

REPUBLIC OF SOUTH AFRICA



HIGH COURT, SOUTH GAUTENG LOCAL DIVISION (JOHANNESBURG)

- (1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

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Case No. 20456/2014

In the matter between:

TREVOR JOHN MURGATROYD

Applicant

and

THEODOR WILHELM VAN DEN HEEVER N.O.

First Respondent

KGASHANE CHRISTOPHER MONYELA N.O.

Second Respondent

NANO ABRAM MATLALA N.O.

Third Respondent

NOMVUYO YVONNE SERITI N.O.

Fourth Respondent

SEGOPOTJE SHEILA MPHAHLELE N.O.

Fifth Respondent

NIMBLE RISK SERVICES, a division of

NORMAN BISSETT & ASSOCIATES GROUP (PTY) LTD

Sixth Respondent

ACCOUNTANTS AT LAW (PTY) LTD

Seventh Respondent

RUDOLPH, BERNSTEIN & ASSOCIATES

Eighth Respondent

Case Summary: Companies Act 71 of 2008 – Business Rescue Proceedings – Whether business rescue practitioner of a company in business rescue is entitled to be reimbursed for expenses incurred and disbursements made – whether the expenses were reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings as contemplated in subsections 143(1) and (6) and regulation 128(3) of the Companies Act 71 of 2008.

JUDGMENT

MEYER, J

[1] This application concerns the entitlement of a business rescue practitioner to be reimbursed for expenses incurred and disbursements made during business rescue proceedings.

[2] Subsection 143(1) of the Companies Act 71 of 2008 provides that '[t]he practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in subsection (6)'. Subsection (6) in turn provides that '[t]he Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).¹ Regulation 128 (under subsections 143(1) and (6)) of the Companies Regulations, 2011 reads as follows:

- '(1) The basic remuneration of a business rescue practitioner, as contemplated in section 143(1), to be determined at the time of the appointment of the practitioner by the company, or the court, as the case may be, may not exceed-
- (a) R1 250 per hour, to a maximum of R15 625 per day, (inclusive of VAT) in the case of a small company.
 - (b) R1 500 per hour, to a maximum of R18 750 per day, (inclusive of VAT) in the case of a medium company; or
 - (c) R2 000 per hour, to a maximum of R25 000 per day, (inclusive of VAT) in the case of a large company, or a state owned company.

¹ Subsections (2) to (4), which contemplate 'further remuneration' for the business rescue practitioner, do not apply in this instance.

- (2) Sub-regulation (1) does not apply to, limit or restrict any “further remuneration” for a business rescue practitioner, as contemplated in section 143(2) to (4).
- (3) In addition to the remuneration determined in accordance with section 143(1) to (4), and this regulation, a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner’s functions and facilitate the conduct of the company’s business rescue proceedings.’

[3] A practitioner’s claim for remuneration and expenses enjoys preferential ranking. Subsection 143(5) provides that, ‘[t]o the extent that the practitioner’s remuneration and expenses are not fully paid, the practitioner’s claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.’²

[4] No provision is made in the Companies Act for the taxation of a business rescue practitioner’s remuneration, disbursements and expenses. I share the following

² Also relevant is s 135 of the Companies Act, which provides as follows:

- ‘(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company’s business rescue proceedings, but is not paid to the employee-
 - (a) the money is regarded to be post-commencement financing; and
 - (b) will be paid in the order of preference set out in subsection 3(a).
- (2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing-
 - (a) may be secured to the lender by utilizing any asset of the company to the extent that it is not otherwise encumbered; and
 - (b) will be paid in the order of preference set out in subsection (3)(b).
- (3) After payment of the practitioner’s remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated-
 - (a) in subsection (1) will be treated equally, but will have preference over-
 - (i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and
 - (ii) all unsecured claims against the company; or
 - (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
- (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.

sentiment expressed by CJ Claassen, J in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2012 (3) SA 273 (GSJ):³

‘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. There is, therefore, independent control over the costs of liquidation, whereas there is currently none in the case of a business rescue procedure. This aspect may be for the legislature to consider when further amendments to the Act are proposed.’

And I also agree with the comment by the learned authors of *Henochsberg on the Companies Act* 71 of 2008⁴ that-

‘...it seems unwise not to make provision for the amounts claimed to be scrutinized by an independent party in order to ensure that there is no abuse by practitioners claiming excessive fees’.

[5] The factual matrix within which the issues to be decided in this application arose, is essentially uncontroversial. On 29 May 2012, Sanyati Civil Engineering and Construction (Pty) Ltd (currently in liquidation) (Sanyati) voluntarily commenced business rescue proceedings pursuant to a resolution of its board. On 6 June 2012 the applicant was appointed as business rescue practitioner of Sanyati (the practitioner). He concluded, on 4 July 2012, that there was no reasonable prospect that Sanyati could be rescued. An application to this court for an order discontinuing the business rescue proceedings and placing Sanyati into liquidation was lodged on 9 July 2012: the order was issued on 11 July 2012. The first to fifth respondents were appointed as provisional liquidators of Sanyati on 20 July 2012, and they were subsequently appointed as its joint liquidators (the liquidators).

³ Para [49].

⁴ Vol 1 at 499

[6] Sanyati conducted business throughout South Africa and it was involved in approximately 50 projects at the time its business rescue proceedings commenced. Approximately 14 persons were involved in its management and It had in excess of 2 700 employees and 1 500 creditors. It had 5 guarantee providers with an exposure to loss of almost R383 million. Its balance sheet reflected liabilities of approximately R832million and assets of R516 million. A number of sale transactions were contemplated in an attempt to rescue Sanyati and detailed financial analyses of the effect of such contemplated sale transactions needed to be undertaken.

[7] The sixth respondent, Nimble Risk Services (Nimble),⁵ was formally appointed on 6 June 2012 (but with effect from 28 May 2012), the eighth respondent, Rudolf Bernstein & Associates Inc (Rudolph Bernstein) on 5 June 2012, and the seventh respondent, Accountants at Law (Pty) Ltd (Accountants), on 21 June 2012 to assist the practitioner in the carrying out of his duties as business rescue practitioner of Sanyati and to facilitate the conduct of Sanyati's business rescue proceedings. They rendered their services and invoiced the practitioner. The business rescue proceedings were superseded by the liquidation order and the amounts owing to Nimble (R1 219 332.28), Accountants (R428 414.74) and Rudolph Bernstein (R272 523) have not been paid.

[8] The practitioner and the liquidators are ad idem that Sanyati is a 'large company' within the meaning of regulation 128(1) and that the practitioner's remuneration is regulated in terms thereof. There is no dispute in relation to the amount of the practitioner's claim for remuneration in the sum of R714 488 for his services in connection with the business rescue proceedings of Sanyati. There is also no longer

⁵ Nimble is a division of Norman Bissett & Associates Group (Pty) Ltd.

any dispute about the practitioner's claim for expenses incurred by him in relation to Rudolph Bernstein in the sum of R272 523. On the contrary, these claims were proved and admitted at the first meeting of creditors of Sanyati without challenge by the creditors' concursus. The practitioner did not prove his claim for expenses incurred by him in relation to Nimble and Accountants, because the liquidators raised issues of principle against his claim and he was invited to approach this court for declaratory relief.

[9] The primary relief which the practitioner seeks in terms of his notice of motion, is formulated as follows:

- '1. declaring the applicant entitled to full recovery from the estate of Sanyati Civil Engineering and Construction (Pty) Ltd (In Liquidation) ("*Sanyati*") of such moneys owing to him, in respect of the services rendered by him as duly appointed business rescue practitioner of Sanyati in priority before the claims of all other secured and unsecured creditors in terms of section 143 as read with section 135 and regulation 128(1)© of the Companies Act 71 of 2008;
2. declaring the applicant entitled to full recovery from the estate of Sanyati of such moneys owing by him to the sixth, seventh and eighth respondents, in respect of business rescue support, legal and advisory services rendered by the sixth to eighth respondents to the applicant in his capacity as business rescue practitioner of Sanyati in priority before the claims of all other secured and unsecured creditors in terms of section 143 as read with section 135 of the Companies Act 71 of 2008;'

[10] The liquidators concede the relief claimed in prayer 1 of the notice of motion and in prayer 2 thereof insofar as Rudolph Bernstein (the eighth respondent) is concerned. They dispute the claims in relation Nimble and Accountants on the basis that these

claims are not expenses incurred by him to the extent reasonably necessary to carry out his functions qua practitioner and facilitate the conduct of Sanyati's business rescue proceedings as contemplated in reg 128(3).

[11] They argue that a practitioner must himself perform his functions and he has no authority to delegate them to 'other (outside) professionals' or persons. A practitioner, so they argue, may only 'delegate any power or function' of the practitioner to a person who was part of the board or pre-existing management of the company as contemplated in subsec 140(1)(b).⁶ This subsection is the only express provision in Chapter VI that provides a practitioner with the power to delegate his powers or functions. It must be

⁶ Section 140 reads as follows:

- (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter-
- (a) has full management control of the company in substitution for its board and pre-existing management;
 - (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;
 - (c) may-
 - (i) remove from office any person who forms part of the pre-existing management of the company; or
 - (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and
 - (d) is responsible to-
 - (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and
 - (ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.
- (1A) The practitioner must, as soon as practicable after appointment, inform all relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.
- (2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person-
- (a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or
 - (b) is related to a person who has a relationship contemplated in paragraph (a).
- (3) During a company's business rescue proceedings, the practitioner-
- (a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;
 - (b) has responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and
 - (c) other than as contemplated in paragraph (b)-
 - (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but
 - (ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the power and performance of the functions of practitioner.
- (4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.'

inferred, so the liquidators argue, from the failure to provide for the power to delegate to other (outside) persons that the legislature did not intend there to be any delegation otherwise than in accordance with s 140(1)(b). They argue that the rule of construction of written instruments, *expressio unius est exclusio alterius*,⁷ finds application as far as a practitioner's power to delegate his powers or functions is concerned.

[12] The objection raised by the liquidators is not that the practitioner abdicated or delegated his powers to Nimble or to Accountants, but rather that he delegated some of his functions to them contrary to the provisions of the Companies Act. The practitioner states in his founding affidavit that he was 'confronted with an effective breakdown of the management of Sanyati and an overall incapacity in effectively assisting him through the business rescue process' and that 'the services rendered by the sixth to eighth respondents were essential in the performance of [his] functions as business rescue practitioner and facilitated the conduct of Sanyati's business rescue proceedings'. He further states that-

'[t]he magnitude of claims against Sanyati and the number of affected persons to be notified and consulted, coupled to the extremely short time periods in which to notify all affected persons, hold the necessary meetings with management, creditors, shareholders, employees and guarantee providers and formulate and publish the business rescue plan, necessitated [his] procurement of the services of the sixth to eighth respondents to assist [him] in the performance of [his] functions as business rescue practitioner and to facilitate the conduct of Sanyati's business rescue proceedings.

⁷ See: *Gentruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 602E-F; *Beaver Marine (Pty) Ltd v Wust* 1978 (4) SA 263 (A) at 277D; *South African Roads Board v Johannesburg City Council* 1991 (1) SA 1 (A) at 16G; *National Automobile and Allied Workers' Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* 1994 (3) SA 15 (A) at 26G.

[13] As far as the appointment of Nimble is concerned, the liquidators state in their answering affidavit that ‘... its scope of services relate to matters which should be performed by the business rescue practitioner himself, as required in terms of the Act.’ And as far as Accountants is concerned ‘... that there is no reason why the directors and management of Sanyati could not have assisted the Applicant in performing these functions’, that the practitioner ‘... does not say that he could not get internal assistance in Sanyati and that he was therefore compelled to appoint forensic accountants to perform these functions’, and ‘... that the services that were rendered were not reasonably necessary, as the very same functions could and should have been performed by the Applicant as business rescue practitioner, duly assisted by the directors and management of Sanyati, where necessary.’

[14] The liquidators are factually incorrect in saying that the practitioner does not say why he could not get internal assistance. The practitioner explained the complexities he encountered. He also inter alia states that the management was dysfunctional and could not be relied upon by him, that the financial information in the possession and under the control of the directors was limited in extent and that the accuracy and currency thereof were ‘... highly suspect and required consolidation, critique and analysis’. Furthermore, Accountants’ services included ‘an on-site review’ of Sanyati’s business units in Bloemfontein ‘... in anticipation of the resignation and exodus of key employees’.

[15] 'Business rescue' is defined in s 128(1)⁸ as certain proceedings by the provision inter alia of '(i) the temporary supervision of the company, and the management of its affairs, business and property'. 'Supervision' again, in terms of s 128(1)(i), is the 'oversight imposed on a company during its business rescue proceedings'.

[16] After his appointment a practitioner has the powers and functions set out in s 140 'in addition to any other powers and duties set out in this Chapter'. They include '(a) full management control of the company in substitution for its board and pre-existing management'.⁹ Because of the provisions of subsec 140(1)(a) there might be some doubt whether the 'pre-existing' management retains any powers and what the powers of the practitioner in this respect are. The practitioner has 'full management control', but what about the old management? The practitioner may remove them and appoint new managers (subsec 140(1)(c)), but in accordance with the maxim *delegatus non potest delegare*¹⁰ he may not delegate his powers unless authorised to do so, either expressly or by necessary implication. Thus, to remove any uncertainty, *ex abundanti cautela*,

⁸ Section 128(1)(b) reads as follows-

"business rescue" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;

⁹ A practitioner has various other powers and duties in terms of Chapter VI 'in addition to' those enumerated in s 140.

¹⁰ In *Attorney General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A), at 639, Botha JA said this:

'The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.'

subsec 140(1)(b) provides for a delegation to the old management.¹¹ The words of subsec 140(1)(b), therefore, do not have a bearing on delegation generally or on the meaning of the other provisions in Chapter VI.

[17] A practitioner has various other powers and duties embodied in Chapter VI 'in addition to' those enumerated in s 140. There is no indication in Chapter VI that all the functions of a practitioner are required to be undertaken and discharged by the practitioner personally. The provisions of Chapter VI are not unduly prescriptive or restrictive as far as a practitioner's functions and duties are concerned. His functions and duties are broad and require a variety of steps to be taken. The every nature of a practitioner's powers implies that he may in appropriate circumstances appoint advisors, valuers, auctioneers, forensic accountants, lawyers and other experts or persons to assist him in the carrying out of his plenary functions. Although no specific provision is made for the power of a practitioner to appoint advisors, s 140(2) prohibits a practitioner from appointing certain persons as advisors. A practitioner, therefore, by necessary implication has the power to appoint advisors. Furthermore, a forensic audit or the undertaking of other forms of work or services which fall within the ambit of a practitioner's functions and duties may well be required of the advisor in order for him or her to give advice to the practitioner or to the company. To distinguish between advice per se and the undertaking of any other service seems to me to be unduly artificial in this context. Furthermore, in addition to his own remuneration, s 143(1) entitles a practitioner to charge an amount for his expenses. Regulation 128(3) expressly provides for the recovery of disbursements and expenses.

¹¹ See: *Johannesburg City Council v Tucker's Land Holdings Ltd and others* 1971 (2) SA 478 (W) at A-H.

[18] The appointment, in appropriate circumstances, of auditors or other professionals or persons to assist a practitioner in the carrying out of his functions and in facilitating the conduct of the company's business rescue proceedings involves no delegation of the practitioner's powers, but such power merely follows from the powers given to him under Chapter VI. In *Johannesburg Municipality v Davies and another* 1925 AD 395, Stratford AJA said the following:

'Here it may be as well to remark that the rule that a power is to be implied to do that which is reasonably incidental to what has been expressly authorised is no new rule of construction of statutes, it is merely an example of a proper implication to draw.'

[19] The liquidators further argue that all expenses incurred prior to confirmation of the practitioner's appointment on 6 June 2012 and subsequent to 4 July 2012 (the day when the practitioner concluded that there was no prospect of rescuing Sanyati) are, as a matter of principle, not recoverable under reg 128(3). There is no merit in this contention.

[20] The business rescue proceedings commenced on 29 May 2012 and ended on 11 July 2012 when Sanyati was placed in liquidation. There is no reason why a practitioner cannot accept the services that were rendered prior to his appointment and assume the responsibility for the payment thereof. Expenses incurred and disbursements made after a conclusion that there is no reasonable prospect for the company to be rescued and before the business rescue proceedings ended may or may not, depending on the facts of a given case, be proved to have been reasonably necessary as contemplated in reg 128(3). A practitioner cannot simply abandon ship before the business rescue proceedings are ended and he may conceivably still require assistance during that time.

[21] The test for a business rescue practitioner's entitlement to reimbursement for expenses and disbursements is whether they were reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings. The question is a factual one which must be assessed on the facts and circumstances of each case with reference to factors such as the size of the company, the functionality of its management, the accuracy and currency of its financial and accounting data, the complexities involved and the scope of the work required to be undertaken by the business rescue practitioner. It is also implicit in the reasonableness requirement of reg 128(3) that a business rescue practitioner is not entitled to reimbursement to the extent to which the charges of the service providers are not market-related, in other words reasonable.

[22] Nimble rendered services in connection with the preparation of a business rescue plan after it had been concluded that there was no reasonable prospect for Sanyati to be rescued. The practitioner accepts that those expenses do not necessarily meet the requirement of reg 128(3) and he, correctly in my view, abandoned that portion of his claim. Nimble also rendered services after the business rescue proceedings of Sanyati had ended, which expenses are obviously not recoverable in terms of subsecs 143(1) and (6) and reg 128(3). The order which I propose to make will limit the practitioner's entitlement to reimbursement of his expenses to work undertaken during the period of Sanyati's business rescue proceedings.

[23] The liquidators have not refuted the case put up by the practitioner that Nimble and Accountants were appointed for justifiable reasons; that their charges were market related and for work actually performed; and that the expenses incurred in relation to

them (other than the costs of continuing with the preparation of a business rescue plan after it had been concluded that there was no reasonable prospect for Sanyati to be rescued and the expenses incurred after Sanyati had been placed liquidation) were indeed reasonably necessary to have carried out his functions and facilitate the conduct of Sanyati's business rescue proceedings. The liquidators contest the practitioner's entitlement to reimbursement rather on issues of principle. Real disputes of fact disentitling the granting of final relief to the practitioner have not been raised.

[24] Finally, the matter of costs. The liquidators contend that no order as to costs should be made by virtue of the novelty of the questions raised in this application ('...delegation and whether the costs are reasonably necessary') and the fact that both sides were entitled to seek guidance from this court. I am, however, not persuaded that the circumstances of this case warrant a deviation from the general principle that costs should follow the event. The practitioner is substantially successful.

[25] In the result the following order is made:

1. The applicant is declared entitled to full recovery from the estate of Sanyati Civil Engineering and Construction (Pty) Ltd (in liquidation) (Sanyati), in priority before the claims of all other secured and unsecured creditors in terms of section 143 as read with section 135 and regulation 128(1)(c) of the Companies Act 71 of 2008, of:
 - 1.1 such moneys owing to him in respect of the services rendered by him as duly appointed business rescue practitioner of Sanyati;
 - 1.2. such moneys owing by the applicant to the sixth and seventh respondents in respect of business rescue support and advisory services rendered by them to

the applicant in his capacity as business rescue practitioner of Sanyati during the period of its business rescue proceedings from 29 May 2012 until 11 July 2012, but excluding the expenses incurred in connection with the business rescue plan after it had been concluded on 4 July 2012 that there was no reasonable prospect for Sanyati to be rescued;

- 1.3 such moneys owing by the applicant to the eighth respondent in respect of business rescue support, legal and advisory services rendered by it to the applicant in his capacity as business rescue practitioner of Sanyati.
2. The first, second, third, fourth and fifth respondents are ordered to pay the applicant's costs of suit, including the costs of senior counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

29 July 2014

Date of Hearing:	6 – 8 May 2014
Date of Judgment:	July 2014
Counsel for Applicant:	Adv A Subel SC
Attorneys for Applicant:	Baker & McKenzie, Sandton
Counsel for 1 st to 5 th Respondents:	Adv PF Rossouw SC
Attorneys for 1 st to 5 th Respondents:	De Vries Incorporated, Sandton