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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Ergomode (Pty) Ltd v Jordaan NO and Others (643/2022) [2024] ZASCA 10 (29 January 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal with costs, including the costs of two counsel, against the decision of the Mpumalanga Division of the High Court, Middelburg (the high court).

The background facts to this matter are uncontroversial. On 23 October 2020 the third respondent, Sakhile Contract Mining (Pty) Limited (Sakhile), was placed under business rescue in terms of s 129(1) of the Companies Act 71 of 2008 (the Act). On 30 October 2020 the first and second respondents, Mr Craig Dereck Jordaan and Mr Brett Leslie Holding were appointed as business rescue practitioners (BRPs) of Sakhile. Sakhile owned a coal washing plant (the plant) situated on Ergomode's property pursuant to a lease agreement entered into between Ergomode and Sakhile, in terms of which Sakhile occupied a portion of Ergomode's premises. The plant was operated from the leased premises until August 2020 when the owner of the filter press, a component of the plant, removed the filter press from the plant. This rendered the plant non-functional. At the date of the commencement of the business rescue, Sakhile owed arrear rental of more than R18,2 million to the landlord, Ergomode. The latter submitted a claim in the said amount. On 30 March 2021, the majority creditors and other interested parties adopted a business rescue plan at a meeting convened in terms of s 151 of the Act. The business rescue plan, inter alia, provided for the relocation and refurbishment of the plant. On 22 February 2022 the BRPs, acting in terms of s 136(2) of the Act, suspended the lease agreement between Sakhile and Ergomode with immediate effect and gave instructions to their agent to remove the plant from Ergomode's property.

Before the plant could be removed and effect given to the business rescue plan, Ergomode sought leave in the high court in terms of s 133 of the Act to institute an application to: (a) perfect its landlord's hypothec over the plant as real security in respect of arrear rentals; (b) set aside the BRPs determination in terms of s 145(5) of the Act that it is not an independent creditor; (c) condonation for its admitted failure to comply with s 145(6) of the Act; and (d) declaring the adoption of the business plan on 30 March 2021 to be of no force or effect or, alternatively, for same to be reviewed and set aside.

In the high court, counsel for Ergomode argued that the time period for the publication of the business rescue plan as provided for in s 150(5) had lapsed because there was no valid extension of the time for the publication of the plan beyond 31 January 2021, alternatively, 28 February 2021. As a consequence, no business rescue plan could, absent a valid extension, be validly adopted thereafter. Ergomode further contended that s 150(5) requires that express consent must be obtained from creditors in a formal meeting to extend the 25-day period within which the business rescue plan must be published. Furthermore, it submitted that without a formal meeting and in the absence of express consent having been given, the purported extensions were legally ineffectual. The high court, however, dismissed the application which lead to Ergomode's appeal to this Court, with leave from the high court.

Dealing with the issues raised by Ergomode, the SCA made the following findings: Pertaining to the perfection of the landlord's hypothec the SCA held that where a lessee company was placed in business rescue, the landlord's claim for arrear rental was affected by the general legal moratorium in terms of s 133 of the Act. The moratorium precluded the landlord from taking legal action to perfect its hypothec after the commencement of the business rescue process, unless the business rescue practitioner or the court grants consent to the perfection. The SCA also found that there was no dispute on the papers that Ergomode's tacit hypothec was not perfected before Sakhile was placed in business rescue. Consequently, Ergomode's leave to perfect the hypothec had to fail. Relating to the setting aside of the BRP's determination that Ergomode was not an independent creditor and condonation thereof, the SCA held that in terms of s 145(6), Ergomode had to institute such review within five days after receiving a notice of determination but had failed to institute such review within the required time period. As a result, SCA therefore held that it would not be in the interest of justice to for condonation to be granted because: (a) Ergomode took part in the proceedings; (b) it voted at the meeting against the adoption of the business rescue plan; and (c) it did not object to the determination until after the business rescue plan was adopted. Lastly, coming to the issue of declaring the adoption of the business plan on 30 March 2021 to be of no force or effect, the SCA held that Ergomode's argument in this regard had to also fail because at no time during the meeting of 30 March 2021, or at any time prior thereto, did Ergomode raise the issue that the time period for the publication of the business rescue plan had lapsed. The majority of the creditors allowed the extension(s) sought for the publication of the business rescue plan. Therefore, according to the SCA, Ergomode's belated attempt to impugn the process long after the adoption of the plan was prompted by its dissatisfaction with the outcome of the adopted plan. Based on those findings, the SCA ordered that the appeal be dismissed with costs.

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