REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/24747

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

……………………… ……………………………

DATE SIGNATURE

In the Matter between:

CORDEIRO HOLDINGS CC	First Applicant
THE SPAR GROUP LTD	Second Applicant
ABSA BANK LTD	Third Applicant
and	
MARKET DEMAND TRADING 254 (PTY) LTD	
(IN BUSINESS RESCUE)	First Respondent
RICH REWARDS TRADING 143 (PTY) LTD	
(IN BUSINESS RESCUE)	Second Respondent
RANJITH CHOONILALL N.O.	Third Respondent
COMPANIES AND INTELLECTUAL	

PROPERTIES COMMISSION Fourth Respondent

JUDGMENT

Headnote:

Business Rescue, sections 129, 130, 150 of the Companies Act 71 of 2008

Application by creditors to set aside resolutions passed ito section 129 by the distressed companies placing themselves in business rescue on ground that business rescue practitioner had not filed a plan within the prescribed time and thereupon convert proceedings into liquidation proceedings – counter application for court's sanction to an extension of 60 days to file plan

Panamo Properties (Pty) v Nel 2015 (5) SA 63 (SCA) applied – what is just and equitable governing outcome

Laxity of Business rescue Practitioner in meeting section 129 deadlines warranted censure, but on the facts, the circumstances facing him provided some mitigation

Key issue on the facts was whether there was a reasonable prospect of business rescue saving the business – the prospects were not reasonable – Two retail outlets which were grossly underfunded from inception fell out with both the bank, to whom it owed a sum of R27m which could not be funded by sales revenue the servicing costs of which amounted to half the turnover of the shops, and with the franchisor who had stopped supplies and had indicated an unequivocal desire to terminate the relationship, litigation about the validity of the termination being carried on in parallel to the business rescue proceedings. In addition, one shop was in dispute with the landlord, the first applicant, who was pursuing eviction proceedings in parallel with the business rescue proceedings. The envisaged plan relied heavily on the shops trading for the period of the extension, but was short on ideas about capital injection. On a conspectus of such circumstances there were no reasonable prospects.

Held: The business rescue proceedings were set aside, and a provisional order of winding up ordered, costs to costs in the liquidation.

Sutherland J:

Introduction

[1] The real controversy in this application is about whether or not business rescue proceedings should be set aside and the proceedings be converted into winding up proceedings or the business rescue practitioner, the third respondent (Choonilall) be granted an extension within which to present a business rescue plan.

[2] The parties are called by their names. The fourth respondent did not participate. The second applicant (Spar) filed a replying affidavit but had prior to the hearing withdrawn from the application and tendered the respondents' costs. The role it played in the saga shall not go unremarked upon. All references to various Sections are to the Companies Act 71 of 2008.

[3] Several ancillary matters troubled the parties. The application to set aside the resolutions passed by the Market Demand and Rich Rewards, first and second respondents in terms of section 129 of the Companies Act 2008, began life as an urgent application. The parties agreed to submit the fate of when the matter would be heard to the deputy judge president. He allocated a date inconvenient to the respondents and declined to revise it. An appetite persisted to address the question of urgency, but in my view the question of urgency was overtaken by his directive. Further, the respondents, in addressing the application to set aside the resolutions and wind up the two companies, filed a counter claim pursuant to section 150(5) seeking the court to sanction a 60 day extension of time to file a business plan. They supported that counter application and answered the initial application in a single affidavit. The applicants in turn replied and answered in a single affidavit. It was argued that the counterclaim was not properly opposed. I took the view that albeit that the papers might suffer from a procedural incoherence, the substance of the controversies had been traversed and no useful purpose was to be served by any fuss over the process. Another complaint by the respondents about the contents of the applicants' replying affidavits and an application to strike out various passages was, ultimately, not persisted with. Other points about the attesting of affidavits raised in the papers were abandoned.

A history of the Critical events in the litigation

[4] It is manifestly obvious that the two companies are severely financially distressed. The respondents themselves confess that they were underfunded from when the present owner, the Inarman Family Trust, (represented by Premchand Kandhai Inarman, a trustee and the sole director of both companies) bought the businesses in 2014. Market Demand ran the Squeeze In shop. Rich Rewards ran the Crestview shop. The Trust borrowed R27m from Absa to buy the two business. Absa has security for the loan, although on these papers the full extent is not really apparent. As regards working capital, Absa provided, initially, a R5m overdraft but reduced it later to R3m. In September 2015, Absa cancelled overdraft facilities altogether after a long period of bickering.

[5] The businesses ran as Spar outlets. To do business as a Spar shop one joins the Spar guild, of which Spar, itself, is a “distribution’ member. Supply from Spar was critical to maintaining stock levels with which to trade in credible circumstances. Poor payment resulted in a stop put on supply until arrears were paid. About R3m was owing. This decision by Spar, self-evidently, precipitated what the respondents appropriately describe as a catastrophe. Respondents say that stock purchases were being made from the takings of the day before. The Crestview shop closed in April 2016 owing to inadequate stock levels to trade effectively.

[6] On 4 April 2016, the Spar Guild purported to terminate their membership; the validity of which is still in dispute. However, it is not disputed that the relationship between the Guild and its members can be terminated on a month’s notice. The fact of the unpaid debts led to Spar perfecting a notarial bond, eventually obtaining an order on 22 April 2016.

[7] When the intention of Spar to perfect its bond was made known to the companies, it became plain to them that they could not carry on with business as usual. Thus, on 21 April 2016 the companies moved an application for business rescue in the High Court in Durban. That application got postponed. The two companies then passed resolutions on 25 April 2016, in terms of section 129, to put themselves into business rescue. Choonilall was promptly appointed the business rescue practitioner on the same day. Of no little significance, on that same day Spar was paid R3m by an unnamed ‘Third party’.

[8] Choonilall was at once faced with multiple challenges to address. First, the lease of the Squeeze In premises was in dispute. An eviction application against Market Demand, which ran the Squeeze In shop, had been instituted in August 2015 by the landlord, Cordeiro, the first applicant, and this attack had to be fended off. Cordeiro has no relationship with Rich Rewards. Second, Spar, as a result of the termination or alleged termination of membership of the Spar Guild, marched on the businesses and removed the branding and other business equipment. Choonilall on 12 May, (16 days after his appointment) launched a spoliation application. On 24 May a consent order restored the *status quo ante*, albeit that the physical return and reinstallation took some time. According to Spar, only by 21 June was restoration complete.

[9] On 30 May 2016, 34 days after his appointment, Choonilall asked the creditors for an extension to produce a business plan, ie 9 days after the statutory 25 days had run out within which to present a business plan. They refused. Why a request was not made earlier is unexplained.

[10] Six weeks after that refusal, the applicants instituted the application to set aside the resolutions and obtain a winding up order. The matter was set down in the urgent court, as alluded to above. Whilst awaiting the DJP's directive, on 28 July 2016, the counter -application for an extension was filed. The DJP, on 12 August, directed the matter to be set down for hearing on 31 August 2016.

[11] From the bar, I was informed that the litigation over the eviction of Market Demand from the premises it let from Cordeiro and the validity dispute over the cancellation by the Spar Guild of the two companies' membership remains pending and are unlikely to reach a court until 2017. The market Demand shop is about three kms from the Crestview shop run by Rich Rewards. The Market Demand shop was moribund at the time of the hearing. In an uncontested supplementary affidavit it is stated that the Crestview shop had resumed trading since18 August 2016, a fortnight before the hearing.

Evaluation

The relief sought

[12] The applicants (now minus Spar) want the setting aside of the resolutions, and with them out of the way, a winding up of the two companies, alternatively, Choonilall ought to be ordered to give security, if the business rescue of Rich Rewards is to continue.

[13] They also sought leave to sue in terms of section 133(1)(b) which provides that a court's leave is needed to sue a company in business rescue. In the hearing it was argued they did not need that by virtue of the provisions of section 130(5)(c) which expressly refers to a conversion to winding up proceedings. However they had not cited section 130(5)(c) in the notice of motion. I am of the view that they need not invoke section 133(1)(b) to seek the relief sought, because section 130(5)(c) read together with section 133 implies that section 133 does not apply to the setting aside of a resolution or the conversion into liquidation proceedings. Moreover, the omission of an express allusion, in the notice of motion, to section 130(5) (c) as the provisions in terms of which the winding up is sought, in the context of the relief sought as a whole, is of no moment because it is obvious to the informed reader that section 130(5)(c) is envisaged.

[14] The counter application is straight forward; Section 150 (5) (a) provides for a business plan to be presented within 25 days or 'such longer time as may be allowed by the court, on application by the company...' Choonilall is in control of the companies. He asks for 60 days, ie, two months, whereupon he shall file a plan. Self-evidently he wants to base a proposal on the trading record.

The principles to be applied

[15] Counsel are *ad idem* that the decision in *Panamo Properties (Pty) Ltd & Another v Nel & Others 2015 (5) SA 63 (SCA)* governs the application. In that matter Wallis JA clarified the meaning to be attributed the provisions of section 129. Where

there is a failure to comply with section 129 (as there is in this case as regards the timelines) the provisions which cause the resolutions to lapse do not also mean that the business rescue proceedings lapse too. Notwithstanding such a lapse of the resolutions the proceedings remain in existence unless as court orders otherwise. What is required is that a court, in deciding whether to order the cessation of business rescue proceedings, must have regard to any non-compliance with section 129 *and* ' having regard to all of the evidence [consider whether] it is otherwise just and equitable to do so.' This means that the non-compliance is no more than a door that opens to the prospect of an order setting aside the resolutions.

Choonilall's conduct

[16] That Choonilall ought to have applied for the extension before the expiry of the 25 days, ie, before 20 May 2016, is plain. He asked for an extension from the creditors when he was already 9 days late. He does not say why he missed the deadline, and so it can be imputed to him that he was remiss. However, I am inclined to take an empathetic view of the ostensible tardiness, owing to the scale of drama with which he was confronted in the period since his appointment. It is however, unimportant to nit-pick his conduct because even were he to have been derelict (which I do not accept I can find on these papers) the sins of omission function merely to set the table for a debate about what is just and equitable in the given circumstances.

[17] Section 150(5) does not prescribe any particular norms for the evaluation of the merits of an application for an extension. Self-evidently, a consideration must be that the plan could not have be presented earlier. Why that might be so is wholly fact-specific. Moreover, it seems to me to also be the case that such an application is not to be refused simply because a plan *could* have been prepared earlier; the threshold is not impossibility of a quicker presentation, nor an explanation for non-compliance that is free from blemish, but rather, ought to be weighted towards the absence of prejudice to any affected party and the reasonableness of affording more time to the rescue practitioner to compose a viable plan if he contends that there is

some impediment that rationally inhibits him from presenting a plan earlier. This need not imply that a creditor, or any other stakeholder, does not suffer some inconvenience.

[18] In my view the peculiar circumstances facing Choonilall, would have inclined me towards being sympathetic to his plea for an extension, were it not for certain objective factors to which I shall allude in due course. When the request was initially made and rebuffed, on 31 May 2016, Choonilall had, shortly before, taken steps to try halt the eviction of Market Demand from the Squeeze In shop and had extracted a climb-down from Spar who consented to restoring the paraphernalia necessary to get trade to resume. The Crestview shop had shut. The predicament of the two companies was summed up by him in his report of 11 July 2016. It is appropriate to cite it in full:

> *"As previously advised, the two Spar supermarkets, being franchises owned by the aforesaid companies are under business rescue. I report on their progress as follows:-*
>
> 1. *Business Rescue proceedings of both entities commenced on 26 April 2016.*
> 2. *The Spar Group (franchisor) and its Guild submitted that their agreement with the companies under supervision were terminated prior to Business Rescue, and the entities dispute such termination.*
> 3. *Notwithstanding being advised that the companies were under business rescue, the Spar Group removed, among other things all their signage and computer equipments and points of sale hence totally disabling their trading operation.*
> 4. *The invariable consequence of such removal was that the stores could not serve customers as all the items had bar codes and had to be scanned at the point of sales.*
> 5. *A High Court application was brought on the urgent basis, in the Pretoria High Court, for an order directing Spars to re-instate the stores forthwith into their trading condition.*
> 6. *It come as no surprise that Spar quickly consented to the order to re-install the equipment and to restore the stores into their trading condition.*

7. *However, although the court order had stipulated the time frame for such re-installation, it took much longer. Save for a few outstanding issues, the store would recommence trading on or about 13 July 2016.*

8. *Post-commence finance is now available to re-open the Crestview Spar to trade.*

9. *A meeting of creditors and employees was held on 12 May 2016 at which they were fully appraised of the closure of the stores and the pending High Court application.*

10. *Upon grant of the order, all the affected persons were informed and thereafter weekly reports were published to them, advising them further that no business plan would be published within the 25 working days of my appointment for the reasons aforementioned.*

11. *An extension of time was sought from the creditors by written communication and although the majority in number did not oppose the request, ABSA, opposed same.*

12. *I advise that I have had the opportunity of more fully investigating the affairs of both entities and further to the report presented after my preliminary investigations on 12 May 2016, I report as set out below.*

13. *<u>MARKET DEMAND t/a SQUEEZE IN</u>*

13.1. *This store does not have a long term lease agreement and it presently monthly tenant.*

13.2. *There is a dispute between the previous tenant, Sharp Move CC and /or Market Demand and the Landlord with regards to arrear rentals in the sum of approximately R900 000.00.*

13.3. *Until this issue is resolved, it is unlikely that Market Demand will obtain the written lease. However, the company will be in negotiations with the landlord when attempting to resolve the arrear rental issues.*

13.4. *Until Market Demand secures at least a long term lease, it would not be prudent to operate this store.*

13.5. *In the meanwhile, the remaining stocks will be removed from this store to the Crestview Spar to commence trading on 13 July 2016.*

14. *<u>RICH REWARDS t/a CRESTVIEW SPAR</u>*

14.1. *A long term lease has been secured with landlord.*

14.2. *Negotiations will take place with the Spar Group/Guild to resolve the dispute of its membership of the Guild and to reinstate the purchase of stocks from the Spar Group, failing which the pending application in the Pretoria High Court will be proceeded with.*

14.3. *It is only after a month of trading that a proposed business rescue plan will be published."*

[19] This letter is a frank account of the travails that had passed. Why a 'preliminary' investigation occurred only on 12 May is unexplained. At that time both shops were not trading. The Spar spoliation had been resolved. He recognises the vulnerability of the lease controversy about the premises of the Squeeze In shop of Market Demand. He updates the reader that the lease at Crestview has been secured. The Spar Guild membership issue is being addressed. Most important of all, he reports on fresh finance that has been accessed that can, he claims, facilitate Crestview re-opening. He states (rather than asks) that a plan will be forthcoming in a month; ie by mid-August.

[20] Nevertheless, Choonilall is properly to be criticised because, in the face of the creditors' refusal of his extension request on 31 May, six weeks later he merely assumes he can proceed unilaterally.

What is just and equitable on these facts?

[21] What is just and equitable is the key issue in the matter. The heart of the resistance to the applicant's case and the foundation of the counter- application is identical; ie, now that Spar is no longer harrying the businesses, Choonilall wants a chance to let the store (or stores) trade for two months so that he can, premised on such activities, compose a plan. The delay is producing a plan is, supposedly, the result of Spar's scorched earth tactics of cutting off supplies and later de-branding the stores.

[22] The counter argument to this scenario, which is independent of Choonilall's unexplained ostensible laxity, is that a revival of trade is fanciful. In my view, there is force in that argument. The initial, failed, business plan of the two companies was to service the debts from trading revenue. It failed. The Absa debt alone requires repayments per annum of R4,608,000 a sum equal to half the projected upper estimate of turnover for both shops trading under uncompromised circumstances.

With only one shop to rely on how such revenue is expected to be forthcoming is unexplained, even with severe cost-cutting. Over and above that factor, there is the financial drain of the other litigation, and the risk of termination of membership of the Spar Guild. No argument is advanced why that battle is tipped in favour of the companies on either matter. Moreover, where is the stock for resale being sourced and how is it being paid for? How are the shelves to stocked, and with what funds? Spar will not supply them. Save for stating that sum of R1.2 m to restock is available, these vulnerabilities are not addressed. The source of the funds is ostensibly the Trust, yet no information is offered about what resources it has left after the rear-guard efforts already embarked on, especially when it is said that a Third party had to step up to pay the R3m to Spar, an indication that the Trust was not able to do so. The absence of critical information about sources of additional funding and the logic inherent in the request for a two month to try to trade is that the hoped-for future trading revenue is a key component of the envisaged strategy. Were the strategy to re-capitalise the businesses, that fact would have been stated. The reluctance of Absa to afford overdraft facilities does not bode well for a prospect that a rational investor would see value in contributing to the rescue.

[23] I was invited to examine what had been envisaged in the attempted application in terms of section 131 in the High Court, Durban. The founding affidavit spelled out several cost cutting measures, promised tighter management, a desire to stave off retrenchments in the short run, and said that in addition to paying off some arrear costs R1.2 was available to restock the Crestview shop which had ceased trading owing to low stock levels.[1] These were measures undertaken by the directors rather than Choonilall. The scenario is hardly rosy. Cost cutting, though commendable, does not address the problem of working capital in the short term.

[24] Section 130(1)(a)(ii) contemplates that if there is ‘no reasonable prospect of rescuing the company’ the resolution may be set aside. In my view that is the case. What Choonilall is really asking for is a chance to gamble with the businesses. In a

[1] Paragraphs 19.2 – 26 of the founding affidavit of Maharaj.

gamble the unexpected can sometimes be achieved. The flaw in the case for the respondents is less in the absence of detail than in the absence of a viable strategy.

Conclusions

[25] As a result, despite the sterling efforts of Choonilall to rehabilitate these companies from the predations of their creditors, what he is tasked with is saving two shops that cannot deliver adequate revenue, one of which with an extremely tenuous claim to lease premises and which is at present dormant, and another whose future is dependent on its continued membership of the Spar Guild, which is unequivocal that it does not want Rich Rewards as a member, and may terminate membership on a month's notice.

[26] In my view, the prospects are not reasonable. To the extent the bleakness of the present condition might be blamed on Spar's actions, it must not be overlooked that the critical difficulties in trading stem from the desire of Spar to distance itself from these businesses, a stance which began before the spoliation and has been sustained even after what was owed (save for a not significant sum in dispute) was paid. Self-evidently the Spar brand reputation is more important to Spar than a continued relationship.

[27] Without question, the law inclines a Court to save a business rather than let the creditors ravage it, but if reasonableness is the threshold, the expectations articulated here are inadequate to clear it. The fate of the workers is a matter of concern but in my view the prospects of preserving their jobs is hopeless, even if a business rescue plan could be composed, as self-evidently, cost-cutting cannot spare the staff.

[28] The prayer to convert the proceedings into liquidation proceedings, as contemplated by section 132 (2) (a) (ii), is appropriate. In my view a provisional order

is appropriate. A proper investigation into the circumstances can proceed in the usual way.

Costs

[29] The applicants have sought punitive costs against Choonilall. In my view their complaints do not warrant such a sanction. In my view Choonilall has been earnest in his efforts, albeit lax about meeting statutory deadlines, in respect of which I am willing to accept that there is some mitigation.

The Order

[30] An order is made thus:

30.1. The respondents' counter-claim is dismissed.

30.2. The applicants claim as set out hereunder is granted.

30.2.1. The Resolutions of 25 April 2016 by the first and second respondents are set aside.

30.2.2. The first and second respondents are provisionally wound up.

30.3. The costs of the application and counter application shall be costs in the winding up.

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Roland Sutherland

Judge of the High Court,

Gauteng Local Division, Johannesburg

Hearing: 31 August 2016

Judgment: 6 September 2016.

For First and Third Applicants:

Adv T Ossin,

Instructed Werthschroder Inc

For First to Third respondents:

Adv M Hellens SC, with him, Adv S K Dayal,

Instructed by Jailall & Associates Inc