

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 1216/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
DATE: 30/6/2021

In the matter between:

PIETER MENTZ N.O.

Applicant

and

**TRUCK MEC (PTY) LTD
(UNDER SUPERVISION)
(Registration Number: [....])**

Respondent

*Application to terminate business rescue and wind-up company. No case made out.
Application dismissed*

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] This matter came before me in the unopposed motion court on 31 May 2021. The applicant believed that the application made out a proper case, and thus sought

a draft order terminating the respondent's business rescue, and placing it in final winding-up. However, the papers are fatally defective. In this context I state some trite principles upon which I base my findings:

[1.1] It is trite that affidavits in motion proceedings are to set out the pleadings and the evidence in the affidavits (with admissible evidence). See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*.¹ The Supreme Court of Appeal formulated it as follows in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*.²

“.. It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit.” (footnotes omitted)

[1.2] It is equally trite that where conclusions are drawn, the facts in support for such conclusions must be pleaded and proven. See *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others*.³

[1.3] It is equally trite that hearsay evidence is inadmissible. See *The Master v Slomowitz*,⁴ and see further section 3(1) of the *Law of Evidence Amendment Act* 45 of 1988.

[1.4] In addition, this application must always have been known to be, in effect, an *ex parte* application, as there was non-service (to which I revert). It

¹ 1999 (2) SA 279 (T) at 323F-324A.

² 2014 (3) SA 96 (SCA) at para 13.

³ 2003 (4) SA 207 (C) at para 28.

⁴ 1961 (1) SA 669 (T) at 672A.

is equally trite that there is a heightened duty in *ex parte* applications to disclose material facts. See *Trakman NO v Livshitz and Others*:⁵

“... It is trite law that in *ex parte* application the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the Court's discretion, to the dismissal of the application on that ground alone (see, for example, *Estate Logie v Priest* 1926 AD 312 at 323; *Schlesinger v F Schlesinger* 1979 (4) SA 342 (W) at 348E-350B). ...”

[2] As was implicitly held in *Carroll v Vlakplaats 335 CC In Re: In the application for the Liquidation of: Vlakplaats CC (under supervision)*,⁶ the relief sought is not merely for the asking, a proper case must be made out:

“In the premises, I am of the view that the provisions of section 141(2)(a)(ii) of the Companies Act do not find application in this matter. There exist no plausible reasons for the Business Rescue Practitioner to have come to the conclusion that there is no reasonable prospect for the applicant to be rescued. By all accounts, the applicant had in fact been rescued by the implementation of an approved and adopted business rescue plan. The fact that the main creditor, nay the only creditor, was unhappy *ex post facto* with the outcome of the implementation of the business plan is irrelevant. Once the plan had been approved the applicant was well on its way to being rescued, and it was assisted in that regard by a compromise which had been brokered as part of the business rescue plan.”

Business rescue practitioner?

[3] The applicant is Pieter Mentz, purportedly in his capacity as the business rescue practitioner of the respondent. I use the word “purportedly” as such appointment was not proven and, as the annexures to the founding papers suggest that the business rescue practitioner was Mr Bennie Kevvy (“Mr Kevvy”).

⁵ 1995 (1) SA 282 (A) at 288E-F.

⁶ [2019] ZAGPPHC 75 at para 29.

[4] These are the relevant, unsubstantiated averments of the applicant in the founding affidavit with regard to his alleged appointment:

[4.1] *"I am an adult male senior business rescue practitioner, practising under the name and style of Mentz Consulting ..."*

The applicant did not seek to prove his status as a senior business rescue practitioner.

[4.2] *"I am the duly appointed business rescue practitioner of the Respondent."*

The applicant did not seek to prove his appointment as the respondent's business rescue practitioner. He also failed to allege the date of his alleged appointment.

[4.3] *"I was appointed by the Companies and Intellectual Properties Commission of South Africa (hereinafter referred to as "the CIPC"), as the business rescue practitioner of the Respondent."*

Stating again, the applicant did not prove his alleged appointment as the respondent's business rescue practitioner, and failed to allege the date of his appointment. Reading the founding affidavit as a whole, the applicant conveys that he was the appointed business rescue practitioner from the commencement of the respondent's business rescue process in mid-2017.

[4.4] *"The business rescue process commenced on 31 July 2017 ..."*

[4.5] *"I have complied with all my duties in terms of the Companies Act, including but not limited to: ... Initially exercising full management control of the Respondent in substitution for its members and pre-existing management";*

One example is used above of the steps that the applicant avers that he took (and the remainder in similar vague terms have been omitted). No detail was given, or even dates when steps were taken, such as publishing a business rescue plan or when he ceased to exercise management control.

[4.6] “*The first meeting of creditors and employees' representatives in terms of Section 147 and 148 of the Act, was held on 16 August 2017 ...*”

The applicant seeks to convey that he attended the meeting without stating that fact. A minute of a meeting of 16 August 2017 is attached to the founding affidavit. It contradicts the applicant's version in a number of instances.

[5] The minute shows simply that it was a meeting of the respondent's creditors (and not that the respondent's employees also formed part of the process, as alleged). According to the minute, the chairperson of the meeting was the business rescue practitioner, Mr Keevy, not the applicant. The applicant is not even listed as having been present.

[6] Mr Keevy acted as the chairperson at the meeting. Also present were two more persons who, like Mr Keevy, were representing “Commonwealth Trust”. That entity seems to be Commonwealth Trust (Pty) Ltd, as also attached to the founding affidavit, but not referred to therein, are an affidavit and a letter by Mr Keevy from Commonwealth Trust (Pty) Ltd wherein he sought to accept appointment as the respondent's business rescue practitioner.

[7] Under these circumstances, the application stands to be dismissed as the applicant has failed to plead and prove his *locus standi* as the respondent's business rescue practitioner.

Respondent insolvent?

[8] The applicant sought that the business rescue proceedings of the respondent be discontinued and that the respondent be placed in final liquidation in terms of section 141(2)(a)(ii) read with section 132(2)(a)(ii) of the Companies Act 71 of 2008 (“the 2008 Companies Act”).

[9] This relief was sought as the applicant seemingly believed that the respondent is insolvent. He made no averment about solvency, it is a conclusion I draw. I could draw the conclusion from the fact that the applicant purportedly sought to comply with the provisions in terms of section 9(4A) of the Insolvency Act 24 of

1936,⁷ and correctly also with the similar winding-up formalities set out in section 346A of the Companies Act 61 of 1973 (“the 1973 Companies Act”).⁸ I could draw the conclusion further as no attempt was made to justify the winding-up of a solvent company by its business rescue practitioner (as opposed to by other interested parties) in terms of section 81(1)(b) of the 2008 Companies Act. That section reads (underlining added):

“(1) A court may order a solvent company to be wound up if-

(a) ...;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141(2)(a), on the grounds that there is no reasonable prospect of the company being rescued; or

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that-

⁷ “(a) When a petition is presented to the court, the petitioner must furnish a copy of the petition-

- (i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and
- (ii) to the employees themselves-

 - (aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or
 - (bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;

- (iii) to the South African Revenue Service; and
- (iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.”

⁸ “(1) A copy of a winding-up order must be served on-

- (a) every trade union referred to in subsection (2);
- (b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;
- (c) the South African Revenue Service; and
- (d) the company, unless the application was made by the company.

(2) For the purposes of serving the winding-up order in terms of subsection (1), the sheriff must establish whether the employees of the company are represented by a registered trade union and determine whether there is a notice board inside the premises of the company to which the employees have access.”

- (i) the company's business rescue proceedings have ended in the manner contemplated in section 132 (2) (b) or (c) (i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or
- (ii) it is otherwise just and equitable for the company to be wound up;
- (d) ...”

[10] If one has regard to section 132 of the 2008 Companies Act, a section upon which the applicant does rely, the section deals with the termination of business rescue proceedings in section 132(2) (underlining added):

“(2) Business rescue proceedings end when-

(a) the court-

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings;

(b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or

(c) a business rescue plan has been-

(i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or

(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.”

[11] Omitted from the express provisions in section 132(2)(a) is an express power for a court to order that business rescue proceedings terminate, without ordering that the company be wound up. As will appear below there is authority that the court does have such a power.

[12] The applicant further relies on section 141 of the 2008 Companies Act. Section 141(1) addresses the investigative obligation of the business rescue practitioner (underlining added):

“As soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.”

[13] The aforesaid investigative task in terms of section 141(1) ought to have been completed shortly after July 2017, four years ago. If the business rescue practitioner forms the view at any time (upon the conclusion of the investigation or thereafter) that there is no reasonable prospect (or anymore such a reasonable prospect) that the respondent could be rescued, section 141(2) comes into play. It has two main provisions (underlining added):

“(2) If, at any time during business rescue proceedings, the practitioner concludes that-

(a) there is no reasonable prospect for the company to be rescued, the practitioner must-

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation”;

(b) there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and-

- (i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or
- (ii) otherwise, file a notice of termination of the business rescue proceedings; or
- (c)”

[14] It seems to me that the business rescue practitioner must make an assessment continuously: Is the company under business rescue still financially distressed? Section 128 of the 2008 Companies Act defines “financially distressed” to mean if 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*”, or it “*appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months*”.

[14.1] If the company is not or no longer financially distressed, he or she must seek that the company be restored in terms of section 141(2)(b). Once a company is no longer so distressed, the original reason for the directors placing it under business rescue without court approval in terms of section 129(1)(a),⁹ would fall away. The papers before me contain no averment, proven with admissible evidence, that it is likely that the respondent will not be able to pay all of its debts as they become due and payable within the immediately ensuing six months or that it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months. The contrary is the case, the averment is that its debts have been paid. As such the inference on the papers is that the

⁹ “(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-

- (a) the company is financially distressed; and
- (b) there appears to be a reasonable prospect of rescuing the company.”

respondent is no longer financially distressed, which is in conflict with the relief sought by the applicant;

[14.2] If the company remains distressed, one of two courses remain available:

[14.2.1] The one course is that the business rescue plan be implemented, or sought to be implemented. The papers before me contain no averment, proven with admissible evidence, that such a plan was ever proposed and voted upon. I address below the authority that a court has the power to set aside a business rescue process if a business rescue practitioner does not fulfil his or her duties;

[14.2.2] Assuming that a business rescue practitioner after duly complying with his or her obligations find that a business rescue plan is doomed, and there is no reasonable prospect for the company to be rescued, liquidation must follow in terms of section 141(2)(a). Normally such a company would be insolvent (which is the approach taken by the applicant in this case). But what happens if the company is financially distressed, and the business rescue plan is doomed, but the company is solvent? I raise this only to test my findings, as it is not the case made out by the applicant. Section 141(2)(b) would not apply to such a case. Does section 141(2)(a) apply to a solvent company? One indication is that section 81(1)(b) of the 2008 Companies Act (already referred to) foresees a possibility that a solvent company be wound-up by a business rescue practitioner (instead of by another party with locus standi). Section 81(1)(b) caused considerable difficulties to the presiding judge in *Firststrand Bank Ltd v Wayrail Investments (Pty) Ltd*,¹⁰ who came to conclusion in para 45 that, in effect, section 81(1) was included in 2008 Companies Act in error. This would limit the application of section 141(2)(a) to insolvent companies. I need not make a finding in this regard, as it is not in issue before me.

¹⁰ [2012] ZAKZDHC 91.

[15] The relief that the applicant sought before me might have been inappropriate to commence with, as my options may well not have been only the two possibilities set out in section 141(2) of the 2008 Companies Act, as read with section 81(1)(b). There might have been a third option that ought to have been addressed on the facts of this case where there has been an extraordinary delay in the matter.

[16] A business rescue practitioner must act without undue delay. Section 147 of the 2008 Companies Act deals with a meeting of creditors that the business rescue practitioner must convene within ten business days after being appointed. There is no evidence that the applicant held such a meeting. Section 148 of the 2008 Companies Act deals with a meeting of employees' representatives that the business rescue practitioner also must convene within ten business days after being appointed. There is no evidence that this ever happened. Section 150 of the 2008 Companies Act obliges the business rescue practitioner, after consulting the creditors, other affected persons, and the management of the company, to prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151. Section 150(5) obliges the business rescue practitioner to do so within a limited period:

“(5) The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by-

- (a) the court, on application by the company; or
- (b) the holders of a majority of the creditors' voting interests.”

[17] Shortly thereafter, in terms of section 151(1) of the 2008 Companies Act the plan must serve before “a meeting of creditors and any other holders of a voting interest”:

“Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.”

[18] In the case before me there is no evidence of the business rescue plan, or that it was ever submitted for approval, or that a court extended the business rescue process, or that monthly reports were duly submitted as required by section 132(3) of the 2008 Companies:

“If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must-

(a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and

(b) deliver the report and each update in the prescribed manner to each affected person, and to the-

(i) court, if the proceedings have been the subject of a court order; or

(ii) Commission, in any other case.”

[19] It was held in *South African Bank of Athens Ltd v Zennies Fresh Fruit CC*¹¹ (whether or not the respondent remains distressed), that an unreasonable delay to finalise business rescue proceedings in itself is sufficient reason to terminate the proceedings. Hence a court would not be obliged to wind-up a company that is solvent in order to terminate business rescue proceedings. The solution retains a discretion to this court to see that justice is done. One consideration would be the question why a business rescue practitioner, and not the other affected parties, should make the winding-up call, especially a business rescue practitioner who failed in the carrying out of his or her duties. I thus make no finding that I ought to apply *Zennies Fresh Fruit* in this case, as the indications of neglect in this matter may be the result of the manner in which the founding affidavit omitted to plead and prove the applicant's case. I thus make no finding that I ought to apply *Zennies Fresh Fruit*.

¹¹ 2018 (3) SA 278 (WCC) at para 43.

[20] The fact that a court is not a rubber stamp. As set out above, a significant number of matters were not addressed. Disquieting is that the applicant's case of insolvency is in conflict with the information that appears in the annexures to the founding affidavit. This of course impacts on any implicit (but not pleaded) belief that that it is likely that the respondent will not be able to pay all of its debts as they become due and payable within the immediately ensuing six months or that it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months for a finding that the respondent remains distressed. I address the context and the facts next.

[21] The founding affidavit states that "*the board of directors*" of the respondent passed a resolution in terms of section 129(1) of the 2008 Companies Act on 31 July 2017 in terms whereof the respondent voluntarily commenced business rescue proceedings. That resolution is attached to the founding affidavit. A sworn statement of the facts on which the board resolution was founded is attached too, but the author is not identified in the founding affidavit. Having regard to the two annexures:

[21.1] The resolution is dated 31 July 2017 was by a single person, Mr Anastassis Christoforou ("*Mr Christoforou*"). Two averments stand out (underlining added)-

"1.3 The company is financially distressed and currently unable to pay off its debts as they have become due and payable and hence it appears reasonably likely that without such voluntary supervision the company will become insolvent within the immediately ensuing six-month period If Business Rescue Proceedings are not initiated;

1.4 There is a reasonable prospect of rescuing the company. The board has contemplated a rehabilitation plan to deal with this".

[21.2] These statements point to temporary commercial insolvency. The affidavit was deposed to on 31 July 2021. In as far as the reasons for the distress are concerned, four reasons were provided-

"3.2.1 Certain of the Company's contracts were not renewed;

3.2.2 During January 2017 it was discovered that certain service providers defrauded the Company to a value in excess of R 2 000 000.00;

3.2.3 The Company is currently involved in a dispute with the Motor Industries Bargaining Council regarding contributions of over R 1 000 000.00 claimed;

3.2.4 The Provident Fund obtained judgment against the Company despite the Company disputing the quantum of their claim. The director was unaware of the court proceedings and did not oppose the application, whereafter default judgment of over R5 000 000.00 was granted”;

[21.3] These statements still point to temporary commercial insolvency. In as far as the way forward was concerned, the affidavit envisaged the following rehabilitation plan-

“4.1 A capital injection from the current shareholder;

4.2 Selling off assets that are not encumbered, sufficient to restore the business rehabilitation; and/or

4.3 More profitable contracts will be negotiated with existing clients and possible new clients;

4.4 A significant reduction in monthly overheads in order to improve the cash flow position;

4.5 Investigating and reducing or eliminating the disputed Motor Industries Bargaining Council and Provident Fund claims.”

[22] In short, the company needed breathing space, it would restructure if given time and its shareholder would make a cash injection. That was the position as at 31 July 2017, almost four years ago. The applicant does not dispute the accuracy of these averments, despite alleging that he had fully investigated the affairs of the respondent at some unspecified time.

[23] On 8 December 2020 the applicant avers in the founding affidavit (there is no paragraph 5.9, and underlining added):

“5.8 In an attempt to restructure and rescue the Respondent, a financier had agreed to invest in the vicinity of R29 000 000.00 (Twenty Nine Million Rand) in the Respondent in order to enable the Respondent to meet all its financial trade obligations in terms of the business rescue plan. The company director settled creditors in his personal capacity over time.

5.10 I submit there is no longer a reasonable prospect of rescuing the Respondent for one or more of the following reasons:

5.10.1 The company stopped trading in April 2018.

5.10.2 The prospect of rescuing the Respondent was dependent on the fulfilment of conditions of third parties investing in the company, and the possible fulfilment of which is questionable and in my view will not take place.”

[24] There is an obvious tension in paragraph 5.8. Once creditors have been paid (another unproven averment), why would a further investment of R29 million still be needed from the unidentified financier? The original intended plan referred to above, was to raise capital through a capital injection from “*the shareholder*” and the sale of some assets. Although the founding affidavit does not address these matters with any clarity, it appears that “*the director*” and “*the shareholder*” are one person, Mr Christoforou. Assuming that it is him, then he settled creditors to the value of many millions of rand, as will appear below. There is no suggestion that the payments by Mr Christoforou constituted a loan. He did make, in effect, the intended capital injection. Why would a financier (seemingly not an additional shareholder, if one has regard to the term “financier”) still be needed? After creditors were paid, why would R29 million be needed to meet financial trade obligations as alleged by the applicant? What conditions stood in the way of the investment by the financier? This point must be made, the fact that the company stopped trading, does not stand in its way to commence trading again. It is a heavy-duty transport business. As will appear below, it seemingly still has assets worth large sums of money.

[25] The applicant's version appears to be in conflict with the content of the minutes of the meeting of 16 August 2017 and he omits to explain the intervening four years. The minute of a meeting of 16 August 2017 shows a solvent company, with many unencumbered assets. At this meeting Mr Keevy conveyed the following information to the creditors:

[25.1] He confirmed what a cursory reading of the original documents prepared by Mr Christoforou did show too, the respondent was placed in business rescue due to a dispute with the Bargaining Council and provident fund. He stated the debt to be more than R5 million and not more than R6 million as Mr Christoforou had alleged. The company was unable to effect payment of the judgment amount as its cashflow did not allow for such a large payment, which caused the company's financial distress. According to Mr Keevy, the respondent admitted to about R300 000.00, and that he would dispute the claim. (It really no longer matters, if it is true that Mr Christoforou paid the debt);

[25.2] The respondent is factually and commercially solvent. Mr Keevy was of the view that the company is capable of being rescued, whether by entering into an envisaged empowerment transaction to grow the business, or by the selling off of assets. The largest creditors (prior to the alleged payment by Mr Christoforou) were-

[25.2.1] Standard Bank, an overdraft claim of R5 million (prior to payment by Mr Christoforou), but which was secured by a fixed deposit of R10 million and a cession of book debts in the amount of R3 million. In some conflict, later during the meeting the total amount of the claim was stated to be R5.5 million;

[25.2.2] Investec, a claim of R2 million (prior to payment by Mr Christoforou), secured by an immoveable property to the value of R5 million. In some conflict, later during the meeting the total amount of the claim was stated to be R2.8 million;

[25.2.3] Unsecured trade creditors, claims of about R4 million (prior to payment by Mr Christoforou), but which were subject to

confirmation. In some conflict, later during the meeting the total claims were stated to be R4.6 million;

[25.2.4] Loan accounts in favour of associated entities in the amounts of R9.5 million and R2.5 million (prior to payment by Mr Christoforou). In some conflict, later during the meeting the total claims were stated to be R11.5 million;

[25.2.5] Arrear rental in the amount of R 600 000.00 (prior to payment by Mr Christoforou);

[25.2.6] Bargaining Council, a disputed claim of R5.5 million (prior to payment by Mr Christoforou), which was much more than the previous recordals;

[25.2.7] Wes Bank, a claim of R6.6 million. (It really no longer matters, if it is true that Mr Christoforou paid the debt);

[25.2.8] No amount was stated to be due to Mercedes-Benz Financial Services. (It really no longer matters, if it is true that Mr Christoforou paid the debts);

[25.2.9] No amount was stated to be due to the South African Revenue Services. (It really no longer matters, if it is true that Mr Christoforou paid the debts);

[25.2.10] No amount was provided for payment to employees. (It really no longer matters, if it is true that Mr Christoforou paid the debts).

[25.3] The respondent had substantial assets, and the valuations would take about another two-and-a-half weeks. The respondent had approximately 250 vehicles and trailers (and on the facts alleged in the founding affidavit, must still have them). The majority of these were unencumbered, with (prior to payment of the debts) only five being financed by WesBank and two financed by Mercedes-Benz Financial Services. On the papers before me, these movable assets were still available, as well as the immoveable property mortgaged to Investec;

[25.4] Financial statements were near completion, and would be distributed within about a week to creditors, and management accounts for the previous six months were being prepared too;

[25.5] The company would be trading as normal, provided that Mr Keevy would be in control of the company's banking accounts, he would be the only person authorising payments. The applicant avers that he took full control for an unspecified period.

[26] On the papers, those were the last words on the solvency of the respondent. Another important possible source document would have been the business rescue plan. Mr Keevy stated that he would need until after 31 October 2017 to produce it. The applicant averred that he had complied with all his duties in terms of the Companies Act, including but not limited to, *“developing a business rescue plan to be considered by the affected persons of the Respondent, in accordance with Part D of Chapter 6 of the Act.”* As already set out, he mentions no date or that he ever submitted the plan to affected parties for approval. Had the plan been prepared, it would have contained detailed financial information in terms of section 150 of the 2008 Companies Act.

[27] The application stands to be dismissed as the applicant has failed to plead and prove the case he pursued, namely that the respondent is actually or commercially insolvent. The founding papers suggest that it is solvent. No case has been made out for such a winding-up. The respondent seems no longer to be financially distressed either.

No notice to affected parties and non-service

[28] The notice of motion gives the address of the company, its employees and Mr Christoforou, as 4 Boron Street, Alrode, Alberton. If one has regard to the founding affidavit, the applicant does state that his attorneys will ensure that *inter alia* the formalities of proper service on the respondent, the employees of the respondent and *“the director”* would be complied with. *“The director”* (presumably Mr Christoforou) is not identified, and his (or her) address is not stated. The respondent's registered address is given as alleged to be the address mentioned

above, 4 Boron Street, Alrode, Alberton, but the fact is not proven. A judge could never evaluate the founding papers to see if proper service had taken place.

[29] An obvious indication that there was a problem in the matter, was the returns of service themselves. They appear to be returns of non-service as the papers were served at an address where the applicant, according to the founding affidavit, knew the respondent no longer conducted business since April 2018. That is three years ago. Service at its previous business address would therefore be non-service and would not comply with *inter alia* Uniform Rule 6(5)(a) that “*every application other than one brought ex parte must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, must be served upon every party to whom notice thereof is to be given*”.

[30] The fact of non-service appears from the returns of service too as they were served upon the employee or at the gate of a different company. There were three returns of service loaded onto the electronic case file:

[30.1] The first return of service was for service on the respondent. The material parts read (underlining added):

“On this 12th day of April 2021 at 12:10 I served the NOTICE OF MOTION FOUNGING AFFIDAVIT AND ANNEXURES in this matter upon MRS L GLEESON, EMPLOYEE OF CONSTANN INVESTMENTS apparently a responsible employee and apparently not less than 16 years of age, of and in control of and at the principal place of business within the court’s jurisdiction of TRUCK MEC (PTY) LTD (UNDER SUPERVISION) at 4 BORON STREET ALRODE ALBERTON by, handing to the PARTY SERVED a copy thereof after explaining the: nature and exigency of the said process. RULE 4(1)(a)(v).”

[30.2] The second return of service was for service on the respondent’s director. The material parts similarly read (underlining added):

“On this 12th day of April 2021 at 12:12 I served the NOTICE OF MOTION FOUNGING AFFIDAVIT AND ANNEXURES in this matter

upon MRS L GLEESON, EMPLOYEE OF CONSTANN INVESTMENTS apparently a responsible employee and apparently not less than 16 years of age, of and in control of and apparently in authority at the place of employment of ANASTASSIS CHRISTOFOROU at 4 BORON STREET ALRODE ALBERTON by being temporarily absent and by handing to the PARTY SERVED a copy thereof after explaining the nature and exigency of the said process. RULE 4(1)(a)(iii)."

[30.3] The third return of service was for service on the respondent's employees. It differs slightly from the wording of the previous two returns. The material parts read (underlining added):

"On this 12th day of April 2021 at 12:11 I properly served the NOTICE OF MOTION FOUNDING AFFIDAVIT AND ANNEXURES in this matter by affixing a copy thereof to the MAIN ENTRANCE of the PLACE OF EMPLOYMENT of TRUCK MEC (PTY) LTD (UNDER SUPERVISION) at 4 BORON STREET ALRODE ALBERTON, which is kept locked and thus prevent alternative service.

REMARK: MRS L GLEESON, EMPLOYEE OF CONTANN INVESTMENTS INFORMED DEPUTY THERE ARE NO EMPLOYEE OF TRUCK MEC (PTY) LTD."

[31] The point is that the applicant must have known that there would be no trace of the respondent at 4 Boron Street, Alrode, Alberton where it ceased to trade three years ago. He could not be surprised to find Contann Investments in control of the property.

[32] It is not the end of the matter, as section 141(2)(a) of the 2008 Companies Act expressly requires that the company, and all affected persons, be notified in the prescribed manner that the business rescue practitioner is of the view that the company cannot be rescued. "*Affected parties*" is defined in section 128 to include all shareholders, creditors, any registered trade union representing employees of the company, and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives. The applicant failed to address even the existence of such persons and entities, not

even mentioning the prescribed notice to them. These provisions are more extensive than section 346A of the 1973 Companies Act, save for the addition in the latter of the South African Revenue Service.

[33] The application stands to be dismissed as the applicant has failed to plead and prove the address details of the respondent and of interested parties. The application also stands to be dismissed as the applicant has failed to serve the application. The application lastly stands to be dismissed as the applicant has failed to comply with section 141(2)(a) of the 2008 Companies Act. On the facts of this case, I decline to exercise a discretion to postpone the matter for re-service.

Conclusion

[34] The application is so lacking in factual detail and evidence, that no case has been made out for the relief sought. It appears from the annexures to the papers that the applicant may have no locus standi, the respondent may no longer be financially distressed, the respondent may be solvent, and there may have been neglect in the matter. In addition, the application was not properly served or brought to the attention of affected parties.

Accordingly, I make the following order:

1. The application is dismissed;
2. The applicant may not recover any fees or disbursements pertaining to this application from the estate of the respondent.

DP de Villiers AJ

Heard on: 31 May 2021

Delivered on: 30 June 2021 by uploading on CaseLines

On behalf of the Applicant:

Adv. A P Allison

Instructed by

Tony Berlowitz Attorneys