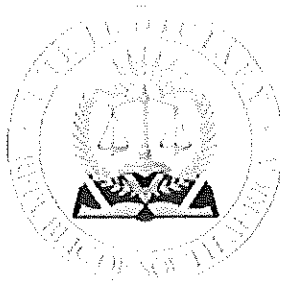


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

CASE NO: 21/35958

7/09/2021
DATE

M M Antonie
M M ANTONIE

In the matter between:

MANGO PILOTS ASSOCIATION

First Applicant

SOUTH AFRICAN CABIN CREW ASSOCIATION

Second Applicant

NATIONAL UNION OF METAL WORKERS SOUTH AFRICA

Third Applicant

and

MANGO AIRLINES SOC LIMITED

Respondent

COMPANIES & INTELLECTUAL PROPERTY COMMISSION

Third Party

JUDGMENT

ANTONIE AJ:

- [1] The application and counter application were argued before me on 6 August 2021. Having regard to the urgency of the matter, I made an order on 10 August 2021 and indicated that I would furnish reasons for my decision at a later date. Those reasons follow.
- [2] The applicants, representing a range of persons employed by the respondent, Mango Airlines Soc Limited (**Mango**), launched an urgent application pursuant to the provisions of section 131 of the Companies Act¹ (**the Act**) for an order placing Mango under supervision and commencing business rescue proceedings. The applicants are affected persons as contemplated in section 128(1)(a) of the Act and, accordingly, have *locus standi* to have instituted the application.
- [3] Mango is a wholly owned subsidiary of South African Airways SOC Limited (**SAA**). It commenced business in 2006 as a low-cost domestic aviation company and employs more than seven hundred employees. Prior to 1 May 2021, when it suspended its operations, it operated five aircraft.
- [4] As a state owned company, Mango's shareholder representative is the Minister of Public Enterprises (**the Minister**).
- [5] All parties agree that the matter is urgent, that Mango is financially distressed and that there is a reasonable prospect for rescuing Mango.
- [6] Mango opposes the relief sought by the applicants on the ground that it adopted and filed a resolution (**the resolution**) under section 129(1) of the Act which it asserts became effective from 28 July 2021. Mango instituted a counter application and third party proceedings which I deal with in more detail below.

¹ 71 of 2008

- [7] The primary dispute between the parties is not whether Mango should be placed in business rescue but rather, the mechanism by which that should occur.

Third Party proceedings and participation by liquidating creditors

- [8] The third party is the Companies & Intellectual Property Commission (**the Commission**). On 28 July 2021 Mango, through its attorneys, attempted to file through the Commission's E-Services platform (**the platform**) the resolution it had adopted accompanied by a sworn statement and the Commission Form CoR123.1, together with the prospective business rescue practitioner's declaration. The platform rejected the application on the basis that Mango's board resolution had been adopted more than five business days before the filing of the documents with the Commission for the commencement of voluntary business rescue proceedings. The platform automatically generated a notification which recorded, *inter alia*:

"CoR123.1 and supporting documents must be filed within 5 business days from date of resolution, else the resolution becomes a nullity.

...

Kindly submit a court order."

- [9] Despite Mango's attorneys logging a query and engaging with management of the Commission, the attorneys were unable to obtain any joy and ultimately advised that if the Commission did not change its status to record that it was in voluntary business rescue, Mango reserved the right to approach the court on an urgent basis. On 29 July 2021, the Commission responded and refused to accept Mango's filing for voluntary business rescue on the basis that:

- [a] The resolution taken on 16 April 2020 under section 129 of the Act was adopted more than five days prior to the filing of the statutory documents with the Commission on 28 July 2021.

- [b] The resolution was of no force and effect on the date on which it was adopted, on the basis that additional requirements needed to be fulfilled before the resolution could be filed with the Commission and does not have retrospective application.
- [c] The application had not been submitted via the new platform in accordance with the notices issued by the Commission.
- [d] The content of the resolution did not comply with the Commission's standard business rescue resolutions.
- [e] The resolution was not validly passed in accordance with the requirements of the Act.
- [f] Liquidation proceedings were pending before the High Court against Mango.

[10] When Mango filed its answering affidavit in opposition to the applicants' application, it simultaneously delivered a third party notice to the Commission and launched a counter application for the relief sought in the third party notice. Aside from seeking urgent relief, Mango sought the following relief:

*"2. That the Third Party's (i) refusal to process the Respondent's board resolution, taken on 16 April 2021 under section 129 of the Act, ("**BR Resolution**"), and (ii) refusal to make a change to the Respondent's enterprise status to "in business rescue" once the BR Resolution was filed be declared invalid; (iii) that it be declared that the Business Rescue proceedings of the Respondent became effective from 28 July 2021; (iv) that it be directed that the Third Party immediately change the Respondent's enterprise status to "in business rescue"; (v) that the Applicant's application be dismissed with costs ..."*

[11] On 2 August 2021 Lucinda Steenkamp, senior legal adviser at the Commission recorded in correspondence to Mango's attorneys that the Commission would not oppose being joined as a third party and would abide the court's decision.

Subsequently, Ms Steenkamp, on behalf of the Commission, confirmed in writing that if an order was made in favour of Mango, the Commission agreed that the five business day period contemplated in section 129(3) of the Act would be extended to expire only five business days after a final order, including one made in any appeal, was granted. That concluded the Commission's role in this dispute.

[12] On 2 August 2021 Aergen Aircraft Four Limited and Aergen Aircraft Five Limited (collectively, **Aergen**) launched an application to postpone this application. They are creditors of Mango and had, on 28 April 2021, launched an application for its winding-up. That application was pending. Since Aergen were affected persons they were entitled to participate in the application. They sought a postponement until 17 August 2021 because they required more time to properly assess whether the applicants' proposed plan to rescue Mango had reasonable prospects of success.

[13] Counsel appeared on behalf of Aergen when the matter was called on 3 August 2021. He indicated that Aergen persisted in its postponement application. Counsel for the applicants and Mango recorded that they would oppose the postponement application. By the time the matter was argued, Aergen had withdrawn both the postponement and liquidation applications.

Chronology of material events

[14] On 16 April 2021 the board resolved that Mango voluntarily begin business rescue proceedings as contemplated in section 129(1) of the Act. Mango contends that because its board was obliged to obtain the approval of both the SAA board and the Minister, pursuant to the provisions of section 54(2) of the Public Finance Management Act (**the PFMA**),² it did not file the resolution until such approval had been obtained. I deal with section 54(2) of the PFMA later in this judgment because it

² 1 of 1999

has a material bearing on the final determination of these proceedings and, in particular, whether Mango was entitled to file the resolution with the Commission more than three months after it had been adopted.

- [15] On 19 April 2021 the board of SAA passed two resolutions: (i) approving the Mango board resolution that it be placed under business rescue; and (ii) that the shareholder (represented by the Minister) be informed of the decision and urgently provide its concurrence. It seems clear to me that the boards of both SAA and Mango were cognisant of the fact that the approval of the Minister was required before Mango could be placed under supervision. That is the only plausible explanation why the resolution was not filed with the Commission as soon as it was adopted.
- [16] It is not in dispute that on 30 April 2021 the chairperson of the SAA board addressed a letter to the Minister, the Director General of the Department of Public Enterprises and the Minister of Finance requesting formal approval to place Mango under business rescue. On 7 May 2021 the Minister responded that the request was under consideration and that there were a number of financial and legal issues that needed to be finalized before a decision could be made. On 7 June 2021 the Minister requested Mango to urgently conduct an assessment of its future sustainability and to share same with him before 30 June 2021. On 22 July 2021, having received a sustainability assessment report from Mango, the Minister addressed a letter to the chairperson of SAA (Mango's sole shareholder) advising that he supports the board's decision to place Mango under business rescue.
- [17] On 28 July 2021 Mango attempted to file the resolution and other documents, but the Commission's platform rejected same.

The proper interpretation of section 129(2), (3) and (5) of the Act

[18] The applicants, represented by *Mr Hellens*, argue that the resolution was a nullity and was of no force or effect, for two reasons:

[a] First, that the resolution could not be adopted because liquidation proceedings had been initiated by Aergen.

[b] Second, the resolution was of no force or effect, had lapsed and was a nullity because Mango had not filed same within five days of having adopted it.

[19] In support of their first argument, the applicants rely on section 129(2) which provides:

“(2) A resolution contemplated in subsection (1) –

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.”

[20] The resolution was adopted on 16 April 2021. The liquidation proceedings were instituted by Aergen on 28 April 2021. A copy of Aergen’s founding affidavit in the liquidation proceedings, which was deposed to on 28 April 2021, was attached its postponement application.

[21] The purpose of section 129(2)(a) is to prevent the board thwarting an application to liquidate the company by adopting a business rescue resolution.³

[22] Neither counsel referred me to any authority as to the meaning of *initiated* in the context of section 129(2)(a). I, similarly, have been unable to locate direct authority

³ *Sulzer Pumps (South Africa) (Pty) Ltd v O&M Engineering CC* [2015] JOL 32825 (GP), para 29

on this point. As to the ordinary meaning of *initiated*, the Oxford Dictionary definition is *to cause a process or action to begin*.

[23] The decision in *A-Team Trading*⁴ is useful in determining this issue. In that matter Standard Bank launched an application for the provisional liquidation of *A-Team Trading* on the basis that it was unable to pay its debts. After the application was launched, but before it was heard, an application was launched in the Local Division in Durban for an order placing the respondent under supervision and commencing business rescue proceedings in terms of section 131 of the Act. The only issue which was argued was whether it was competent to grant a provisional liquidation order in light of the business rescue application. Ploos Van Amstel J found that it was not, and made an order suspending the application for liquidation pursuant to the provisions of section 131(6) which provides:

“(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –

- (a) the Court has adjudicated upon the application; or
- (b) the business rescue proceedings end, if the Court makes the order applied for.” (my emphasis)

[24] During the course of his reasoning, the learned judge referred to two decisions in *Summer Lodge*.⁵ In the first *Summer Lodge* decision, three applications for provisional liquidation orders were pending. Before the hearing, applications were launched for orders placing the respondents under supervision and commencing business rescue proceedings in terms of section 131 of the Act. Van der Byl AJ held that the business rescue applications did not suspend the liquidation applications

⁴ *Standard Bank of South Africa Limited v A-Team Trading CC* 2016 (1) SA 503 (KZP)

⁵ *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP) for the provisional winding-up orders and 2013 (5) SA 444 (GNP) for the final orders.

because, in his opinion, liquidation proceedings *commenced* by the granting of a provisional or final liquidation order. He granted the provisional liquidation orders. On the return day of the provisional orders, the same issue was argued before Makgoba J. He reached the same conclusion as Van der Byl AJ.

[25] In *A-Team Trading*, the learned judge disagreed with the reasoning of both judges in *Summer Lodge* on the grounds that they had overlooked the fact that liquidation proceedings *commenced* by the launching of an application and not by an order of provisional or final liquidation. I agree.

[26] In my view, reliance by the learned judges in *Summer Lodge* and *Makuna Farm*⁶ on section 348 of the 1973 Companies Act, is misplaced. Its purpose is aimed at an attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the application for liquidation and the granting of that order by a court.⁷ It retrospectively avoids transactions that may have been perfectly legitimate at the time they were entered into.⁸ In my opinion, reliance on the interpretation of section 348 is singularly unhelpful in determining the proper interpretation of *commenced* in section 131(6) of the Act.

[27] The provisions of section 131(6) would be subverted if an application to court to place a company in business rescue first had to await a liquidation order before liquidation proceedings could be suspended. During that period, a company which is genuinely financially distressed and has a reasonable prospect of being rescued, would have to wait for months before its application for business rescue can be determined. That could not have been the intention of the legislature.

⁶ *Absa Bank Ltd v Makuna Farm* CC 2014 (3) SA 86 (GJ)

⁷ *Vermeulen & Another v CC Bauermeister Edms Bpk & Others* 1982 (4) SA 159 (TPD) at 161F - G

⁸ *Development Bank of Southern Africa Limited v Van Rensburg & Others* NNO 2002 (5) SA 425 (SCA), para 8

[28] In my view, *A-Team Trading* correctly distinguished the reasoning of Swain J in *Imperial Crown Trading*.⁹ In that case, whilst finding that it would be anomalous if what was meant by liquidation proceedings being *initiated* by or against the company for purposes of section 129(2)(a) differed from what was meant by liquidation proceedings being *commenced* by or against the company for purposes of section 131(6), Swain J did not conclude that liquidation proceedings being *commenced* meant that a liquidation order had been granted. In *Imperial Crown Trading* the bank sought an order for provisional liquidation. At the hearing before Swain J the respondent sought a postponement to enable it to investigate the advisability of launching an application for business rescue. In granting the provisional order of liquidation Swain J pointed out that any affected person was at liberty to launch an application to court under section 131(1) to have the company placed in business rescue. *Imperial Crown Trading* is not authority for the proposition that *commenced* means that a liquidation order has been granted. In those circumstances, the reliance on *Imperial Crown Trading* by the respective judges in *Summer Lodge*, was misplaced.

[29] In my opinion, *initiated*, *begin* and *commenced* must have the same meaning as applied in sections 129(2)(a), 129(6) and 131(6) of the Act, namely that a liquidation application has been issued by the registrar and, at the very least, is pending.

[30] Since the liquidation application launched by Aergen was initiated twelve days after the Mango board resolution had been adopted, section 129(2)(a) is inapplicable and the applicants' first argument must fail.

[31] The applicants' argument that even though the resolution may have been adopted, it "*has no force or effect until it has been filed*" as contemplated in section 129(2)(b),

⁹ *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD)

has no merit. The Supreme Court of Appeal has made it clear that once a resolution is taken, it only becomes effective when it is filed with the Commission.¹⁰ All this means is that, whilst a resolution to commence business rescue may have been adopted, the company cannot be regarded as being in business rescue until the resolution has been filed. To adopt the applicants' argument would negate the validity of the resolution adopted under section 129(1) and result in an absurd outcome, thereby defeating the clear intention of the legislature.

[32] The applicants' second argument is that the resolution lapsed and is a nullity because it was filed more than five days after it was adopted. In this regard it relies upon sections 129(3) and (5)(a) of the Act. They provide:

- "(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must –
- (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
 - (b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.
- ...
- (5) If a company fails to comply with any provision of subsection (3) or (4) –
- (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and ..."

[33] Whilst in most cases, the resolution would be filed as expeditiously as possible after its adoption, neither section 129(1) nor (2) state that the resolution must be filed within five business days of its adoption. To do so, ignores the fact that state owned

¹⁰ *Panamo Properties (Pty) Ltd & Another v Nell & Others* NNO 2015 (5) SA 63 (SCA), para 9

entities, to which the PFMA applies,¹¹ may not be able to promptly comply with section 129 to voluntarily commence business rescue proceedings timeously. The reason is obvious – state owned entities must comply with additional requirements in terms of the PFMA before filing an adopted resolution with the Commission. It is highly unlikely that the approval required could be obtained within five business days of the adoption of the resolution. This is precisely what occurred in this instance.

[34] In section 129(5) the failure to comply with the provisions of subsections (3) or (4) must, properly considered, refer to the procedural requirements in subsection (3)(a) or (b) or (4)(a) or (b). The five business day period recorded in section 129(3) of the Act does not govern the time between the adoption and the filing of the resolution. It governs what must occur within five business days after the filing of the resolution namely, the publication of the notice to every affected person and the appointment of a business rescue practitioner. The adoption and filing govern the date from which the procedural requirements in 129(3)(a) and (b) must be satisfied. This conclusion is informed by the legislature's use of the word *within*. Since filing can only occur after a resolution has been adopted, *within five business days after* can only, sensibly, mean within five business days after a company has filed a resolution.

[35] My conclusion that the period of five business days only commences once the resolution has been filed finds additional support in section 129(3) in the portion which reads “ ... or such longer time as the Commission, on application by the company, may allow ...” The only sensible interpretation of this portion of section 129(3) is that the Commission may allow the extension of the period for the publication of the resolution or the appointment of a business rescue practitioner. That, in turn, leads to the ineluctable conclusion that the period of five business days

¹¹ Section 5(4)(b)(ee) of the Act provides that if the Companies Act and the PFMA cannot be applied concurrently, the PFMA shall take precedence.

commences only when the resolution is filed. There is no indication in section 129 that the Commission has the power to extend the time for the filing of a resolution.

[36] There is a further reason why the period of five business days commences to run only once the resolution is filed. Section 129(2)(b) provides that the resolution has no force or effect until it has been filed. Allied to this, section 132(1)(a)(i) provides that business rescue proceedings begin when the company files a resolution to place itself under supervision in terms of section 129(3). That is also the date when the general moratorium on legal proceedings against a company commences as contemplated in section 133(1). The legislature saw fit to impose a strict time limit within which a company must publish the notice of the resolution and appoint a business rescue practitioner once the resolution had been filed. The reason for imposing such a time limit is manifest – the legal status of the company is materially altered as soon as the resolution is filed and the rights of all affected persons will have been significantly impacted by the company's material change in status.

[37] In my view, there is nothing in section 129 of the Act which could lead to any other sensible interpretation.¹²

[38] The applicants argued that to adopt this interpretation would allow companies to abuse the business rescue procedure by adopting, but not filing, a resolution. I disagree. Whilst some companies may abuse the process, this factor should not influence the proper interpretation of section 129(3) of the Act. The proper approach to interpreting a statute is set out in *Endumeni*. Moreover, in those rare cases where a company does attempt to abuse the process, an affected person has a remedy – it

¹² See the principles enunciated by Wallace JA *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593, para 18 where the judge emphasized that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document (statute). In *Panomo Properties* (paragraph 27), Wallace JA emphasized this point and stated that such an approach would avoid anomalies in interpreting a statute.

may apply to court for an order setting aside the resolution under section 130(1)(a) of the Act.

[39] Whilst it is not strictly relevant to the proper interpretation of section 129(3), I mention that the Commission's Form CoR 123.1, which is the statutory notice of the beginning of business rescue proceedings, provides:

- "This notice must be published to every affected person within 5 business days after –
 - (a) It has been filed, in the case of a resolution; or
 - (b) The date of the court order, in such a case.
- If this Notice is issued following a board resolution –
 - (a) The company must appoint a business rescue practitioner within 5 business days after filing this notice; and
 - (b) Any affected person may apply to a court in terms of section 130 for an order setting aside the resolution."

[40] It seems clear that the Commission, itself, interpreted section 129(3) in the same manner that Mango did.

The impact of the PMFA

[41] Section 46 of the PMFA provides that the provisions of Chapter 6 thereof apply to all public entities listed in Schedule 2 or 3. SAA is listed as a major public entity under Schedule 2 which also provides that any subsidiary of a public entity is, similarly, a public entity. Mango, as a wholly owned subsidiary of SAA, is therefore a public entity and subject to the provisions of Chapter 6 of the PMFA.

[42] Section 49(2) of the PMFA provides that a public entity's board constitutes its accounting authority. In that capacity, the board is bound by the fiduciary duties and general responsibilities listed in sections 50 and 51.

[43] Section 54 of the PMFA governs information to be submitted by accounting authorities. More specifically, section 54(2)(e) provides:

“(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

...

(e) commencement or cessation of a significant business activity;

[44] It is not in dispute between the applicants and Mango that, being placed under supervision and commencing business rescue proceedings, constitutes commencement or cessation of a significant business activity.

[45] It is common cause that Mango’s executive authority was the Minister and that the relevant treasury, applicable to Mango, was the National Treasury.

[46] On the face of it, Mango satisfied the provisions of section 54(2). It obtained the approval of the SAA board and the Minister, and informed the Minister of Finance. The applicants contend that subsequent approval by the Minister and/or the board of SAA is legally irrelevant because the Minister could not ratify the resolution that had already been adopted. *Mr Hellens* argued that Mango ought to have sent a draft resolution to the Minister for approval and, once that approval had been obtained, the board could then adopt the resolution under section 129(1).

[47] As authority for this proposition, the applicants relied upon *Swifambo*.¹³ There, the applicant (**PRASA**) had applied for the review and setting aside of its own decisions awarding, and subsequently entering into, a contract with Swifambo for the supply of locomotives. It was common cause that PRASA was a public entity and that its

¹³ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ)

board was required to obtain prior approval of the Minister of Transport for the acquisition of a significant asset or a large capital investment. During the course of his judgment, Francis J commented that there was no evidence before him that any approval had been obtained under section 54(2).¹⁴

[48] In my opinion, the decision in *Swifambo* is distinguishable for two reasons:

[a] First, since PRASA failed to obtain the approval of the Minister of Transport, the question of ratification by that Minister did not arise. That was not the *ratio* of the judgment.

[b] Second, in *Swifambo*, the tender was awarded and partly implemented. There is little doubt that, in those circumstances, the transaction had been *concluded* without approval as contemplated in section 54(2).

[49] That is not the position in the present matter. Here, the resolution was adopted but not *concluded*. This finding is inescapable if one has regard to the provisions of the Act to which I have already alluded. Section 129(2)(b) expressly states that a resolution contemplated in subsection (1) has no force or effect until has been filed. Accordingly, Mango did not go into business rescue simply because it adopted the resolution. Its board and that of SAA were alert to the requirements of section 54(2). That is why the resolution was not filed with the Commission after it had been adopted. Rather, the SAA board immediately approached the Minister for approval of the transaction. Section 132(1)(a)(i) provides that business rescue proceedings begin when the company files a resolution to place itself under supervision in terms of section 129(3). That is the moment when the transaction is concluded.

¹⁴ para 70

[50] To be clear, Mango did not suggest that the Minister ratified the conclusion of the transaction and, for the reasons already stated, there is no basis to find that he did.

[51] I cannot agree with the applicants' submission that Mango ought to have obtained the Minister's approval before it adopted the resolution. In the peculiar circumstances of this dispute, and for the reasons set out above, that was unnecessary.

[52] Having said that, this portion of my judgment must not be understood to mean that boards of public entities may conclude transactions without prior approval of the relevant executive authority. In most instances (unlike the present), prior approval will be required before a transaction is concluded. The decision in *Swifambo* constitutes a perfect example.

[53] In the circumstances, the applicants' argument on this ground must fail.

The competence of the applicants' application

[54] On 15 July 2021 the first applicant addressed a letter to the Minister, SAA, Mango and others. Amongst other issues raised in the letter, the first applicant highlighted the pending liquidation proceedings which had been instituted by Aergen. It stressed that the option of business rescue had become urgent and that it was incumbent upon either the first applicant, the board of Mango or the Minister to launch a counter application for business rescue. The first applicant concluded that if it did not receive confirmation on 16 July 2021 that the Mango board intended launching a counter application for business rescue on an urgent basis, it would have no choice but to intervene in the liquidation application and apply for business rescue.

[55] On 16 July 2021 the acting CEO of Mango addressed a letter to each of the applicants advising that the Mango board had taken a resolution on 16 April 2021 to

put Mango into business rescue and that, amongst other things, the board was awaiting the Minister's approval. It is clear that the applicants were aware on 16 July 2021 that the resolution had been adopted.

[56] On 22 July 2021 the Minister approved that transaction and, on 26 July 2021, the applicants launched their application.

[57] Mango contends that the applicants' application is legally incompetent having regard to the express provisions of section 131(1) of the Act which provides:

"131(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings."

[58] This means that, if a company has adopted a resolution contemplated in section 129, an affected person may not apply for an order placing the company under supervision. Having regard to the chronology sketched above, that is precisely what occurred here. The applicants had knowledge of the resolution which had been adopted by the Mango board ten days before it launched its urgent application. It was precluded by the provisions of section 131(1) from doing so. Its application is legally incompetent. Its remedy, as correctly pointed out by *Mr Subel* was to have applied to court to set aside the resolution (if it believed it had grounds to do so) under section 130(1) of the Act.

[59] The applicants could not simply conclude, as they apparently did, that the resolution was of no force or effect, or had lapsed. They required a court order. This much is clear from section 130(1)(a) which provides:

"(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order –

- (a) setting aside the resolution, 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;"

[60] Since the applicants contend that there is a reasonable basis for believing that Mango is financially distressed and that there is a reasonable prospect for rescuing the company, its only recourse was to apply to set aside the resolution on the grounds that Mango had failed to satisfy the procedural requirements set out in section 129. Until such an order was granted, the resolution remained valid and binding.

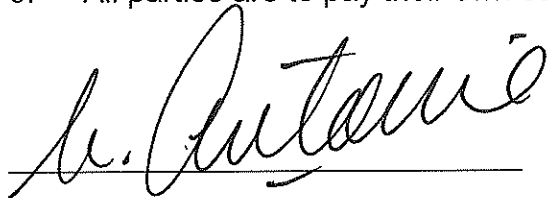
[61] In the circumstances, the applicants' application must be dismissed.

[62] In the exercise of my discretion, I deem it appropriate that the applicants and Mango should bear their own costs. This was a matter of significant public importance and, in my view, even though the applicants were unsuccessful, they should not be mulcted in further costs.

I make the following order:

1. The applicants' application is dismissed.
2. It is declared that the third party's refusal to (i) process the respondent's board resolution adopted on 16 April 2021 under section 129 of the Companies Act, 71 of 2008 (**BR Resolution**), and (ii) make a change to the respondent's enterprise status to "*in business rescue*" once the BR Resolution was filed, is declared invalid.

3. It is declared that business rescue proceedings of the respondent became effective from 28 July 2021.
4. The third party is directed to immediately change the respondent's enterprise status to "*in business rescue*".
5. As agreed by the third party, the five day period contemplated in section 129(3) of the Companies Act, 71 of 2008 is extended to expire five business days from this order or the finalization of any appeal.
6. All parties are to pay their own costs.



M M ANTONIE

Acting judge of the High Court

Gauteng Local Division, Johannesburg

Date of Hearing: 6 August 2021

Date of Judgment: 7 September 2021

For the Applicants: Adv M R Hellens SC

Instructed by: Stein Scop Attorneys Inc

For the Respondent: Adv A Subel SC

Instructed by: Werksmans Attorneys

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the hand down is deemed to be 7 September 2021.