REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 26883/2021

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

11/4/2022
DATE

SIGNATURE

In the matter between:

DONALD GORDON ERICKSON N.O.	1ST Applicant
LEHLOHONOLO NAPE LETELE N.O.	2ND Applicant
KGOMOTSO DITSEBE MOROKA N.O.	3RD Applicant
YOLISA SANDRA PHAHLE N.O.	4TH Applicant

and

KGATONTLE SATELITE OPERATIONS (PTY) LTD	Respondent

JUDGMENT

MAKUME J:

[1] This is an application to place the Respondent company under a final winding up. The basis of the application is that:

i) The company is presently indebted to the Applicant in the sum of R34 266 393,00 and is unable to make payment in accordance with the agreement and unable to meet its obligations.

ii) Further that it is just and equitable to place the company under liquidation as the two directors of the Respondent namely Ms Mothibe and Mr Phillip Seleke are at loggerheads and are in a deadlock situation which has destabilised the business of the Respondent to the extent that it is no longer operational.

[2] It is common cause that the Respondent has only two members each of whom owning 50% members interest and who are the only two directors namely Mr Sephiri Phillip Seleke (Phillip) and Ms Thandeka Mothibe. Phillip supports the application. Ms Thandeka Mothibe has filed an opposing affidavit and maintains that the Respondent company should be placed under business rescue as contemplated in Section 131 (4) of the Companies Act 71 of 2008.

[3] It is not in dispute that the Respondent is indebted to the Applicants in the amount set out above. It is also not in dispute that Ms Mothibe is an affected person as envisaged in Section 128(1)(a) of the Companies Act 71 of 2008 and so is entitled to seek that the Respondent be placed in business rescue.

[4] The Applicants are the duly authorised Trustees of Multichoice Enterprise Development Trust and are cited in their capacities as such.

[5] On the 30th October 2018 the Trust entered into a loan agreement with the Respondent in terms of which the Trust loaned and advanced to the Respondent an amount of R34 266 393.00 which amount was to be repaid by the Respondent in monthly instalments of R6 853 278.60 with effect the 31st March 2021. That date was extended to 30th September 2021 by agreement.

[6] This matter is about the competing rights of a creditor who seeks relief in terms of Section 344 (f) of the Companies Act 1973 on the basis that the Respondent is unable to pay its debts as envisaged in Section 344(f) read with Section 345 (i) alternatively on the basis that it is just and equitable to place the Respondent under a winding up order an envisaged in Section 344 (h) of the 1973 Companies Act.

[7] Competing with the creditor's rights stated above is the right asserted by Mr Mothibi in her capacity as a shareholder that the Respondent should be placed under supervision and that business rescue proceedings be commenced.

[8] Ms Mothibi the intervening party through her counsel conceded that in the event this court should find that she has not made a case for

business rescue then the Respondent should be placed under final liquidation.

[9] The Applicants do not dispute that Ms Mothibi is an affected person as envisaged in Section 128 (1)(a) of the Companies Act 2008 and is accordingly entitled to seek that the Respondent be placed in business rescue.

[10] The Respondent's indebtedness to the Applicant is founded in the loan agreement concluded between the Applicant (Trust) and the Respondent on the 30th October 2018. I set out hereunder those clauses in the loan agreement on which this application is based. These appear and are succinctly summarised in the Applicants founding affidavit.

[11] Clause 1.1.10 of the agreement contains a definition of material adverse change as being a change in the circumstances existing on or before the signature date, which the lender in its sole discretion considers to have undesirable effect on:

a) The business; operations; property condition (financial or otherwise) or prospect of the borrower; or

b) The ability of the borrower to perform its obligations under this agreement; or

c) Legality or validity of this agreement or the rights or remedies of the lease.

[12] In terms of clause 3.3 of the loan agreement the Respondent agreed to keep full and complete records indicating the manner in which the loan amount has been used and whenever requested by the Applicants to promptly provide the Applicants with such records including but not limited to the Respondent's audited financial statements and any other material information in relation to the Respondent's financial affairs as the Applicants may request.

[13] In terms of clause 3.5 the Respondent agreed to furnish the Applicant with copies of its monthly management accounts signed by the Respondent and the Financial Manager as soon as they become available.

[14] Clause 7 which is the breach clause tabulates a number of instances of breach which if not remedied within a specified time triggers the cancellation clause and grants the Applicant the right to accelerate and call up the full balance owing at that stage.

[15] It is common cause that during the latter part of the year 2020 Seleke and Mothibi the only shareholders and sole directors of the

Respondent became embroiled in various disputes which ultimately led to the Respondent company not being able to trade.

[16] The Applicant says the two directors are not on speaking terms and communicate with each other via their attorneys. They have deadlocked and have not been able to even pay their staff since March 2021. They are embroiled in litigation in the High Court which is still pending.

[17] So for intends and purposes the Respondent Company has become dormant, it has no employees and is in financial distress. The issue is whether to accede to the intervening parties argument that the Respondent Company be placed under business rescue or whether it should be liquidated finally.

[18] Section 131(1) and 131 (4) of the Companies Act provides that:

(i) 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.

(4) After considering an application in terms of sub-section (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;

iii) It is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect of rescuing the company.

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

[19] For the Intervening party Ms Mothibi to succeed she must establish in her founding affidavit grounds that there are reasonable prospects of rescuing the company by placing it under supervision and business rescue so as to enable the company to continue existing on a solvent basis.

[20] The Intervening Party must in my view prove three things namely:

i) That the company is in financial distress.

ii) That the company has failed to pay over amounts due in terms of a contract.

iii) That it is otherwise just and equitable to place the company under supervision as there are reasonable prospects of rescuing it.

[21] There is no dispute as regards to first two hurdles namely financial distress as well as failure to meet financial commitment in accordance with contract. The problem is with the last requirement namely whether there are reasonable prospects to place the company under business rescue because it is just and equitable.

[22] The meaning of a "reasonable prospect" was summarised as follows:

On Appeal in the matter of **Oakdene Square Properties (Pty) Ltd vs Farm Bothas Fontein (Kyalami) (Pty) Ltd 2013 (4) SA 539 (SCA)** Brand JA said the following:

> "As a starting point it is generally accepted that it is a lesser requirement than the "reasonable probability" which was the yardstick for placing a company under judicial management in terms of Section 427 (1) of the 1973 Companies Act (See for example **Southern Palace Investments 265 (Pty) Ltd vs Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC) at paragraph [21].** On the other hand, I believe it requires more than a mere 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 speculation suggested is not enough."

[23] In **Propspec Investment vs Pacific Coasts Investments 97 Ltd 2013 (1) SA 542 (FB) at paragraph 11** the court concluded as follows:

> "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."

[24] In short the Applicant must establish grounds for the reasonable prospects of achieving one of the two goals in Section 128 (1) (b) which are firstly to develop a plan aimed at restoring the company as a solvent going concern and if that is not possible to facilitate a better deal for creditors and shareholders than they would rescue in a liquidation process.

[25] The question is, has the Intervening party Ms Mothibi established the factual basis in her founding and answering affidavit to place this Court in a position to exercise its discretion whether or not to place the Respondent under business rescue.

[26] Her argument and reasons for the application begin at paragraph 30 of her founding affidavit. She starts off by conceding that the breakdown of trust between her and Seleke is a stumbling block to the success

and recovery of the company. She in fact describes that situation as a "fundamental stumbling block".

[27] This Court agrees totally with that conclusion. I may add that it is a situation that can be described as a deal breaker. There is no evidence that this deadlock situation is about to end. In the event that business rescue proceedings are finalised and for some reason or other the Company is back on its feet, the deadlock situation will still be in existence and the company will once more revert to its present state. Counsel for Ms Mothibi argued that the business rescue practitioner has the power to sell the company as a growing concern. The problem with that is it is not in the founding papers that the company should be sold. It is also nowhere in the heads of argument. What has been proffered throughout is that the probability of the one shareholder buying out the other without setting out how that would be achieved. There is evidence that that aspect has been traversed and it has failed.

[28] The next reason she puts forward is to be found in paragraph 33 wherein Ms Mothibi says the following:

> "I have obtained letters of intent, not only for funding of KSO to be structured as post commencement finance in the business rescue, but also clear intention of contracting the services of KSO independently from Multichoice Group of Companies. I attach hereto two letters of intent received from Intelsat and the Technology Innovation Agency respectively marked "TM4" and "TM5".

[29] There are two problems with the two annexures. Firstly, they are not commitment but proposals still to be discussed. Secondly Intelsat has now distanced itself from the so-called commitment. There is accordingly no evidence of any financial commitment by an outside source to inject funding into the business of the company. Ms Mothibi had earlier in her affidavits in a related matter intimated that she possesses financial guarantees. She has unfortunately up to now not produced any evidence of those financial guarantees.

[30] Brand JA in the **Oakdene Square Properties (Pty) Ltd vs Farm Bothas Fontein** (supra) added that:

> "more over 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 requires that it must do so in its founding papers."

[31] What Ms Mothibi has placed before this Court in her application for business rescue are vague averments and speculative suggestions See: **Propspec Investments vs Pacific Coast Investment** (supra). Before this Court can exercise a discretion whether or not to place the Respondent under business rescue it is necessary for Ms Mothibi to establish in her affidavit a factual basis that there are reasonable prospects for rescuing the company.

[32] I am persuaded that Ms Mothibi has failed to establish any grounds to support her contention that there are reasonable prospects that the Respondent will be rescued. She as a director and Shareholder and employee of the company should have been in a position to set out in her founding affidavit facts including financial information to demonstrate that there are reasonable grounds for rescuing the Respondent. She has failed to do so and her application falls to be dismissed.

[33] The common cause facts in fact point out to the contrary and demonstrate that there is no point of return for the Respondent it is headed for liquidation. Such common cause facts include this deadlock situation between Mothibi and Seleke, criminal charges have been laid on the basis that she contends that Seleke fraudulently removed her as a director, the ongoing high court litigation between the two directors does not augur well for the Respondent continuing to be in business, the Respondent has not conducted any business transaction since March 2021 and all the employees have left the company. The company has no work streamlined for it to survive.

[34] I am persuaded that the Respondent should be placed under final liquidation as a result of the following undisputed facts:

34.1 The Respondent is indebted to the Applicant in the amount of R34.2 million which amount became due and payable.

34.2 Despite demand in terms of Section 345 of the Companies Act the Respondent had been unable to pay this debt.

34.3 The fact that Ms Mothibi is applying for business rescue is proof that the company is in financial distress (See: **Trinity Asset Management (Pty) Ltd vs Grindstone Investment 132 (Pty) Ltd [2015] JOL 32886 (WCC)**. Employees have not been paid since March 2021.

34.4 The Respondent is factually insolvent in that its liabilities exceed its assets. This is confirmed by Ms Mothibi herself in paragraph 8.1 of her replying affidavit wherein she says that the Respondent has assets of R26.5 million. This clearly means that the assets are less than the debt due to the Applicants which presently stand at R34.2 million.

34.5 In the circumstances and in my view it is just and equitable to wind up the affairs of the Respondent and as Tsoka J said in **Wellman v Marcelle Props 193 CC and Another 2012 [ZAGPJHC 32 (24 February 2012) paragraph 28**:

> "Business rescue proceedings are not for terminally ill Close Corporations nor are they for the chronically ill. They are for ailing corporations which given time will be rescued and become solvent."

[35] The Respondent company has steadily moved over time from ailing to chronically ill and it is now at its terminal stage and there are no prospects of reviving it.

[36] In the result I make the following order:

ORDER

[1] The application to place the Respondent under business rescue is dismissed.

[2] The Respondent is hereby placed under final winding up.

[3] The costs of this application shall be the costs in the winding up.

DATED at JOHANNESBURG this the 11 day of APRIL 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING	:	14 FEBRUARY 2022
DATE OF JUDGMENT	:	11TH APRIL 2022
FOR APPLICANT	:	ADV GILBERT
INSTRUCTED BY	:	WEBBER WENTZEL ATTORNEYS
FOR INTERVENING PARTY	:	ADV W BEZUIDENHOUT
INSTRUCTED BY	:	MESSRS BURNETT ATTORNEYS