

SOUTH AFRICA / JUDGMENT

Van Der Heever and Another v Bronx Mining And Investment (Pty) Ltd (2021/29817) [2024] ZAGPJHC 636 (10 July 2024)

[2024] ZAGPJHC 636

COURT

South Gauteng High Court, Johannesburg

BEFORE

B.C. Wanless

CASE / FILE NUMBER

2021/29817

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case Number: 2021/29817

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: YES

10

July 2024

In

the matter between:

THEODOR
WILHELM VAN DEN HEEVER N.O.
First Applicant
NAPHTALI
NKHANEDZENI RADZILANI NO.
[the
appointed joint liquidators of Grasta Mining (Pty) Ltd
(in
liquidation), Master's reference: G1290]
Second Applicant
and
BRONX
MINING AND INVESTMENT (PTY) LTD
(Registration
number: 1961/001801/07) Respondent

JUDGMENT

WANLESS J

Introduction

- [1] On 26 August 2021, Matojane J made an order (“the order”) provisionally winding-up Bronx Mining Investment (Pty) Limited (“Bronx”). The Applicants in the winding-up application (“the main application”) are Theodor Wilhelm Van der Heever and Naphtali Nkhanedzeni Zadzilani, who are the appointed joint liquidators (“the liquidators”) of Grasta Mining (Pty) Limited (in liquidation), referred to herein as “Grasta”.
- [2] As is the practice of this Division, when granting the order, Matojane J issued a Rule Nisi, returnable on 21 October 2021 (“the rule”). Thereafter, the rule was extended on a number of occasions. On 13 November 2023, Wepener J granted an order whereby the rule was extended to 20 February 2024 (“the Wepener order”). This was in fact an error and the rule should have been extended to 5 February 2024. In order to cure this error in the Wepener order, following a meeting convened by this Court with the legal representatives of all of the interested parties, this Court made an order, on 5 February 2024, in terms of which, inter alia, this Court ordered that (a) the Wepener order was amended to read that the rule was extended to 5 February 2024; (b) the rule was further extended to 20 February 2024; (c) timelines were set for the filing of further affidavits; updated Practice Notes and Heads of Argument in respect of both the application to extend the rule and an application by a creditor to intervene and (d) the costs of the case management meeting held on 2 February 2024, together with the extension of the rule on 5 February 2024, were reserved for determination by this Court.

- [3] The effect of the said order was that the application to intervene (“the intervening application”) and the application for the extension of the rule (“the interlocutory application”) were both postponed to 20 February 2024 to be added to the Opposed Motion Roll of this Court and argued before this Court on that day. The intervening creditor in the intervening application was Grasta Africa (Pty) Limited (“Grasta Africa”). On or about 19 February 2024 the liquidators instituted a further interlocutory application for condonation for the filing of a further affidavit in respect of the interlocutory application, together with updated Heads of Argument and an updated Practice Note (“the condonation application”).
- [4] On 20 February 2024 this Court was advised that the intervening application would not be proceeding, in light of the fact that Grasta Africa was no longer in existence, having been deregistered. In the premises, Adv Ferreira, who appeared for Bronx, asked that the intervening application be dismissed, with costs. This Court agreed with that request and granted same. An appropriate order

in respect thereof will be included by this Court in the order made at the conclusion of this judgment (as indicated on 20 February 2024 would be the case). Insofar as the condonation application was concerned (Bronx had also filed a further affidavit) this Court made an order granting

condonation to the liquidators as sought in their Notice of Motion. Once again, an appropriate order to that effect (in order to avoid any confusion in respect thereof) appears at the end of this judgment.

- [5] Arising from the foregoing, this Court heard full argument in respect of the interlocutory application on 20 February 2024. Judgment was reserved and the matter postponed to 15 March 2024 (with the rule extended to that date) for the sole purpose of this Court delivering that judgment. However, on 15 March 2024 this Court was advised that a further application by a creditor to intervene in the main application (“the second intervening application”), namely one Andries Petrus Theron (“Theron”) was to be instituted. Arising therefrom, this Court could not deliver judgment on 15 March 2024. The matter was postponed with guidelines in respect of the filing of further papers and other documents pertaining to the second intervening application. Thereafter, whilst the second intervening application was initially opposed by Bronx, Bronx did not file an Answering Affidavit. Importantly, the appointed joint provisional liquidators of Bronx (“the Bronx liquidators”) then proceeded with an application in terms of subsection 155(7) of the Companies Act[1] (“the Act”), which had already been instituted before 15 March 2024. This application was successful. However, Bronx has filed an application

for leave to appeal that decision and that application is pending. After several postponements and extensions of the rule, this matter once again comes before this Court. At the direction of this Court the parties have filed a Joint Practice Note. In terms thereof, it is recorded that (a) Bronx has formally withdrawn its opposition to the second intervening application (as set out above); in the event that this Court dismisses the interlocutory application which results in the discharge of

the rule the intervening creditor seeks an order that Bronx once again be placed in provisional winding-up retrospective to 26 August 2021. With regard to the interlocutory application, both the liquidators and the intervening creditor seek an extension of the rule (which will enable all proceedings in respect of the 155(7) application to be finalised). Bronx does not oppose the extension of the rule in terms of the interlocutory application. Unfortunately, Bronx does not (as is the case with regard to the second intervening application) consent thereto. In the premises, it is incumbent upon this Court to deliver this judgment. In doing so, same should be read (and understood) in light of the fact that this Court had prepared a judgment to be delivered on 15 March 2024; the events that took place on 15 March 2024 and the happenings which have transpired between 15 March 2024 and the delivery of this judgment (21 June 2024).

The second intervening application

[5A] As set out above, Bronx, whilst not consenting to an order that Theron be granted leave to intervene in the main application as a creditor of Bronx, does not oppose the second intervening application and the relief sought. As a result thereof (and in light of the decision reached by this Court in respect of the interlocutory application) this judgment will not be burdened unnecessarily by dealing with the merits of this application. Suffice it to say, this Court is satisfied that Theron has set out sufficient grounds to enable this Court to determine that he should be granted leave to intervene in the main application.

The interlocutory application

- [6] In the interlocutory application the Applicants are the liquidators of Grasta who are also the applicants in the main application (for the winding-up of Bronx). The respondent in the interlocutory application is Bronx. In this application, the liquidators initially sought the further extension of the rule to 13 May 2024. Bronx initially opposed the relief sought by the liquidators and sought an order that the rule be discharged. The present status pertaining to this application has already been dealt with earlier in this judgment.
- [7] Arising from, inter alia, the impasse between the parties in this matter; the fact that the rule had been granted as long ago as 21 October 2021 and the fact that the return date sought by the liquidators was 13 May 2024, coupled with the fact that if the further extension was granted, the “outcome” of the rule was to be determined in the not so distant future (13 May 2024) at the hearing of a further application (dealt with hereunder), this Court undertook to attempt to deliver its judgment in respect of the interlocutory application on 15 March 2024. In the premises, having heard argument (for approximately four hours) on 20 February 2024, this Court extended the rule to 15 March 2024 for that very purpose. This “undertaking” was given despite the fact that (as dealt with above) the matter had been added to this Court’s Opposed Motion Roll and to the workload of this Court.
- [8] It was always the intention of this Court to deliver a written judgment in this matter. In light of, inter alia, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the

premises, this judgment is being delivered ex tempore. Once transcribed, it will be “converted” or more correctly “transformed”, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an ex tempore basis.

The case for the liquidators

[9] In very broad summary, the liquidators sought an extension of the rule to 13 May 2024 based on the fact that the creditors in the main application had voted to reach a compromise in terms of subsection 155(7) of the Act and an application to that end had been filed by the Bronx liquidators. This application (“the compromise application”) had been set down for hearing on 13 May 2024. In the premises, the liquidators sought an order extending the rule to the same date on the basis that it would be just and equitable for this Court to make such an order, thereby giving effect to the wishes of all of the creditors in the main application. The same principles still apply as at 21 June 2024.

The case for Bronx

[10] Also in broad summary, Bronx sought an order that the relief sought by the liquidators be dismissed and that the rule be discharged. This would result in Bronx no longer being subject to a provisional winding-up order.

[11] This opposition to the further extension of the rule is based upon, inter alia, the following, namely:

11.1 the Mining Contractorship Agreement (“the Plantcor agreement”) between Bronx and Plantcor (Pty) Ltd (“Plantcor”) which forms the basis for the compromise application has fallen away due to non-compliance with certain conditions precedent;

11.2 the alleged claim by the liquidators has been tendered by Bronx, to be paid upon the discharge of the rule;

11.3 the appointed provisional liquidators of Bronx did not have the authority to accept the Plantcor agreement because it contained less favourable terms than a previous Mining Contractorship Agreement with “Saamfox” and those liquidators (the Bronx liquidators) did not have the requisite authority to do so, in law;

11.4 material reliance is placed upon the substantial and alleged claim of Grasta Africa but Grasta Africa has now been deregistered; and

11.5 the application is not bona fide but is an abuse of process.

The facts

[12] The relevant facts in this matter, which are either common cause or cannot be seriously disputed by any of the parties, are, inter alia, the following:

12.1 Bronx is insolvent both factually and commercially;

12.2 the mining right owned by Bronx is the only real asset;

12.3 all of Bronx's creditors voted in favour of the Plantcor agreement; and

12.4 if Bronx is wound-up the creditors will not receive a dividend from the insolvent estate. If the Plantcor agreement is implemented, then all creditors will be paid in full.

The law

[13] Section 155 of the Act deals with a compromise between company and creditors.

Subsection 155(7) of the Act states:

"If a proposal is adopted as contemplated in subsection, (6) –

- (a) the company may apply to the court for an order approving the proposal; and
- (b) the court, on an application in terms of paragraph (a) may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to –
 - (i) the number of creditors of any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal; and
 - (ii) in the case of a compromise in respect of a company being wound up, the report of the Master required in terms of the laws contemplated in item 9 of Schedule 5."

[14] It is self-evident from the foregoing provisions of the Act that a compromise cannot be sanctioned by the court if a company is finally wound-up. In the premises, in order for a court to sanction the Plantcor agreement it is necessary for this Court to extend the rule. Moreover, this requirement (the extension of the rule) is a material term of the Plantcor agreement.

[15] There was no dispute between the parties as to the test to be applied in the interlocutory application. This was whether or not it was in the best interests of the creditors to extend the rule to enable the court to decide whether the Plantcor agreement was in the best interests of all creditors. Further, there was no dispute between the parties that, in deciding same, this Court has a wide (or unfettered) discretion to be exercised judicially. As a corollary thereto, the extension of the rule should be granted if there is "good cause".

Discussion

Has the Plantcor agreement fallen away?

- [16] As set out earlier in this judgment, Bronx submits that the Plantcor agreement has lapsed due to non-compliance with certain conditions precedent. It is further submitted that, as a result thereof, the very basis for the application no longer exists. In the premises, it is submitted that the rule should be discharged.
- [17] In the opinion of this Court, it is unnecessary to decide whether, as a matter of fact, the Plantcor agreement still exists or not. This is because, inter alia, the liquidators placed before this Court (with no objection thereto by Bronx) a letter from Plantcor confirming that Plantcor still intended to enter into the Plantcor agreement. Furthermore, the said agreement was placed before the court at the hearing of the compromise application
- [18] Even if this was not so, as submitted on behalf of the liquidators, it is always open to the creditors to accept another agreement and bring another compromise application. Ultimately, this is not an issue which should cause any concern to this Court. If it indeed was/is an issue, same could have been properly determined at the hearing of the compromise application and/or any can be determined at any appeal in respect thereof. For present purposes, it remains only necessary for this Court to determine whether there exists good cause for the extension of the rule and that same would be in the best interests of all of the creditors of Bronx. In the premises, this Court cannot accept this ground of opposition as put forward on behalf of Bronx.

Does the tender to pay the alleged claim of the liquidators by Bronx give rise to the discharge of the rule?

- [19] When considering this submission made on behalf of Bronx, it is important to remember that the liquidators are not the Bronx liquidators but the appointed liquidators of Grasta. In the premises, any tender made by Bronx to satisfy the alleged claim of Grasta, would only satisfy a single creditor. The claims of the other creditors of Bronx would remain unsatisfied.
- [20] In any event the tender made has been refused by the liquidators. This refusal is based, inter alia, on the fact that to accept same could well lead to the payment being set aside should Bronx be finally wound-up on the basis that it constitutes an unlawful disposition in terms of Insolvency Act. Further, if accepted, it would have the effect of destroying the locus standi of the liquidators in the interlocutory application (presumably the reasoning behind Bronx making the tender in the first place). It must follow from the foregoing that the answer to the question posed (in the heading above) must be in the negative. This tender does not give rise to the discharge of the rule.

Did the liquidators of Bronx have the requisite authority to accept the Plantcor agreement?

- [21] Whilst this point was not argued with any great conviction by Counsel for Bronx at the hearing of this application (if at all) it is still necessary for this Court to consider same, since it was not specifically abandoned by Bronx.

- [22] Once again (similar to the first ground of opposition dealt with earlier in this judgment) this Court is of the opinion that it is unnecessary to decide whether the liquidators of Bronx had the requisite authority, in terms of either the law, or in fact, to accept the Plantcor agreement. In this regard, it would appear to this Court that in both instances the liquidators of Bronx acted on behalf of, and not at the behest of, the creditors of Bronx at a properly convened meeting thereof. So, these liquidators did not act “on a frolic of their own” but in terms of the Insolvency Act.
- [23] In addition thereto, it is the opinion of this Court that whether the Plantcor agreement is less favourable than the Saamfox agreement, has no bearing on the ultimate decision to be made by this Court in the interlocutory application. For present purposes there is an agreement which has been accepted by the creditors of Bronx. This agreement has been sanctioned by the court at the hearing of the compromise application. Similarly, if those liquidators genuinely did not have the authority (in law) to accept the Plantcor agreement on behalf of the creditors of Bronx (which is highly doubtful) then this issue should also ultimately be decided in the compromise application. In the premises, this Court finds that any alleged lack of authority on behalf of the liquidators of Bronx to accept the Plantcor agreement is not a valid reason, particularly when considering all of the relevant facts and applying the correct principles of law, to discharge the rule.

The rule should be discharged in light of the liquidators’ material reliance upon the substantial and alleged claim of Grasta Africa.

- [24] When considering this submission on behalf of Bronx, it is imperative to note that whilst it is correct that, at the time this interlocutory application was heard, Grasta Africa had been deregistered, it is not so that the claim of Grasta Africa necessarily stands to be excluded from the concursus creditorum of Bronx. In the first instance, evidence was placed before this Court that Grasta Africa was presently applying to be re-registered.
- [25] Even if Grasta Africa is never re-registered, it is difficult to understand as to how the lack of a claim by this creditor affects the present application for the extension of the rule. This is simply because, whilst Grasta Africa may be the largest creditor of Bronx, it is far from being the only creditor. There are several other creditors who not only voted in favour of the Plantcor agreement but whose claims need to be satisfied and whose claims are not insubstantial.
- [26] In this regard, not only has Bronx failed to place any real evidence before this Court as to how, if the rule was discharged, the claim of these other creditors would be satisfied but the fact that Grasta Africa may not ultimately lodge a claim, only strengthens the averments made on behalf of the liquidators that the Plantcor agreement will result in all creditors receiving the full amount of each of their claims. If Grasta Africa's claim falls away the more money will be available to settle the claims of the remaining creditors.

[27] For all of the foregoing reasons any “material reliance” placed by the liquidators upon the alleged substantial claim of Grasta Africa is not a valid reason to discharge the rule.

The application is not bona fide but is an abuse of process.

[28] This Court understands that this submission made on behalf of Bronx is based primarily on two grounds. Firstly, the number of postponements in the matter for, inter alia, the extension of the rule and, secondly, the relationship between one of the liquidators and one of the liquidators of Bronx (who are married to one another and who are employed by the same entity of professional liquidators).

[29] It is true that there have been, for a number of various reasons, a fairly considerable number of postponements in the main application. Of these, several were brought about particularly for the extension of the rule and related to the consideration of certain “Mining Contractorship Agreements.” However, it is common cause that the only real asset of Bronx is the mining right. As correctly submitted on behalf of the liquidators, it is in the best interests of all of the creditors if this mining right is protected by the entering into of the Plantcor agreement (or even another such agreement). Furthermore, in addition to the lack of information placed before this Court on behalf of Bronx in respect of how the claims of the creditors will be paid, is the equal lack of information as to how, if the rule is discharged, the substantial cost of complying with the regulations/requirements of the mining authorities will be satisfied. It is probable that (as submitted on behalf of the liquidators) the discharge of the rule would ultimately lead to the loss of the only realisable asset of Bronx, namely the mining right. Of course, it is always open to any creditor of Bronx to oppose the compromise application if valid grounds exist. The test in respect of the interlocutory application, is a very different one.

[30] With regard to the relationship which exists between the two liquidators (as dealt with above), it does appear to this court rather strange that the liquidators of a creditor of Bronx should be the applicant in the interlocutory application rather than the liquidators of Bronx. This puzzling question is not adequately dealt with in the application papers. However, at the end of the day, this court must agree with the liquidators that the “conspiracy theories” raised by Bronx are not supported by any real facts. Further, Counsel for the liquidators correctly pointed out the improbabilities of the liquidators somehow being able to conspire with the liquidators of Bronx and a creditor, to bring about the demise of, or act contrary to the best interests of, Bronx (and the creditors of Bronx). This judgment will not be burdened unnecessarily by dealing with these improbabilities in any detail.

[31] In the premises, this Court finds that the application for the extension of the rule is not an abuse of process and that there is nothing on the application papers before this Court to show any mala fides on behalf of the liquidators or any other party involved in the interlocutory application and who supports same. Once again, if

necessary, these averments could have been dealt with by the court when deciding the compromise application and/or will be dealt with by the appeal court thereafter.

Conclusion

- [32] It is clear from the foregoing that this Court must reject all of the grounds upon which Bronx relied for the discharge of the rule. Based on the facts of this matter (which are largely common cause), this Court finds, in the exercise of its unfettered discretion, that it is clearly in the best interests of the creditors of Bronx to extend the rule to enable the finalisation of the compromise application.
- [33] Moreover, the extension of the rule is based upon “good cause”. The good cause includes, inter alia, the protection of the only asset of Bronx (the mining right) and the fact that the extension of the rule is necessary to keep the Plantcor agreement in place (it is a material term thereof). At the end of the day the fact that the extension of the rule allows the compromise application to be adjudicated upon is “good cause” in itself. The discharge of the rule would clearly not be in the best interests of the creditors. Bronx would remain insolvent and the probabilities are that a fresh application for its winding-up would be instituted by a creditor. If the rule is to be discharged, it should follow the outcome of the compromise application.

Order

- [34] This Court makes the following order, namely:
1. The application by Grasta Africa (Pty) Limited (“Grasta Africa”) to intervene in the application (“the main application”) for the final winding-up of Bronx Mining and Investment (Pty) Limited (“Bronx”) is dismissed;
 2. The costs of the intervening application referred to in paragraph 1 hereof are to be paid by Grasta Africa;
 3. The application by the Applicants for condonation in respect of the late filing of the further affidavit in support of the extension of the Rule Nisi, is granted;
 4. The costs of the condonation application referred to in paragraph 3 hereof are to be costs in the cause;
 5. The application by Andries Petrus Theron (“Theron”) to intervene in the main application, is granted;
 6. The application for the extension of the Rule Nisi is granted and the Rule Nisi is extended to the Opposed Motion Court Roll on 10 February 2025;

7. The costs of the case management meeting held on 2 February 2024; the extension of the Rule Nisi on 5 February 2024; the intervention application referred to in paragraph 5 hereof and the application for the further extension of the Rule Nisi referred to in paragraph 6 hereof, are to be costs in the cause of the main application.

B.C. WANLESS

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:

15 March 2024

Date of ex tempore Judgment: 21 June 2024

Date of written judgment:

10 July 2024

APPEARANCES

On behalf of the Applicant:

Adv. K. A Slabbert (Nee Wilson)

Instructed by:

DMO Incorporated Attorneys

On behalf of the Intervening Creditor: Adv. E. L. Theron SC

Instructed by:

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On behalf of the Respondent: Adv E. Ferreira

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[1] 71 of 2008.

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