THE NKOMATI ACCORD – HOLDING DIRECTORS PERSONALLY LIABLE FOR THE DEBT OF A COMPANY THAT HAS BEEN LIQUIDATED: THE NORILSK v BCL CASE

It was during those crazy university days, that, when we returned to school following a lockout after a student strike we were made to sign a document that said we shall never again engage in a strike. We dubbed it “Nkomati Accord.”

The name we derived from the infamous concord between Apartheid South Africa and Mozambique. The Mozambique government was forced to commit never to permit their country to be used as a launching pad by the guerillas. As the name suggests, the official signing ceremony was held at a place called Nkomati in South Africa.

Nkomati is in the news once again, now more to do with commerce than with politics. There is a mine there which has become the subject of litigation here in Botswana. BCL had bought the mine from Norilsk but when it was time to pay in went into voluntary liquidation. Norilsk is now suing the shareholder (Botswana Government) and the directors who were involved in approving the transaction.

The purchase price cannot be paid because BCL is insolvent, and it is being liquidated. But Norilsk is not ambivalent, it wants compensation, as consummation has been rendered impossible. They’re now looking to the shareholder and the directors to make good the promise of payment of the consideration.

I am not sure of the basis on which Norilsk is claiming payment from the shareholder. Perhaps some international law doctrine or some delictual concept, maybe. But as for the directors, if the newspaper reports are anything to go by, they are being accused of reckless trading.

Thankfully, the Companies Act of 2008 provides for circumstances under which directors may be held personally liable for the debts of a company that has gone bankrupt. See: ss.130 (e), 160 and 481 of the Companies Act. S.517 on the other hand provides a safe harbour.

Insolvent or reckless trading says that if a company is insolvent, in the sense that it is unable to pay its debts as when they become due, and a director allows the company to incur new debts, that director can be held personally responsible for those new debts.

S. 130 (e), imposes a duty upon a director of a company not to agree to the company incurring any obligation unless he/she believes at the time, and on reasonable grounds, that the company will be able to perform the obligation when called upon to do so.

S. 160 says that a director of a company who knowingly becomes party to the contracting of a debt by a company, and had at the time no reasonable or probable grounds for believing that the company would be able to pay the debt, may, on the application of a creditor or liquidator, be held personally liable for the debt or part of it, if the company is wound up.

S. 481 provides that in winding up or judicial management proceedings, a director may be held personally liable for the debts of a company if it appears that the business of the company was conducted recklessly or with intent to defraud creditors.

A defense to a claim of insolvent trading, under any of the provisions referred to above, is found in the business judgment rule. The rule is codified under s.517. Accordingly, a director will not be held personally responsible for the debts of an insolvent company if he can show that he made a business judgment.

A business judgment is defined to mean that a director acted in good faith and for a proper purpose, with no material interest in the subject matter and after he informed himself about the subject matter to the extent he reasonably believed to be appropriate and that he had a rational belief that the decision was in the best interests of the company.

This rule was developed, initially by the courts, then so codified by statute, to provide a safe harbour for those directors who act in good faith, honestly believing that the business decisions they are making are in the best interests of the company.

That safe harbour is intended to give directors the freedom and entrepreneurial conform to make business decisions on behalf of their

companies without being constrained by the risk of personal liability. Otherwise innovative and venturesome business decisions would be stifled.

Thus, if the Norilsk matter were to be settled in court, possibly the Court of Appeal, it will no doubt set a very important precedent that will guide business decision making processes going forward. And, it will be interesting to see the extent to which our courts are prepared to go, to give conform to those directors who are prepared to take business risks, to grow their companies and create wealth for shareholders.

That, the BCL liquidation is a voluntary one makes the case even more interesting.

Abel Modimo

19 October 2017.