REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: 2023/080710

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
10.02.2025 [redacted]
DATE SIGNATURE

IN THE MATTER BETWEEN:

SANA DEVELOPERS (PTY) LTD	1st APPLICANT/ RESPONDENT
MAHOMED MAHIER TAYOB N.O	2nd APPLICANT/ RESPONDENT
AND	
NEDBANK LIMITED	RESPONDENT/ APPLICANT

JUDGMENT [LEAVE TO APPEAL]

SIWENDU J

[1] The applicants, Sana Developers (Sana Developers) and the business rescue practitioner, Mr Tayob (Mr Tayob) were the respondents in the application *a quo*. They seek the Court's leave to appeal against its judgment rendered on 23 October 2024 in favour of Nedbank Limited (Nedbank). Nedbank was the applicant *a quo* and is the respondent in this application. The leave to appeal is brought in terms of section 17(1)*(a)(i)* of the Superior Courts Act[1].

[2] Section 17(1)*(a)(i)* stipulates that a leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal *would* have a reasonable prospect of success. Courts have repeatedly affirmed the import of the provision limits the right to appeal cases whether there *would* be reasonable prospect of success. The test is "stringent" and the section "raises the bar" for the criterion for granting leave to appeal.[2]

[3] In the present case, the Court concluded that Nedbank was entitled to the order both under section 130(1*)(a)(ii) or (iii*) of the Companies Act[3] (the Act) and on the alternative ground in section 130(5*)(a) (ii)* on the basis that it is just and equitable to set aside the resolution placing Sana Developers in business rescue. The Court granted a *provisional* order for the liquidation which included consequential orders:

i. Setting aside the resolution placing Sana Developers under supervision;
ii. Terminating the rescue proceedings;
iii. Finding on the facts that the jurisdictional requirements for reasonable prospect of successfully rescuing Sana Developer have not been met; and
iv. Directing the filing of further affidavits to oppose the final order.

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[1] 10 of 2013.
[2] *Erasmus Superior Court Practice at* RS 2, 2024, D-101 (see also *Matoto v Free State Gambling and Liquor Authority* (unreported, FB case no 4629/2015 dated 8 June 2017) at para [5]) referred to.
[3] 71 of 2008.

[4] Counsel for the applicants confirmed that the application for leave to appeal is confined to specific orders granted by the court, namely the order:

i. Admitting Nedbank's supplementary affidavit dated 21 May 2024 into evidence.
ii. Placing Sana Developers under provisional liquidation.
iii. Terminating business rescue proceedings.
iv. Setting aside the resolution taken by the board of directors of Sana Developers on 17 April 2023, placing it under supervision and in business rescue, is in terms of sections 130(1*)(a)(ii*) and/or *(iii)* of the Act.
v. Declaring that the business rescue proceedings of the first applicant have come to an end in terms of section 132(2*)(a*) of the Act.

[5] The complaint is that Nedbank filed a supplementary affidavit without a formal application, which was admitted by the court. The applicants challenge the Court's exercise of the discretion to do so. They complain they were denied a request to postpone the liquidation proceedings as well as the opportunity to address the contents of the supplementary affidavit.

[6] As the judgment appealed against states, a court will exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. The qualification to the admission of further affidavits is that there should be no prejudice caused to the other party by the admission of the additional affidavits.[4] The circumstance for the admission of the further affidavit and the exercise of the discretion by the court have relevance, and are as follows below.

[4] *Ndlebe v Budget Insurance Ltd* 2019 JDR 0506 (GJ) at para [7].

[7] Nedbank alleged the commencement of the business rescue proceeding was a stratagem to avoid the sale of certain properties pursuant to their attachment on or about 23 March 2023, following an order obtained on 6 September 2022. Mr Tayob was appointed as the business rescue business practitioner on 19 April 2023.

[8] Mr Tayob purported to suspend the obligations of Sana Developers to Nedbank in terms of the loan agreements in terms of section 136(2) of the Act. As said, Nedbank, a secured creditor already had a judgment against Sana Developers in respect of the properties underpinning its security, which were the subject of the loan agreement. In addition, Nedbank held security by way of a cession of book debts over rentals of properties leased by Sana Developers. I was of the view that the purported suspension in the face of the judgment was irregular.

[9] Mr Tayob convened the first meeting of creditors, on 2 May 2023, but failed to produce a business rescue plan despite an extension granted to him to 5 July 2023. As at the date of the launch of the liquidation application in August 2023, (the subject of the orders appealed against), Mr Tayob had not published a business rescue plan nor sought an extension from creditors for the failure to do so. That conduct is not countenanced by the Act.

[10] Mr Tayob furnished the business rescue plan on 9 October 2023. The business rescue plan considered by the court was annexed to his answering affidavit opposing the liquidation application. As said, it was not published within the 25 business day period stipulated in section 150(5) of the Act nor within the reasonable period after the extension was granted. It was published approximately two months after Nedbank launched the application for liquidation.

[11] The injunction in the Act contemplates that business rescue proceedings should be conducted expeditiously. The Court rejected Mr Tayob's explanation for the delay and found his explanation implausible.

[12] Nedbank contended that on 17 May 2024, a few days before the hearing of the application for liquidation, Mr Tayob unilaterally amended, or in the language employed in section 153 (1*)(a)(i)* "revised the plan" (the business rescue plan annexed to his answering his affidavit) without the approval of the creditors. It is undisputed that although the revision was unauthorised, Nedbank attended the meeting out of caution and voted against the plan. It is indeed so that extracts of the revised plan formed part of the supplementary affidavit admitted by the Court.

[13] Rather than accept the rejection of the plan and file a certificate to terminate the proceedings, Mr Tayob informed the meeting he would avail to section 153 (1) *(a) (ii)*. The section permits him to apply to court to challenge Nedbank's vote against the plan as "in appropriate."

[14] It is this unauthorised plan, voted against by Nedbank, a creditor with 93,184% of the voting interest, that the applicants complain I should have granted the postponement for the applicants to address. It is on this basis that the applicants say the Court relied on "incorrect evidence" – that being "the original business rescue plan, which was attached to the answering affidavit."

[15] From the facts before the Court, the spectre of abuse of business rescue proceedings which have been decried by the courts in several decisions, and the prejudice to the major creditor loomed large. The revised plan surfaced on the eve of the hearing of the liquidation application. Nedbank anticipated Mr Tayob would seek a postponement to further delay the hearing of the liquidation application. At the time of the hearing, he had "threatened to challenge" the rejection of the plan. I did not understand that the application had been launched. He was required to do so within 5 days of the rejection of the plan.

[16] Significantly for the court, despite the request to investigate the issue the cession of book debts and the payment of monies due to Nedbank in respect thereof, Mr Tayob failed to collect monies due. He had no answer to this failure. It was suggested during argument that Nedbank's debt had been reduced. This too is not based on the true reason for the reduction of the debt owing. Nedbank exercised its rights to the security separately. The reduction of the debt did not flow from Mr Tayob's impartial and independent conduct of rescue proceedings expected of him under the Act.

[17] Accordingly, the discretion to admit the supplementary affidavit was judicially exercised in the circumstances. As will be apparent below, any prejudice that the applicants would likely suffer was ameliorated by the import of the orders granted.

[18] The applicants attack the Court's conclusion that Nedbank would have been entitled to the order under section 130(1)*(a)(iii)* of the Companies Act for a procedural irregularity. Further they say the Court ought to have found there is a reasonable prospect of rescuing Sana Developers based on the unilaterally revised business rescue plan. They say the Court erred in proceeding with the liquidation application "during the adjourned period contemplated by section 153(2)(a)", on the same day that the business rescue practitioner "had announced the intention" to seek a court order to set aside the applicant's vote.

[16] The complaints lack merit. The procedural irregularity in Ms Warren's affidavit, supported by correspondence, catalogued the complaint but was not challenged or disputed. In any event, section 130(1)*(a)(iii)* was not the sole basis for reaching the conclusion that Nedbank would be entitled to an order setting aside the resolution initiating business rescue and terminating the proceedings.

[17] Here, Nedbank's liquidation application was launched some months before the belated unauthorised attempts to revise the business rescue plan. An

announcement of an intention to challenge a vote against the plan is of no moment. Section 153(2*)(a)* does not provide an additional moratorium to a rescue practitioner. It does not a bar an aggrieved affected person from instituting liquidation proceedings.

[18] I must add that when asked about the fate of the challenge to the rejection of the plan during the hearing of this appeal, it was clear to the court that there have been no steps to prosecute it expeditiously.

[19] I turn to whether I should grant leave to appeal. The question is whether the applicants would have a reasonable prospect of success on appeal. As put to Counsel for the applicants, I must be satisfied that the decision in respect of which leave to appeal is sought is appealable. The often cited test in *Zweni v Minister of Law and Order*[5] makes it plain that the order appealed against must be:

i. final in effect and not open to alteration by the Court of first instance
ii. definitive of the rights of the parties; and
iii. lastly, have the effect of disposing at least a substantial portion of the relief claimed in the main proceedings.

[20] I accept that the interests of justice have been infused with the above considerations.[6] Fundamentally, the flexible and pragmatic approach propounded in *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS*[7] still applies. As stated in *Zweni* whether the appeal will lead to a just and reasonably prompt resolution of the real issue between the parties is an important factor.

[21] Counsel sought to contend that each of the orders should be construed in discrete parts. I disagree with this segmentation. In my view the granting of the provisional order for liquidation is linked inextricable with the finding on the

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[5] 1993 (1) SA 523 (A).
[6] *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) at para [40].
[7] 2010 (6) SA 469 (SCA).

prospect of success in rescuing Sana Developers. The same reasons for granting the provisional order impact whether Sana Developers can be rescued. Importantly, the provisional order has not been rendered final or discharged.

[22] In this case, the construction of the judgment and order appealed is material. The often cited decision in *Firestone South Africa (Pty) Ltd v Genticuro*[8] makes it plain that:

"The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules …

Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it."

[23] Although Nedbank sought a final order for liquidation, the Court granted a provisional order for liquidation to safeguard the interests of all affected persons including the applicants. Notwithstanding the conduct which is not in keeping with the objects of business rescue and flagrant disregard of the requirements, the Court in its Judgment states the following:

"I am minded that Professors Patrick O'Brien and Juanitta Calitz express the view that the requirement of a reasonable prospect for rescuing the company is a continuous one that applies to business rescue from birth to death." By implication Mr Tayob can present facts pointing to the availability of post commencement finance to answer Nedbank's supplementary affidavit. Pending that, and without pronouncing on the correctness of the application, under section 153, or the right of an affected person to bring the business rescue proceedings, that right is not a bar to the provisional order Nedbank seeks as a security holder nor a legitimate basis for a postponement of this application." [emphasis added]

[8] 1977 (4) SA 298 (A) at 304 para D-F.

[24] Accordingly, a final word has not been spoken on the fate of Sana Developers. The applicants were not left remediless or prejudiced by the orders. The Court availed them the opportunity to answer the supplementary affidavit and present any new information before the Court to dispel and rebut the *prima facie* view forming the basis for the provisional liquidation order.

[25] In the parlance in *Zweni*, a leave to appeal will not result if it will not lead to "a just and reasonably prompt resolution of the real issue between the parties." Here, leave to appeal will not dispose of all the issue between the parties. The court order is not final and definitive of the rights of the applicants. It could hardly be in the interest of justice to grant the leave to appeal in this case.

[26] In the result, I make the following order

a. The Application for leave to appeal is dismissed.

b. The applicants are ordered to pay the costs of the application jointly and severally at Scale C.

[redacted]
NTY SIWENDU
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment is handed down electronically by circulation to the Plaintiff's Legal Representative and the Defendant by email, publication on Case Lines. The date for the handing down is deemed 10 February 2025

Date of appearance: 29 January 2025
Date Judgment delivered: 10 February 2025

Appearances:

For the Applicants: Advocate Mathopo

Instructed by: Mayet Attorneys Inc

For the Respondent: Advocate De Oliveira

Instructed by: KWA Attorneys