

SOUTH AFRICA / JUDGMENT

Wescoal Mining (Pty) Ltd and Another v Mkhambo NO and Others (2023-079991) [2023] ZAGPJHC 1234 (31 October 2023) [2023] ZAGPJHC 1234

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2023-079991

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case

No. 2023-079991

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

31/10/23

In the matter between:

WESCOAL
MINING (PTY) LTD
First
Applicant
SALUNGANO
GROUP LTD
Second
Applicant
And
PHAHLANI
LINCOLN MKHOMBO NO
First
Respondent
ARNOT
OPCO (PTY) LTD
Second

Respondent
NDALAMO
COAL (PTY) LTD
Third
Respondent
MASHWAYI
PROJECTS (PTY) LTD
Fourth
Respondent

JUDGMENT

WILSON J:

1 The first, second and fourth respondents, respectively Mr. Mkhombo, Arnot, and Mashwayi, seek leave to appeal against my

judgment

of 2 October 2023, in which I concluded that a variant of a plan to rescue Arnot under the provisions of Chapter 6 of the Companies Act 71 of 2008 (“the Act”) had been lawfully adopted at a meeting of Arnot’s creditors on 28 July 2023. I reached that conclusion by interpreting the word “creditor” in Chapter 6 of the Act to refer only to a person who is a creditor

of a company under business rescue at the point that the business rescue process commences. That meant that the voting interests of “post-commencement creditors” (creditors whose claims arose after the commencement of business rescue) should not have been counted when the plan to rescue Arnot was voted on at the 28 July meeting. Those votes having been excluded, I found that the statutory threshold set in section 152 (2) (a) of the Act had been met at that meeting, and that the plan had been adopted.

2 The implementation of the plan would mean the sale of Arnot to the third respondent, Ndalamo. Ndalamo does not oppose the applications for leave to appeal, but it seeks the interim execution of my order under section 18 (3) of the Superior Courts Act 10 of 2013.

3 I shall deal first with the applications for leave to appeal, and then turn to the application for interim execution.

The application for leave to appeal

4 The interpretation of the Act that I adopted in my judgment has far-reaching consequences, not just for Arnot, but for all business rescue proceedings undertaken in terms of the Act. Given that the Act does not speak explicitly to the question of whether the category of “creditor” includes post-commencement creditors, the meaning I ascribed to the term was a reasoned inference, based on the language and purposes of the Act. Given the nature of that interpretive exercise, I have no doubt that the

conclusion

I reached is one with which another court could reasonably differ. I am also alive to the fact that an appellate court is likely

to benefit from submissions by other interested parties on the nature of the business rescue process, and the role of post-commencement

creditors, which were not made before me, and which might take a court of appeal's interpretation of the Act on a different

course.

5 Aside from the point of statutory interpretation, Mashwayi contended that the exclusion of post-commencement creditors would have made no difference to the outcome of the 28 July 2023 meeting, and that my order was erroneous for that reason too. That contention

came as something of a surprise, since, as counsel agreed during the leave to appeal hearing, that was not a point debated during the main application, which was argued by all parties on the basis that the exclusion of post-commencement creditors would have resulted in the adoption of the business rescue plan. Had there been a dispute about this issue, it is unlikely that I would have reached the point of statutory interpretation I ultimately decided, or that I would have issued the order I did.

6 Still, Mr. Harris, who appeared for Mashwayi in the application for leave to appeal, contended that the argument that the exclusion of post-commencement creditors from the voting tally would have made no difference to the outcome of the 28 July meeting is sustainable on the papers. He confirmed that Mashwayi intends to pursue it on appeal, if necessary with an application to introduce new evidence. Given that it was never argued before me, I am unable to say what the prospects of success on that point are, but in light of the speed at which this matter was argued and determined a quo, I am inclined to conclude that it is an issue that ought to be ventilated on appeal.

7 Finally, Mr. Symon, who appeared for Mr. Mkhombo and Arnot, argued that there is some prospect that a court of appeal might conclude that the appropriate remedy, on finding that post-commencement creditors are not permitted to vote an interest at meetings convened under section 152 of the Act, was to refer the issue back to Arnot's creditors for a fresh vote after further deliberation in light of my judgment. When I decided the main application, I could see no facts that would tend toward the conclusion that such further deliberation would make any difference to the outcome, and I concluded that my overriding concern should be to give effect to the statute on the facts as they stood on 28 July

2023. However, I accept that, at least at the level of principle, the remedial alternative Mr. Symon proposed is one that another court might reasonably adopt.

8 For all these reasons, leave to appeal should be granted. Given the complexity and the stakes involved in the issue of statutory interpretation, the appeal should plainly lie to the Supreme Court of Appeal.

The application for interim execution

9 An applicant for interim execution must show that there are exceptional circumstances justifying such an order, that the applicant would suffer irreparable harm if the judgment appealed against is not immediately brought into effect, and that none of the other parties would suffer irreparable harm if it is.

10 I am prepared to accept that Ndalamo has shown that there are exceptional circumstances in this case. However, I do not think that

I can conclude, on a balance of probabilities, that Ndalamo would suffer irreparable harm unless my order is immediately executed.

11 The forthcoming appellate delay will only cause Ndalamo irreparable harm if it means the collapse of Arnot's sale to it. The only real likelihood that this would ensue is if the business rescue process itself collapsed, and Arnot had to go into liquidation. This matter was initially argued before me on the basis that the business rescue process would collapse on or about 15 October 2023, unless I heard and decided the case before then.

12 But things have since changed. Mr. Mkhombo now believes that the business rescue process can endure for another four to six months, even if Arnot's sale to Ndalamo is not proceeded with. That, I am urged to find, is long enough to allow the Supreme Court

of Appeal to consider an appeal against my judgment on an urgent basis. I have no reason to believe that the Supreme Court of Appeal

would not agree to hear and decide the matter within that time. Where appropriate, it has entertained urgent appeals on shorter timeframes in the past.

13 Mr. Miltz, who appeared for Ndalamo, was not really able to gainsay Mr. Mkhombo's position, although he called attention to

the rather sober and conditional language in which it was expressed. I am alive to the fact that Mr. Mkhombo's views must be assessed in light of that fact that he is also an applicant for leave to appeal, but there is no suggestion that his view on the present durability of the business rescue process is in any way self-serving or contrived.

14 It seems to me that, on the probabilities, I must accept Mr. Mkhombo's forecast: that the business rescue process can endure

for another few months, and that this will be long enough to allow my judgment to be reconsidered on appeal. Despite Ndalamo's

critique, there are really no facts on the record that support a contrary inference. It follows that I cannot presently find that

Ndalamo would suffer irreparable harm unless my order is executed forthwith. The prospect of the collapse of Arnot's business

rescue process is too remote, on the facts as they currently stand, to justify interim execution.

15 Mr. Miltz also emphasised that, unless the sale goes through immediately, Arnot's mining activity will continue to deplete

the coal reserve, and that Ndalamo will receive less than it has bargained for if it takes control of Arnot only after the appeal

process is exhausted. But I do not think the reduction in the coal reserve constitutes irreparable harm. There is no suggestion that the reduction in the reserve is likely to be such that it would dissuade Ndalamo from taking over the mine at all, and no suggestion that the terms of sale could not be varied by agreement were a reduction in price warranted.

Prospects of success on appeal

16 Whether or not the prospects of an appeal succeeding have any role to play in an interim execution case has been a matter of some

debate in the cases. The Supreme Court of Appeal's view is that those prospects do play a role. However, it appears that the Supreme Court of Appeal has not yet had the opportunity to consider in what way they affect the enquiry (see *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA), paragraphs 14 and 15 and *Knoop NO v Gupta (Execution)* 2021 (3) SA 135 (SCA) paragraphs 49 and 50).

17 It is not strictly necessary for me to consider the strength of Mr. Mkhombo's, Arnot's and Mashwayi's prospects

of success in deciding the interim execution application, because I have already found that Ndalamo has not demonstrated that it would suffer irreparable harm without interim execution. However, I think that I should record that it weighs with me that, if, as could very well happen, the appeal against my order succeeds on the basis that I was wrong to interpret the Act as I did, then the effect of an order for interim execution would be that I would have authorised a very large commercial transaction, affecting thousands of people and their livelihoods, without any statutory basis for having done so. It was submitted that I need not worry too much about that because, if the appeal succeeds, then the sale would be cancelled, and restitution would have to take place.

18 In a context as complex as this, I cannot accept that submission. The consequences of pushing the sale through, only for it to be undone a few months later, are unknowable. It seems ill-advised to assume that they will all be reversible.

Costs

19 Given that the application for leave to appeal and the application for interim execution were heard simultaneously, costs in the application for leave and in the application for interim execution will be costs in the appeal.

Order

20 For all these reasons –

20.1 The first, second and fourth respondents are granted leave to appeal to the Supreme Court of Appeal against the whole of my judgment and order dated 2 October 2023.

20.2 The third respondent's application for interim execution is refused.

20.3 The costs of the application for leave to appeal, and the application for interim execution, will be costs in the appeal.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 31 October 2023.

HEARD ON: 30 October 2023

DECIDED ON: 31 October 2023

For the Applicants:

A Botha SC

SL Mohapi

Instructed by

Mkhabela Huntley

For the First and Second Respondents:

S Symon SC

C Cremen

Cox Yeats

For the Third Respondent:

I Miltz SC

D Block

Instructed by Webber Wentzel

For the Fourth Respondent:

L Harris SC

JC Viljoen

Liebenberg Malan Mofolo Inc

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