IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 12746/2011

In the matter between:

CAPE POINT VINEYARDS (PTY) LTD	Applicant
and	
PINNACLE POINT GROUP LTD	First Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
and	
ADVANTAGE PROJECTS MANAGERS (PTY) LTD	Intervening Party

JUDGMENT

OWEN ROGERS AJ

[1] On 28 July 2011, and on the application of Cape Point Vineyards (Pty) Ltd ("CPV"), I granted an order in terms of s131(4)(a) of the

Companies Act 71 of 2008 placing the first respondent, Pinnacle Point Group Ltd ("PPG"), under supervision and commencing business rescue proceedings. Advantage Project Managers (Pty) Ltd ("APM") had earlier been granted leave to intervene to oppose the application. After receiving additional information in a supplementary affidavit filed by CPV, APM withdrew its opposition. The application was thus in the event unopposed.

[2] The costs occasioned by AMP's intervention have been ordered to stand over for later determination. Other than these costs, CPV sought an order that its costs in the business rescue application be borne by PPG. I reserved my decision on that point because s131 does not in express terms empower the court to make such an order. Counsel for CPV and AMP (the latter at the court's invitation and for the court's assistance, for which I express my thanks) have filed written submissions for and against the power of the court to make a costs order.

Costs of business rescue application

[3] In the case of liquidation proceedings the petitioning creditor recovers its costs from the insolvent company by virtue of s342 of the Companies Act 61 of 1973 read with s97 of the Insolvency Act 24 of 1936. In terms of these provisions the petitioning creditor's taxed costs are part of the costs of the liquidation ranking ahead of claims of pre-liquidation creditors. (The liquidation provisions in the 1973 Act, which form part of Chapter XIV of that Act, remain in force despite the repeal of the 1973 Act – see item 9 of schedule 5 to the 2008 Act.)

[4] The business rescue provisions of the 2008 Act contain no express provisions dealing with the costs incurred by an applicant in proceedings

under s131. However, it appears from s135(3) that in business rescue proceedings priority is given to the payment of the business rescue practitioner's remuneration and expenses, and to *"other claims arising out of the costs of the business rescue proceedings"*. Such expenses and costs stand ahead of what s135 refers to as *"post-commencement finance"*. If the court has the power to order the distressed company to pay the applicant's costs in bringing an application in terms of s131, those costs would, I think, give rise to a claim by the applicant *"arising out of the costs of the business rescue proceedings"*.

[5] In the case of the High Court there are many provisions in legislation and the rules of court that take for granted the power of the court to make costs orders. There is not, as far as I am aware, any general statutory provision conferring such a jurisdiction on the High Court. The High Court's power to make costs orders in matters that come before it is part of the court's inherent jurisdiction. This applies to all types of proceedings, whether in terms of the common law or under express statutory authority. Accordingly, and although a statute may in a specific instance vary the usual general jurisdiction regarding costs, the mere absence of an express provision for the court to make a costs order in a particular type of statutory proceeding does not mean that the court has no such power. Merely by way of example, s424 of the 1973 Act does not itself confer on the court the power to make a costs order in such proceedings but no one could doubt the court's power to do so.

[6] I cannot discern any reason why the legislature would have wanted to deprive the court of its power to make costs orders in s131 proceedings. The distressed company through its board would be in a position to avoid such costs by timeously passing a resolution in terms of s129 commencing

voluntary business rescue proceedings. In that event an affected person could not seek relief under s131 (see s131(1)). If the distressed company fails to take steps under s129 but an affected party satisfies the court under s131 that circumstances are present justifying a business rescue order, the applicant ought not to be left out of pocket. If the applicant in a business rescue application were not granted costs, and if the rescue succeeded and the company were restored to complete financial health, the applicant would be worse off than all other affected persons, since he would have to recoup his legal costs out of his claim as a creditor or out of the value of his shareholding as the case may be. An inability to recoup reasonable costs would serve as a disincentive for affected persons to bring proceedings under s131 and might encourage them instead to apply for liquidation (where their costs would be part of the costs of liquidation). That would be an undesirable outcome. The business rescue provisions in the 2008 reflect a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction (and see s7(k) of the Act).

[7] Conversely there is every reason why a person that brings an unmeritorious rescue application which is successfully opposed by the company or by an affected party should in general be ordered to pay the other part's costs.

[8] I thus consider that the court's inherent jurisdiction in regard to costs applies to proceedings under s131. The costs that are in issue here exclude those occasioned by AMP's intervention. Essentially, therefore, the costs are those of bringing the application on an unopposed basis. The application is aimed at providing an opportunity for PPG to be restored to financial health for the benefit of the company and thus for its creditors

and shareholders. CPV is not seeking to advance its own exclusive interests. It would thus be fair to direct that such costs be paid by PPG. The latter, I may add, does not resist such an order.

[9] In liquidation proceedings the costs recoverable from the debtor are the petitioning creditor's costs as taxed by the registrar (s97(3) of the Insolvency Act). I consider that a similar qualification should be included in business rescue proceedings. In the nature of things, the court granting a business rescue order will not know what costs the applicant has incurred and whether they are reasonable. The court should thus not grant an order which would entitle the applicant to recover all its costs, whatever they might be. On the other hand, in general I see no reason why the costs should not be taxed on the scale as between attorney and client.

[10] I shall thus order that CPV's costs as taxed on the attorney and client scale, but excluding costs occasioned by APM's intervention, shall be payable by PPG.

Service and notification

[11] Since the business rescue procedure in this country is novel, it may be worth noting one or two other features of the present case and the order granted. I shall not go into the merits of the assessment under s131(4)(a) because the present case was a relatively clear one for granting relief and since the order carried significant support among shareholders, the company's management and other stakeholders.

[12] As regards service and notification in terms of s131(2), there was due service on PPG and on the Companies and Intellectual Property Commission. Initially, when the application was launched on 27 June 2011, there was no notification to *"affected persons"*. The latter expression is defined in s128(1)(a). It covers shareholders, creditors, trade unions and employees who are not represented by a trade union. Following AMP's intervention, CPV took certain steps to achieve notification to creditors and members. The application was sent by email to all creditors on 19 July 2011. In regard to shareholders, a SENS announcement was published on 19 July 2011 setting out the nature of the proceedings and the relief sought. The application was, at the time of these notifications, enrolled for hearing on 27 July 2011, so that recipients would have had about one week's notice of the proceedings.

[13] Paragraphs (a) and (b) of s131(2) distinguish between the applicant's duty to *"serve"* the application on the company and the Commission and to *"notify"* affected persons of the application. Notification must be *"in the prescribed manner"*. Regulation 7(1) of the regulations promulgated on 26 April 2011 states that a notice or document may be delivered in any manner contemplated in s6(10) or (11) or as set out in Table CR3 to the regulations. Regulation 7(3) provides that if, in a particular matter, it proves impossible to deliver a document in the prescribed manner, the person who is required to deliver the document may apply to the Tribunal or High Court for an order of substituted service. With regard specifically to s131(2)(b), regulation 124 states that the applicant must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant.

[14] In terms of Table CR3, notification by email is one of the permitted methods of notification. The emailing of the application to creditors in this case was thus in accordance with the requirements of the Act.

[15] Notification to shareholders is more problematic. PPG is a listed company. It has a large number of shareholders. In terms of s50(1) a company must establish and maintain a register of its issued securities in the prescribed form. In terms of ss26(1)(e) and (2) an applicant for a business rescue order would (subject to considerations of urgency) be able to inspect and obtain a copy of the company's securities register. The prescribed form for the register is set out in regulation 32. The register must contain the shareholder's address and an email address if available (unless the shareholder has declined to provide an email address). The evidence in this case did not disclose whether PPG had as yet brought its register into the form required by regulation 32. (It was not a requirement of the 1973 Act that the share register should contain email addresses.)

[16] In my view, physical delivery of an application to all the shareholders of a listed company will rarely be a practically feasible course. Where email addresses are available to the applicant, individual notification of the application ought to be practically possible. Whether in such cases it would be feasible to email the whole application in what might be a data-heavy file to thousands of recipients is less obvious. I question the appropriateness of the requirement in regulation 124 that the full application must be delivered to affected parties. Section 131(2) draws a distinction between service of the application on the company and the Commission and notification of the application to affected parties in the prescribed manner. What may be prescribed is the manner in which affected parties should be notified of the application. To notify someone

of an application would be to tell the person that the application has been launched. Effectively regulation 124 requires service of the whole application on all affected parties. In so doing, regulation 124 may well travel beyond what may lawfully be prescribed under s131(2)(b).

[17] Be that as it may, in the present matter there was a pending liquidation application and other circumstances which rendered the application relatively urgent. I do not think it was practically possible for CPV to deliver the full application to all shareholders or even to deliver to each of them personally a notification of the proceedings. Although CPV did not apply in advance for an order for substituted service, it did publish an announcement via SENS (an acronym for the Securities Exchange News Service). This announcement gave the date of the hearing, set out the relief to be sought and advised readers that a copy of the application could be obtained from the company or from CPV's attorneys. Telephone numbers and email addresses were given for this purpose. In terms of the JSE Listings Requirements publication through SENS is one of the prescribed methods of bringing corporate information to the attention of shareholders of listed companies. In certain other instances relating to business rescue proceedings the regulations appear to sanction and indeed require the use of SENS for listed companies.[1] If I could have authorised such substituted service in advance of the SENS publication, I think I can now condone the departure from the strict requirements of the regulations.

[18] In following this course, I had regard to the relative urgency of the matter and to the harm that those affected by PPG's future might have suffered if stricter adherence to the notification requirements and the regulations

[1] See regulations 123(2)(b)(iii), 123(6)(b)(iii), 125(2)(c)(iii) and 125(6)(a)(iii). It should be noted, though, that in terms of the regulations the use of the exchange's electronic information service is prescribed in addition to, and not in substitution for, individual notification to affected persons.

were insisted upon. I should nevertheless caution that in future applicants in proceedings under s131 would be well advised to seek authority from the court in advance, under regulation 7(3), for substituted service. Where email addresses for shareholders and creditors are available, these should be used, rather than resorting to substituted service. Where all shareholders and creditors can be notified in this manner, substituted service would not be necessary (unless the applicant sought leave to email only a notification and not the full application). Where, in respect of a listed company, an applicant desires to use publication in addition to or as a substitute for personal notification, it would be preferable for the proposed substituted service to include not only publication via SENS but also publication in a national newspaper. I say so, because not all shareholders will necessarily access the wire services that transmit SENS announcements. Of course, not all shareholders will necessarily read the chosen newspaper either, but the two methods of notification are likely to cover a wider field. I draw attention, in this regard, to the fact that while for certain kinds of announcements the JSE Listings Requirements only require publication via SENS, for others types of announcements additional publication must take place in an English national daily newspaper and in one other official language in another national daily newspaper[2].

[19] In the present case there was no notification to trade unions or employees. PPG is a holding company. A supplementary affidavit was submitted disclosing that PPG itself has only eleven employees. They are not members of a trade union. They are all aware of the application. This was confirmed under oath by PPG's chief financial officer.

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[2] See the Appendix to Section 11 of the Listings Requirements. The SENS Procedural Requirements are to be found in Schedule 19 to the Listings Requirements.

[20] In terms of s131(8)(b) the business rescue order must be notified to each affected person within five business days of the date of the order. This duty of notification rests on the distressed company, not the applicant. In the present case, however, the applicant included provision in the order for such notification to be effected by the applicant. In line with what I have said above, I granted authority for shareholders to be notified of the order by a SENS announcement, by electronic mail to those shareholders whose email addresses are known to the applicant, and by one publication in *Business Day*.

Intervention

[21] I have already made reference to the fact that APM applied for leave to intervene in the business rescue proceedings in order to oppose the relief sought by CPV. The costs in respect of those proceedings have been reserved for later determination. In terms of s131(3) each affected person has a right to participate in the hearing of an application in terms of s131. In the circumstances, I do not think the legislature contemplated that an affected party would have to apply for leave to intervene in the proceedings. If the person is an *"affected person"* such person has a right to participate in the hearing. If the person wishes to file affidavits, the court will obviously need to regulate the procedure to be followed to ensure fairness to all concerned.

Order

[22] The full order of the court, incorporating the orders granted on 28 July 2011 (paragraphs 1 to 4) and the costs order in accordance with these reasons (paragraph 5), thus reads as follows:

1 The applicant's non-compliance with the forms and service provided for in rule 6 of the Uniform Rules of Court be condoned and that this matter be heard as one of urgency in terms of rule 6(12) thereof.

2 The first respondent is placed under supervision and that business rescue proceedings commence as envisaged in terms of the Companies Act 71 of 2008 ("the Act").

3 Mr Michael John Lane be appointed as business rescue practitioner to conduct the business of the first respondent with all powers and duties entrusted to him in terms of the Act.

4 The applicant gives notice of this order in the following manner:

4.1 by notifying creditors of the first respondent of this order, within five days of this order having been granted, by way of electronic mail;

4.2 by notifying shareholders of the first respondent, within five days of this order having been granted, by way of:

4.2.1 electronic publication on the SENS publication service, provided by the Johannesburg Stock Exchange; and

4.2.2 electronic mail, to such shareholders whose electronic mail addresses are known to the applicant;

4.3 by serving a copy of the order on the first respondent at its registered office at Arcam House, 3 Annalie Road,

Parktown, Johannesburg, 2193, within five days of this order having been granted.

4.4 by notifying the employees of the first respondent, by way of attaching a copy of this order to the first respondent's notice board, alternatively a prominent and visible place at the offices of the first respondent situated at its principal place of business at Ground Floor, Travers House, Boundary Terraces, 1 Mariendahl Lane, Newlands, Cape Town, within five days of this order having been granted.

4.5 by publication of this order in one publication of the *Business Day*, within five days of this order having been granted.

5 The applicant's costs, taxed on the scale between attorney and client and including the costs of two counsel where employed, shall be payable by the respondent, such costs to be confined to the costs of the founding papers issued on 27 June 2011, the supplementary founding papers filed on 8 July 2011, the affidavits of service filed on 8 and 12 July 2011, the giving of notice to affected persons and the appearance on 28 July 2011.

OWEN ROGERS AJ

11 AUGUST 2011