THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19959/2016

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

23 February 2017 .....
DATE SIGNATURE

In the matter between:

DUMISANI WILLIAM GQWARU **First Applicant**

MONWABISI PATRICK RWEXU **Second Applicant**

And

MAGALELA ARCHITECTS CC **First Respondent**

CHUKWUMA MTSHALI **Second Respondent**

JUDGMENT

RATSHIBVUMO AJ:

1. This is an application wherein the applicants seek relief in terms of which the first respondent is placed under supervision and commencing business rescue proceedings. They further seek an appointment of the interim practitioner under section 131 (5) of the Companies Act, 71 of 2008 (the Act). The application is opposed by the respondents; with the second respondent acting in his personal capacity and also on behalf of the first respondent, a close corporation in which he holds 51 % majority members interest. The remaining 49 % is held by the applicants who assert themselves as experienced businessmen.

2. In support of the application, the applicants allege that the first respondent is unable to pay all its debts when they become due;[1] something conceded to by the second respondent in his application for liquidation of the first respondent.[2] The applicants further allege that the first respondent is in financial distress and as such, it is just and equitable for it to be placed under business rescue. In support of this, they aver that there are reasonable prospects of rescuing its business.

3. According to the sale agreement, the overall management of the first respondent is directed by the parent company named R&G Consultants which is owned by the applicants. As a result, the applicants direct the overall management of the first respondent and only they (the applicants) could be nominated as its accounting officer.[3] With this background, the

[1] See page 14, para 30 of the Founding Affidavit.
[2] See page 214 – Annexure A to the Answering Affidavit, para 38.
[3] Sale agreement, page 40.

applicants aver that there are reasonable prospects of rescuing the first respondent for the following reasons:

i. Other than the sum of R25 000.00 owing to PKF Accountants, the balance of the first respondent's indebtedness is to R&G Consultants and the first respondent members.
ii. As owners of R&G Consultants, the applicants undertake that R&G Consultants will not demand payment of the sum of R696 263.56 due to it, until the first respondent is in a position to make payment thereof.
iii. The applicants also undertake not to demand the sum of R919 323.68 due to them, until the first respondent is in a position to make payment thereof.
iv. The sum of R448 451.60 owing to the second respondent in respect of outstanding salary should properly, be set off against his debit loan account in the first respondent.
v. There is every likelihood that the first respondent will be paid about R8.78 million in respect of projects underway and the possibility of a further payment of R2.5 million having regard to its appointment to the Department of Health's Panel of Professional Service Providers.
vi. In the event that the first respondent is liquidated, the appointment will be nullified causing the six other members to suffer, impoverished communities in dire need of health care services will be left to wait even longer and the first respondent may be liable to civil claims.[4]

4. As indicated above, the application is opposed by the respondents. The second respondent avers that the application constitutes an abuse of the process because of the following reasons:

[4] See page 28 para 103 of the Founding Affidavit.

i. This application is in response to the second respondent's application for the liquidation of the first respondent, issued in April 2016 and served on the applicants in May 2016.[5]

ii. The first respondent is factually insolvent and it is just and equitable for it to be liquidated.

iii. The applicants had assumed total control of the first respondent and were acting fraudulently and illegally; "misapplying and wasting" the first respondent's property, to the detriment of the creditors.

iv. There was a breakdown of trust between the applicants and the second respondent.

v. The applicants are not professionally qualified architects and hold a combined members interests of only 49 %. The second respondent was the only member who is duly admitted architect and he is precluded from participating in the management of the first respondent including banking and scrutinizing the contracts between the first respondent and the third parties.

vi. The second respondent holds 51 % members interests and will not support nor participate in any business rescue operation.

5. It is common cause that the first respondent is in financial distress in that it is unable to meet its financial obligations to its creditors. The dispute is whether liquidation would be the viable option as opposed to a business rescue. Coupled with this is the real predicament on how any of these would be implemented given the breakdown in trust between the parties. There are accusations levelled against the applicants by the second respondent whereas he in return is unwilling to take part in the business rescue. Finally, the second respondent seems more interested in having a liquidator investigate

[5] See page 202, the Founding Affidavit in the liquidation application.

the fraud allegations because he/she can also make recommendations for criminal prosecutions if necessary.

6. Business rescue means proceedings 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 existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[6]

7. Business rescue can be initiated by a court order or as a voluntary decision by a company following a resolution by its board.[7] If however the rescue is initiated by a court order, no prior resolution by the company is necessary. An affected person can apply to court for an order to place the company under supervision and to commence business rescue proceedings. Every affected person must be notified. The court can grant the order if it is satisfied that – the company is financially distressed; 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

[6] See sec 128 (1) (b) of the Act.
[7] See sec 129 (1) of the Act

matters; or it is otherwise just and equitable to do so for financial reasons; and there is a reasonable prospect for rescuing the company.[8]

8. "Affected person" in relation to business rescue means a shareholder creditor of the company; any registered trade union representing employees of the company; and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.[9] Whereas the willingness of the company shareholders is determinative in voluntary business rescue, it is not a consideration for purposes of a business rescue through a court order, hence the application can also be brought by persons who are not shareholders but just "affected persons."

9. There is no dispute that the first two requirements have been met for placing the first respondent under business rescue. The first respondent is financially distressed and it has failed to pay over any amount in terms of an obligation under the contract. There is however dispute as to whether there is a reasonable prospect for rescuing it. The applicants make a good case which if it is to be believed, it would make a reasonable prospect for rescuing it. They inter alia make an undertaking not to claim monies legally due to them in excess of R1 million. The second respondent casts doubt on the allegations by the applicants for the reasons that he has no knowledge of them since he has been excluded in the running of the first respondent.

10. The second respondent confirms though that the applicants have settled an obligation to SARS to the value of R829 900.00 which would otherwise

[8] See sec 131 of the Act.
[9] See sec 128 of the Act.

have had to be paid from funds then unavailable to the first respondent.[10] Again, the fact that the second respondent is not aware of the contracts signed on behalf of the first respondent does not mean that there are no such contracts. This could just mean that he is not aware of their existence owing to the fact that in terms of the sale agreement, the second respondent cannot be nominated as an accounting officer.[11] For these reasons, the lack of knowledge on the part of the second respondent cannot on its own negate what the applicants averred.

11. As for the submission by the second respondent that the applicants were supposed to be responding to the liquidation application initiated by the respondents, the Act permits the halting of liquidation process through a court order placing the business under rescue.[12] The court also noted the second respondent's concern that with business rescue, his accusations of fraudulent activities against the applicants may not be investigated the way the liquidator would have been able to. There is no merit in this argument given the powers that the business rescue practitioner has. Sec 141 (2) of the Act provides,

> "2. If, at any time during business rescue proceedings, the practitioner concludes that-

[10] Page 179, para 36 of the answering affidavit.
[11] See footnote 3 *supra*.
[12] See sec 131 (6) & (7) of the Act which provides,

> "(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." See also *Firstrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* [2012] 2 All SA 560 (KZD)

(c) there is evidence, in the dealings of the company before the business rescue proceedings began, of-

(ii) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must-

(aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

(bb) direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.

12. The second respondent voiced his intention not to support the business rescue. Although this is not for consideration currently, it cannot be ignored. In their papers, the applicants and the second respondent voiced their willingness to buy each other's interests out of the first respondent. The Act empowers the business rescue practitioner on several steps he could consider to implement in case of failure to have a business plan adopted by the company.[13] In *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and another*[14] the court set aside the rejection of business plan that was "irrational and unreasonable" as being inappropriate.

13. The applicants also have plans to buy out the second respondent as envisaged above. In so doing they rely on the provisions of sec 153 (1) (b) (ii) of the Act which provides,

"any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on

[13] Sec 153 of the Act provides,

"(1) (a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may-

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

[14] 2014 (6) SA 214 (LP)

> the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated."

In this approach, the applicants interpret the Act as empowering the Business rescue practitioner in forcing the shareholders into selling their shares or interests. This is the interpretation adopted in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others*.[15]

14. In setting aside this decision, the SCA held in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others*[16] that,

> "The term "binding offer" must be appreciated against the meaning of "offer" as hitherto understood in South Africa. In everyday use, the word "offer" signifies a presentation or a proposal to someone for acceptance or rejection. The settled meaning, both in the general use and in the more technical legal use of the word "offer" is that it is only on acceptance that an offer creates rights and obligations. It is a well-established principle of our law that an ambiguous proposal cannot be classified as an offer. A mere regurgitation of the provisions of section 153(1)(b)(ii) (that the offer was or would be to purchase the voting interest at a value to be independently determined) could not constitute a proper binding offer."

A binding offer remains predominantly similar in nature to the common law offer, save that it may not be withdrawn by the offeror until the offeree responds thereto. A binding offer made to a creditor who opposes a business rescue plan is not automatically binding on the offeree. In my view, it would be absurd to start considering whether the second respondent would accept the offer before one is even made to him.

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[15] [2013] 4 All SA 432 (GNP).
[16] [2015] 3 All SA 10 (SCA)

15. If after the appointment of a business rescue practitioner, it appears that there is no reasonable prospect of the company being rescued, liquidation can follow immediately thereafter.[17] If however, the company is liquidated, that process would wind up the business and there cannot be business rescue thereafter.

16. With all the above, I am satisfied that the first respondent is financially distressed; that it has failed to pay over any amount in terms of an obligation under the contract and that there is a reasonable prospect for rescuing it. The following order is therefore made.

    16.1 The first respondent is placed under supervision commencing business rescue proceeding;

    16.2 Eugene Nel is appointed as the interim business practitioner under sec 131 (5) of the Companies Act, 71 of 2008.

    16.3 The costs of this application shall be costs in the business rescue proceedings.

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[17] Sec 141 (1) of the Act provides,

"As soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.

(2) If, at any time during business rescue proceedings, the practitioner concludes that-

(a) there is no reasonable prospect for the company to be rescued, the practitioner must-

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;

(b) there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and-

(i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or

(ii) otherwise, file a notice of termination of the business rescue proceedings;

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	**30 January 2017**
Judgment Delivered:	**23 February 2017**
For the Applicant:	**Adv. PJ Wallis**
Instructed by:	**David Vicek / Dougas de Jager – Cox Yeats Durban**
For the Respondent:	**Adv. CE Boden**
Instructed by:	**JJS Manton Attorneys Durban**