

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Panamo Properties (Pty) ltd v Nel and another NNO

The Supreme Court of Appeal has today handed down a judgment in which it clarifies certain controversial provisions of the Companies Act 71 of 2008 (the Act) dealing with business rescue proceedings. In a number of cases heard in the various divisions of the high court it has been held that where a company is placed in business rescue pursuant to a resolution of its board of directors, but thereafter fails to comply with the procedural requirements in s 129 of the Act, the effect is to cause the business rescue proceedings to terminate. The reason for this was said to flow from the provisions of s 129(5) of the Act, which provide that such non-compliance with procedural formality results in the resolution placing the company under business rescue lapsing and becoming a nullity.

Panamo Property's sole shareholder was a trust the trustees of which were Mr and Mrs Nel. They were also the directors of the company who took the resolution to commence business rescue. That was intended to avoid the company's property being sold pursuant to a judgment against it by a financial institution. The Nels co-operated with the process of business rescue as they hoped to find alternative sources of

finance to discharge the company's debt. A business rescue plan was duly approved, but no further funds were forthcoming and the business rescue practitioner sold the property in accordance with the business rescue plan. When it was about to be transferred to the purchaser the present proceedings were brought by the trust. It alleged that it had not complied with the procedural requirements laid down in s 129 of the Act and as a result the entire business rescue process was a nullity. That argument had been upheld in the high court.

The SCA pointed out in a unanimous judgment that the termination of business rescue proceedings is specifically dealt with in s 132(2) of the Act. That provision does not say that the lapsing of the initiating resolution will cause the business rescue to terminate. Instead it says in s 132(2)(a)(i) that business rescue is terminated when the court sets the initiating resolution aside. This focuses on the provisions of s 130 of the Act, which provide for an affected party to apply to court for the initiating resolution to be set aside in certain circumstances, including non-compliance with the procedural requirements of s 129. In addition the court will only grant an order setting aside the initiating resolution if it is satisfied on a consideration of all the circumstances that it is just and equitable to do so.

The court pointed out that this approach to the construction of the relevant sections would prevent business rescue proceedings from being stultified by creditors or those who stand behind the company, in the form of its shareholders and directors, on the basis of technical arguments that undercut the basic purpose of business rescue.