REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

Signature .....

Date 29/6/2018

CASE NO: 3437/2018

In the matter between:

SIBUSISU KHEHLA PETRUS MAPALAKANYE	**First Intervening Applicant**
BENJAMIN ADRIAAN SCHLEBUSH	**Second Intervening Applicant**
JOHANNA JACOBA SCHLEBUSH	**Third Intervening Applicant**
DAVID STEPHANUS LUBBE	**Fourth Intervening Applicant**

In re:

JOSEPH KARABO MAPALAKANYE	**First Applicant**
NTHABISENG EMELY MAPALAKANYE	**Second Applicant**

and

BORN-TO-PROTECT SECURITY SERVICES (PTY) LTD (IN LIQUIDATION)	**First Respondent**
DEON MARIUS BOTHA NO	**Second Respondent**
MARYNA ESTELLE SYMES NO	**Third Respondent**
AYESHA AYOB NO	**Fourth Respondent**

JUDGMENT

MAKGOBA JP

[1] The Applicants brought an urgent application in terms of section 131(4) read with section 131(7) of the Companies Act, 71 of 2008 to place the First Respondent in business rescue. The First Respondent Company, Born-to-Protect Security Services (Pty) Ltd (In Liquidation) ("the Company") was placed in final liquidation by order of this Court on 11 May 2018. Pursuant to this Court order the parties cited as Second, Third and Fourth Respondents herein were appointed joint provisional liquidators of the Company.

[2] This application is launched by Mr Joseph Karabo Mapalakanye and Mrs Nthabiseng Emily Mapalakanye, the First Applicant and the Second Applicant respectively. The Applicants were employees of the First Respondent at the date of the final liquidation of the First Respondent.

[3] The First, Second, Third and Fourth Intervening Applicants are all employees of the First Respondent. The proceedings for the final liquidation of the First Respondent were instituted by the four Intervening Applicants.

The liquidation order was granted on the ground that the Company (First Respondent) is factually and commercially insolvent and unable to pay its creditors including its employees.

[4] In the present application the following facts are common cause:

4.1. The Applicants, as employees of the Company are the interested and affected persons as contemplated in section 128(1)(a) of the Companies Act, 2008 and thus have the necessary *locus standi* to bring the application for business rescue.

4.2. The First Respondent Company is financially distressed and apart from that failed to make payment to its employees in terms of a contract of employment.

[5] What has to be assessed or determined therefore is whether there is a reasonable prospect for rescuing the First Respondent. Section 131(4) of the Companies Act provides that the Court may, after considering an application for business rescue in terms of section 131(1) make an order placing the Company under business rescue proceedings if the Court is satisfied that the Company is financially distressed and there is a reasonable prospect for rescuing the Company. It is quite evident that this subsection grants a Court a discretionary power to issue or refuse an order for the business rescue of a Company.

[6] The Company in the present case is already in liquidation pursuant to the order of this Court on 11 May 2018. The question arises as to whether a Company in final liquidation can still be placed into business rescue. This question was authoritatively answered in the case of **Richter v ABSA Bank Ltd 2015 (5) SA 57 (SCA)**.

[7] In that case the Supreme Court of Appeal decided that:

Section 131(6) of the Companies Act 71 of 2008 provides that if liquidation proceedings have already been commenced by or against the Company at the time an application for business rescue is made, the application will suspend those liquidation proceedings. The term "liquidation proceedings" does not refer only to a pending application for a liquidation order but includes the process of winding-up of a Company after a final order has been granted, i.e it includes proceedings that occur after a winding-up order to liquidate the assets and account to creditors, up to deregistration of a Company.

[8] Accordingly, it is trite that even if a Company has been finally liquidated it is still competent for the Court to grant an order for business rescue in terms of section 131(4) of the Companies Act, 2008.

[9] In order to succeed with an application to procure an order for business rescue, an Applicant is required to establish more than a prima facie case or an arguable possibility that the Company may be rescued. The prospect for business rescue must be a reasonable prospect, with the emphasis on "reasonable". It means that it is a prospect based on reasonable grounds. A mere speculative suggestion is not enough.

See **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) at para [29] and [30].**

[10] The requirement is "a reasonable prospect" which is a lesser requirement than the "reasonable probability". Some reported decisions laid down, however, that the Applicant must provide a substantial measure of details about the proposed plan to satisfy this requirement. (See **Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) paras 24-25; Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others 2012 (2) SA 378 (WCC) para 18-20**)

[11] In considering the above two decisions of the Western Cape High Court, Van der Merwe J commented as follows in **Propspec Investments (Pty) Ltd v Pacific Coast Investments (Pty) Ltd and Another 2013 (1) SA 542 (FB) at para 11-12**:

"[11] 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. But with respect to my learned colleagues, I believe that they place the bar too high.

[12] In my view, a prospect in this context means an expectation. An expectation may come true or it may not. It therefore signifies a possibility. A possibility is reasonable if it rest on a ground that is objectively reasonable. In my judgment, a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds."

[12] I agree with Van der Merwe J that the discretion to make an order for business rescue in terms of section 131(4)(a) arises whenever the facts show that the Company is financially distressed and a reasonable possibility of the Company continuing to exist on a solvent basis or of a better return for creditors or shareholders than would result from the immediate liquidation of the Company.

[13] It is clear from the scheme of the Companies Act that there can be in a business rescue one of the two objects. The prime object is to rescue the

Company and to return it to business as a solvent entity. The secondary goal is, even if the Company will not survive and return to trading, a business rescue can still be achieved if it would result in a better return for creditors. These two objectives will be borne in mind when deciding the fate of the Company (First Respondent) in this case.

[14] Mr Diamond, Counsel for the Applicants argued strenuously that a case has been made out for the granting of the business rescue order. He argued further that by far the largest creditor of the First Respondent are its employees as a group and that they support this application. Counsel put much reliance on a decided case in this Division by Makgoba J (as he then was) in the case of **Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another 2014 (6) SA 214 (LP)**. I find it appropriate to quote the following paragraphs in the judgment on pages 220-221 relied upon by Counsel:

"[29] The aim of business rescue is to save a business, rather than destroy it. Business rescue is preferred to liquidation. See Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investents 386 Ltd 2012 (2) SA 423 (WCC). In Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others supra in para 14 it was said:

"It is clear that the legislature has recognised that liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant

destruction of wealth and livelihoods. It is obvious that it is in public interest that the incidents of such adverse socioeconomic consequences should be avoided where reasonably possible. Business rescue is intended to serve the public interest by providing a remedy directed at avoiding the deleterious consequences of liquidation in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or securing a better return to creditors than would probably be achieved in an immediate liquidation.

[30] The purpose of the business rescue plan need not be to save the company from liquidation and thus return the business to solvency. If the goal is just to ensure a better return for creditors than would be achieved in liquidation, such goal is a valid goal in terms of the Act. In the present case it is common cause that in the event of liquidation of the Applicant only the First Respondent, as a secured creditor, will get a dividend of R 0,45 in the rand and the rest of the concurrent creditors totaling about R 8 million will get no dividend at all.

The question then arises as to whether a business rescue plan is not an option worth trying.

[31] In Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) it was held that the Applicant for business rescue is bound to establish

reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, there is no reason why the proclaimed opposition should be ignored – unless, of course, the attitude can be said to be unreasonable or mala fide."

[15] Mr Van der Merwe SC, Counsel for the Intervening Applicants submitted that whilst the principles set out in **Copper Sunset Trading** might be good law, each case must be decided on its own facts. That the facts that prevailed in that case are dissimilar to the facts and circumstances in the present case. Accordingly, I shall proceed to analise the facts and circumstances in the present case in order to come to a conclusion whether a case has been made out for a business rescue order sought by the Applicants.

[16] It is common cause on the papers in this case and even in the papers relating to the application for liquidation of the Company that there were serious and gross irregularities in the Company's financial affairs. Certain individuals enriched themselves at the expense of the Company and its creditors. More than one thousand employees of the Company are owed several months' salaries to date hereof. In this application the Intervening Applicants have pointed out convincingly that a liquidator is, given the peculiar facts and circumstances, far better equipped to deal with the problems presented in the

Company as opposed to a business rescue practitioner in the business rescue sought by the Applicants.

[17] During the lifetime of the deceased owner of the Company, one Mr Phillip Mapalakanye who died on 16 June 2016, the Company was a successful enterprise in the security services industry. After the deceased's demise his three brothers took control and ran the business of the Company. There are well grounded suspicions that grave mismanagement took place while the three brothers as well as the Applicants in the liquidation application operated the Company. Thereafter the deceased's two sons and a sister got involved in the running of the business of the Company. The Company business went down and ultimately the Company went into liquidation.

[18] As matters stand now, the two Applicants in this application, being the deceased's son and the deceased's sister are clubbing together in an effort to rescue the Company whilst the other son, the First Intervening Applicant herein is clubbing with the other former employees of the Company (Second, Third and Fourth Intervening Applicant) to oppose the business rescue application and support the liquidation of the Company. In the light of such a family feud it is doubtful whether the Company can be rescued.

[19] It is important to have regard to the circumstances that led to the liquidation of the Company. An urgent application was brought for the liquidation of the Company on the basis that there was gross mismanagement. The Company was in a financial hardship, was mismanaged and hundreds of thousands of rands simply disappeared from the Company. Massive fraud was perpetuated by the management of the Company and large sums of money simply disappeared. Even when the application for liquidation was pending the looting of the Company funds proceeded unabated and numerous fraudulent payments were made from the Company's bank accounts.

[20] The assets of the Company have been plundered. With the aid of the liquidators it could be established that there are 199 vehicles belonging to the Company but they have procured possession of only 11 vehicles. The unpaid employees of the Company even resorted to violence by setting alight certain vehicles of the Company. The Company was losing its clients at a fast rate and disgruntled unpaid employees were resorting to protest action and self-help.

[21] The Intervening Applicants have expressed a reasonable fear that there is an ulterior motive behind the application for business rescue. They have shown convincingly that it is only an attempt by the erstwhile corrupt management to wrestle back control of the Company's bank accounts because the Company

is expecting a substantial payment in due course by a creditor. On their own version the Applicants expect payment of an amount of R 25 million rand from the erstwhile client, Transnet into the Company's bank account. Transnet has already cancelled its service agreement with the Company in December 2017. There are no prospects of acquiring such an anchor client like Transnet.

[22] The Applicants' further contention is that a Business Rescue Practitioner will do as good as a liquidator and that a business rescue will save employment opportunities. In their opposing affidavit the Intervening Applicants have pointed out the advantages of a liquidation and compared same with the disadvantages of a business rescue. Amongst others the following is stated:

22.1. A massive fraud was perpetrated upon the Company, its assets were dissipated and siphoned off to unknown destination, income was spirited away and it is only a liquidator that can properly deal with such a situation.

22.2. There are still many assets of the Company unaccounted for, many vehicles are still missing and also many firearms. A liquidator is well equipped to apply, even *ex parte*, to a Magistrate, for a warrant for search and seizure in terms of the provisions section 69 of the Insolvency Act, 24 of 1936 to search for and seize and attach assets suspected to be that of the insolvent estate. This a Business Rescue

Practitioner cannot do. This remedy is crucially needed in the Company's situation.

22.3. A Business Rescue Practitioner cannot conduct an enquiry. A Business Rescue Practitioner cannot procure a warrant for search and seizure. A Business Rescue Practitioner cannot deal with recalcitrant witnesses and cannot procure documents and evidence as a liquidator can do.

[23] The Supreme Court of Appeal judgment in **Oakdene** confirmed the judgment in the Local Division, Johannesburg in **Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2012 (3) SA 273 (GSJ)**. In the latter judgment the Court listed various factors which militated against a business rescue and which supported a liquidation, and those were the following:

23.1. A liquidator can realise assets as good as a Business Rescue Practitioner.

23.2. The foreseeability of future litigation militates against a business rescue and favour a liquidation. This is so because a liquidator can far better deal with pending litigation.

23.3. A liquidator can far better investigate alleged wrongdoing by management, because a Business Rescue Practitioner will be far less effective than a liquidator to unravel a complicated and intertwined conundrum.

23.4. In the event of a misappropriation of Company assets or funds, the interests of creditors, as opposed to that of the Company, should carry more weight.

23.5. There is no provision for the taxation of the fees, costs and expenses of a Business Rescue Practitioner, whereas a liquidator's costs are subject to taxation.

23.6. The impeachment provisions in the law relating to insolvency equip a liquidator far better to deal with alleged wrongdoing, if compared to the restricted powers of a Business Rescue Practitioner.

See **Oakdene** *a quo* para 49, p 287-290.

[24] The Intervening Applicants in this case have shown the disappearance of the Company substratum. They have shown that with the exception of only two remaining contracts, all other contractors with whom the Company had contracts had cancelled their contractual relationship with the Company. The remaining two contracts are being proceeded with by the provisional liquidators. The one contract will reach its expiry term by the end of June 2018 and the other contract will reach its expiry by the end of September 2018.

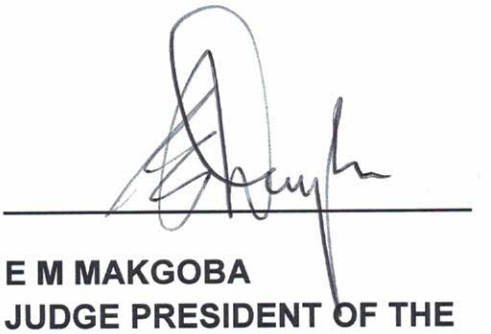
All the other parties with whom the Company contracted had indicated that they would no longer be interested to utilise the Company's services.

[25] In my view there are no reasonable prospects that in the event of a business rescue order being granted the Business Rescue Practitioner will be able to procure new contracts for the Company to continue its business operations. The goodwill of the Company has been dented. No reasonable business man will desire to do business with a Company that is emerging from liquidation. Liquidation in itself signals the death of a Company. There is no iota of evidence furnished by the Applicants to prove that a Business Rescue Practitioner will be able to revive the contracts or acquire new clients for the Company.

[26] I am inclined to believe that the real purpose behind the application for business rescue, in the circumstances of this case, is an endeavor by the Applicants to regain control over the financial affairs of the Company. I am of the view that it cannot be in the interests of justice to hand back control of the Company to those who made themselves guilty of gross mismanagement of the Company before liquidation. There is indeed a real and cogent fear that if the Company does not remain in liquidation assets will be dissipated, income will be siphoned off and money of the Company will be stolen, just as it happened before liquidation.

[27] In the result the application for business rescue fails and the following order is granted:

The Application is dismissed with costs.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	:	**26 June 2018**
Judgment Delivered	:	**29 June 2018**
For Applicants	:	**Adv. G J Diamond** **Adv. M Malatji**
Instructed by	:	**DIAMOND INC**
For Intervening Applicants:		**Adv. MP Van der Merwe SC**
Instructed by	:	**MCROBERT INC** **c/o Espag Magwai Attorneys**