REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 5639/2016

In the matter between:

G F LOOTS Applicant

And

NONGOMA MEDICAL CENTRE CC Respondent

And

ABSA BANK LIMITED Intervening Creditor

Heard on: 14 June 2016

Delivered on: 24 June 2016

JUDGMENT

BOQWANA, J

Introduction

[1] This is an application for business rescue proceedings in terms of section 131 of the Companies Act, No. 71 of 2008 ('the Act'). This application is one of

many proceedings that have been brought by the applicant ('Loots') together with others whom I will mention later in this judgment.

[2] The application is opposed by the intervening party ('ABSA') who was granted leave to intervene as a creditor on 25 May 2016. Gleaning from the Loots' heads of argument, ABSA's *locus standi* is placed in issue.

[3] The respondent ('Nongoma') is a close corporation currently in liquidation and Loots is of the view that Nongoma can be a viable business if it were to be placed under supervision in terms of the Act.

[4] Loots brings this application on the basis that he is a creditor of Nongoma and the owner of 100% of the membership interest in Nongoma which he purchased on 15 April 2014. In regard to his claim as a creditor, he alleges that he had a loan with Nongoma which stood at an amount of approximately R839 295.30 as at January 2011. This loan, he alleges, was in respect of rental income due to him for sub-letting a portion of the property of Nongoma which he loaned to Nongoma for purposes of payment of its obligations.

[5] In regard to his claim of ownership of 100% of the membership interest in Nongoma, Loots obtained a court order on 12 May 2015 ordering the Companies and Intellectual Property Commission ('CIPC') to amend its records so as to reflect him as Nongoma's sole member pursuant to failed attempts he made to the CIPC to register him as Nongoma's sole member. The CIPC has to date not effected such registration.

[6] As a result of the above assertions Loots contends that he is an 'affected person' as defined in s 128 (1)(a)(i) of the Act, which provides as follows:

> ' Business rescue proceedings
>
> 128. Application and definitions applicable to Chapter
>
> (1) In this Chapter-
>
> (a) "affected person" in relation to a company, means-
>
> (i) a shareholder or creditor of the company'

[7] ABSA alleges that this application has not been brought in good faith by Loots. It contends that the purpose of the application is not genuinely to rescue Nongoma from financial distress and liquidation. Its real purpose is to obtain the suspension of the liquidation proceedings in respect of Nongoma and for Loots' own personal benefit to enable him to further unlawfully collect rental from Nongoma's tenants that ABSA is entitled to. According to ABSA this amounts to abuse of court process. Loots' standing is also placed in dispute by ABSA.

[8] Before I deal with the contentions raised by the parties, it is convenient to start with the history of this matter and the role players involved.

Role players

[9] This matter has a long history and Loots has been central to many of the proceedings that have been brought before various courts dealing with issues surrounding Nongoma, some of which involved the loan agreement between Nongoma and ABSA.

[10] Nongoma is a property owning close corporation with its only asset being an immovable commercial property in Nongoma, Kwa-Zulu Natal. It presently has two members registered on the records of the CIPC being Anna Christina Barnard and Lionel Patrick Barnard ('the Barnards'). The Barnards allegedly left South Africa and are now living abroad.

[11] Loots is a medical doctor who resigned as a member of Nongoma during 2001. Another person who featured in many of the proceedings and in this current application is Hester Elizabeth Van Rooyen ('Van Rooyen'). Van Rooyen also resigned as a member of Nongoma during 2007. Van Rooyen is allegedly unemployed. Both she and Loots referred to each other as 'partners'.

[12] ABSA alleges that it is a secured creditor of Nongoma and holds a first registered mortgage bond over the immovable property of Nongoma situated at Nongoma, Kwa-Zulu Natal.

Factual background

[13] On 29 November 2010, ABSA issued summons in this Court against Nongoma as principal debtor and Van Rooyen and the Barnards as sureties for payment in the amount of R 792 850.68.

[14] Default judgment was granted against all the defendants on 19 September 2011. Van Rooyen applied for rescission of this judgment on 13 February 2012. Loots supported this application. On 29 May 2012, Van Rooyen filed a notice to amend her application and joined the Barnards as applicants to the application. In addition to Van Rooyen's application, Loots brought a separate rescission application on behalf of Nongoma and attested to a supporting affidavit in respect thereof. ABSA opposed the rescission application by filing an opposing affidavit on 16 September 2013. The rescission was dismissed with costs by Van Rooyen AJ on 25 August 2015. Subsequent application for leave to appeal the dismissal of the rescission application was also dismissed with costs on 21 October 2015.

[15] On 22 March 2011, ABSA had applied for the liquidation of Nongoma which was opposed by both Loots and Van Rooyen on 13 May 2011. This application was withdrawn because Nongoma had apparently been deregistered which rendered the application defective.

[16] On 21 June 2011, Loots brought an application for a conditional business rescue of Nongoma on an urgent basis under case number 12401/2011. He made no attempts to enrol the matter until ABSA which was also the intervening party in that application did so. The business rescue application was dismissed with costs on 7 October 2015.

[17] On 7 November 2011 ABSA again lodged an application for the liquidation of Nongoma. The CIPC company report indicates cancellation of deregistration process on 26 October 2011. Loots applied to intervene in the liquidation proceedings on 13 February 2012. He also filed an affidavit in opposition to the liquidation application purportedly on behalf of Nongoma. The liquidation was delayed as a result of the business rescue application. On 7 October 2015 a

provisional liquidation order was granted against Nongoma. On 29 October 2015, Loots filed an application to intervene in the liquidation proceedings and an opposing affidavit. The final liquidation order was granted on 11 February 2016.

[18] On 11 December 2012, Loots and Van Rooyen had launched an action in the Kuilsriver Magistrates' Court against ABSA alleging that payment of the debt in respect of which the default judgment had been granted in the High Court had created a false impression of indebtedness that misled both Nongoma and Van Rooyen and resulted in amounts totalling R 43 548.00 being paid to ABSA in error. That action was dismissed with costs on 19 November 2015.

[19] Another application was brought in the Nongoma Magistrates' Court by Loots, represented by his attorney at the time Mr Rob Green ('Mr Green'), in terms of which an order was made that tenants had to pay their rental into the trust account of Mr Green. It is not clear on what basis Loots persuaded the Magistrate that he was entitled to such an order.

[20] ABSA then brought an application against Mr Green for repayment of rentals that Mr Green admittedly collected and held in trust. Mr Green opposed the application and admitted to having received an amount of R 437 074.01 in respect of the rental for the period of 1 June 2011 until 28 February 2013 allegedly as per mandate from Loots. He also stated that he disbursed as legal fees to Rob Green & Associates, his law firm, an amount of R 239 884.93 from 1 June 2011 until 28 February 2013 from the said amount on instructions of Loots. The remainder he disbursed in accordance with Loots' instructions, which information he alleged he could not divulge due to attorney-client privilege.

[21] On 6 March 2014 Veldhuizen J ordered Mr Green to pay to ABSA the amount of R 437 074.01 as well as the costs of that application. Veldhuizen J held that Loots and/or Mr Green had no right to collect any rental from tenants of Nongoma and that doing so was unlawful.

[22] ABSA executed on the judgment and the Sheriff rendered *nulla bona* returns. Mr Green failed to make any payments towards the judgment by

Veldhuizen J. His conduct is, according to ABSA, the subject of scrutiny by the Law Society and the Fidelity Fund.

[23] On 28 May 2012 Loots represented by Mr Green had instituted an action against the Barnards in the amount of R 284 350.00 alleging that Loots was the tenant of Nongoma and that he ceded the right to occupy certain premises to the Barnards. He further alleged that failure by the Barnards to effect payment of Nongoma's obligation, *inter alia,* in respect of the amounts due to ABSA entitled him to payment. Green attested to a supplementary affidavit claiming that Loots had to be paid a rental amount of R6050 per month and over the period it accrued to R 284 350.00. Judgment was granted by default in favour of Loots for that amount.

[24] There are other court proceedings which I do not find it necessary to all mention.

Evaluation

[25] The relevant provisions of section 131 of the Act read as follows:

> ' 131. **Court order to begin business rescue proceedings.** – (1) 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 subsection (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; or
>
> (iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

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

…

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.

… ’

[26] The object of the above provision has been articulated in many cases. As Binns-Ward J put it in *Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 at 382H-383A: ‘*[b]usiness rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.’*

[27] The requirements that must be shown by an affected person applying for business rescue of a company are that (a) the company is in financial distress, (b) the company has failed to pay any amount in terms of an obligation or for example a contract, or (c) it is just and equitable to make an order sought for financial reasons and (d) there is a reasonable prospect for rescuing the company.

Abuse of process

[28] Before I deal with whether those requirements have been met, it is important to touch on the important point made by *Henochsberg on the Companies Act 71 of 2008*, Volume 1 at 464 (12) that:

> 'The application must not be an abuse of process and should be brought in good faith and for a proper purpose ie for the "rescue" of the company…and not for an ulterior motive such as to suspend liquidation or for a personal benefit.'

[29] As was observed by Gamble J in *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC) at para 20: '*a business rescue application might well be used by an obstructive debtor intent on avoiding the obviously inevitable as part of its ongoing strategy to hinder a creditor from pursuing its lawfully permissible goal, and, experience tells one that the business rescue proceedings may then be advanced by the debtor with a degree of tardiness inversely proportional to the alacrity with which it initially approached the court*'

[30] ABSA alleges that the present matter is a case of a person who seeks to obtain suspension of the liquidation for his own personal benefit and for him to further collect rental from the tenants of Nongoma unlawfully as he did before.

Existence of ABSA debt and ABSA's locus standi as a creditor

[31] In the current application Loots disputes that Nongoma is indebted to ABSA, effectively challenging ABSA's *locus standi* as a creditor to Nongoma. This is in my view is absurd as shall be seen in this judgment.

[32] It has been common cause that ABSA is a creditor of Nongoma since it instituted action to enforce its debt. In all previous proceedings it was accepted by all involved, including Loots that ABSA entered into a written loan agreement with Nongoma on 19 August 2002 in terms of which ABSA lent and advanced an amount of R1 117 485.26 to Nongoma. Nongoma failed to pay instalments in terms of the loan timeously, and as agreed. It was in arrears as early as October 2004.

[33] On 21 February 2002, the Barnards and Van Rooyen signed a document titled 'ALGEMENE SESSIE" in terms of which Nongoma ceded all its rights arising from existing and future contracts of lease in respect of its premises to ABSA.

[34] The existence of a debt was admitted on numerous occasions. In the replying affidavit of the present matter, Loots now disputes this debt. He alleges that the "admissions" in the "various affidavits" referred to by Mayer were prepared under the misguided influence of ABSA and its legal representative's misleading and false information. This is surprising and disingenuous because not only was a default judgment granted in ABSA's favour, Loots and Van Rooyen filed rescission applications where they did not challenge the existence of the debt. Instead in paragraph 10 of her affidavit in support of her rescission application, Van Rooyen stated that her defence was '*based, inter alia, on the fact that the, Respondent's[ABSA] actions by not acting timeously and reasonably has caused prejudice to the Applicant[Van Rooyen]….had the Respondent [ABSA] acted reasonably and timeously not only would the debt have been extinguished – it was a 10 year term loan agreement initiated on 19 August 2002 – but Respondent[ABSA] would have taken cession of the leases in terms of the loan agreement and ensured collection of rentals and thus payments of the amount owed to them.'*

[35] Loots repeated similar allegations in an affidavit in support of the rescission application purporting to act on behalf of Nongoma. He mentioned, *inter alia*, that: *'...It is my submission that Respondent acted with undue delay and furthermore it is my submission that if Respondent had acted reasonably and timeously, it would have taken cession of rental lease agreements which Applicant (Nongoma) had ceded to Respondent and ensured collection of the rentals and thus payments of the amount owed to Respondent.'* This disingenuity cannot be accepted. Both Loots and van Rooyen allege that they were legally represented by Mr Green. They unequivocally admitted indebtedness to ABSA and raised some defences which were rejected by Van Rooyen AJ as being without merit, not bona fide and opportunist. Application for leave to appeal Van Rooyen's AJ's judgment was dismissed. As things stand, the judgment granted in favour of ABSA on 19 September 2011 stands.

[36] Loots disputes the existence of ABSA's debt on the basis that the loan agreement by ABSA was sold to an entity called Home Obligors Mortgage Enhanced Securities (Pty) Ltd ('Homes') in a process of securitisation. When looking at the record of previous proceedings, it appears that the issue of securitisation was raised by Loots in his opposing affidavit to the liquidation application as a new fact for consideration. It was not entertained by the Court hearing that application as his opposition was dismissed. He now endeavours to present this as a new fact before this Court, which is clearly not the case. This manner of litigating cannot be allowed and this matter is evidently *res judicata*.

[37] These allegations are in any event denied by ABSA as being false. ABSA alleges that records at the Deeds Office contradict the allegation made by Loots. It also disputes the allegation also because only residential mortgages may be securitised. The loan to Nongoma is a commercial loan. Nongoma's property is zoned as commercial property and cannot form part of any securitisation practise. ABSA further alleges that the system it uses does not afford a possibility of commercial properties and commercial loans being included in any securitisation process. Based on the well-known *Plascon-Evans* rule (*Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) at 634-635), there would have been no reason not to accept ABSA's version.

Previous business rescue proceedings

[38] Loots previously brought an application for the business rescue of Nongoma and that application was dismissed. The basis of those proceedings was that he was a creditor of Nongoma in the sum of R839 295.30, as the rental income due to him for sub-letting a portion of the premises, in the amount of some R6050 per month, was loaned to Nongoma for purposes of Nongoma's obligations in respect of the loan from the bondholder, ABSA. The second basis was that Loots had obtained a Power of Attorney in 2011 from the remaining members of Nongoma, the Barnards.

[39] The first part of the above bases is similar to the current application. The second part relates to the Power of Attorney which was the subject of previous litigation before Veldhuizen J. This Power of Attorney purportedly signed and given by the Barnards on 13 January 2011 nominated Loots and van Rooyen as follows:

> '…to be our Agent for managing and transacting our business in THE REPUBLIC OF SOUTH AFRICA AND IN EVERY TERRITORY OR COUNTRY ANYWHERE IN THE WORLD with full power and authority to sell all fixed property and settle all outstanding bonds registered in our name.'

[40] Veldhuizen J found at paras 12 and 13 of his judgment dated 6 March 2014 in the matter of *ABSA Bank Limited v Robert Peter Green*, case number 18662/2013 dated 6 March 2014 that:

> '[12]If regard is to be had to the history of the matter and the steps which the applicant [ABSA]took to recover the money Nongoma owed it then should have been clear to Loots and the respondent [Mr Green] that they did not have a mandate to collect the rentals due to Nongoma. Even if the power of attorney gave Loots the power to manage Nongoma's affairs it did not give him a mandate to disburse the rentals that were collected in the manner admitted by the respondent [ABSA].
>
> [13] In the result I conclude that the respondent failed to prove that he had a mandate to collect and disburse the rentals due to Nongoma.'

[41] In the present matter, Loots no longer relies on the Power of Attorney for obvious reasons. He now relies on a lease agreement which he alleges was entered into between Nongoma and himself on 1 February 2011. Van Rooyen signed this lease agreement on behalf of Nongoma, purportedly by virtue of the same Power of Attorney dated 13 January 2011, that I have alluded to above. The commencement date in the lease agreement is stated as 1 February 2011 and termination date is 31 July 2020.

[42] In terms of clause 4 of the lease agreement, subject to clause 14.2, Loots would pay a monthly rental of R50.00 inclusive of VAT and other taxes and levies. Clause 14.2 states that :

> *'At the sole discretion of the Tenant [Loots], the Tenant may consent (verbally or in writing) that the Landlord [Nongoma] may let out, in its own name, any buildings or portion of land situated on the Property. In this event any or all rentals received by the Landlord (or any other income received by the Landlord as a result of this consent) will be appropriated by the Landlord towards the maintenance, management and expenses of the Property or of the Landlord (including payment of any creditors of the Landlord) as will be allocated and directed by the Tenant in its sole discretion. During the time which any rentals are being appropriated by the Tenant as per clause 14.1, or such letting of land or buildings by the Landlord in its own name is allowed (as per clause 14.2) the rental payable by the Tenant (as per clause 4) will be waived.'*

[43] First, it is rather strange that this lease agreement was not presented in court during the proceedings before Veldhuizen J as a document which entitled Loots to collect the rental. The curiosity arises because this agreement was purportedly concluded long before Veldhuizen J's judgment of 2014 was delivered. Clearly the lease agreement would have been pivotal in convincing the Court of Loots' entitlement to the collection of the rental. This lease agreement was also not raised in the previous business rescue application proceedings.

[44] In this regard, ABSA's allegation that this document may have been contrived in order to support the current application and be presented as the latest premise since Loots could not use the Power of Attorney as the basis to collect rental, is not far-fetched at all.

[45] The second issue which is concerning about this lease agreement is that Loots is only obliged to pay R50.00 rental amount to Nongoma whereas Nongoma according to him, currently has funds of R45 000 per month available to pay its costs, maintenance and expenses [from sub-leases]. It does not make sense that the potential rental income received by Loots is R45 000 a month for his sub-leases but he only pays R50.00 to Nongoma.

[46] A further disturbing factor is that Loots declines disclosing information or substantiation in this regard on the basis it is 'private and confidential' and pertains

to himself only. This clearly does not appear to come from an applicant determined to convince the Court by demonstrating candidly that reasonable prospects exist that Nongoma can be rescued.

[47] The nature of this lease agreement and the fact that it was never disclosed during the proceedings before Veldhuizen J points to one inescapable conclusion that the lease agreement seems to be a strategy designed to circumvent the findings in Veldhuizen J's judgment. This is all the more why it is necessary for the liquidation process to continue so as to investigate all these matters.

[48] For the reasons outlined above alone, the application is not bona fide and should be dismissed. The merits which I will nevertheless touch on are not convincing either.

Requirements of the Act for a business rescue

Financial distress

[49] There has been no attempt to acknowledge that the company is in financial distress. Loots instead lays the blame on ABSA as being responsible for bringing Nongoma into financial distress. He seeks to demonstrate that Nongoma is a sound business with its assets exceeding liabilities and is commercially solvent. In all of this supposed solvent state of Nongoma, ABSA as a creditor remained unpaid.

[50] In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 LTD* 2012 (2) SA 423 WCC at para 24 the court held that:

> *'while every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis, unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable...'*

[51] Loots has not fulfilled this requirement, instead he puts blame on the legal proceedings brought by ABSA and ABSA's alleged misleading information about

the status of the loan agreement as being the cause of its financial distress. This allegation is lacking in substance and is without foundation.

Reasonable prospects

[52] The courts have held that 'a reasonable prospect' is a lesser requirement than a reasonable probability. (See *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kayalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at para 29).

[53] The Court in *Oakdene supra* held at para 29:

> *'On the other hand, I believe it requires more than a 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 speculative suggestion is not enough. Moreover, 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, require that it must do so in its founding papers.'*

[54] The lease agreement that I have already dealt with is presented as the only evidence to support a reasonable prospect of rescue. I have dealt with my impressions of this lease agreement. Loots alleges that he is leasing the entire property from Nongoma and is subletting the commercial building situated in the property. He further alleges that there is no rental amount payable by him to Nongoma. He further contends that Nongoma currently has funds of about R45 000 a month available to pay for its costs, maintenance and expenses. The lease entitles him to receive all the rental amounts payable from shops and offices on Nongoma's property but yet he refuses to disclose any information regarding the total amount of the rental and on what basis thereof is it being made available to Nongoma. I am in agreement with ABSA that, in these circumstances, the lease agreement cannot be held to be genuine. It appears to have been created for the purposes of undermining the cession that ABSA has to all the rental payable in respect of Nongoma's premises.

[55] I am inclined to accept ABSA's supposition that all these efforts, including the sudden denial the existence of ABSA's debt are attempts to get the debt removed so as to present Nongoma as being commercially viable as a business. In the process, other creditors of Nongoma have not been disclosed and what amounts are owing to them. Furthermore, no information has been given regarding the business rescue practitioner apart from the mentioning of his or her name in the notice of motion. No details of any proposed business plan have been outlined either, so as to satisfy the Court about the reasonable prospect of rescuing Nongoma.

[56] In the circumstances, Loots has failed to show any grounds to satisfy the court that there is a reasonable prospect of rescuing Nongoma from financial distress and liquidation. If ever there was a case that should be subjected to the scrutiny it is this one.

[57] I conclude with the words of Eloff AJ in *Southern Palace Investments 265 v Midnight Storm Investments* 386 2012 (2) SA 423 (WCC) at 426 C – D where he stated that:

> 'It is necessary that an application for business rescue be carefully scrutinised so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy. The instant case is one where such attempt was not discernible from the affidavits filed of record'

[58] For these reasons, the application for business rescue cannot succeed.

[59] As to costs, ABSA seeks costs on an attorney and client scale. I do not need to spend much time on this issue save to say that the Loots' conduct as demonstrated above evidently justifies costs on an attorney and client scale. The court must show its discontent with the manner in which Loots has conducted this litigation. A number of issues raised in this application were raised and determined in previous proceedings. Furthermore, Loots did not disclose in his founding affidavit various proceedings previously brought before other courts which had an impact on this application. Had this application not been opposed by ABSA, those

proceedings and the content thereof would possibly not have come to this Court's attention. Apart from that, I am satisfied that based on my findings in this matter a cost order on attorney and client scale is warranted. I must mention in passing my concerns about the persistent litigation surrounding the business of Nongoma, which is undoubtedly costly. This in my view cannot be supporting the interests of Nongoma and must at some point come to an end.

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

1. The application is dismissed with costs on attorney and client scale.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicant:	Adv E Callaghan
Instructed by :	Van der Linde Attorneys, Cape Town
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