rescue was not published to him, as required by section 129(3) of the Companies Act 71 of 2008, it was a nullity and that the order granted by Justice Khumalo was to ensure that the fact of such nullity is confirmed by a court.

8.

The Applicants, on the other hand seem to be arguing that the resolution validly placed the company under business rescue and that it was irregular for the Respondent to have approached the Court *a quo* without first obtaining the consent of the business rescue practitioner or the Court.

9.

The Applicants further submit that Kotze failed to comply with the Rules of Court when bringing the application for the setting aside of the resolution placing Top Trailers under business rescue. An important attack against the manner in which the Respondent obtained the order granted by Justice Khumalo was that the Respondent failed to observe the time frames set out in the Rules for setting down applications. The Applicants maintain that the application which served before Justice Khumalo was set down before the *dies* expired .The Applicants maintain in the circumstances that the

order was granted without their knowledge and should on this ground be rescinded.

10.

Before dealing with merits of the matter it will useful to deal with events leading to the current proceedings.

11.

On the 13th of August 2014 the directors of Top Trailers convened a meeting of the Board at which it was decided that Top Trailers was financially distressed but that if it was placed under business rescue, there was a reasonable prospect of it being rescued. On the basis of the conclusion that Top Trailers needed the protection of business rescue for it to be rescued from destruction, the Board of directors resolved to place the company under business rescue. A resolution putting Top Trailers was duly adopted at the meeting of the 13th of August 2014.

12.

On the 18th of August 2014 the Companies and Intellectual Property Commission was notified of the decision to place the company under business rescue. On the 22nd of August 2017 Sipho Sono, the Second Applicant, was appointed as the business rescue practitioner. Soon after his appointment as the business rescue practitioner, Sono convened various meetings of creditors which culminated in a meeting at which what he refers to as the Initial Business Plan, was discussed. It is stated by Sono that at this meeting, creditors representing 92 percent of the voting interest eligible to vote participated to adopt the Initial Business Plan and that 85 percent of them voted in favour of the Initial Business Plan. Sono states that those who voted in favour of the Initial Business Plan were independent creditors.

13.

Accordingly the Initial Business Plan was adopted on 11 February 2015. Following the adoption of the Initial Business Plan a business rescue status plan was issued. The business rescue status plan dealt with a variety of steps relating to issues such as post-commencement finance, staff restructuring, re -assessment of lease agreements concluded by the company with other parties, reduction of rental commitments, engagement with potential investors, and providing regular feedback as events unfolded.

14.

On 22 June 2015 a meeting of creditors was convened to consider offers which had been made to the Business Rescue Practitioner when the Initial Business Rescue Plan was adopted. This meeting was adjourned in order to ensure that offers which would be capable of being acceptable to the creditors could be negotiated further. The business rescue practitioner continued to negotiate for better offers and on the 24th of June 2015 an acceptable offer was received from an entity, CIMC Vehicles Group Co Ltd, which offer was accepted and included as part of the Final Plan.

15.

The Second Applicant states that throughout the business rescue process affected persons were informed at every point of the progress of the proceedings using a list of affected parties provided to him by the Board of Directors of Top Trailers. The Second Applicant is silent on why Kotze was not among the affected persons who were informed at every point of the proceedings.

16.

The company is represented by the same Counsel as the business rescue practitioner

and it would have been expected of the Board of Directors, who were actively keeping the business rescue practitioner apprised of the details of affected persons, to provide the Court with an affidavit explaining why Kotze was not among the affected persons who were kept informed of proceedings at every point.

17.

At all times during the proceedings the Applicants were represented by the same Counsel and the submissions made were made on behalf of both Applicants.

18.

Kotze states that as at the date of the resolution by the Board of Directors of Top Trailers to place Top Trailers under business rescue, he was a creditor of the company. He states that on the 15th of September 2011 he entered into a licencing agreement with Top Trailers in terms of which he made available for use by Top Trailers, his trademark and patent.The patent consisted of a "swing bin" which was used for manufacture in the trucking industry. The *quid pro quo* for the use of the swing bin was that Top Trailers would pay royalties to Kotze as per the terms of the payment specified in the licensing agreement.

19.

Kotze states that since February 2013 Top Trailers had failed to make payments in terms of the licensing agreement. Frustrated by the non-payment of the royalties, Kotze cancelled the agreement with Top Trailers on 4 December 2013, and demanded the return of his trademark and patent and all sketches and models related to the trademark and patent, as well as payment of what he refers to as the minimum arrears royalties in the amount of R1 842 050.28.The demand for the return of the trademark and patent and all sketches and models as well as payment of the amount of R1 842 050.28 was in the form of a letter which was penned by Kotze's attorneys and served on Top Trailers

by the sheriff on 5 December 2013.
There was no response to this letter.

20.

On the 16th of January 2014, Kotze issued a summons against Top Trailers for the return of the trademark and patent and all models and sketches for the manufacture of the swing bin and payment of the amount of R1 842 059.28 and other ancillary relief.

21.

Top Trailers, although properly served with the summons, failed to defend the matter. Kotze applied for and was granted default judgment including for payment of the amount of R1 842 050.28, on 19 September 2015. It was after Kotze issued the warrant of execution that he for the first time got wind of the fact that Top Trailers might be under business rescue and that the Second Applicant might be the person appointed to act as the business rescue practitioner.

22.

On the 28th of May 2015 Kotze's attorneys of record addressed a letter to the Second Applicant to enquire if Top Trailers was indeed under business rescue. In the letter, Kotze reiterated the fact he had terminated the licensing agreement with Top Trailers, and he demanded the return of the trademark and patent and enquired whether his claim in the amount of R1 842 050.28 was being attended to by the Second Applicant. There was no response to this letter.

23.

Kotze states that he was never informed of the correct or true position of the business rescue proceedings and that he does not know who the other creditors are. He

concludes that he was deliberately excluded by the First and Second Applicants from the business rescue proceedings.

I would not disagree with his observation that he was deliberately excluded from the business rescue proceedings.

24.

Kotze states that faced with the stonewalling from the Applicants regarding business rescue proceedings, he had no other option but to launch the proceedings which culminated in Justice Khumalo setting aside the resolution placing Top Trailers under business rescue.

25.

Kotze issued the application that served before Justice Khumalo and served it personally on the First Applicant on the 24th of May 2016 and on the Second Applicant on the 26th of May 2016. The Notice of Motion called on the Applicants to file their Notice of Intention to Oppose within 5 days of receipt of the Notice of Motion.

26.

The Notice of Motion further stated as follows:

> *"Should the Respondents fail to file and serve their Notice of Intention to Oppose as well as their Answering Affidavit within the time limits set out hereinabove, the Applicant will proceed to set the matter down on the unopposed roll for the 27th of of June 2016 at 10h00 or so soon thereafter as the Applicant may be heard."*

27.

The First Applicant served its Notice to Oppose on 9 June 2016, that is, some ten court days after being served with the Notice of Motion. Likewise, the Notice of Intention to Oppose by the Second Applicant was served on the 9th of June 2016.

28.

The Applicants did not file any Answering Affidavit. The Respondent proceeded to enrol the matter on the unopposed roll for the 27th of June 2016, whereafter Justice Khumalo granted the order setting aside the resolution.

29.

Can it be said objectively considered, that the order was obtained without the Applicants' knowledge and that therefore it must be rescinded? In my respectful view the Applicants were informed that unless the Notice to Oppose and Answering Affidavit were filed within the time limits set out in the Notice of Motion, the Application would be set down on the 27th of June 2016 on the unopposed roll. To me, this demanded some action from the Applicants.

30.

The Applicants only filed their Notices to Oppose but not their Answering Affidavit. It can perhaps be argued that the Applicant did not strictly follow Rule 5 or the practice directives of this court when setting the matter down on the unopposed roll for the 27th of June 2016.

31.

The Applicants knew that the matter was enrolled for the 27th of June 2016 but decided to ignore this because of their perception that the enrolment was irregular.

32.

Irregular steps are dealt with in terms of Rule 30.The Applicants would have been well

advised to utilise the Rule instead of leaving it for when they launch their rescission application. After all they knew the matter was set down for the 27th of June 2016 but instead chose to do nothing about it.

33.

The allegation that the order granted by Justice Khumalo was granted without their knowledge cannot be accepted as valid and is rejected.

34.

The current rescission proceedings against Kotze's Application are based on the grounds that the proceedings *a quo* were irregular in that they were brought contrary to the provisions of section 130 of the Companies Act no 71 of 2008 (hereafter "the Companies Act") in terms of which a resolution for business rescue may be set aside. The grounds which, according to the Applicants, Kotze could and should have relied on for setting aside the resolution placing Top Trailers under business rescue are as provided for in section 130 (1)(a) of the Companies Act, which provides as follows:

> *"Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to court for an order -*
> *(a) setting aside the resolution, on the grounds that-*
>
> *(1) there is no reasonable basis for believing that the company is financially distressed;*
> *(2) there is no reasonable prospect for rescuing the compay; or*
> *(3) the company has failed to satisfy the procedural requirements set out in section 129 of the Companies Act."*

35.

It was submitted on behalf of the Applicants that Kotze was aware of the business rescue proceedings at the very latest as at May 2015 and that his failure to utilise section 130 of the Companies Act to set aside the business rescue proceedings

constituted an irregularity that vitiated the order granted by Justice Khumalo on 27 June 2016.

36.

The implication of this submission is obviously that when Kotze applied for the setting aside of the resolution on the 27th of June 2016 he was out of time because at that stage the Final Business Plan had already been adopted.

37.

It was further argued that section 133 of the Companies Act provides a general moratorium on all legal proceedings against a company once the company has been placed under business rescue, except where written consent is obtained from the business rescue practitioner or the leave of the court is granted.

38.

The Applicants also rely on non-compliance with the rules of Court, and non-joinder as additional grounds for setting aside the order of Justice Khumalo.

39.

Before dealing with the arguments submitted on behalf of the Applicants it will be useful first for me to determine whether the resolution of the Board of Directors of Top Trailers placing the company under business rescue was valid and in existence when Justice Khumalo made the order setting such resolution aside on 27 June 2016. Such an investigation is necessary in order to determine whether or not the adoption of the Final Plan had been validly done. If I find that the Final Plan was the result of a resolution that complied with the requirements of section 129(3) and was not touched by the invalidity contemplated in subsection (5) of the Companies Act, then it will follow that the

Respondent is bound by the provisions of section 130(1)(a) and section 133(1)(a) and (b), and should comply with those legal provisions.

40.

If I find that the resolution was a nullity as argued by Kotze's counsel, then of course the business rescue proceedings would not have come into existence.

41.

If I come to the conclusion that the resolution was a nullity, it must follow that everything that was done on the authority of the impugned resolution would be of no force or effect. This would include the appointment of the business rescue practitioner as well as everything done by the business rescue practitioner as he would be acting on the authority of an invalid resolution.

42.

If, however, I find that the resolution was valid when the matter served before Justice Khumalo, I shall be obliged to determine the points relied on by the Applicants and determine whether there is a proper case entitling me to set that order aside.

43.

The gravamen of the submissions by the Applicants is that since the machinery of the business rescue proceedings had been put into effect and was running when Kotze brought the application for the setting aside of the resolution placing Top Trailers under business rescue, it matters not that there was no compliance with the peremptory provisions of the Companies Act. The Applicants seem to argue that once business rescue proceedings are in progress the protection afforded to affected persons in

section 129(3) and (4) and (5) of the Companies Act, do not apply, even when the law was disregarded. This cannot have been the intention of the Legislature when it enacted the nullity provisions.

44.

In my view it is disingenuous for the Applicants to blame Kotze for not utilising the provisions of sections 130 and 133 of the Companies Act. At all material times Kotze has been complaining that he was deliberately kept in the dark by the Applicants about the business rescue proceedings which were in full swing. He went to Court without knowing about the business rescue proceedings.

45.

How Kotze should have become aware of the business rescue proceedings is not explained by the Applicants. The Applicants have the obligation to notify all affected persons of the resolution but have not done so and have not proffered any explanation for their breach. They are now approbating and reprobating, demanding that Kotze should perform miracles. The Applicants themselves had not complied with the law but are using the same legislation that they disregarded, to achieve a perverted outcome. The Court will not allow itself to be a party to an illegality.

46.

It is common cause that by 5 December 2013 Kotze had, by means of a letter served on the First Applicant through the sheriff, cancelled the licensing agreement he had with Top Trailers. With the cancellation of the agreement, Kotze demanded the return of his trademark and patent and all sketches and models as well as payment of the amount of R1 842 050.28.This submission was not contradicted by the Applicants and must be regarded as being truthful.

47.

In my view this makes Kotze an affected person as defined in section 128(1)(a)of the Companies Act which provides that an affected person, in relation to a company, means "a shareholder or creditor of the company".

48.

The fact of the indebtedness of the company has not been contradicted by the Applicants and must be accepted as having been proved.

49.

Throughout the current proceedings, the Applicants, although confronted with the above facts relating to the indebtedness of Top Trailers to Kotze, have not attempted to dispel the above submissions relating to the indebtedness of Top Trailers to Kotze, or even to deal with them. The Applicants instead dealt with the matter as if the validity of the resolution placing Top Trailers under business rescue was never in question. The Applicants have simply ignored dealing with the submissions that Kotze had relied on when he applied for the resolution placing Top Trailers under business rescue to be set aside before Justice Khumalo.

50.

The main argument relied on by Kotze at the proceedings before Justice Khumalo was that the resolution placing Top Trailers under business rescue was a nullity because of the company's non-compliance with section 129 (3) of the Companies Act. From a reading of the affidavit filed by Kotze at the hearing before Justice Khumalo, it is clear that Kotze was attacking the resolution adopted by the Board of Directors. The attack was to the effect that because he, as an affected person, was not notified of the resolution as provided for in section 129 of the Companies Act, the resolution stood to

be set aside. I cannot disagree with his reasoning on this score.

51.

A company is required in terms of section 129(3) of the Companies Act to publish a notice of the resolution and its effective date to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded, and to appoint a business rescue practitioner who satisfies the requirements for probity listed in section 138 of the Companies Act.

52.

After appointing a business rescue practitioner, a company must file a notice of the appointment of the business rescue practitioner within two business days after making the appointment and publish a copy of the notice of appointment to each affected person.

53.

The resolution was never brought to the notice of Kotze .No explanation is proffered by the Applicants as to why Kotze was not notified as required by law.

54.

Non-compliance by the company with the above requirements results in the resolution being a nullity and void *ab initio*.
Section 129 is quoted in full for clarification

Company resolution to begin business rescue proceedings

129(1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-

(a) The company is financially distressed; and
(b) There appears to be a reasonable prospect of rescuing the company.

(2) A resolution contemplated in subsection (1)-
(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
(b) has no force or effect until it has been filed.

(3) Within finve business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must-
(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)(b), a company must-
(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and
(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

(5) If a company fails to comply with any provision of subsection (3) or (4)-
(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
(b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.

(6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2).

(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128(1)(e) that are

applicable to the company, and its reasons for not adopting a resolution contemplated in this section.

55.

Kotze's opposing affidavit, where he states that he was never informed of the business rescue proceedings, was never contradicted by Applicants and as such it must be accepted as truthful.

56.

The Applicants, especially the First Applicant must be held to have known of the company's indebtedness to Kotze as early as December 2013 because the First Applicant was served with a letter of demand setting out the company's indebtedness to Kotze on 5 December 2013.
Despite this knowledge the First Applicant did not make any effort to comply with the provisions of the Companies Act to notify affected persons, or if they notified other affected persons, to have notified Kotze. Whether or not other affected persons were notified of the resolution was not dealt with during the proceedings before this Court. However, it cannot be gainsaid that Kotze was not notified of the resolution placing Top Trailers under business rescue.

57.

I find that Kotze as an affected person, a creditor of the company, should have been notified of the resolution placing Top Trailers under business rescue but he was not notified. The fact that Kotze was not notified clearly infringes on his rights as an affected person and creditor of the company.

58.

The effect of the non-compliance by the company with the provisions of the Companies

Act relating to notifying creditors of a resolution placing a company under business rescue, renders the resolution a nullity. The language used in section 129(5) of the Companies Act is clear and peremptory in nature. A resolution placing a company under business rescue which is not in compliance with section 129(3) and (4) is a nullity and cannot be resuscitated by an attitude that the wishes of a party to proceed regardless.

59.

The question that has to be answered is whether or not, in the face of the nullity of the resolution placing Top Trailers under business rescue, Kotze should have merely folded his arms and relied on the obvious invalidity, or the good nature of the Applicants, or should he have approached the Court to have the invalidity confirmed?

60.

It is trite law that an unlawful administrative decision remains effective and may be acted on and produce valid legal consequences unless it is reviewed and set aside by a Court of law. The wisdom of the above becomes clear in the current proceedings .The applicants, even in the face of the invalidity of the resolution placing Top Trailers under business rescue, steamed ahead with processes to implement the impugned business rescue practitioner's invalid mandate. In terms of the principle of legality enunciated above, namely that decisions remain effective unless set aside by a court, this means that the decisions taken by the Second Applicant would remain valid and binding unless the resolution is set aside.

61.

The Supreme Court of Appeal in ***Oudekraal Estates (Pty) Limited v The City of Cape Town and Others*** **(41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004)** at paragraphs 26 -27 stated as follows:

"[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter: Administrative Law 355:

'There exists an evidential presumption of validity expressed by the maxim omnia praesumuntur rite esse acta; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.' At other times it has been explained on little more than pragmatic grounds. In Harnaker v Minister of the Interior 1965 (1) SA 372 (C) Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) 'in a sense delay would . . . "validate" the nullity'.
Or as Lord Radcliffe said in Smith v East Elloe Rural District Council [1956] UKHL 2; [1956] AC 736 (HL) 769-70:
'An [administrative] order...is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'
[28] That has led some writers to suggest that legal validity (or invalidity) in the context of administrative action is never absolute but can only be described in relative terms. In Wade: Administrative Law 7 ed by H.W.R. Wade and Christopher Forsyth at pages 342-4 that view is expressed as follows:
'The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances.

The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another... 'Void' is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation.'

62.

The Applicants complain that when Justice Khumalo made the order setting aside the resolution placing Top Trailers under business rescue, she did not have all the facts at her disposal, otherwise she would have declined to grant the order. However, the Applicants fail to inform this Court of the nature of the facts that should have been placed before her in order to convince her not to grant the order. Nothing would change the nullity of resolution into something valid.

63.

The order granted by Justice Khumalo merely records that the resolution is set aside without giving details of the facts that she considered.

64.

It is my considered view that when Justice Khumalo made the order setting aside the resolution placing Top Trailers under business rescue she had taken into account the fact that Kotze is an affected person and that the company's failure to notify him of the resolution placing Top Trailers under business rescue amounted to the said resolution being a nullity. After all, the papers before her dealt in detail with Kotze's claim that he was deliberately excluded from the business rescue proceedings.

65.

In my view Justice Khumalo's order was necessary to provide certainty to the world, of the nullity of the resolution and all the subsequent processes which the Applicants undertook on the authority of the impugned resolution.

66.

The above means that the appointment of the business rescue practitioner, and the business rescue plans, and any other processes undertaken in reliance on the impugned resolution, are null and void, and were null and void when Justice Khumalo set the resolution aside.

67.

It must therefore be concluded that the business rescue never came into existence .

68.

It is no longer necessary for me to deal with the remainder of the Applicants' arguments relating to the rescission of Justice Khumalo's order dated 27 June 2016. The reason for this is that the grounds for the application are based on the putative validity of the resolution. As appears above the resolution was a nullity from the day that the company failed to notify Kotze of the placement of Top Trailers under business rescue. The order granted by Justice Khumalo was merely meant to give certainty of the nullity of the resolution placing Top Trailers under business rescue. When the matter served before Justice Khumalo it was already a nullity which had to be confirmed as such in order to comply with the principle of legality, namely, unless an invalid decision is set aside by a Court, it continues to be considered as valid and has legal consequences.

69.

Order

The following order is granted:

1. The Application is dismissed.

2. The applicants are to pay the costs of the application jointly and severally, the one paying, the other to be absolved.

CASE NO: 38424/2016

HEARD ON: 02 November 2017

LEGAL REPRESENTATIVES:

FOR THE FIRST & SECOND APPLICANT: Adv. J E Smit
INSTRUCTED BY: Edward Nathan Sonnenbergs Inc (ref.: NMakena/MK/0383223)
(Correspondent Attorneys: Jacobson & Levy Inc. (ref.: J Levy/lh/K3915)

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