GAUTENG DIVISION, JOHANNESBURG

(COMMERCIAL COURT)

CASE NO: 21033/2021

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

8 June 2022 .....

SIGNATURE

In the matter between:

CESMAN, HAROLD N.O	First Applicant
BESWICK, SANDRA N.O.	Second Applicant
And	
R AND R WHOLESALERS AND DISTRIBUTORS CC	First Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
PILLAY, PATHMANATHAN MADEVARAJAN	First Intervening Party
MOBILE TELEPHONE NETWORKS (PTY) LTD	Second Intervening Party

JUDGMENT

SPILG, J:

8 June 2022

INTRODUCTION

1. This is an application brought by the joint business rescue practitioners ("*the BR practitioners*") to bring an end to the business rescue ("the BR") proceedings in respect of R & R Wholesalers CC ("*R&R" or "the Corporation"*) and place it under final winding-up in terms of s 141(2)(a)(ii) of the Companies Act 71 of 2008 ("*the Act")*

2. The application is opposed by Mr. PM Pillay who is the sole member of R&R. He has also brought a counter-application, effectively seeking to continue with the BR and stay a winding-up until the outcome of a dispute with MTN based on alleged prohibited conduct, which he asks the court to refer to the Competition Tribunal for determination. [1]

3. MTN which is the single largest creditor has also intervened. It does so in support of the winding-up.

4. R&R's business was the purchase of prepaid airtime vouchers at a discount from cellular service providers for on-sale through stores and informal vendors.

5. On 28 January 2021 Pillay passed a resolution placing the Corporation under BR. The resolution was filed with the Companies and Intellectual Property Commission on 4 February 2021. The BR practitioners were appointed shortly after that.

6. Sometime between the passing of the resolution to place R&R under business rescue and the appointment of the BR practitioners the corporation ceased trading and since then has not done so.

7. According to the BR practitioners, the Corporation is indebted to its creditors in excess of R500 million. MTN's claim is for R330 million. The next largest creditor is Telkom for R90 million. ABSA Bank is owed some R86 million and holds a cession of R&R's debtor book with the result that it is entitled to appropriate all revenue that might be received up to that amount should the Corporation recommence trading.

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[1] Pillay's Heads of Argument para 3

GROUNDS FOR INVOKING SECTION 141 (2)(a)(ii) OF THE ACT

8. The BR practitioners contend that in terms of s 141(2)(a)(ii) they are obliged to discontinue the BR proceedings and place R&R under final winding-up.

The section reads:

> *(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*

9. The BR practitioners point out that R&R has not traded since at least the time they were appointed, which also means that no employees will be affected by the Corporation's demise, that the half a Billion Rand owed to creditors continues to attract interest and that no business plan has been put forward which has any prospect, let alone a reasonable prospect as required by the Act, of rescuing the Corporation. They are supported in this by MTN.

WHETHER THERE IS ANY VALID GROUND TO OPPOSE THE APPLICATION

10. In his heads of argument *Mr. Zimerman* submitted on behalf of Pillay that due to MTN violating the Competition Act 89 of 1998 ("the Competition Act ") the Competition Tribunal will order MTN to remedy its unlawful conduct and require the latter to supply airtime "*at*

rates which do not constitute a margin squeeze for distributors … and treat all distributors equally".

In other words, Pillay wants the court to refer MTN to the Competition Tribunal in the expectation that it might compel MTN to accord R&R more favourable trading terms and in order for that to eventuate, requires the BR proceedings to continue. There is no tender of payment nor any viable plan put forward to pay creditors the difference between their claims and the amount by which MTN may be found to have acted anti-competitively in relation to other distributors (which is disputed by MTN) and which would still run into well over R100 million or the interest that continues to accrue on it.

11. Even if the effect of the order sought by Pillay can be construed as a business plan for the purposes of s 128(1)(b)(iii), which I very much doubt, and even if this court can in the present circumstances competently refer the matter to the Competition Tribunal or the Tribunal has the jurisdiction to come to R&R's assistance in the manner contended for (points which were disputed by the other parties)[2], such a plan is not one which by any stretch of the imagination;

    a. has a reasonable prospect of rescuing the company as envisaged by s 141(2) ((a);

    b. has any prospect of maximizing the likelihood of R&R 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*" as required under s 128(1)(b).[3]

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[2] Adv. Acker relies on s 65 of eth Competition Act which requires that the issue has not been raised in a frivolous or vexatious manner and, more importantly, that the resolution of the issue *" is required to determine the final outcome of the action"*.

[3] s 128(1)(b) defines business rescue as:

"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*

12. The main reasons for so concluding are that;

a. R&R is *de facto* not trading. It has no employees and admits that it is dormant.

Accordingly the issue is not about the survival of a legal entity for the purposes envisaged by Chapter 6 of the Act; namely the efficient rescue and recovery of financially distressed companies in a way which balances the rights and interests of all affected parties. The affected parties as defined in terms of s 128(1)(a) are employees (or their representative trade union if applicable), creditors and holders of company's securities. [4]

With no employees falling within the equation, it is difficult to see how the rights and interests of a sole member to preserve the existence of a corporation can outweigh the rights and interests of creditors in circumstances where, as will be demonstrated, the corporation has no prospect of meeting within the foreseeable future even the liability which Mr. Pillay is prepared to admit, and where interest on such admitted amount continues to be incurred by a business which does not trade.

Pillay claims that he can open up shop tomorrow as he does not need premises and has all the required equipment and infrastructure. In the most profound way R&R is a one man show and nothing more than the alter ego of Pillay alone.

b. R&R admits that it is only capable of re-opening "*if the right conditions are imposed on MTN by the Competition Tribunal and/or this court.*" [5]

This submission exposes Pillay's attempt to bring a legal challenge to liability *via* the back door in circumstances where;

i. he was responsible for passing the very resolution which placed R&R under business rescue based effectively on the admission that it was financially distressed because it was unable to pay its creditors. He did not contend at the time, as one would have expected, that any of the

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in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."

[4] See also ss 144 to 146

[5] Pillay's Heads of Argument para 13

debts were disputed or that he intended pursuing a complaint before the Competition Tribunal. This is therefore an afterthought as amply demonstrated in the arguments presented by *Ms. Acker* and *Mr. Bham* on behalf of the BR practitioners and MTN respectively;

ii. prior to placing the Corporation under BR he and the Corporation had the opportunity to bring the issue before the Competition Tribunal but did not do so. He therefore had the opportunity and cannot now claim that a winding-up would frustrate his ability to do so

iii. even if MTN had discriminated against R&R in the way it discounted airtime to wholesalers then, at best, R&R would remain indebted to its creditors in hundreds of millions of Rand excluding interest with no business plan that has a reasonable prospect that R&R of rescuing the corporation;

iv. it is not disputed that at present R&R has no supply agreement with any cellular service provider for airtime vouchers. In other words, its *raison d'etre* no longer exists since it cannot acquire stock for on-sale. This puts paid to Pillay's speculative attempt to suggest in his forecast that the corporation will generate in excess of R131million revenue per month.

In the result, even if there is a favourable outcome before the Competition Tribunal, Pillay has not demonstrated a reasonable prospect that R&R can be rescued.[6]

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[6] See generally *Ziegler South Africa (Pty) Ltd v South African Express Airways SOC Limited and others* 2020 (4) SA 626 (GJ) at para 51. See also the criteria set out in Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 WCC) which clearly have not been met. See at para 24 of the judgment

13. Earlier I mentioned that the corporation has no prospect of becoming a viable business within the foreseeable future even at the reduced liability as contended for by Mr. Pillay. This is because Mr. Zimerman was compelled to concede that the business plan would require a moratorium on the repayment of existing liability and that the existing debt would, on the most optimistic (and unrealistic) outcome, require repayment over 5 years- a period which itself excludes the two or so years it would ordinarily take for the Competition Tribunal to deal with the matter.

14. In a material way Pillay was compelled to change tack. Instead of only making out a case that there was a viable business plan, he was obliged to also submit that the BR proceedings should be stayed pending the outcome of a decision by the Competition Tribunal.

15. This brings into focus the default position of BR proceedings. By their nature they are meant to have a limited life span. BR either achieves the objective of placing the corporation back on its feet with a viable business plan which is then voted on by creditors or else the corporation must be would up. The time allowed for achieving the former is six months unless good cause is shown. If it is evident that this will not occur, then the BR practitioner is obliged to apply to court expeditiously for the corporation's winding-up.

In *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC) Binns-Ward J said at para 10:

> *"It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings — however dubious might be their prospects of success in a given case — materially affects the rights of third parties to enforce their rights against the subject company."*

16. In the present case the BR commenced on 4 February 2021. The only business plan proposed is one whereby the company can obtain MTN airtime for on-sale at a better discount rate than it previously enjoyed. This would not only require MTN to provide a better rate but there would also have to be a moratorium placed on the repayment of the existing debt owed to it by R&R and for that matter the other creditors. Needless to say there would also have to be the prospect that MTN or another service provider would supply airtime vouchers going forward.

    MTN is not prepared to do either. Absent agreement the question is whether there is any other basis on which the company can continue in business rescue, bearing in mind that that the corporation's controlling mind was responsible for placing it under business rescue thereby admitting that it was financially distressed but could come up with a reasonable plan to either obtain capital or trade its way out of debt[7]. Pillay has produced neither.

    No case is made out by Pillay that a court, or Competition Tribunal for that matter, can compel MTN or any other service provider to supply it going forward.

17. Accordingly, and having regard to the fact that R&R is factually and commercially insolvent, there is no basis on which the court should exercise its discretion to continue with BR proceedings.

18. Insofar as the application for a stay pending the outcome of proceedings before the Competition Tribunal is concerned, there is similarly no basis on which the court should exercise its judicial discretion in favour of doing so.

    Aside from the basic principles that BR proceedings must achieve the expeditious return of the company to solvency failing which it is to be wound up, the reason for R&R finding itself in the position it did has more to do with the way in which Pillay conducted its affair by utilising R&R funds in affiliated loss making entities. The stay is sought to enable the Competition Tribunal to investigate complaints against MTN. The outcome cannot realistically affect the parlous state of R&R which has already closed shop. It therefore is

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[7] BR proceedings are intended provide a moratorium, or breathing space, in respect of legal proceedings to enable the BR practitioner to re-organise the affairs of the corporation. Adv. Acker referred the court to *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a WesBank* 2015 (3) SA 438 (SCA) at para 14 and *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 28

unnecessary to consider the further argument advanced by the BR practitioners that the requirements of s 65 of the Competition Act have not be satisfied.

19. Finally, it is not disputed that all the statutory requirements for a final winding-up have been met.

COSTS

20. The BR practitioners request that the costs be costs in the winding-up save that Pillay be held jointly and severally liable to pay them.

21. I am of the view that Pillay abused the BR process. He had no business plan and had expected a docile BR practitioner. When it was evident that there was no viable way to pursue a BR, Pillay looked for a way out. Irrespective of whether MTN may or may not have discriminated unfairly against R&R (and the Competition Tribunal threw out a similar complaint by another dealer) the best outcome is a Pyrrhic one, since R&R will remain factually and commercially insolvent in amounts well over R100 million with no prospect of recovery through capital injection or otherwise.

22. In my view the *dicta* of Wallis JA in Van *Staden N.O. and others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) are apposite. At para 22 the court said:

> *"It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals, a punitive costs order is appropriate. "*

23. BR proceedings should not have been brought while a winding up in the ordinary course would have been inevitable. While maintaining fairness and in order to avoid the difficulty of

determining whether any particular opposed cost should properly be allocated to the BR proceedings or the winding up or the counter-application (which was really based on the same arguments raised by Pillay in the main application) the order sought by the BR practitioners appears most appropriate in the circumstances.

ORDER

24. I accordingly order that:

1. *The business rescue proceedings in respect of the First Respondent are hereby discontinued*

2. *The First Respondent is hereby placed under final winding-up in the hands of the Master*

3. *The counter-application is dismissed*

4. *The costs of the applicants and the Second Intervening party, i.e. MTN, in the business rescue, the winding-up proceedings and the counter-application are costs in the winding up, for which costs the First Intervening party, Mr. Pillay, will be jointly and severally liable on the party and party scale, the one paying the other to be absolved. The costs include the costs of counsel but are limited to the engagement of a single senior counsel for each party.*

SPILG, J

DATE OF JUDGMENT:	8 June 2022
FOR APPLICANTS:	Adv. L Acker
	Elliott Attorneys
FOR FIRST INTERVENING PARTY:	Attorney R Zimerman
	Taitz & Skikne Attorneys
FOR SECOND INTERVENING PARTY:	Adv A E Bham SC
	Adv NC Ferreira
	Webber Wentzel