

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 359/2017

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

12 June 2018  
DATE

  
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SIGNATURE

In the matter between:

**ADRIAN PETRUS SMUTS N.O.**

Applicant

and

**GUMEDE RURAL DEVELOPMENT (PTY) LIMITED**

Respondent

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**JUDGMENT**

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**YACOUB, AJ:**

1 The purpose of business rescue proceedings is to achieve one of two goals:

1.1 to return the company to solvency, or

1.2 to provide a better return to stakeholders than may be achieved by liquidation.<sup>1</sup>

- 2 The respondent was placed in business rescue on 10 November 2015, by means of a resolution by its sole director, Mr Gumede, and the applicant is the respondent's business rescue practitioner.
- 3 The applicant brings this application for the discontinuation of the business rescue proceedings and liquidation of the respondent in terms of section 141(2)(a)(ii) of the Companies Act, 71 of 2008 ("the Act"), to place the respondent into liquidation and discharge the business rescue proceedings, as, in his view, there are no reasonable prospects of successful rescue of the respondent.
- 4 The reasons why, in the applicant's view, there are no reasonable prospects of successful rescue are:
  - 4.1 the business rescue plan was not adopted by the creditors;
  - 4.2 the applicant had intended to set aside the vote on the business rescue plan in terms of section 153(1)(a)(ii) of the Act;
  - 4.3 the business rescue plan was based on certain projects that were to commence in 2016, together with the procurement of finance;
  - 4.4 the projects were not approved and the finance was therefore not procured, and

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<sup>1</sup> Section 128(1)(b)(iii) of the Act. Also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at [26].

4.5 there was therefore no point in proceeding with an application in terms of section 153(1)(a)(ii).

5 The respondent has opposed the application. The answering affidavit is deposed to by Mr Gumede, the director. For the purpose of this judgment I do not deal with the question whether the sole director is entitled to decide that the company oppose the application without the agreement of the business rescue practitioner. Had Mr Gumede sought to oppose the application in his own right, it is my view that he would, in any event, have been entitled to do so. Mr Gumede was not represented at the hearing of the matter, nor did his legal representatives cause written argument to be filed. Mr Gumede's attorneys of record withdrew two court days before the hearing.

6 The bases on which Mr Gumede opposes the liquidation of the company are two *in limine* points:

6.1 he objects to the jurisdiction of this court, on the basis that the applicant changed the registered address of the company unlawfully, and

6.2 he alleges that the applicant has no *locus standi* because the business rescue plan was not adopted by the meeting of creditors, and no person took steps in terms of section 153.

7 I am satisfied that the applicant, having full managerial control of the respondent, was entitled to change the registered address.

- 8 However the question of *locus standi* is a somewhat more vexed one. The Act contemplates that business rescue proceedings would last 3 months.<sup>2</sup> The applicant has not sought an extension of that time from a Court, nor does he appear to have provided the monthly reports required by section 132(3)(b). In addition, it is not apparent from the papers why it took the applicant almost 10 months (from 31 March 2016 to 10 January 2017)<sup>3</sup> to realise that there was no prospect of successful rescue and to bring this application.
- 9 Nevertheless, in view of the conclusion I have reached regarding the application for liquidation, I do not make any finding regarding the *locus standi* of the applicant.
- 10 Mr Gumede also alleges that the applicant has excluded him from the respondent's financial information, including its bank account, which allegation is not denied.
- 11 Mr Gumede stated in the answering affidavit that he would file a substantive answering affidavit once he had been provided with the information requested in his notice in terms of Rule 35(12) and (14). However he has not done so.
- 12 This said, it is worth noting that the response to the notice includes an assertion by the applicant that he is not in possession of the respondent's bank statements, despite the fact, acknowledged and relied upon in the

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<sup>2</sup> Section 132(3) of the Act.

<sup>3</sup> The Notice of Motion is stamped 10 January 2017 although it is dated by hand 13 January 2017.

founding affidavit, that the applicant has full management control of the respondent.<sup>4</sup> Of as much concern is the allegation in the founding affidavit that Mr Gumede had informed the applicant of turnover amounting to almost R2 million in the months of June – September 2016. Where the business rescue practitioner has full managerial control of the respondent but alleges that he has no personal knowledge of the respondent's turnover, and is not in possession of the respondent's bank statements, the extent to which that control is being exercised must be subject to some doubt.

13 The applicant also alleges that the company is commercially insolvent because it has no income to satisfy creditors. However, he does not appear to have taken steps to verify this allegation against Mr Gumede's allegation. In addition, it appears from the minutes of the second meeting of creditors that the company has over R10 million in assets, while its liabilities amount R4.85 million.

14 The Court is not obliged to accept the business rescue practitioner's assessment, but may, in terms of section 141(3) of the Act, make any order which has been applied for.<sup>5</sup>

15 After considering the papers and hearing counsel for the applicant, I am not convinced that the applicant has made out a sufficient case that there is no reasonable prospect of rescue.

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<sup>4</sup> Section 140(1)(a) of the Act.

<sup>5</sup> This conclusion is supported by the approach of the Court in *Commissioner, South African Revenue Services v Beginsel N.O. and Others* 2013 (1) SA 307 (WCC)

16 However, it appears to me that, similarly, the business rescue proceedings cannot be allowed to continue *ad infinitum*.<sup>6</sup> This is particularly the case where the business rescue proceedings ought to have been concluded within three months from 10 November 2015, that is, by 10 February 2016, and there appears to have been no good reason for them to have been so prolonged.

17 Although the order I propose to make appears to leave the respondent and its creditors in an indeterminate situation, in my view this is not a catastrophe. Either the respondent or its creditors can now bring a properly supported application, should it be necessary, for appropriate relief.

18 For these reasons, I make the following order:

[1] The business rescue proceedings of the respondent are terminated.

[2] The application for liquidation is dismissed.

[3] The costs of this application form part of the expenses in the business rescue proceedings of the respondent.



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**S JACOBB**  
**ACTING JUDGE OF THE HIGH COURT**

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<sup>6</sup> *South African Bank of Athens Ltd v Zennies Fresh Fruit CC* 2018 (3) SA 278 (WCC) at [34] and [37].

***COUNSEL FOR APPLICANT***

***ADV W P MARX***

***APPLICANT'S ATTORNEYS***

***STRAUSS DALY INC***

***DATE OF HEARING***

***04 JUNE 2018***

***DATE OF JUDGMENT***

***12 JUNE 2018***