NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: 2934/2015
Date heard: 20 August 2015
Date delivered: 25 August 2015

In the matter between

VUSUMZI NDAKISA	**Applicant**
vs	
DOKOSE CONSTRUCTION CC	**First Respondent**
FIRSTRAND BANK LTD t/a WESBANK t/a GMSA FINANCIAL SERVICES	**Intervening Creditor**

JUDGMENT

PICKERING J:

[1] On 7 April 2015 Firstrand Bank Ltd ("*Firstrand*") applied for and was granted an order in case no 41/2015 placing Dokose Construction CC under provisional liquidation in the hands of the Master of the High Court, Eastern Cape Division, Grahamstown.

[2] On the return date Dokose Construction CC, which has its principal place of business at Tsolo, opposed the granting of a final order of liquidation and the Rule Nisi was accordingly extended. The present applicant, Vusumzi Ndakisa, who is the sole member of Dokose Construction CC, launched the present urgent application for an order placing the close corporation in business rescue in terms of s 131 of the Companies Act no 71 of 2008. Firstrand, as an intervening creditor, opposed the granting of the business rescue application and, on 30 June 2015, this application as well as the application for the final liquidation of Dokose Construction CC were by agreement both postponed to 20 August 2015.

[3] Although the relief sought in the present application is couched in the form of a rule nisi together with certain interim relief, both Mr. Marabini, who appeared for the applicant, and Ms. Watt, who appeared for the intervening creditor, were agreed that the matter should be argued as an application for final relief.

[4] As appears from the liquidation application the respondent and Firstrand entered into a number of instalment sale agreements in terms whereof certain equipment was sold to respondent. In respect of these agreements respondent fell into arrears and, on 21 July 2014, was approximately R700 000,00 in arrears when Firstrand elected to cancel the respective agreements, the full capital of approximately R2,1 million thereby becoming due and payable. Respondent thereafter failed to comply with Firstrand's demand for payment of this amount.

[5] In these circumstances it is not in dispute that respondent is financially distressed. What is also clear, however, is that, whilst respondent may be commercially insolvent in that it is unable to pay its debts arising in the ordinary course of its business, its assets exceed its liabilities by at least R1,7 million and it is factually solvent. In particular, the respondent owns immovable property which is non-essential to the running of its business. The property was purchased for the sum of R2,9 million and was bonded to Firstrand in the sum of R2,380 000,00. The outstanding bond amount on this immovable property is R1,3 million. In the circumstances an amount of at least R1 million would be available upon sale of the property to be utilised for payment of respondent's debts.

[6] Applicant states with reference to respondent's financial statements for the years 2015/2014, 2014/2013, and 2013/2012, that the main reason for respondent finding itself in financial difficulty is that the turnover of the business has gradually decreased over the last three years, year on year.

[7] Indeed, these statements indicate a decline of turnover in these financial years from approximately R15 million, to R10 million to R3 million.

Applicant avers that the problem has been "*slow and pervasive*" and was not readily apparent to him in his day to day running of the business. Respondent also found itself in a "*cash flow dilemma*" as many of its clients, usually municipalities, became slower and slower to pay on invoices rendered for work done. In the result respondent was, at the time of the liquidation application, owed in the region of R800 000 - R900 000.

[8] As a result of its cash flow problems respondent began to struggle to meet its monthly debt and fell behind in its repayments on its credit agreements with Firstrand.

[9] Applicant states that Firstrand knew at the time of its cancellation of the various agreements that there was equity in the form of respondent's partly unencumbered immovable property in the business which was fully secured and was in fact held with one of Firstrand's own divisions. He avers that Firstrand had the option to recover the amounts owing on each individual agreement but instead opted to cancel all the agreements thereby resulting in the full outstanding balances becoming payable and rendering respondent commercially insolvent.

[10] Applicant avers further that since the granting of the provisional liquidation order certain of respondent's debtors have paid their accounts and that respondent's bank account was, at the time of the liquidation application, in credit in the amount of R397 418,40, which amount it cannot now access.

[11] Applicant avers further that despite respondent's difficulties it was, until the granting of the provisional liquidation order, operating at full capacity and was working on various contracts. He avers that, having regard to the fact that respondent is factually solvent, its assets may, given time, be properly realised and the immediate debt dealt with. In these circumstances, so he avers, the reasonable prospect exists that under the guidance of a business rescue practitioner the respondent would be steered back to commercial solvency without the need to liquidate it. He points to the fact that respondent's business was run successfully for a period of nine years prior to

it becoming financially distressed. Should a business rescue practitioner be appointed he or she would be able to administer the finances of respondent which would enable applicant to focus on obtaining new contracts and developing the business in a "*new profitable direction, namely toward the private sector*."

[12] For its part, Firstrand, which is the majority creditor, lays the blame for respondent's financial distress at the door of applicant alleging that it was applicant's mismanagement which was the cause of the respondent's problem. It denies that there are any reasonable prospects of rescuing the respondent and alleges that applicant's averments in this regard are merely speculative.

[13] "*Business rescue*" is defined in s 128(b) as follows:

> "'business rescue' *means proceeding to facilitate the rehabilitation of a company that is financially distressed by providing for –*
>
> *(i) the temporary supervision of the company, and of the management of its affairs, business and property;*
>
> *(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
>
> *(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in the existence of a solvent basis or, if it is not possible for the company to so continuing existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.*"

[14] S 131 (4) of the Act provides:

> "(*4*) *After considering an application in terms of subsection (1), the court may –*

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that –

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company; or

(b) *dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation*."

[15] In Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) Brand JA stated as follows at para 21 with regard to the issue whether or not there was a reasonable prospect of rescuing the company, namely:

> "*As to whether there is a reasonable prospect of rescuing the company, it can hardly be said, in my view, that it involves a range of choices that the court can legitimately make; of which none can be described as wrong. On the contrary, as I see it, the answer to the question whether there is such a reasonable prospect can only be* 'yes' *or* 'no'*. These answers cannot both be right. The position is comparable to the decision whether or not the conduct of a defendant in a case based on negligence met the standards of the reasonable person, or whether the negligent conduct should attract legal liability and thus be regarded as wrongful. Hence it involves a value judgment."*

[16] At para 29 the learned Judge of Appeal stated further:

> *"This leads me to the next debate which revolved around the meaning of* 'a reasonable prospect'. *As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable possibility' which was the yardstick for placing a company under judicial management in terms of section 427(1) of the 1973 Companies Act... On the other hand, I believe it requires more than a prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on 'reasonable' – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers.*"

[17] At para 31 Brand JA stated that in an application for business rescue, an applicant was required to satisfy the court that the business rescue proceedings would either "*restore the company to a solvent going concern, or at least facilitate a better deal for creditors and shareholders' than they would secure from the liquidation process.*"

[18] Ms. Watt, who appeared for Firstrand, submitted at the outset, with reference to paragraph 30 of Mfazwe v AN Gadi Property Investments (Pty) Ltd/Absa Bank Ltd unreported Eastern Cape Full Bench judgment, case no CA192/2014, that Firstrand could not be compelled to participate in a business rescue plan of which it did not approve, particularly where it is by far the major secured creditor and stated that should the application for business rescue be granted Firstrand would oppose any proposed business rescue scheme.

[19] The passage relied upon by Ms. Watt in Mfazwe's case must, however, be seen in its correct context. In that matter the outstanding amount owing to the intervening creditor, Absa, in terms of a judgment debt was in excess of R4,5 million, Absa being the major, if not the only creditor. It was abundantly

clear that at the best for the respondent company it would, even after the intervention of any business rescue practitioner, only be able to meet its monthly expenses, those being "*interest to Absa, salaries and wages and minor general expenses*." In those circumstances it was held that a business rescue plan would have the effect of compromising Absa's judgment against the respondent. The facts of the present matter are very different.

[20] I obviously do not intend to convey that Firstrand's declared intent to oppose any proposed business rescue scheme should be ignored. In the Oakdene case *supra*, Brand JA stated as follows at para 38:

> "*As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In these circumstances I do not believe that the court a quo can be criticised for having regard to the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants.*"

[21] It is also apposite, in my view, to bear in mind what was stated in Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) at para 22 namely, that in exercising its discretion whether or not to grant the order the court should give due weight to the legislative preference for rescuing ailing companies if reasonably possible. As further stated in para 22:

> "*It would therefore be inappropriate for a court faced with a business rescue application to maintain the mind-set (from the earlier regime) that a creditor is entitled* ex debito justitiae *to be paid to to have the company liquidated.*"

[22] In considering the matter I also bear in mind the *caveat* expressed by the Court in Southern Palace *supra* at para 13 against the possible abuse of the business rescue procedure for instance by rendering the company temporarily immune to actions by creditors so as to enable the directors or other shareholders to pursue their own ends.

[23] It is clear in the present matter, in my view, that there can be no suggestion that the applicant is abusing the procedure for any ulterior motive. What the applicant's affidavits convey, in my view, is a genuine attempt to rescue the respondent which has been trading successfully in Tsolo for a number of years. I am satisfied that this application is not simply a stratagem to delay or frustrate respondent's creditors.

[24] I should mention that applicant does not contend that business rescue would necessarily facilitate a better deal for Firstrand than it would secure from the liquidation process. I turn then to consider whether applicant has established that there is a reasonable prospect of rescuing the respondent.

[25] In this regard Ms. Watt assailed what she submitted was the paucity of detail in applicant's affidavits concerning the nature of the proposed business rescue scheme. There was, she submitted not only insufficient information as to what had caused the drastic drop in turnover thus casting considerable doubt on applicant's denials of mismanagement but also insufficient information concerning the proposed business plan such as would enable the Court to assess whether there was a reasonable prospect of rescuing respondent. Everything, she submitted, was based on speculation.

[26] In my view, however, nothing appears from the affidavits to suggest that the underlying fundamentals of the respondent are not sound. In this regard it must be remembered that respondent is a Construction Industry Development Board Grade 6 Civil Engineering Work Potential Emerging Company which can tender for contracts up to R40 million. It took respondent three to four years to reach this level. Because of an unfortunate concatenation of events the respondent, which was operating in a competitive environment during an economic downturn, became overgeared with debt at a time when it was experiencing severe cash flow problems caused by the inexcusable delay on the part of its clients, usually municipalities, to pay their debts timeously.

[27] Brand JA, in Oakdene *supra*, dealt with the way in which an applicant for business rescue must show a reasonable prospect. The learned Judge of Appeal stated at para 30, that it would neither be practical nor prudent to be prescriptive about this. He then cited, with approval, the following comments of van der Merwe J in Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another 2013 (1) SA 542 (FB) at paragraphs 11 and 15 namely:

> "*11 I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.*
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> *15 In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual*

details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings."

[28] At para 31 Brand JA concluded that:

"*I have indicated my agreement with the statement in* Propspec *that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(10(b).*"

[29] In my view, in the exercise of my discretion in the sense referred to above by Brand JA, applicant has passed the requisite threshold of establishing that there is a reasonable prospect of rescuing respondent and restoring it to a solvent going concern. It is clear, in my view, as was submitted by Mr. Marabini, that the business rescue practitioner will have many options available to him which were not available to applicant because of its debt and cash flow problems and which are not presently available to applicant, because of the provisional order of liquidation. Applicant envisages that the business rescue practitioner will, *inter alia*, set about selling various assets, settling respondent's debts, making respondent more efficient and planning the future conduct of the business. Applicant has also indicated, as part of the proposed scheme, his intention to pursue contracts in the private sector.

[30] Respondent is not a multi-million rand business with, for instance, problems involving shareholders with irreconcilable differences. It is a modest business with a single member. In these circumstances, in my view, applicant has laid a "*sufficient factual foundation for the existence of a reasonable prospect*" that the respondent can be rescued. It will be for the business

rescue practitioner to set out a detailed plan for the creditors to consider. Firstrand will obviously consider its options in the light of such plan.

[31] In my view therefore the application must succeed. The only remaining issue is that of costs. In this regard Ms. Watt submitted that it would be fair and appropriate to order that the costs of both this application and of the liquidation application be costs in the business rescue. I am satisfied that the costs of the liquidation application should be costs in the business rescue. The provisional order of liquidation in case no 41/2015 will accordingly be discharged together with such a costs order.

[32] As regards the costs of the present application I can see no reason why the costs should not follow the result. Firstrand has unsuccessfully opposed the granting of the application and, in the circumstances, it should pay the costs thereof.

[33] 1. An order is granted placing the respondent under supervision and commencing business rescue proceedings as contemplated in s 131(4)(a) of the Companies Act 71 of 2008.

2. Mr. Rynard Edward Mclaren is hereby appointed as an interim rescue practitioner as envisaged in s131(5) of the Act pending ratification by the creditors of such appointment at their first meeting as envisaged in s147 of the Act.

3. The intervening creditor, Firstrand, shall pay the costs of this application.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Mr. Marabini
Instructed by: Netteltons Attorneys, Mr. Marabini

Appearing on behalf of the Intervening Creditor: Adv. Watt
Instructed by Joubert Galpin & Searle, Mr. Huxtable.