



**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 4653/2015B

In the matter between:

GARY WALTER VAN DER MERWE	1st Plaintiff
CANDICE JEAN VAN DER MERWE	2nd Plaintiff
THE TRUSTEES FOR THE TIME BEING OF THE EAGLE TRUST	3rd Plaintiff
(Gary Walter van der Merwe NO, Fern Jean Cameron NO, Candice Jean van der Merwe NO)	
BANK ON ASSETS GLOBAL (PTY) LTD	4th Plaintiff
HELIBASE SWAZILAND (PTY) LTD	5th Plaintiff

and

ZONNEKUS MANSION (PTY) LTD (in liquidation)	1st Respondent
THE LIQUIDATORS OF ZONNEKUS MANSION (PTY) LTD (in liquidation)	
Namely Cloete Murray NO, Darusha Moodliar NO and Gordan Nokhando NO	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	2nd Respondent
ABSA BANK LIMITED	3rd Respondent
BANK ON ASSETS HOLDINGS (PTY) LTD	4th Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	5th Respondent
THE COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	6th Respondent
	7th Respondent

Coram: KOEN AJ
Heard: 4 February 2016
Delivered: 18 February 2016

JUDGMENT

KOEN AJ

[1] This is an application for an order placing the first respondent, Zonnekus Mansion (Pty) Ltd (“Zonnekus”), under supervision and commencing business rescue proceedings as contemplated by section 131 (1) of the Companies Act 71 of 2008 (“the Act”).

[2] There are five applicants. The first and second applicants are Mr Gary Van Der Merwe and his daughter Candice Van Der Merwe. The third applicant is the Eagles Trust (“the Trust”). Bank on Assets Global (Pty) Ltd and Helibase Swaziland (Pty) Ltd are the fourth and fifth applicants, respectively.

[3] The respondents who oppose this application are the Standard Bank of South Africa Ltd (“the Bank”) and The Commissioner for the South African Revenue Service (“SARS”).

[4] Because SARS denied that any of the applicants had *locus standi* to bring this application it is necessary, to commence with, to establish whether at least one of the applicants is an “affected person”, as defined in the Act.

[5] In terms of section 128 (1) of the Act a shareholder of Zonnekus is an affected person and has standing to bring this application in terms of section 131 (1) of the Act. The allegation is made in the founding affidavit that the Trust is the sole shareholder of Zonnekus. Mr Van Der Merwe attached to his founding affidavit a document purporting

to evidence the fact that the Trust had resolved to bring this application. The document did not do that. It related to different litigation between different parties, and was signed by only two of the trustees. However, all of the trustees have filed affidavits in support of this application. Counsel for SARS, with whose submissions in regard to *locus standi* the Bank aligned itself, submitted that the affidavits were not evidence of the Trust having resolved to bring this application. Mr Van Der Merwe's affidavit stated that the trustees brought this application in their representative capacities, and the confirmatory affidavits deposed to by the other trustees confirm that allegation. In my view that is evidence enough of the Trust having resolved to make this application.

[6] In argument SARS also placed in dispute the allegation that the Trust was the sole shareholder of Zonnekus. The answering affidavit filed on behalf of SARS does not bear this out. It refers the reader to paragraph 20 of the particulars of claim in an action SARS has instituted against Mr Van Der Merwe, his daughter Candice, Zonnekus, the Trust and others. In paragraph 20 of the particulars of claim the following allegation is made by SARS: "*The Eagles Trust is the registered owner of 100% of the issued share capital...*" in Zonnekus. This allegation, I think, puts an end to the question whether the Trust is the sole shareholder of Zonnekus. In the circumstances I am satisfied that the Trust, at least, is an "affected person" within the meaning of section 131 of the Act, and that it has standing to make this application. It is not necessary, therefore, to deal with the standing of the other applicants.

[7] Having found that the Trust has standing to bring this application it is necessary to turn back the clock. On 20 June 2014 the Bank instituted proceedings for the winding up of Zonnekus on the basis that Zonnekus was commercially insolvent. Zonnekus opposed the liquidation application and, by agreement between the parties, the liquidation

application was postponed to 11 September 2014 for hearing on the semi-urgent roll. Zonnekus was ordered to file its answering affidavit by 8 August 2014.

[8] Notwithstanding various demands by the Bank no answering affidavit was filed. However, on 9 September 2014, just two days before the hearing, Zonnekus launched an application for the postponement of the liquidation application. On 11 September 2014, the postponement application was dismissed after the Court had heard argument on behalf of the parties. Zonnekus was placed in provisional liquidation, with the return day being 28 October 2014.

[9] Zonnekus did not oppose the application for liquidation on the return date. Accordingly, on 28 October 2014, the provisional liquidation order was made final.

[10] The first meeting of creditors was convened by the Master of the High Court on 2 December 2014. At this meeting the Bank proved three claims against Zonnekus. It bears mentioning, at this juncture, that none of the Bank's claims are in dispute. The Bank's claims against Zonnekus arise as a result of two mortgage loan agreements and a building loan agreement concluded between it and Zonnekus. It is evident, therefore, that the Bank is a secured creditor by way of the three mortgage bonds referred to above.

[11] The second meeting of creditors took place on 24 February 2015. Certain of the applicants sought to prove claims in the insolvent estate at this meeting but they were unsuccessful. This was followed, on 25 March 2015, by an application issued by the liquidators in terms of section 417 of the Companies Act for the purposes of convening an enquiry into the affairs and business dealings of Zonnekus. The first session of the enquiry was scheduled to take place on 20 and 21 April 2015.

[12] On 13 April 2015, that is about ten months after the liquidation application had been issued, and approximately one week prior to the enquiry in terms of section 417 commencing, this application for business rescue was issued.

[13] In response to this application a preliminary point was taken by the Bank and SARS that a business rescue application was not competent in respect of a company which was in final liquidation. The preliminary point was argued before this court on 28 May 2015. On 10 June 2015 the preliminary point was resolved in favour of the applicants and it was held that business rescue proceedings could be brought in respect of a company in final liquidation. An order was made postponing the application to the semi-urgent roll on the earliest date which the parties were able to agree, alternatively a date to be determined by the Judge President of this Court with further directions relating to the filing of answering affidavits, replying affidavits and heads of argument.

[14] The matter then came to be set down for hearing on 1 December 2015. That this had occurred came to the knowledge of the applicants on, or very shortly after, 20 October 2015. However, the set down of the matter for hearing on 1 December 2015 had not occurred in accordance with an agreement between the parties, nor was it a date determined by the Judge President of this Court as contemplated in the order which had been made on 10 June 2015. Binns-Ward J had been allocated the matter on 1 December 2015. A reading of the transcript of the judgment delivered by him on that day reveals that the applicants had taken the point that the matter could not proceed in view of the fact that the set down of the matter had occurred improperly. The learned judge held that the point was well taken and in the course of his judgment criticised the applicants for their inertia when confronted with the fact of the set down of the matter for hearing on 1 December 2015. In the result he made an order, the material terms of which provided that

the business rescue application was postponed for hearing in the fourth division on the semi-urgent roll on 4 February 2016; the applicants were directed to deliver replying affidavits by not later than 20 December 2015; and heads of argument were to be delivered by the applicants not later than ten days before the postponed hearing date. It is to be noted that the order recorded that the timetable which it incorporated had been proposed by the applicants themselves.

[15] The applicants did not comply with any of the requirements imposed upon them by the order made on 1 December 2015. Time went by, however, and in view of the voluminous record an early allocation of the matter took place. The papers were thus given to me several days in advance of the allocated hearing date.

[16] Included in the Court file was a practice note which had been filed by the applicants on 14 January 2016. The practice note indicated that the matter would not be able to proceed on 4 February 2016 due to the fact that replying affidavits had not been finalised. The practice note went on to say that the first applicant, Mr Gary Van Der Merwe, who was the accused in a criminal trial relating to alleged tax fraud had been engaged in the preparation of heads of argument which were to be submitted by 10 December 2015 and that considerable time and effort had been expended by him in this task as a consequence of which it had been impossible for the replying affidavits to be finalised before 20 December 2015. According to the practice note, this fact had been communicated to the representatives of the Bank and SARS on 21 December 2015. It was further stated that Mr Van Der Merwe had had to travel to Australia to join his wife on 24 December 2015 because it had been necessary for her to undergo emergency surgery there. In conclusion, the practice note contained the submission that the matter

could not proceed on 4 February 2016 and that the applicants would request a postponement of the matter to a date to be agreed upon by the parties.

[17] Less than two days before the matter was due to be argued I was advised by my registrar that a set of replying affidavits were to be delivered to my chambers. After making enquiries I ascertained that the papers which were sought to be handed to me were not accompanied by a written application for condonation. I accordingly advised my registrar not to accept delivery of the papers which I noted extended to almost two hundred pages.

[18] At the commencement of the hearing on 4 February 2016 counsel for the applicants handed up a written application for condonation of the late filing of the replying affidavits. The application was dated 3 February 2016 and had been delivered to the Bank and SARS only hours previously. Counsel for the Bank and SARS indicated that the condonation application would be opposed and that wished to argue the matter without filing any answering affidavits.

[19] Shorn of unnecessary verbiage the basis for the condonation application boiled down to the following uncontroverted facts. Mr Van Der Merwe had been ordered on 30 November 2015 by Le Grange J, who had presided in the criminal trial adverted to above, to submit comprehensive heads of argument by 10 December 2015. The criminal trial had run for two years and the record was in excess of seven thousand pages. In the result Mr Van Der Merwe had been engaged in the preparation of the heads of argument required in the criminal matter until 18 December 2015. On 21 December 2015 the Bank and SARS had been requested to afford for an extension of time for filing of the replying affidavits until 11 January 2016. The request had been refused. Mr Van Der Merwe then

had to travel to Australia on 24 December 2015 because his wife had undergone emergency surgery there. He returned to South Africa on 15 January 2016.

[20] In summary, then, the failure on the part of the applicants to file a replying affidavit by 20 December 2015 was attributed to the fact that Mr Van Der Merwe had been otherwise engaged in attending to the criminal proceedings against him. His absence overseas until 15 January 2016 is only relevant in so far as it relates to the delay which occurred in relation to the launching of the condonation application.

[21] Does this form a basis for the granting of condonation for the delivery of replying affidavits almost seven weeks after the date which the applicants themselves had proposed they should be filed, and only a day or so before the postponed date of the hearing? In *CSARS v Van Der Merwe* 2016 (1) SA 599 (SCA), a case co-incidentally involving both Mr Van Der Merwe and his daughter, the Court had occasion to repeat the well-known rules relating to condonation. The case emphasised the factors that are relevant, namely, the degree of non-compliance, the nature of the explanation given for the delay, the effect of the delay, the importance of the case, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the interest of all in the finality of litigation. The case also stressed the importance of applying for condonation without delay.

[22] I do not think that it can be said that the applicants have made out a case for the condonation of the late filing of replying affidavits. It was they who proposed the terms of the order made by Binns-Ward J on 1 December 2015. Having been ordered by Le Grange J the day before to file heads of argument they were fully cognisant of the fact that further work was to be done in the criminal trial of Mr Van Der Merwe and what that

work would entail. They did nothing to alert any of the respondents to the possibility that they might not be able to comply with the court order they had proposed until after the time for compliance had expired. And when respondents refused to consent to the late filing of replying affidavits the condonation application was not launched immediately. Nor was it launched immediately after Mr Van Der Merwe's return from Australia on 15 January 2016. Instead, the applicant sought to defer the matter by requesting the Judge President, in a practice note, not to allocate a judge for the hearing of the matter on 4 February 2016. That is not a permissible way to avoid the consequences of an order directing that papers be filed according to a given timetable. In fact, I consider it to have been an entirely improper attempt to defer the hearing.

[23] Having heard argument in relation to the application for condonation, and for the reasons briefly set forth above, I refused it with costs including the cost of two counsel where two were employed.

[24] Counsel for the applicants then sought to move the application for the order sought in the main application and to hand up heads of argument in relation to thereto. These ought to have been filed by 20 January 2016 in terms of the order which had been made on 1 December 2015. There was no written application for the late filing of the heads of argument but an application for condonation was orally made from the bar. The reason for the late filing of the heads was that counsel who had been briefed to prepare them had been engaged in assisting in the preparation of the written argument which was required in Mr Van Der Merwe's criminal trial and then in the preparation of the replying affidavits. He had been too busy, it was said, to draft the heads of argument. An apology was tendered.

[25] It is, of course, quite undesirable that the Court and the respondents should be deprived of the benefit of written heads of argument in advance of the hearing. Be that as it may, not to have proceeded with hearing would have prejudiced not only the respondents but also the proper and efficient administration of justice to an even more undesirable extent. Confronted with two unsatisfactory alternatives I chose that which I considered to be the least unsatisfactory, condoned the late filing of the heads of argument, and heard argument in the main application.

[26] It is regrettably necessary to observe that it is unacceptable that the Court and the respondents were held to ransom, as it were, in the manner described above. Litigants and their legal representatives have a responsibility to facilitate the efficient administration of justice by adhering to the rules of Court, and to Court orders which regulate process. That responsibility is even greater when the process is regulated by an order proposed by the defaulting party. The time will come when an apology will not suffice.

[27] I turn now to consider the merits of the main application. Zonnekus is a property owning company which owns five immovable properties. These are erf 13898 Milnerton (“Zonnekus Mansion”) which is unencumbered, erven 8666, 901 and 902 Milnerton, and erf 13421 Somerset West. Zonnekus is indebted to the Bank in an amount just exceeding R5.3 million. The Bank holds security in the form of three continuing covering mortgage bonds registered over two of the Milnerton properties and a bond registered over the Somerset West property. The remaining Milnerton property is bonded to Absa Bank Ltd. Zonnekus allegedly owns movable property in the form of certain aircraft. It has no employees and conducts no business in the accepted sense of the word, at least not a business which can be said to be ongoing. I am mindful of the fact that it was submitted on behalf of the applicants that Zonnekus held the immovable properties it owned with a

view to later developing them, and that this was its business. However, it is only in respect of the Somerset West property that there is any evidence of the business of property development being conducted by Zonnekus, and this development ground to halt some time ago as a result of inadequate funding.

[28] It is also necessary to mention that Zonnekus is no stranger to financial difficulty. It was indebted to Nedbank Ltd for an amount of approximately R 7 million in respect of a mortgage loan. Nedbank had brought a winding-up application against it during August 2013 on account of it having defaulted in respect of the mortgage loan. That winding up application was withdrawn when Zonnekus managed to raise the funds to pay Nedbank. It is thus apparent that from at least August 2013 Zonnekus had been experiencing financial problems. If the business of Zonnekus was property development, it is apparent that for some time it has struggled.

[29] SARS allege that Zonnekus is indebted to it in the amounts of R 30 million and R 12 million, respectively. It caused proceedings to be instituted during May 2015 in this Court against Zonnekus for recovery of these amounts. In the same action SARS claims various declaratory orders and the payment of amounts of money against Mr Van Der Merwe, his daughter and the Trust. The action is defended by Zonnekus and the others and it is almost impossible to predict when it will finally be determined. It is not impossible, however, to predict that it is very likely that the action will take some time before it is finalised.

[30] It is also relevant to note that during April 2013 SARS sought and obtained a provisional preservation order in terms of section 163 of the Tax Administration Act, 28 of 2011, against, amongst others, Mr Van Der Merwe and Zonnekus. In terms of the

preservation order Zonnekus was interdicted from dealing with, disposing of, encumbering or removing from South Africa any assets of which it is the owner. The preservation order was made final during March 2014 and has the effect that as matters presently stand Zonnekus cannot deal with any of its assets.

[31] Much was made in the papers, and in argument, of the running battle between SARS and Mr Van Der Merwe. This battle relates not only to allegedly unpaid taxes but also to the criminal trial presently pending in which Mr Van Der Merwe is accused of tax fraud. These disputes, however, do not seem to impact upon Zonnekus as much as they do upon Mr Van Der Merwe. I do not propose to canvass the full extent of the disputes. To do so would not materially assist in a determination of whether the proposed business rescue, which relates only to Zonnekus, would be viable. What the disputes do illustrate, however, is that the disputes between SARS, on the one hand, and Mr Van Der Merwe and Zonnekus, on the other, are wide-ranging and factually complex. It is overwhelmingly unlikely that they will be resolved in the short to medium term.

[32] Before going further it is necessary to deal briefly with the submission made by counsel for SARS to the effect that Zonnekus is not “financially distressed” but hopelessly factually and commercially insolvent. The argument was to the effect that Zonnekus was “dead”, not merely distressed, and could not be brought back to life through the implementation of any business rescue plan.

[33] The starting point is section 128 (1) (f) of the Act. It states that “ *‘financially distressed’*, in reference to a particular company at a particular time, means that (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as

they become due and payable within the immediately ensuing six months...". The Act thus gives its own meaning to the expression "*financially distressed*".

[34] It is safe to say that it is common cause between the parties that Zonnekus will not be able to pay all of its debts as they become due and payable within the immediately ensuing six month period. In my view, then, a purely physiological metaphor is inapposite and it must be held that Zonnekus is financially distressed as contemplated by the provisions of the above quoted section of the Act.

[35] To turn now to the proposed business rescue bearing in mind that all that is required of the applicants at this stage is that they "*place before the court a factual foundation for the existence of a reasonable prospect*" that a business rescue can be achieved (see *Propsec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 11). It must also be borne in mind that in *Propsec* it was also stated that "... *To require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of probability, and unjustifiably limits the availability of business rescue proceedings.*" That statement was approved of in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at paragraph 31.

[36] In the first rescue plan postulated by the applicants in the founding affidavit Zonnekus Mansion, being erf 13898, Milnerton, which is unencumbered, is to be sold by the proposed business rescue practitioner for the sum of R 30 million. The claims of secured creditors will then be settled. The remaining immovable properties are to be developed by Zonnekus. A second rescue plan postulated in the founding affidavit envisages the sale of the movable assets allegedly belonging to Zonnekus and the use of the cash obtained thereby to develop the immovable properties.

[37] A third proposal is annexed to the founding affidavit. It envisages a different rescue plan. In terms of a so-called short-term proposal, all claims and loan accounts against Zonnekus are to be converted to share capital. The proposal goes on to postulate the reinstatement of the bond accounts of the banks. In the medium term it is envisaged that Zonnekus Mansion is to be developed into a “*50 unit luxury retirement resort*”. The funding necessary to undertake this development is estimated in the draft business rescue plan to be R 50 million. It is envisaged, then, that the three remaining Milnerton properties will be developed as a retirement complex requiring funding of some R 75 million. And finally, it is proposed that the partly completed structure on the Somerset West property will be completed and sold.

[38] In the light of the proposed rescue plans can it be said that there is a reasonable prospect for rescuing Zonnekus? By this I mean has it been shown that there is a reasonable prospect that Zonnekus can be restored to a solvent going concern, or will creditors or shareholders be better off than they would under the liquidation (see *Oakdene Square Properties* at paragraph [26]). It is also necessary, in my view, in considering these questions, to take account of the fact that the Act contemplates that a return to

solvency, or the attainment of a better deal for creditors or shareholders, will be the product of the “*temporary supervision*” of Zonnekus, and a “*temporary moratorium on the rights of claimants against the company or in respect of property in its possession*” (see sections 128 (1) (b) (i) and (ii) of the Act).

[39] There can obviously not be an inflexible rule as to how long it should be before a rescue can be said to have been successful. But it is clear, I think, that the legislature intended by its use of the word “*temporary*” that any rescue plan should not be of indeterminable duration. Indeed, that fact that section 132 (3) of the Act requires reports on progress to be filed if the rescue proceedings are not complete within a period of three months, is a strong indication of the legislature’s intention that the implementation of a plan should be of short duration.

[40] The resolution of the disputes between Zonnekus and Mr Van Der Merwe, on the one hand, and SARS on the other is central to the success of the business rescue. SARS makes it clear that it does not support the proposed rescue plan. There is no reason to think that until the disputes are resolved SARS will permit the assets of Zonnekus in respect of which the preservation order applies to be disposed of in order to facilitate the rescue. How long it will take for these disputes to be resolved is, of course, impossible to say. But it is clear that the issues in dispute are wide-ranging and the amounts involved are substantial, running into tens of millions of Rand. It appears to be unlikely that a resolution will be reached, through the Courts or otherwise, in the short to medium term. It is much more likely that a resolution of the disputes will take years.

[41] The Bank has also made it clear that it does not support the rescue plans. There is no reason to think that it will be prepared to revive its lending arrangements with

Zonnekus, as postulated in the proposed rescue plans, in order to facilitate any of the various rescue proposals suggested by the applicants.

[42] What Mr Van Der Merwe describes in the founding affidavit as a business rescue boils down, in my view, to no more than the sale of the immovable property of Zonnekus and the payment of secured creditors. The draft business rescue plan annexed to the founding affidavit assumes that the banks will continue to fund Zonnekus by the reinstatement of their bonds. On the applicants version in excess of R 125 million for the development of the properties which are to be developed is required. Zonnekus does not have these funds and does not appear to be in a position to raise working capital against the security of its assets given that certain of its assets are mortgaged and especially in the light of the preservation order which has been obtained by SARS. These factors weigh heavily against the submissions made on behalf of the applicants that the applicants have established grounds for the reasonable prospect of achieving one of the two goals in section 128(1) (b) of the Act.

[43] Moreover, the selling of the assets of Zonnekus in order to pay creditors as is proposed by the applicants' amounts to an informal liquidation of the kind expressly disapproved of in *Oakdene Square Properties* (see paragraphs [33] to [35]). Business rescue was not intended to enable a company to liquidate its assets in its own time and its own pace as the applicants apparently intend.

[44] A further factor which I think is relevant is that Zonnekus has been in liquidation for a considerable period. This application was launched some four months after a final liquidation order was made, and has come to be heard almost two years after liquidation proceedings commenced. The passage of so much time, during which Zonnekus has been

financially paralysed, and lacking in management and leadership, does not enhance the prospects of there being a successful business rescue.

[45] In *African Banking Corporation of Botswana v Kariba Furniture* 2015 (5) SA 192 (SCA) Leach JA observed as follows: “*Suffice it to say that the company was clearly hopelessly insolvent and effectively dormant in that it had not traded for years and had no business contracts in place. This is not a case in which an ongoing business was likely to be rescued. It is a matter in which there was at best a forlorn hope, unsupported by any objective facts, that the company might rise from the dead. Consequently, I agree that there was no reasonable prospect of achieving the ends of business rescue...*” (at paragraph [55]). In this context a physiological metaphor is, I think, apposite.

[46] In the circumstances I find that the applicants have not made out a case for the relief sought in the notice of motion.

[47] As to costs there is no reason why the usual rule, being that costs follow the result, should be departed from.

[48] I therefore make the following order:

The application is dismissed with costs, including the costs of two counsel where two have been employed.

KOEN AJ

APPEARANCES
For the Applicants:

Ms P Tredoux
Instructed by:

Deon Perold & Associates

For the 3rd Respondent:

Mr G Woodland SC
Instructed by:
ENS Africa

For the 6th Respondent:

Mr HGA Snyman SC
Ms C Naude
Instructed by:
Macrobert Inc