THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others (136/2022) [2023] ZASCA 34 (31 March 2023)

Today, the Supreme Court of Appeal (SCA) dismissed with costs, including the cost of two counsel, an appeal against the decision of the Gauteng Division of the High Court, Johannesburg (the high court). The issue before the SCA was whether the creditor's right to cast a vote on a debtor company's business rescue plan (the plan) as contemplated in s151 read with s152 of the Companies Act 71 of 2008 (the Act) vests in the business rescue practitioner (the practitioner) or the company's board of directors (the board).

The fifth respondent, Tegeta Exploration and Resources (Pty) Ltd (in business rescue) (Tegeta) is the creditor of the first respondent, Optimum Coal Terminal (Pty) Ltd (OCT), also in business rescue. The sixth and seventh respondents, Mr Johan Louis Klopper NO and Mr Kurt Robert Knoop NO are Tegeta's business rescue practitioners (the Tegeta practitioners) and the second and third respondents are Mr Juanito Martin Damons NO and Mr Kurt Robert Knoop NO, OCT's business rescue practitioners (the OCT practitioners).

In February 2018, OCT and Tegeta were placed under voluntary business rescue. Shortly thereafter, the OCT and Tegeta practitioners were appointed. In October 2021, the OCT practitioners published a business rescue plan and notified OCT's affected persons, which included Tegeta as a creditor of OCT, that a meeting to vote on the proposed business rescue plan for OCT would be held on 10 November 2021. The appellants, Tegeta's directors, contended that they had the right to vote on the plan, while the Tegeta practitioners argued that the right was theirs. The matter served before the high court, which interdicted the holding of the meeting, pending the determination of the right to vote. The high court answered the legal question in favour of the respondents, holding that the right to vote lay with the Tegeta practitioners who were given full management control under Chapter 6 of the Act.

Section 140(1) in Chapter 6 of the Act provides that: 'During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter – *(a)* has full management control of the company in substitution for its board and pre-existing management'. The appellants referred to s 66(1) of the Act, which provides that: 'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise'.

Their reliance on this section was to emphasise that under the Act it is the board that enjoys the plenary powers of the company. They contended that the business rescue process in Chapter 6 of the Act, posited what they styled as a 'hybrid cohabitation model', in which the board continues to play a decisive role in the affairs of the company, together with the practitioner, after it has been placed under supervision and in business rescue.

The appellants' contentions as to the powers of the board during the process of business rescue must be determined by reference to the proper interpretation of the relevant provisions of the Act. The approach cannot change depending on the facts of the case.

Whilst s 66(1) of the Act confers original powers on the board to manage the business affairs of the company and to exercise all the company's powers and perform its functions, it operates 'except to the extent that [the] Act . . . provides otherwise'. Chapter 6 is one such exception. It installs the practitioner as the authority with full management powers and duties, in charge of the company and mandated to run it for the duration of the business rescue. Counsel for the appellants conceded that the question of who had the right to vote boils down to whether that power fell within the purview of the 'full management control' of the practitioners as contemplated in s 140(1)*(a)*.

The SCA held that the ordinary meaning of the wide expression 'full management control' itself signifies the control of the property of the company. Intrinsic to the power to run the company is management of the company's resources or property, including its assets. The debtors' book forms part of the assets of the company. As a creditor, the vote on the plan of a debtor simply entails a decision over the company's property.

This is reinforced by the context of the Act as illustrated by numerous provisions, which are supportive of the reading that 'full management control', entails the practitioner's exercise of control over the property of the company. The definition of 'business rescue' in s 128(1)*(b)* of the Act underscores in express terms the shift of management and control of the company's affairs, business and property from the directors to the practitioner. Section 128(1)*(b)*(i) refers to two categories of power, ie 'temporary supervision of the company' and 'management of its affairs, business and property'. In terms of s 133(1)*(a)*, the practitioner has control in relation to the claims by third parties to the property of the company. In terms of s 134(1)*(a)*, during a company's business rescue proceedings, 'the company may dispose, or agree to dispose, of property only in the ordinary course of its business. The practitioner also has powers to investigate the company's affairs, business, property and financial situation in terms of s 141(1).

In considering the full suite of powers over the company's property outlined above, the SCA found it difficult to see how the practitioner cannot also have the power to vote on the plan of a debtor company and thereby determine the extent to which a particular debt would be recovered under that plan or not.

The primary purpose of business rescue is to enable the practitioner to prepare and implement 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'. In developing a plan, it would make no sense to exclude the power to vote on the plan of a debtor. If that were to be the case, the practitioner would be unable to meet the requirements of s 141(2)*(a)* and *(b)*, in terms of which he or she has to undertake a proper investigation of the affairs of the company, ie if it is in financial distress and whether there is a reasonable prospect of rescuing it. If it is not in financial distress, to take steps to terminate the business rescue proceedings.

The SCA held that the inability to vote on a debtor company's plan would affect the practitioner's assessment of the company's prospects of rescue and/or the state of its financial distress. That would undermine the very purpose of Chapter 6. The SCA consequently held that the words 'full management control' found in s 140(1)*(a)* must be interpreted as including the power to vote for or against a plan for a debtor company. The SCA further held that to give this power to the directors would be subversive of the purpose of the 'full management control' conferred to the practitioner by the Act.

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