

SOUTH AFRICA / JUDGMENT

Piper and Another v Glosam Manganese (Pty) Ltd and Others (2024/069923; 2024/053300) [2025] ZAGPJHC 63 (10 January 2025)

[2025] ZAGPJHC 63

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

2024/069923; 2024/053300

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2024-069923

2024-053300

(1)

REPORTABLE: NO

(2)

Of INTREST TO OTHER JUDGES: NO

(3)

REVISED : NO

10/01/2025

In the matter between: ADAM DOUGLAS
PIPER
1st Applicant
WEPEX TRADING (PTY)
LTD
2nd Applicant
And
GLOSAM MANGANESE (PTY)
LTD
1st Respondent (in business rescue)
FUJAX SOUTH AFRICA
(PTY) LTD
2nd Respondent
STEFAN SMYTH
N.O.
3rd Respondent
ALISON TIMME
N.O.
4th Respondent
THE COMPANIES AND
INTELLECTUAL
5th Respondent
PROPERTY COMMISSION
THE AFFECTED
PARTIES
6th Respondent
(SECTION 128(1)(a)
READ WITH SECTION
130(3)(b) OF THE
COMPANIES ACT, 71 OF 2008)
And in the matter

between: GLOSAM MANGANESE (PTY)
LTD
Applicant
WEPEX TRADING (PTY)
LTD
1st Respondent
THE COMPANIES AND
INTELLECTUAL
2nd Respondent

JUDGMENT

FISHER J

Introduction

- [1] This judgment deals with two related main applications involving the business rescue processes and proceedings relating to two associated companies-Wepex Trading (Pty) Ltd (Wepex) and Glosam Manganese (Pty) Ltd (Glosam). Both companies were founded, by and large, by Mr Adam Douglas Piper.
- [2] The cases can aptly be described as competing attempts to gain beneficial control over a valuable manganese mine situated in Kuruman in the Northern Cape (the mine). The mine is owned by Wepex.
- [3] The first application is brought by Piper and Wepex against Glosam and others under case number 2024-69923. Its central objective is to set aside a resolution which placed Glosam under business rescue and to remove the business rescue practitioners appointed pursuant to the resolution, Mr Stephan Smyth and Ms Alison Timme (collectively the BRPs). I shall refer to this first application as the “Removal application”.
- [4] The second is the application of Glosam against Wepex under case number 2024-053300. It is brought by the BRPs acting on behalf of Glosam (in business rescue) to place Wepex under business rescue. I shall refer to this as the “Business Rescue application /BR application”.

Procedural background and dramatis personae

- [5] These applications share a factual complex and were consolidated by an order of this court of 12 July 2024.
- [6] Interim relief was sought urgently on behalf of all parties. These urgent claims were ultimately resolved on the basis that these matters would be heard as a special motion on an expedited basis. This is the judgment in this special motion.
- [7] There were also interlocutory applications filed as follows – in the business rescue application, Mazule Mineral and Energy Resources Pty Ltd (MMER), an alleged creditor of Wepex sought to intervene in the business rescue application as co-applicant for business rescue of Wepex; Mazule Holdings (Pty) Ltd (Mazule), another alleged creditor and a related company of MMER who sought to intervene to oppose the Removal application. MMER and Mazule are referred to collectively as the Mazule parties.
- [8] These interventions by the Mazule parties were not ultimately pursued before me, MMER being in liquidation and Mazule not proceeding therewith for reasons which are not entirely clear but seem to be as a result of a shareholders’ dispute.

- [9] In addition to these intervention applications, Glosam Manganese Mining (Pty) Ltd (GMM) and Mr Louis Neethling, its sole shareholder and director have filed an intervention application as first and second intervening parties respectively in the BR application (the Neethling application).
- [10] The Neethling application is made on the basis that Neethling seeks to place factual matter before the court relating to the manner in which the business of the mine is being conducted under his control. He seeks no relief save the joinder. He is, however, allied with and makes common cause with Piper in both applications as to the factual complex. Neethling is also a director of Wepex.
- [11] The Neethling application is opposed by the BRPs on the basis only that their costs and those of Glosam should be paid in the Removal application by Neethling and GMM jointly and severally with Piper and Wepex.
- [12] The BRPs make the point that it was not necessary for Neethling to join the BR application to provide the information that he proffers in that such information could have been set out in answer to the BR application by Wepex without the necessity for any joinder. Neethling, GMM and Wepex are friendly parties as are Neethling and Piper.
- [13] Piper claimed personally, in the Removal application, judgment in the sum of USD 1 900 000 against Glosam. It was ultimately conceded by Piper that this claim was best referred to trial. It was sought, however, on behalf of the BRPs that the application for such payment be dismissed.
- [14] There have been a number of supplementations of the sets of affidavits in each of the applications, including the applications to intervene. This includes a flurry of supplementation which occurred up to a day before the hearing.
- [15] It seems that, under the banner of urgency, the parties have regarded themselves to be at liberty to file papers as and when they see fit. This has led to an ever- growing morass of disputed factual material which was evolving even up until the day before the special hearing.
- [16] This court is, however, charged with the task of cutting through this Gordian knot in order to come to some semblance of sense so as to do justice to the matters.
- [17] This task is made more difficult by the fact that I am asked by each of the main parties to decide the disputes on the basis that I disbelieve the respective versions and reject them on paper.
- [18] The parties were represented as follows. Mr I Miltz SC with Mr JRS Karuaihe represented Piper and Wepex in both main applications; Mr P Daniels SC with Mr M Cooke represented Glosam and the BRPs in both main applications; Mr M Antonie SC represented Fujax SA the second respondent in the Removal application. Mr van der Merwe represented Mr Neethling and GMM in the BR application.

- [19] As I have said, the factual background is common to both the Removal application and the BR application.

Prologue

- [20] At its most fundamental level this interwoven litigation amounts to a struggle for power over the rights in and to the mine.
- [21] The approaches taken by all parties abound, on all sides, with strategic motives and disputed facts.
- [22] The disputes include various interpretations of a web of agreements relating to the exploitation of the mining reserves in issue.
- [23] This is all regrettable in that it leads to a situation where there are many versions of the salient features of the narrative relating to the financial positions of the central companies and who owes whom and what amounts.
- [24] There is resort to convoluted mechanisms such as set- off and the extinguishing of indebtedness for transfer of shares which transfer is subject to complex restructuring of the shareholding of the companies in issue.
- [25] Agreements relating to the restructuring relied on have not been fully complied with on all versions. This has led to the sense that the interconnecting relationships relied on are inchoate.
- [26] It is common cause that the rights to mine the manganese, which reside in Wepex, make the mine extremely valuable. It seems that it is not materially in dispute that this value exceeds R 1 billion, assuming favourable market conditions. The mining rights are granted for a period of 10 years which expires in 2031.
- [27] The indications are that the mining reserves available are extensive and that whomever holds the reins to the income flow arising from the sale of the manganese produced, will be in a position, lawfully or otherwise, to marshal the funds to the exclusion of others who claim an interest therein.
- [28] It is not disputed that the mining enterprise, at stages following the granting of the mining rights, relied heavily on loan funding and commercial accommodations from a central figure in the narrative, Mr Christopher Dyason, through the entities in respect of which he was a main guiding mind- the Mazule parties and Fujax SA which is held by Fujax companies registered in the United Kingdom. Fujax SA and the UK companies are collectively referred to as the “Fujax parties”.
- [29] The funds invested in the mining operations were mostly foreign investments. Such investments have run to hundreds of millions of Rands.

- [30] From a general perspective, the nature and character of indebtedness and income-flow lies at the heart of business rescue. These cases are no exception.
- [31] With this in mind, I turn to the factual background, such as it can be discerned in the light of the host of disputes.

Factual background

- [32] The story involves competing interests in the manganese mine in Kuruman in the Northern Cape.
- [33] The mine had previously been mined over decades, beginning in the 1930's. The mining operations ceased in the late 1980's and the mine was placed on care and maintenance.
- [34] The mining operations had left large mine dumps and stockpiles of discarded manganese material.
- [35] It has recently become a profitable enterprise to re-open some mines which have previously been mothballed. This is due, inter alia, to the rising prices in the minerals concerned. The mine in issue is such a mine.
- [36] Whilst the list of dramatis personae is long and complicated both in relation the juristic and human protagonists, three men stand at the centre of the narrative. It is their actions in relation to the mining enterprise which form the skeleton of the factual complex.
- [37] These men are: Piper, Neethling, and Dyason.
- [38] The case of Piper pivots around an alleged central conspiracy. He says that Dyason intends to use his control over what Piper calls the Dyason parties (and which comprise the Mazule and Fujax parties) to engineer a fraudulent takeover of the mining enterprise in issue.
- [39] The story commences in 2015 when Piper was introduced to the mine by Mr Gert Olivier.
- [40] Around this time, Piper formed the two companies that dominate the two cases – Glosam, which was to perform the mining operations and Wepex which was to acquire the property and the rights to mine at the property.
- [41] The mining rights were secured in 2021. Mining operations had, however, been ongoing since 2018 on the basis that the mine dumps on the property were mined. The mining rights endure for 10 years meaning that they expire in 2031.
- [42] At the stage that the mine and the rights were acquired, Piper was the controlling mind behind both Glosam and Wepex. Piper was able to use the relationship between these two associated entities to achieve maximum efficiency in relation to best financial arrangement for his own purposes.
- [43] The ability of Piper to control the two entities is relevant because the relationship of supply and accounting between them remains opaque.

- [44] There are disputes which have arisen as to the rights of Glosam to perform the mining enterprise. These disputes are not capable of determination on paper and are, in any event, not directly relevant at this stage.
- [45] The fact is that, when there was a wholly incestuous relationship between the two companies on the basis that they were controlled by one master – Piper, the accounting principles adopted between the two were malleable to Piper's ends.
- [46] Neethling was also deeply involved in this phase of the life of the mine. He was the CEO of Glosam from 2018 and he was essentially the man in charge of the on the ground day-to-day mining. This meant that he had and still has intimate commercial relationships with the contractors that worked the mine and the service providers of skills and equipment to the mine.
- [47] Whether Neethling takes his instructions from Piper or whether he has 'skin in the game' in respect of the mining operation is not entirely clear. What is, however, clear is that, on whatever basis, Neethling and Piper have taken over the mining enterprise to the exclusion of Dyason.
- [48] Dyason through various entities, has an interest in the mine and has invested significant resources in the mining enterprise.
- [49] The mining industry is unique in that it lends itself to natural stockpiling of resources which can be accessed, at some expense, over time.
- [50] Thus, investment of capital in mining infrastructure and development is thus made in the hope that it will bear fruit over the time of the licence's operation.
- [51] The Dyason parties obviously provided capital on the basis that they would reap some benefits of the investment on the basis of a share of the proceeds from the mining operation over time.
- [52] Certain of the Dyason parties were customers for the manganese during the early stages of the mining. This is how Dyason came to know of and have an interest in the mine.
- [53] The vagaries of mining being what they are, the mine fell on hard times during 2018. The price of manganese was low, and demand too was low.
- [54] Piper required funding to keep the mine running. He approached Dyason who agreed to lend him a substantial sum of money (approximately R40 million all in all) in return for preferential terms in relation to the supply of manganese to the Dyason parties.
- [55] The loan was between the Mazule parties and Glosam and Wepex, but the corporate identities are not that relevant in that, behind the lender entities, stood Dyason and, behind the borrowers, stood Piper.

- [56] As I have said, the relationship between Glosam and Wepex which were sibling companies was smooth sailing from a management and accounting perspective when they were both controlled by Piper. However, with the need for funding came a new interest holder in the form of Dyason.
- [57] Dyason, had lent Piper a lot of money. For this he wanted security and some control of the income stream which flowed from the mine.
- [58] Dyason, an experienced businessman in the mining industry, would presumably have insisted that his parting with the loan funding would bring some advantage in due course when the wheel spun and the market changed. Such is the way of investment in mines. It is a long game hence the long periods of the mining rights. It is in the interests of all concerned in a mine to take maximum benefit out of the period of the mine. This costs money.
- [59] To protect his interests, Dyason appointed executives from his fold of Dyason parties to sit on the board of Glosam. Enter Russel Lamming and Andrew Malashewsky.
- [60] Things did not improve for the mine. Inevitably, in the bad manganese market of that time, Piper couldn't service the debt to the Dyason entities. The inevitable threat of litigation loomed. With it came the prospect of foreclosure on the loans.
- [61] It seems that Piper now had little option but to give Dyason, again through his entities, some form of shareholder control in relation to the mine. This led, in October 2022, to what has been termed a "debt for equity swop".
- [62] This involved a restructuring of what was termed the "Glosam group of companies" which were essentially under the control of Piper. This group comprised Glosam, Wepex and NC Manganese (Pty) Ltd.
- [63] Terms were agreed to between Dyason and Piper and laid down in a term sheet (the 2022 Term Sheet). These terms are complex and entail plans by Dyason and Piper to establish companies to hold their interests in the mine off-shore.
- [64] Not all of what was agreed under the 2022 Term Sheet came to fruition. However, one of the upshots was that a shareholder's agreement was concluded on 08 December 2022. The shareholder's agreement had the effect that Fujax SA acquired 51% of Glosam which owns 100% NC Manganese which owns 43% of Wepex.
- [65] The balance of Wepex is owned by an empowerment concern to the extent of 23% and the Yolandy Trust to the extent of 33%. As an aside I mention that Piper attempted to gain ownership of the percentage shareholding belonging to the Yolandy Trust, on the basis that he made allegations of fraud against Olivier, the mind behind the Trust, and the person who introduced the property to Piper. Arbitration proceedings by Piper to take over the Trust's shares based on these allegations of fraud failed. The balance of the shareholding is held by these shareholders as fractions of their shareholding, which I have rounded down.

- [66] Unsurprisingly, the forced marriage between Dyason and Piper in relation to the spoils of the mining enterprise was not a happy one. It was marred by conflict predominantly over the non-payment of amounts owing to the Dyason parties. This conflict has led to the applications which are now before me.
- [67] On 04 January 2024 Piper emailed Graham Ferns, then the Financial Officer of both Glosam and Wepex, informing him that there was a shareholders/ lenders dispute brewing. Glosam and Wepex were unable to keep up with the loan repayments to the Mazule parties and Dyason.
- [68] On that same day, the CEO of MMER, Sean Rowan wrote to Ferns and Neethling complaining of the non-payment of this indebtedness.
- [69] The inevitable threat of litigation by MMER was then forthcoming.
- [70] By this stage, Piper suggests that he was confused as to the persons involved in the dispute. He sated the following in writing to Ferns and Neethling: “who is this maze of Mazule/ Fujax/ Glosam and who is acting for who?”
- [71] To my mind this confusion seems unlikely. Piper is a seasoned mining executive – he is well versed in the use of corporate identity to facilitate relationships and ownership structures in the mining industry.
- [72] What Piper clearly knew was that, in whatever form, funding had flowed from what he refers to as the Dyason parties to keep the mine afloat at a time when it could not pay its debts. He was aware also that repayments of these amounts were significantly in arrears.
- [73] By the beginning of January 2024, the breakdown in the relationship between Piper and Dyason was intensifying. There is no doubt that the battle lines had, by this stage, been drawn.
- [74] A major problem was that there had been no income to pay the vital cohort of contractors and suppliers which was established at the mine. These contractors and suppliers had threatened to stop work and demobilise the equipment which had been installed at considerable investment.
- [75] Piper and Neethling allege that the contractors refused to work for Glosam any longer. They, however, allegedly trusted Neethling.
- [76] It was agreed that Neethling would use a company established by him, being GMM, to be the interface with these vital creditors on the basis that it was he and not Glosam that was their direct employer. They were guaranteed that they would be paid what was owed them as a priority and that they would be paid in good order going forward.
- [77] It was thus agreed by Dyason and the board of Glosam, which at that stage included Piper and the directors who had been appointed by Dyason, Lamming and Malashewsky, that GMM would be formed to act as a subcontractor of Glosam.

- [78] The sub-contractor status of GMM in this arrangement is vital to these cases.
- [79] It was agreed further that there would be a management of deposits of manganese at the mine, known as detritus, which was less expensive and quicker to mine. The more immediate income from this product would be earmarked for the debts of the contractors and suppliers which would be given preference in relation to the payment.
- [80] The breakdown in relationship and mutual distrust of Dyason and his team on the one hand and Piper and Neethling on the other continued notwithstanding this accommodation.
- [81] A major cause of this enmity arose mainly from the historical indebtedness arising out of the supply of manganese to the Dyason parties.
- [82] The supply terms were, according to Piper, not conducive to the making of a profit for the mine. On the other hand, the Dyason parties that were being supplied, complained of quality and quantity deficiencies in the manganese supplied.
- [83] There are various accusations made by Piper and Neethling against Dyason Lamming and Malashewsky in relation to sub-optimal management of the mine. This includes that they purchased manganese emanating from the neighbouring Kitso mine in which Dyason and Malashewsky had an interest, thus impacting negatively on the profitability of Glosam.
- [84] What can be in no doubt, however, is that there were significant amounts owing to the Dyason parties by Glosam and Wepex at this stage.
- [85] It is not precisely clear how the debts mounted up and how they were structured. These accounting structures are, like much else in this case, opaque. To unravel them, however, even if it were possible on the morass of papers before me which have grown incrementally, is not important.
- [86] The upshot is that it is not denied that, at a stage, there was a substantial amount which ran to in excess of hundreds of millions of Rands owed by Glosam and Wepex to the Dyason parties.
- [87] There was a blame game going on – with Piper accusing Dyason of orchestrating a situation where the mine was deliberately being driven into failure because of the Dyason debt squeeze and Dyason demanding repayment of the significant outlay made in relation to the funding of the mining operations.
- [88] On 24 January 2024 a meeting of the shareholders of Glosam was called in order to remove Piper as director of Glosam. The reasons for Piper's removal included that he had breached his fiduciary duties as a director of Glosam by causing Glosam to become over- indebted; that he was misappropriating company funds and that he had mismanaged Glosam and Wepex resulting in debt levels that put Glosam at risk of insolvency.
- [89] By this stage, Piper had already engaged the services of his attorneys, Andrew Miller & Associates (AMA) who have acted for him throughout the matter.

- [90] Thus, the writing was on the wall. This seems to have been a culminating period from the perspective of the legal positionings which were to be adopted by the respective parties. The litigation phase thus began.
- [91] The Dyason parties and specifically MMER and Mazule began calling up the loans advanced and other debts due to them.
- [92] The repayment of these loans was resisted by Piper on the basis of the 2022 Term Sheet and specifically the equity for debt swap envisaged thereby.
- [93] Whether the Mazule loans were or were not extinguished under the 2022 Term Sheet is not a dispute which I care to unravel and it is not appropriate that I do so here. What is clear is that Dyason sought to marshal this alleged indebtedness in order to preserve the position of the Dyason parties.
- [94] It is this marshalling of this indebtedness which has been branded by Piper as a fraudulent scheme.
- [95] I do not believe that the machinations relating to the debt recovery can be said to rise to the levels of fraud and corruption alleged by Piper. I make no finding in this regard, however, as this matter will, no doubt, have another life in proceedings to follow.
- [96] It is common cause that the financial health and viability of the mine was and is dependent on the means of production which was itself dependent on the vagaries of the price of manganese, which in turn was dependent on national and international drivers. For example, one of the reasons for the recent surge in the price of manganese is the fact that an Australian entity which was a dominant supplier in the industry was effectively sterilized by a tornado in that region.
- [97] Whatever the reasons, it is now common cause that the mine is generating a substantial income for Piper for the first time since it was acquired.
- [98] Once Piper learned of the steps to oust him as a director of Glosam at the beginning of January 2024, it seems that he and Neethling, as their next move on the board, contrived to divert the interest stream flowing from the mining enterprise away from Glosam and into GMM.
- [99] It is not seriously in dispute that Glosam's position as mining contractor was unceremoniously changed by Neethling and Piper at the end of January 2024. GMM and Wepex under the control of Neethling and Piper began diverting the now substantial income generated by the mine directly to GMM.
- [100] It is conceded that this was not in accordance with what had been agreed by the Board of Glosam. This concession is central to the cases.

- [101] GMM continues to pay the creditors of Glosam and Wepex. Neethling and Piper have contrived a model in terms of which they allege that indebtedness which was owing by Wepex to Glosam has been extinguished by set-off in that the debts of Glosam have been settled by GMM which has in turn ceded its rights to repayment by Glosam to Wepex.
- [102] As I have said, locus standi in business rescue is, at its heart, about indebtedness. Thus, one sees that tactically Piper has attempted to achieve a scenario where Glosam is no longer indebted to its creditors and Wepex is no longer indebted to Glosam. The complexity of this “arrangement” suggests a manipulation of the company structures and the income flow.
- [103] This contrivance is unimpressive to this court. What has, in fact, occurred is that there has been a diversion of income from the mine into GMM where the funds are used by Piper and Neethling as they see fit. This is prima facie unlawful.
- [104] What makes the position all the more troubling is that Piper and Neethling refuse to provide any proper financial accounting as to the income and expenditure. The amounts being paid to Neethling and/or Piper from the income of the mine are not disclosed.
- [105] Neethling says that he has taken up a position of management of the major creditors which are servicing the mining operation. This suggests that he, as GMM is paying creditors in which he has an interest. As I have said, significant income is now being generated from the mine and Piper and Neethling are in a position of control over this income.
- [106] Thus, it appears that Dyason and his various entities, having funded a large portion of the establishment of the mine at a time when the mine was not profitable, are now being kept from the benefits when the mine has become profitable.
- [107] No monies have flowed to Glosam from the mine since February 2024. Glosam has been rendered a shell because of the diversion of income into GMM.
- [108] On 14 May 2024 attorneys Falcon & Hume (F&H) acting for MMER emailed Piper an application for the winding up of Wepex on the basis of various amounts owing under purchase agreements with Wepex.
- [109] It seems that this application was more of a threat than a promise. All parties accept, as they must, that the liquidation of Wepex will lead to the termination of the mining rights held by Wepex. This will effectively kill the proverbial golden goose.
- [110] The conflicted positions of Lamming and Malashewsky being what they were at the time (i.e. they were directors of Glosam and had close involvement with Dyason parties), they resigned and Prieur du Plessis and Paul Bushell were installed as directors.
- [111] Of course, Piper claims that this switch out was part of Dyason’s scheme and that du Plessis and Bushell are Dyason’s puppets as were Lamming and Malashewsky.
- [112] On the day following the threat of winding-up of Wepex by MMER, Glosam launched an application to urgently put Wepex into business rescue.

- [113] Five days later, on 20 May 2024, MMER represented by F&H brought an application to join in these urgent business rescue proceedings brought by Glosam against Wepex.
- [114] On the same day, the directors of Glosam - du Plessis and Bushell took the resolution to place Glosam under business rescue.
- [115] As I have said, according to Piper, the BRP's are not independent and are part Dyason's alleged scheme.
- [116] Piper was and remains the third director of Glosam. He was invited to the Board meeting convened for the purpose of the resolution to put Glosam under business rescue but chose not to attend.
- [117] At that stage, Piper felt himself to be ousted as director illegitimately and did not accept that the meeting to deal with his removal was properly convened. He remains a director of Glosam.
- [118] Piper alleges that the resolutions taken to put Glosam into business rescue and to seek the placing into business rescue of Wepex are part of the fraudulent scheme of Dyason to oust him from involvement in the mine for the purposes of Dyason acquiring control over the mine.
- [119] Piper points out that Dyason had been a director of MMER and Mazule until 05 March 2024 when he resigned from both companies and that Malashewsky and Lamming who had both previously been directors of Glosam shared the Boards of Fujax UK with Dyason.
- [120] This notwithstanding, F&H was at pains to point out that there was no link between MMER and Fujax. This seems unlikely. In any event, these links do not serve to establish the central conspiracy relied on by Piper.
- [121] Webber Wentzel was then employed by Glosam, ostensibly to advise on the claims made by MMER and Mazule in relation to the indebtedness of Glosam and Wepex.
- [122] Clearly, if judgments were allowed to be taken against Glosam for these debts, this would add to Glosam's negative financial position – which Piper alleges would have served the alleged strategy which was afoot.
- [123] Piper instructed his attorneys, AMA to file appearance to defend the actions. Webber Wentzel questioned Piper's authority to do so. Webber Wentzel later withdrew as attorneys for the Mazule parties.
- [124] Essentially, Piper alleges that Malashewsky and Lamming planned to allow judgment to be taken by the Mazule parties against Glosam as part of the fraudulent scheme.
- [125] As I have said, the conflict of interest alleged against Malashewsky and Lamming, apparently led to them resigning and being replaced by du Plessis and Bushell.

- [126] Piper alleges that this was part of the conspiracy and that du Plessis and Bushell take instructions from Dyason, Malachewsky and Lamming. This is denied by du Plessis and Bushell who maintain that they acted and still act independently.
- [127] AMA were then informed in relation to the pending litigation between Glosam, MMER and Mazule that Norton Rose Fullbright (NRF) had been appointed to represent Glosam.
- [128] Kiara Barker, who is a director of Fujax SA, makes the affidavits on behalf of Fujax SA. She was involved in the resolutions for the appointment of NRF and the swapping out of the directorships of Malashewsky and Lamming for Bushell and du Plessis. Again, on the version of Piper, this is proof of the alleged conspiracy to allow Dyason to gain control of the mine.
- [129] Piper sought in June 2024 in the urgent “A” portion of the Removal application the urgent suspension of the BRPs function
- pending the setting aside of the resolution to place Glosam under business rescue and the removal of the BRPs. It was also sought
- urgently in terms of section 163 of the Companies Act[1] (the Act) to put Neethling and an independent director on the board of Glosam.
- [130] This urgent relief was refused and the BRPs have continued in office.
- [131] The BR application was, in the meantime, taking its course. It seems that Fujax SA and the other Dyason parties wished to get the BR application decided urgently in the interim.
- [132] Piper argues that the placing of Wepex into business rescue will entail the appointment of pliable business rescue practitioners who it is alleged will do the bidding of Dyason. This is a vital part in the structure of the conspiracy case of Piper.
- [133] Piper alleges that once Wepex is in the hands of business rescue practitioners who will do the bidding of Dyason, this will allow for the “stealing” of the mine.
- [134] As I have said, the elaborate conspiracy theory involving the business rescue proceedings of Glosam and the business rescue application before me is advanced by Piper as central to his case. In short, he says that the BRP’s of Glosam will conspire with the business rescue practitioners of Wepex once appointed to allow for the Dyason parties to take control of the mine.
- [135] This conspiracy theory is obviously disputed by the BRPs. The point is made in the BR application that this court cannot attribute dishonesty to the business rescue practitioners yet to be appointed. This seems to me to be a sound observation. There are irresolvable disputes of fact on this question which obviously cannot be decided on paper.

- [136] Piper and Wepex applied for a consolidation of the two applications so that they could be heard *pari passu* so to obviate a situation where Wepex was under the control of what they contend will be Dyason-friendly business rescue practitioners before the removal of the BRPs could occur in terms of the Removal application.
- [137] Fujax resisted this arrangement. The consolidation application came before Yacoob J. Yacoob J accepted that the two applications were intricately involved with one another. She found that the urgency contended for by Fujax SA in relation to the delay occasioned to the Wepex application was somewhat assuaged by the fact the Wepex' indebtedness to Glosam was being reduced by the payments of GMM of the costs of running the mine.
- [138] Fujax SA, aggrieved by this position sought to appeal the judgment of Yacoob J but this process was withdrawn on the basis of this special allocation.
- [139] The BRPs admit that by October 2022 the financial situation of Glosam was dire. It is further not in dispute that, at that stage, major creditors and contractors operating on the mine refused to continue mining and threatened to liquidate Glosam.
- [140] It seems furthermore not to be in dispute that, as at October 2022, Glosam had debts to trade creditors in the amount of R247 263 896 and a tax liability of approximately R55 000 000. Thus, its debts totalled approximately R 302 million at that stage.
- [141] Prior to February 2024 business was operating in the normal course in relation to the supply arrangement between Wepex and Glosam.
- [142] The BRPs acknowledge that, as at 30 April 2024, Glosam had debts of approximately R142 million.
- [143] Thus, the position from October 2022 to April 2024 had improved. This was because the mine was generating income which was being funnelled into GMM which paid the creditors.
- [144] The BRPs state that they are investigating the allegations that the Dyason parties are acting in concert with one another to execute a hostile take-over of the mine. They state that, to this end, they have had meeting with, *inter alia*, Sean Rowan who is CEO of Mazule; Ryan Moss who is a director of the Mazule parties, Barker Lamming, Malashewsky and Ferns.
- [145] Ferns, Moss and Rowan initially supported Dyason in these proceedings.
- [146] There latterly appears to be a breakdown in the relationship between Moss and Rowan on the one hand and Dyason on the other. This led to the eleventh-hour recantation by Moss and Rowan of previously favourable evidence given for Dyason. Thus previous disputes of fact on crucial issues are now found to be reversed in favour of new disputes. The unravelling of these aspects in favour of one or another of the parties is clearly impossible.
- [147] The BRPs provide no details as to what they have gleaned from their investigation. They complain bitterly however that Piper and Neethling have been uncooperative.

- [148] This complaint does seem to have a foundation when reference is had to the correspondence between Piper and Neethling's respective attorneys and those of the BRPs.
- [149] At this stage, it is not in dispute that the mine is profitable and that the sale of the manganese generates a massive cash flow. Wepex however under the directorship of Piper and Neethling does not receive in any monies. Instead, the funds flow from Wepex directly to GMM – and Glosam is thus bypassed in the scheme.
- [150] Glosam, on any version, has been rendered a shell by virtue of the diversion of the funds earned from the mine.
- [151] The BRP's make the salient point that, in the event that Glosam is ultimately successfully rescued, Piper as shareholder, will benefit and participate in the profits generated by Glosam in the future, or at the very least, obtain a better return than through the immediate liquidation of Glosam.
- [152] The BRPs undertake that they will fulfil their duties as BRPs to the best of their abilities and in good faith.
- [153] There is no basis on which I cannot accept these undertakings. They are experienced BRPs with some reputation and are officers of this court. It cannot be denied by Piper that Glosam and thus he, being the main beneficial holder of equity, was bailed out financially by Dyason and his entities at a time of need.
- [154] There can be no doubt also that this was not an act of altruism on the part of Dyason. Rather it was an investment to be recouped when the market improved.
- [155] The 2022 Term Sheet promised potential returns from the mine. The clear imperative lying at the heart of the Term Sheet was that profits and funds would be generated in Glosam. This was security for the Dyason investment – which initially took the form of loan capital under the loan arrangement in the 2018 Term Sheet and was extended to a trading credit and other debt forms.
- [156] There is no doubt that it was anticipated by the Dyason parties that this income stream into Glosam would in due course turn a profit for Glosam and thus for its shareholders, Fujax SA and Piper through NC Manganese.
- [157] There are attempts to suggest that Glosam did not have the rights under the relationship between Glosam and Wepex to be the actual mining contractor. This is disputed. It appears, in any event, that Glosam acted in the structure as mining contractor and the debt for equity financing arrangement in the Term Sheets was dependent on this position.
- [158] Against this background I turn to deal with each of the applications in turn.

The Removal application.

- [159] Piper and by him Wepex seek in terms of Section 130(1) an order setting aside the resolution to place Glosam into business rescue.
- [160] This can be achieved “ on the grounds that (i) there is no reasonable basis for believing that the company is financially distressed (ii) there is no reasonable prospect for rescuing the company; or (iii) the company has failed to satisfy the procedural requirements set out in section 129.”[2]
- [161] Furthermore the the appointment of the BRPs may be set aside – ie they may be removed , on the ground, inter alia, that they are not independent of the company or its management or lack the necessary skills[3]
- [162] Piper and Wepex seek the setting aside of the resolution on the bases that there is no reasonable basis for believing that it financially distressed and that the procedural requirements of section 129 have not been complied with.
- [163] They seek the removal of the BRPs on the basis that they are not independent because of the conspiracy relied on.
- [164] They contend in addition that the BRP’s, on the facts, lack the necessary skills and information.
- [165] Piper seeks also to impugn the resolution on the basis
- [166] I will deal with each of these contentions in turn.

Financial distress

- [167] Section 128(1)(f) defines the term “financially distressed” to mean that it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- [168] To my mind, on the facts of this case, the suggestion that Glosam is not financially distressed is untenable.
- [169] The attempt by Piper to suggest that the debts of Glosam are extinguished because of the contrived cession arrangements which have purportedly been executed between Piper and Neethling to suit their narrative is without any merit.
- [170] In any event, on all versions, there is an indebtedness of more than R55 million which is owing to SARS.
- [171] It is common cause that Glosam cannot pay this debt because its income is being diverted into GMM by Piper and Neethling.
- [172] Glosam, thus, has no income and is unable to conduct its business on the basis that it has autonomy over the payment of its debts.

[173] A more glaring example of financial distress is hardly conceivable.

[174] That Piper remains as a director of Glosam whilst orchestrating this scheme against its solvency is of concern to this court.

Compliance with section 129

[175] The first complaint of non-compliance is that Glosam failed to comply with section 129(3) which provides for the publishing by the company of notice of the resolution putting the company under business rescue to every affected person within five days and the appointment of business rescue practitioners.

[176] It appears from the papers that the impugned resolution was adopted on 20 May 2024 and was filed with the CIPC on 22 May 2024. Given the fact that 29 May 2024 was a public holiday (election day), the five-business day period expired on 30 May 2024.

[177] The BRPs were appointed on 27 May 2024, which is within the five business day period contemplated in section 129(3)(b) of the Act.

[178] The notice to affected persons, was issued by the BRPs on 30 May 2024.

[179] It is relevant that Piper, as a director, owes Glosam certain fiduciary duties.

[180] Once Glosam was placed in business rescue, it was, in terms of sub-sections 137(2) and (3), incumbent upon Piper to make contact with the BRPs, tender his services to them and provide them with all relevant information (including a list of affected persons).

[181] As I have said, the indications are that he has been singularly unco-operative. This lack of co-operation obviously stems from the

fact that he is disaffected.

[182] The BRPs allege that they had virtually no access to Glosam's accounting systems or information and within the short time available to them, took all practical and reasonable steps to identify all potentially affected persons and obtain contact details.

[183] On 27 May 2024, the Sheriff attended at the mine, being Glosam's principal place of business, and served and displayed the resolution to Ms Wildebees, a HR Clerk.

[184] Piper waited until 7 June 2024 to advise the BRPs, via his attorneys, of certain alleged affected persons who had not been notified of the business rescue proceedings.

[185] On Piper's version, he had taken the time to make contact with those affected persons and discussed the business rescue proceedings with them. I am satisfied that they were, thus, made aware of the proceedings.

[186] Section 130(5)(a) provides:

“(5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may –

(a) set aside the resolution –

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so.”

[187] Mere failure to comply with procedural requirements will, after the decision in *Panamo Properties (Pty) Ltd and Another v Nel and Others* NNO[4], not result in the resolution under section 129 being a nullity ipso facto.

[188] In *Panamo Properties* the SCA (per Wallis JA) found that section 130(5)(a) of the Act must be read conjunctively.

[189] Accordingly, a court is empowered to set business rescue proceedings aside only where one or more of the grounds in section 130(1) of the Act are present and it is just and equitable to do so on the evidence presented.

[190] To my mind the resort to technical non-compliance alleged by Piper is ill founded.

[191] It is unnecessary for the court to enter into a painstaking exercise involving the the counting of days and the unravelling of disputes as to when the various time periods begin and end. It suffices to state that, on my assessment of the manner in which the formalities were met, there is no non-compliance.

[192] If I am wrong, any non-compliance is slight and no prejudice has been established.

[193] Furthermore, the contentions offered by Piper regarding why it would be just and equitable to set aside the resolution are unrelated to the alleged non-compliance with section

129. All of the reasons proffered relate, in some way, to the alleged conspiracy.

[194] I conclude on this point that there is no reason in justice or equity for the business rescue of *Glosam* to be set aside.

[195] This conclusion is compounded by the fact of *Glosam*’s evident financial distress which has, at least in part, been orchestrated by Piper himself.

[196] To set aside the business rescue for slight and technical non-compliance with section 129 of the Act in such circumstances would, to my mind, not only offend against the principles of justice and equity, but would also subvert the purpose of Chapter 6 of the Act.

[197] Piper furthermore seeks to impugn the resolution on the alleged basis that the BRPs do not have the requisite skills to deal with the complexity of the situation because they are not properly apprised of the financial position of the company.

Lack of independence

[198] I have dealt at length with the failure to establish the conspiracy theory. There is no basis on which I am entitled to find on these papers that there is a lack of independence on the part of the BRPs.

[199] The contention is made on behalf of the BRP's that the alleged scheme is outlandish and appears to grow to include anyone who opposes the diversion of the mine's income. This contention has some merit. Recall, that on Piper's version the scheme was hatched long before the appointment of the BRP's

Necessary skills

[200] There are indications that the manner in which Piper has behaved in relation to the furnishing of information which is peculiarly within his knowledge may in due course suggest that there has been deliberate obstruction. Piper's attack on the validity of the resolution is, to my mind, nothing more than obstruction.

[201] This notwithstanding, the BRPs are experienced in their trade. They will be well apprised of mechanisms at their disposal to obtain the necessary information both under the Act and at common law. Indeed, it seems that they have undertaken the BR application in a bid to obtain some redress of this nature, albeit misguided.

The Wepex Business Rescue application

[202] A Section 131(4) provides that, after considering an application to place a company under business rescue, the court may:

“(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that –

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment- related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.”

[203] According to section 128(1)(h), “rescuing the company” means “achieving the goals set out in the definition of “business rescue” in sub- paragraph (b).

[204] Section 128(1)(b) in turn provides:

”‘Business rescue’ means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –(i)the temporary supervision of the company, and of the management of its affairs, business and property;(ii)a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii)the

development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

[205] Thus, it stands to reason that for a business rescue application to succeed the company must be shown to be financially distressed.

[206] The central problem with the BR application is that it is not founded on financial distress.

[207] By every account, the market is favourable, the mine is up and running, and there is substantial income flow from the mine.

[208] The problem is not financial distress. Rather it is the imposition of a scheme whereby the income is kept away from Glosam. The business rescue procedure is not meant to be employed in these circumstances.

[209] The lawfulness or otherwise of the diversion of the income generated from the mine is a matter of contractual, delictual, statutory and possible criminal remedy.

[210] It is clear that there are numerous protections afforded to shareholders under the Act which do not involve business rescue.

[211] The business rescue process is not designed to be used for the wresting of control from directors of a company where there is no financial distress.

[212] In the circumstances, the application for business rescue must fail.

Conclusion and costs

[213] In relation to the Removal application, the attempt to seek findings of dishonesty on heavily disputed facts is to be deprecated.

[214] Piper does not come to court with clean hands. His diversion of the funds belonging to the mining enterprise to be dealt with outside of the normal company structure is, prima facie, unlawful.

[215] The Removal application was ambitious. Some may call it reckless. The likelihood of establishing the conspiracy on which it depended on paper was slim if it was existent at all. To my mind the Removal application is abusive.

[216] In the circumstances, the Removal application must be dismissed in all its parts and punitive costs are warranted.

[217] In relation to the BR application, whilst the basis therefor is not established, to my mind the BRP's can be forgiven for seeking some redress. In fact, they are obliged to act.

[218] Their predicament is exacerbated in that they are faced with a complex operation involving the illegal diversion of the funds of the company they are called on to administrate and where they are afforded no co-operation from those who have taken control of the revenue stream which flows from the mine.

[219] Worse still is the fact the Piper and Neethling have arrogated to themselves the right to manage Glosam's financial affairs.

Orders

I make the following

orders:

Removal application (case: 2024-069923)

1. The application is dismissed.
2. The costs of the first to fourth respondents, which are to include all reserved costs in relation to any part of the application, are to be paid by Piper and Wepex (the applicants) on the scale as between attorney and client, such costs to be joint and several the one paying the other to be absolved and to include the costs of two counsel where employed.
3. The costs of the business rescue practitioners (BRP's) and Glosam in the Neethling application brought under case 2024-053300 are to be paid by Neethling, GMM and Piper jointly and severally on the scale as between attorney and client such costs to include the costs of two counsel where employed.

The Business Rescue application (case: 2024-053300)

1. Neethling and GMM are joined to as parties to the BR application
2. The BR application is dismissed with costs on the party and party scale to be taxed in accordance with scale C and to include the costs of two counsel where employed.

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 10 January 2025.

Heard: 14 & 15 October 2024

Delivered: 10 January 2025

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[1] Act 71 of 2008.

[2] Section 130(1)(a) (i) to (iii).

[3] Section 130(1)(b)(ii) and (iii).

[4] Panamo Properties (Pty) Ltd and Another v Nel and Others N0 2015 (5) SA 63 (SCA).

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