



INSOLVENCY & BUSINESS RESCUE

Business rescue recapitalisations upheld: the legal and commercial significance of *White Rivers Exploration v Polsun*

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The Gauteng High Court, Johannesburg, has delivered an important judgment in *White Rivers Exploration Proprietary Limited v Polsun Limited*, reaffirming the power of an adopted business rescue plan to fundamentally reshape a company's equity structure. The decision will be of interest not only to business rescue practitioners, but also to lenders, investors and shareholders involved in distressed restructurings.

At its core, this case concerned a familiar commercial problem. A financially distressed company required fresh capital if it was to survive, which solution was not simply an operational turnaround or a compromise of debt. It was a full recapitalisation: all of the existing issued shares were to be cancelled and new shares issued to an incoming investor as part of the rescue funding package. The Court described this mechanism as lying "at the very heart of the restructuring" and as the commercial quid pro quo for the capital required to rescue the company.

In practice, distressed capital is often only available if the investor can enter on a clean equity footing. The judgment acknowledges that reality. Business rescue, on this approach, is not confined to preserving an existing shareholding structure while adjusting debt around the edges. It can, where the circumstances justify it, become the vehicle for a complete reset of ownership.

White Rivers Exploration ("WRE") was placed into business rescue on 6 January 2023 by board resolution in terms of section 129(1) of the Companies Act 71 of 2008 ("2008 Companies Act"). A business rescue plan was subsequently adopted in April 2023 with the requisite statutory majorities from both creditors and shareholders. The business rescue plan provided for an immediate capital injection of £300 000 and, critically, for a full recapitalisation of the company through the cancellation of all existing shares and the allotment and issue of 100 new ordinary shares to Lexington Gold South Africa. The business rescue plan was implemented, and a notice of substantial implementation was filed, resulting in the termination of the business rescue proceedings.

Polsun, a foreign minority shareholder of WRE, sought to challenge the completed restructuring. It contended that the cancellation of its shares pursuant to the adopted and implemented business rescue plan was unlawful and unconstitutional, relying on section 25 of the Constitution. Polsun further sought to set aside the business rescue proceedings and to have its prior shareholding reinstated, effectively requiring the Court to unwind a fully implemented and terminated business rescue almost two years after the substantial implementation.

In an application for security for costs brought by WRE, the Court rejected that challenge and held that Polsun's chances of success were slim. It held, first, that section 137 of the 2008 Companies Act, read together with section 152(6), expressly authorises a business

rescue practitioner to cancel shares in accordance with an adopted business rescue plan. This is significant because it confirms that the power to alter securities, including an equity wipe-out and reissue, is firmly grounded in the statutory framework of Chapter 6 of the 2008 Companies Act, rather than being treated as an incidental or implied power.

Secondly, the Court reaffirmed the binding force of an adopted business rescue plan. Once the requisite statutory majorities have been obtained and the plan has been adopted, section 152(4) of the 2008 Companies Act renders it binding on the company and all affected persons, whether or not they supported it. The judgment further situates this within a foundational principle of company law, namely that a shareholder (especially a minority shareholder) accepts that validly constituted majority decisions may prevail notwithstanding any adverse impact on their rights.

Thirdly, the Court rejected the constitutional attack. The complaint was not simply that Polsun had lost an asset. The issue was whether that deprivation was arbitrary. The Court held that the challenge based on section 25(1) of the Constitution could not succeed in light of section 137 of the 2008 Companies Act and the statutory scheme in Chapter 6. Put differently, where securities are altered pursuant to a law of general application and in accordance with a duly adopted business rescue plan, a constitutional challenge of this nature is unlikely to succeed absent an attack on the empowering legislation (being s 137 in this particular case).

Perhaps the most commercially significant aspect of the judgment is its treatment of finality. The Court emphasised that once a plan has been implemented and a notice of substantial implementation has been filed, business rescue terminates by operation of law under sections 132(2)(c)(ii) and 132(2)(b) of the 2008 Companies Act. At that stage, there is no longer an extant business rescue to set aside, and the completed process is not susceptible to retrospective undoing. That is a critical message for investors and creditors. Rescue transactions depend on certainty. If implemented plans could later be unravelled with ease, the willingness of third parties to fund distressed companies would be materially undermined.

The judgment also illustrates that procedure remains decisive in business rescue litigation. The Court held that Polsun's failure to join interested shareholders and creditors was fatal. It also criticised the attempt to rely on section 172(1)(a) of the Constitution without engaging the remedial framework in section 172(1)(b), particularly given that the rescue process had already been fully implemented and time had passed before the institution of the main application.

Although the case arose in the context of an application for security for costs, the Court's assessment of Polsun's prospects makes the broader lesson clear. Business rescue under Chapter 6 of the 2008 Companies Act is a structured, sequential and collective process. It is designed to facilitate rehabilitation or a better return for creditors than immediate liquidation. That purpose would be frustrated if dissenting shareholders could revisit an implemented plan long after the rescue has concluded.

The decision confirms that business rescue is not just about restructuring debt or preserving existing arrangements. It can also reset ownership and control through recapitalisation, as long as the statutory process is properly followed.

For professionals in the restructuring and insolvency space, *White Rivers Exploration v Polsun* highlights two key points. First, equity is not protected in business rescue. Second, once a plan has been properly adopted and implemented, it is final. That finality is not just procedural but it provides the commercial certainty needed to support business rescue funding.



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