REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

2 May 2018
DATE

SIGNATURE

CASE NUMBER: 12897/2018

In the matter between:

RONICA RAGAVAN	**1st Appellant**
RESHMA MOOPANAR	**2nd Appellant**
VIDYA MUDALIAR	**3rd Appellant**
PUSHPAVENI UGESHNI GOVENDER	**4th Appellant**
ASHU CWALA	**5th Appellant**
GEORGE PETER VAN DER MERWE	**6th Appellant**
MDUDUZI JOSEPH MTSHALI	**7th Appellant**
SALIM AZIZ ESSA	**8th Appellant**

And

JOHAN LOUIS KLOPPER N.O.	**1st Respondent**
KURT ROBERT KNOOP N.O.	**2nd Respondent**
JUANITO MARTIN DAMONS N.O.	**3rd Respondent**
KGASHANE CHRISTOPHER MONYELA N.O.	**4th Respondent**

JUDGMENT

TSOKA, J

[1] This is an urgent appeal in terms of section 18 of the Superior Courts Act 10 of 2013 (the Act).

[2] The four respondents are the duly appointed business rescue practitioners (the rescue practitioners) of Optimum Coal (Pty) Ltd and seven other related companies (the rescue entities) forming part of the Oakbay Group of companies (the Oakbay Group).

[3] For convenience and in order to interact with the directors, the management and administrative personnel of the rescue entities, the rescue practitioners elected to utilize premises situate at Grayston Ridge Office Park, Block A, Lower Ground, 144 Katherine Street, Sandton, Johannesburg, Gauteng (the premises) in order to comply with their statutory duties and obligations in rehabilitating the rescue

entities. According to the respondents, although five of the companies which are under business rescue, conduct business elsewhere other than the premises, the control and management of all these rescue entities is centrally operated from the premises.

[4] However on 5 April 2018, the matter took a different turn. The appellants denied the rescue practitioners access to the premises resulting in the latter being unable to execute their statutory duties and obligations, which included the management of the rescue entities and the development and publication of the business rescue plans within the statutorily determined deadlines, which were imminent. The respondents contend that all the information relating to the rescue entities is collated and retrieved from the records kept at the premises. In addition, the financial records, post the commencement of business rescue, such as the revenue and expenses of the rescue entities are kept at the premises.

[5] On 10 April 2018, pursuant to appellants' denial of access to the premises, the rescue practitioners brought an urgent application to regain access to the premises and to direct the appellants to co-operate with the rescue practitioners in the execution of their duties. On 13 April 2018, Fisher J, after having heard argument, handed down a written judgment and order in favour of the rescue practitioners.

[6] Dissatisfied with the order of Fisher J, the appellants, on 16 April 2018 brought an application for leave to appeal the order granted. As the appellants' application for leave to appeal suspends the operation and execution of the order granted on 13 April 2018, the rescue practitioners brought an application in terms of section 18 of the Act for the execution of that order on the basis that exceptional circumstances exist and that they will suffer irreparable harm if the order is not executed. At the same time, they contended that the appellants would not suffer such irreparable harm if the order is executed.

[7] On 17 April 2018 Fisher J dismissed the application for leave to appeal and granted the counter-application for execution of the order in favour of the rescue practitioners. Simultaneously with the order of dismissal, the learned Judge ordered, that "paragraphs 2, 3 and 4 of the said order are to have full force and effect pending any further application for leave to appeal to the Supreme Court of Appeal and/or the outcome of any appeal as contemplated in section 18(4) of the Act." The appellants were ordered to pay the costs occasioned by the application for leave to appeal, and the Section 18(1) application on the scale between attorney and client. Such costs were to be joint and several.

[8] In terms of paragraphs 2, 3 and 4 of the order of 13 April 2018, the appellants were interdicted from obstructing and/or refusing the respondents or their nominated agents, access to the premises. The court further ordered the appellants to provide and continue providing the respondents and their

nominated agents unrestricted access to the premises. In addition, the appellants were further ordered to co-operate with and assist the respondents and their nominated agents in the performance of their duties as the appointed business practitioners of the eight companies (in business rescue) as required by Chapter VI of the Companies Act No 71 of 2008 (the Companies Act).

[9] As the appellants are entitled in terms of section 18(4)(ii) for an automatic right to appeal, on 18 April 2018, they launched an urgent appeal, which the Deputy Judge President of this court, then directed be heard on 23 April 2018. This is the appeal before us.

[10] The issue raised by the appeal is whether Fisher J was correct in ordering the operation and execution of her order granted on 13 April 2018.

[11] I deal with the jurisdictional requirements for the operation and execution of the said order as envisaged in section 18 of the Act.

Exceptional Circumstances

[12] It is undeniable and public knowledge that most of companies that fall under the Oakbay Group have been put under business rescue. Most and if not all of them have been investigated by the Public Protector[1]. They are at present the subject of the "State Capture" investigation currently in the media. The appellants

[1] Public Protector: State Capture Report No: 6 of 2016/17 dated 14 October 2016.

contend that this finding of Fisher J was erroneous, as such issue was not on the papers before her. However, it is common cause that such issue has already been the subject matter of much litigation and the court was and is entitled to have regard thereto.

[13] The majority, if not all of the business rescue entities are involved in the supply or rendering of services on behalf of the people of South Africa. In particular Tegeta Exploration and Resources (Tegeta), Koorfontein Mines, Optimum Coal Mines and Terminal are involved in the supply of coal to Eskom. The latter is a national asset on which the economy and the population of this country rely for the supply of electricity. In March 2018, the Treasury learnt through the public media that Tegeta had concluded a sale of shares transaction with a foreign entity in excess of R66 million in contravention of the Exchange Control Regulations.

[14] It is evident that it is in the interest, not only of the employees and creditors of these entities that the affected companies be rescued, but also in the interest of the entire country on which the economy depends. That it is in the public interest for these entities to be rescued, is obvious. It is therefore undisputed that the rescue practitioners in executing their duties are performing a public and statutory duty beneficial to the people of South Africa. If these rescue entities are permitted to carry on the running of their business without the control and authority of the rescue practitioners, it would be, not only highly detrimental to the country, but also unlawful. Therefore, I conclude that there are exceptional

circumstances that warrant that the order of 13 April 2018 be put into operation and executed.

Irreparable harm if the order is not executed

[15] It is self-evident that the conduct of the rescue entities be thoroughly examined to establish whether these rescue entities conducted themselves unlawfully and whether this unlawful conduct put these companies in distress in the first place. To enable the rescue practitioners to have unrestricted access to the premises to perform their statutory duties and obligations is therefore in the public interest. If indeed R66 million was siphoned off the shores of this country in contravention of the Exchange Control Regulations, this needs to be investigated. Should the allegations prove to be true, this substantial amount of money would be returned to Tegeta to benefit the people of South Africa. However, should the order not be put into operation and executed, the money would be lost. The public would suffer.

[16] To refuse to allow the order to be executed would put the economy of this country at risk and would cause irreparable harm. This is beyond question.

[17] Furthermore, relevant and important documentation relating to the rescue entities is kept at the premises; all invoices are reconciled, approved, signed off and paid by the staff and management at the premises; management and staff who

assisted the rescue practitioners before 5 April 2018 are stationed at the premises; meetings between attorneys, the rescue practitioners, the directors and the management staff are held at the premises. The directors are employed at the premises. That the premises are the nerve centre and administrative offices of the rescue entities is beyond question. It is in this context that the rescue practitioners sought unrestricted access to the premises to execute their statutory duties and obligations in terms of section 140(1)(a) of the Companies Act which provides that –

> 'During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter –
>
> (a) has full management control of the company in substitution for its board and pre-existing management...'

[18] To deny the rescue practitioners the unrestricted access to the premises, in my view, is to subvert the very essence of business rescue which is for the rescue practitioners to have "full management control of the company." To contend as the appellants do, that the rescue practitioners may exercise full control of the companies concerned away from the premises at each individual business operation, is not only inconvenient and impractical but against the prescript of the Companies Act. For the business rescue practitioners to effectively comply with their statutory duties and obligations in terms of the Companies Act, they must have unrestricted access to the premises which, as I pointed out above, is the nerve centre of the affected companies.

Irreparable Harm to the appellants if the order is executed.

[19] At the heart of appellants' contention is that the premises also house other juristic and natural persons whose right to privacy will be infringed if the order is executed.

[20] The appellants, ostensibly, complain on behalf of the other juristic and natural persons. They are not before court and do not complain. There is no allegation that the appellants act in terms of section 38 of the Constitution. The main point of objection against access is the non-joinder of the entities.

[21] As to whether the appellants have a good defence regarding the non-joinder, it is necessary to examine the evidence placed before court. According to the deponent to the Answering Affidavit, one Reshma Moopanar (Moopanar), she is the Legal Head of the Oakbay Group. It is common cause, that the rescue entities form part of this Group. The first appellant, Ronica Ragavan (Ragavan) is the Chief Executive Officer of the Group. The third appellant, Vidya Mudaliar (Mudaliar) is the Financial Executive of the Group. The fourth appellant Pushpaveni Ugeshni Govender (Govender) is the Financial Manager of the Group. All these persons are stationed at the premises. They know of and have, until 5 April, worked together with the rescue practitioners.

[22] According to the appellants the premises are occupied by Oakbay Investment (Pty) Ltd in terms of "an agreement" with Tegeta Exploration and Resources (Pty) Ltd (in business rescue) (Tegeta). There is no explanation of the terms of this agreement. All the resolutions taken and adopted placing the affected companies in business rescue were signed by the appellants at the premises. The resolutions were signed by the various appellants in their capacities as directors of the rescue companies that belong to the Oakbay Group. Although the eighth appellant, Essa, holds no position in the Group, he signed the resolution relating to VR Laser Services (Pty) Ltd at the premises as a director of this company.

[23] To contend and argue, as the appellants do, that there has been a non-joinder of Oakbay is unsustainable. The Oakbay group, represented by various of the appellants is aware of the legal proceedings instituted by the rescue practitioners. In any event, the infringement of the right of privacy of other entities is irrelevant to the issue in this matter. Such entities have no direct and substantial interest worthy of protection. If they did have, they would have intervened, which they did not.

[24] In this regard, it is apt to restate what Corbett J, as he then was, said in *United Watch & Diamonds Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*[2] with regard to direct and substantial interest. At p 415 G-H the learned Judge said the following –

[2] United Watch & Diamonds Co (Pty) Ltd and Others v Disa Hotels Ltd 1972 (4) SA 409 (C)

'This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see Braur v Cape Liquor Licensing Board, 1953 (3) SA 752 (C) – a Full Bench decision which is binding upon me – and Abrahamse and Others v Cape Town City Council, 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be judicially affected by the judgment of the court...'

[25] I conclude therefore that the non-joinder defence has no merit. The parties on whose behalf the appellants raised this defence have no legal interest, which could be judicially affected by the execution of the order of 13 April 2018.

[26] In the result, I find that the appellants, in the context of this matter, would not suffer irreparable harm if the order granted on 13 April 2018 is executed.

[27] Having regard to the aforesaid, the following order is made –

27.1 The application for leave to appeal against the execution of the order of 13 April 2018 is refused;

27.2 The appellants are ordered to pay the costs of the appeal jointly and severally on the scale as between attorney and client, such costs to include the costs of two counsel where so employed.

M TSOKA

JUDGE OF THE HIGH COURT

I agree

S WEINER

JUDGE OF THE HIGH COURT

I agree

J TEFFO

JUDGE OF THE HIGH COURT

DATE OF HEARING: 23 APRIL 2018

DATE OF JUDGMENT: 3 MAY 2018

Appearances:

Counsel for the applicant:	Adv GS Myburgh SC
	Adv M Maschwitz
Instructed by:	Gattoo Attorneys

Counsel for the third respondent:	Adv P Stais SC
	Adv GD Wickins
	Adv S Mathiba
Instructed by:	Smit Sewgoolam Incorporated