REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **20370/2015**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED ✓

Date: 12/2/16 WHG VAN DER LINDE

In the matter between:

Pouroullis, Theofanis Applicant

versus

Market Pro Investments 106 (Pty) Ltd Respondent

South African Bank of Athens Ltd First Intervening Creditor

ABSA Bank Ltd Second Intervening Creditor

JUDGMENT

Van der Linde, J

Introduction and background

[1] This is an application by a director ("the applicant") of the respondent ("the company") under s.131 (1) of the Companies Act 71 of 2008 ("the Act") to place the company under supervision and to commence business rescue proceedings. The first intervening creditor ("Bank of Athens") and the second intervening creditor ("ABSA") oppose the application. In a separate and earlier application under case number 3852/2015 ABSA had applied for the company to be placed under winding-up.

[2] The applications were both ripe for hearing and were argued together. So inter-related were they that counsel were agreed that if the business rescue application succeeds, the winding-up application must automatically be postponed; and if it fails, the winding-up application must automatically be granted. The parties were agreed too that reference could be had to both sets of papers for the adjudication of both applications.

[3] S.131 of the Act provides in relevant part as follows:

"131 Court order to begin business rescue proceedings

(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) An applicant in terms of subsection (1) must-

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(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 for rescuing the company; or

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

(5) If the court makes an order in terms of subsection (4) (a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.

(7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company."

[5] The company's existence centres around a single asset, fixed property of about 250 000 sq m, in Brakpan. The improvements are office blocks of brick and steel, and factory outbuildings. They are all in good condition. These were let to an associated company, thereby

providing a rental income. The company has no employees. The tenant has since been liquidated and the property has not had a tenant since the beginning of 2015. The company acquired the land in 1998 for about R985 000. ABSA is its only bondholder. The indebtedness to ABSA as of February 2015 was R14 987 460.[1]

[5] The sole shareholder of the company is a trust, the Christos Pouroullis Investment Trust, which has two trustees. The applicant is one of them. The trust deed is not available, nor do we know anything about the powers of the trustees to litigate.

[6] The company is *"financially distressed"* as that concept is defined in s.128(1)(f) of the Act. It has defaulted on its monthly bond repayments to ABSA. These initially amounted to R213 544. It has let out a portion of its workshop at R40 000 per month, and it was negotiating in June 2015 to let out further space at R62 000 per month. It is unknown whether this materialised, although one rather suspects that if it had, an affidavit would have been forthcoming.

[7] The expert valuator put up by the applicant says that, going forward, the company ought to realise net rental income of about R181 000 per month. If ABSA were not prepared to agree to reduced monthly payments, and if an accord with the Bank of Athens, to whom about R7,5m was owed, could not similarly be reached, the inevitable result would be that the property would have to be sold to pay the creditors.

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[1] According to the applicant. According to ABSA it was R14921431.45, being R7270191 plus R7651240.45.

[8] The value of the property is about R31m. Only sixty per cent of that value would be realised in a forced sale, such as would be the case in winding-up.

[9] The company is currently commercially insolvent in that it cannot pay its debts as and when they fall due for payment. It is also probably factually insolvent according to its balance sheet, because the liabilities as of February 2015 do not include the approximately R7.5m owed to the Bank of Athens. It included, that would result in a negative shareholder's equity of about R7m.

[10] If one assumes that ABSA would not agree to receive its debt repayment in instalments, and insisted on the full outstanding balance being paid immediately, the only way would be to liquidate the property. That could occur either in liquidation or in business rescue. On the applicant's case, in business rescue it would return R31m, meaning that all the creditors would receive full payment, or in liquidation, in which event only R18,6m would be realised. Then the city council, SARS and ABSA would likely receive full payment of their claims, but not the other creditors, who would likely lose out completely.

[11] On this basis, the applicant submitted, business rescue was still a better option that liquidation, because creditors would receive greater dividends that they would in liquidation.

The issues and the competing contentions

[12] Against this background the applicant argued that a prima facie case for business rescue had been established.

[13] The Bank of Athens argued that a prima facie case was not good enough. It relied on NEWCITY GROUP V ALLAN DAVID PELLOW NO (577/2013)[2014]ZASCA 162 (1 October 2014), at [16]. It submitted that in any event the application was not bona fide and should on that account fail. Here it relied on RICHTER v ABSA BANK LTD, 2015 (5) SA 57 (SCA) at [16].

[14] It argued that the proposed business rescue plan was not bona fide, because there was no suggestion as to how to repay the ABSA instalments. On its own case, it could not afford it. It submitted that the valuation of R31m was fatally flawed, as it relied for part of the value on the failed tenancy. It pointed to the absence of the information that ought to have been provided by way of notes to the income statement and balance sheet attached to the founding papers. It bemoaned the fact that no detail was furnished of the debt to the city council. The Bank of Athens argued too that the company had done nothing in the past year to sell the property.

[15] ABSA made common cause with the Bank of Athens. But it also attacked the applicant's locus standi, the issue of reasonable prospects as envisaged in s.131(4) of the Act, and generally whether the requirements of the Act had been met.

[16] In view of the issues that the parties traversed, I propose dealing with the following: the question of locus standi; the

appropriate test to be applied under s.131(4); and finally the factors that weigh in this case.

Locus standi

[17] The applicant relied on his being a creditor, a representative of the shareholder, and a director, of the company. His directorship is irrelevant, since it is not included in the definition of an *"affected person"* for purposes of s.128 (1)(a) of the Act. ABSA argued that the applicant had not shown he had authority to represent the trust because not all the trustees have joined in the application. The applicant referred to the resolution passed by the trustees and submitted that it was clear that the applicant had been authorised by all the trustees to act in the litigation.

[18] But the question is of course whether the trust deed gives the trustees the power to appoint one of them to represent the other in the litigation.[2] And in this case we have no evidence at all about the trust deed. On the face of it, we have trustees and a trust. And on the face of it, since a trust is in law not a separate juristic person, all the trustees should have joined. As a fact, they did not. In the result, in my view, the point is well-taken.

[19] But the applicant does say he is a creditor, on the basis that he had lent and advanced R21000 to the company. He refers in support

[2] *"[16] This case raises a troubling aspect about business trusts. Trustees have to act jointly unless the trust deed provides otherwise and trust deeds seldom do."* Per Harms JA (as he then was) in NIEUWOUDT AND ANOTHER NNO v VRYSTAAT MIELIES (EDMS) BPK 2004 (3) SA 486 (SCA).

to the attachment that has the appearance of a simplified balance sheet, a document that he himself affirms as being correct. This is thus potentially a classic case of self-corroboration and it is usually not admissible. But there was no objection to it, and ABSA's attack was on the contents of the document which refers to *"Loans from Directors"*, referring as it does to more than one director. Also, ABSA says it challenged the applicant on this issue, and the challenge remained unanswered, since no replying affidavit had been filed.

[20] The challenge is at p56 para 14 in these terms: *"It is not said how, where and on what terms that indebtedness arose."* The applicant submitted that there was nothing more to say. I do not accept that that is a satisfactory answer. The amount concerned raises at least an eye-brow, since it is large and rounded off. The applicant could have explained how it came about and for what purpose the loan was.

[21] However, I am not sure that these questions are so serious as would entitle me to reject the evidence out of hand as being untruthful. Also, balance sheets often refer generically to *"loans from directors"* in the plural, without intending to suggest thereby that it was impossible that only one director had advanced the money. I will thus accept that the applicant has established his locus standi on this score.

The appropriate test to be applied

[22] This issue was authoritatively discussed by Brand, JA in

OAKDENE SQUARE PROPERTIES (PTY) LTD AND OTHERS v FARM BOTHASFONTEIN (KYALAMI)(PTY)LTD AND OTHERS, 2013. The learned judge there said, amongst other things, that a *"reasonable prospect"* means: something less than a reasonable probability; something more than a prima facie case; something more than an arguable possibility; a prospect based on reasonable grounds; and mere speculative suggestion is not enough.

[23] He said too that the plan which the applicant is required to show must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from the liquidation process.

[24] But importantly, he also the following (at [33]): *"[33] My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act H which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek*

to achieve."

[25] Against this background I proceed now to consider those factors that weigh in the present case.

The factors that weigh in this case

[26] The first factor is that I cannot find that the prospect of restoring the company to commercial solvency is based on reasonable grounds. The figures do not wash; the anticipated net rental income is nowhere near what would be required to liquidate the monthly instalments due on ABSA's first bond.[3] That does not take into account servicing the liability owed to the Bank of Athens and to the city council; or even SARS.

[27] The answer offered by the applicant is to say that that is a matter for negotiation between the business rescue practitioner and the creditor concerned. But that is in my view no answer; it is merely stating an axiom. It does not yet suggest why it is that these creditors would on a somehow or other basis take less by way of monthly repayment; nor when and how the indebtedness to them will then finally be paid.

[28] The second factor is then where that takes one. If the company cannot be restored to commercial solvency, it must perforce liquidate its asset, the property, to pay its debts. Where that leads one is

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[3] The fact that fixed property valuations are often "soft", or "elastic", meaning that they are subject to the vagaries of the market, is notorious. In this case the company's sole meaning asset is thus of uncertain value, although of course one does have a ball park conception of what it should fetch.

straight into the debate about whether what the applicant is proposing is not simply an informal type of winding-up process, a scenario expressly frowned upon, even dismissed, by Brand, JA in the paragraph quoted above.

[29] I have difficulty understanding why that result is not inevitable. It does not seem to me to matter whether in the informal winding up the body of creditors will be better off; that will always be the result if one's postulate is that a business rescue practitioner will sell fixed property at a better price than a liquidator. It will also be the inevitable result if one accepts that, as a matter of course, the business rescue practitioner comes cheaper than the liquidator.

[30] But self-evidently, if that type of argument were valid, most liquidations should systemically be business rescues, because on that basis the business rescue system will always render a better dividend than liquidation.

[31] The third factor that weighs with me is that one is not dealing here with potential job losses in the event of a liquidation. If jobs and family incomes were at issue, one looks differently at these things.

[32] The forth factor that weighs with me is that this building is not a residential complex or a school. Again, if relocating families or educational facilities were involved, one would think twice.

[33] The fifth factor that weighs with me is that the two largest creditors, both banks, are supportive of the liquidation route. Of the

other creditors, the city council and SARS enjoy preferent positions. The R9.5m owed to group companies are potentially at risk; so too the concurrent debt owed to the Bank of Athens. But the latter supports the liquidation, as I have said, and the claims of associated companies will have to enjoy less protection than that of the bond holder.

[34] The sixth factor is the position of the major creditor, ABSA. In traditional liquidation, the driver is the winding up of the company by the liquidation of its assets. That is the liquidator's remit. In business rescue, the very objective, whether actually attainable or not, is different. The focus is first and foremost the rehabilitation of the company. Applied to the facts here, one envisages a business rescue practitioner who potentially seeks to serve also the interests of all concurrent creditors, including the other companies in the group, whose claims aggregate a sizable amount.

[35] That suggests a potential conflict of interests between the bondholder and the debtor's associated companies; or put differently, between the bondholder's interests and the debtor's interests. If such a conflict has to be resolved one way or the other, I suggest it is the bondholder who, by dint of the security it enjoys, ought to be preferred.

[36] Finally, winding-up is not the end of the road for the company. As appears from s.131(7) quoted above, the court may make a business rescue order at any time during liquidation proceedings. It is

not inconceivable that the up-to-date financial position of the company is actually different from what it was last year when the applications were launched, good or bad. Interested parties will be free then to reassess their positions.

Conclusion

[35] It follows from these considerations that in my view the business rescue application ought not to succeed. ABSA argued that I should disallow the costs of opposition to the liquidation application, on the basis of KNIPE v KAMEELHOEK, 2014 (1) SA 52 (FB) at [51]. It was there said, with reference to s.342(1) of the 1973 Act, read with s.97(3) of the Insolvency Act 24 of 1936, that special circumstances need be shown before the court would order that the costs of opposition to a winding-up order would be allowed.

[36] I have found the submissions on behalf of the applicant helpful and pertinent, and to the extent necessary will make an appropriate order in this regard.

[37] In view of the parties' agreement, I thus make the following order:

(a) The application under case number 20370/2015 is dismissed with costs.

(b) In the application under case number 3852/2015 I issue a provisional winding-up order, returnable on 18 April 2016, in terms of the draft I have amended, initialled, dated, and marked "X".

(c) I direct that the costs of the opposition to the provisional winding-up order under case number 3852/2015 shall be included in the costs of winding-up.

WHG van der Linde
Judge of the High Court

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Date of hearing: 10 February 2016