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Court File

IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.

DATE 7/6/2011 SIGNATURE

CASE NO: 26597/2011

DATE: 30/05/2011

IN THE MATTER BETWEEN

RIAAN ANTON SWART	APPLICANT
AND	
BEAGLES RUN INVESTMENTS 25 (PTY) LTD	RESPONDENT
FIRSTRAND BANK LTD	1ST INTERVENING CREDITOR
BRIDGING ADVANCES (PTY) LTD	2ND INTERVENING CREDITOR
BIDEASY AUCTIONS CC	3RD INTERVENING CREDITOR
GLACIS GAME BREADERS (PTY) LTD	4TH INTERVENING CREDITOR

JUDGMENT

MAKGOBA, J

[1] The applicant brought this urgent application seeking an order:

1.1 That the non-compliance of the Rules of this Court with regards to form of service be condoned and this matter be heard as an urgent application.

1.2 That the respondent be placed under supervision in terms of the provisions of section 131(4)(a) of the Companies Act 71 of 2008 and commencing business rescue proceedings.

1.3 That Johannes Jacobus van Huyssteen with identity number be appointed as interim practitioner of the respondent in terms of section 131(5) of the Companies Act 71 of 2008.

[2] Subsequent to the filing of the application, first, second and third intervening creditors intervened as creditors and are opposing the application for business rescue. The first intervening creditor (Firstrand Bank Ltd) also seeks an order that a winding-up application it brought against the respondent under case no 8037/11 in this court, be heard urgently and simultaneously with this application and that a winding-up order be granted.

[3] During the course of the hearing of this application on 26 May 2011 the fourth intervening creditor gave notice of its intention to intervene as a creditor. The fourth intervening creditor has on this day concluded a written agreement with the first intervening creditor ("Firstrand Bank") in terms whereof the fourth intervening creditor purchased Firstrand Bank's right, title and interest in the claim that Firstrand Bank had against the respondent. As a result of this development the first intervening creditor withdrew its liquidation application it

has brought against the respondent. Henceforth the first intervening creditor ceased to be a party to the present proceedings.

[4] On 30 May 2011 the fourth intervening creditor after filing and serving a formal application, was granted leave to intervene as such and duly joined as a party to the present proceedings. In its notice of motion the fourth intervening creditor seeks an order that the main application (that is the present application) be postponed for a period of three months <u>alternatively</u> that the respondent be placed under supervision in terms of section 131(4)(a) of the Companies Act 71 of 2008 and commencing business rescue proceedings. In essence the fourth intervening creditor supports the present application.

[5] The applicant is the sole director and the only shareholder of the respondent. The respondent's business consists mainly of a chartering business and dealing in exotic wild life species. As far as the charter business is concerned, respondent is the owner of various aircraft, including a Beechcraft King Air 200 aeroplane and a Bell Textron 206L-3 helicopter.

As a result of various reasons the financial affairs of respondent deteriorated to such an extent that respondent is currently not in a financial position to meet its immediate financial obligations.

[6] The second intervening creditor obtained judgment against the respondent pursuant to a provisional sentence summons on 9 March 2011. The court order agreed upon by the parties provided *inter alia* for a period of thirty days for respondent to market and sell the two aircraft referred to above, which was unsuccessful and eventually the aircraft was put on auction on 6 May 2011 and sold for a total price insufficient to pay the outstanding judgment debt with interest.

I am told that the outstanding debt is presently estimated at R11 000 000,00 with interest accruing at 1% per week or approximately R14 000,00 per day.

[7] The third intervening creditor's claim against the respondent is estimated at R45 000,00 being in respect of legal costs incurred when it opposed the applicant's application to stop the auction for the sale of the aircraft on 6 May 2011. The third intervening creditor acted as an auctioneer in the aforesaid sale.

[8] The fourth intervening creditor, having substituted the first intervening creditor, now has a claim against the respondent for an amount of R3 100 000,00.

[9] Consequently, the second, third and fourth intervening creditors are the affected persons as contemplated in section 128(a) of the Companies Act 71 of 2008. They have the necessary *locus standi* to participate as parties in these proceedings and as creditors of the respondent.

[10] The applicant's case is that the respondent is currently financially distressed in that it lacks the necessary cash flow in order to be able to pay all debts as they become due and payable. That the respondent is financially distressed as envisaged in section 128(f) of the Companies Act 71 of 2008, as it is reasonably unlikely that the respondent will be able to pay all its debts as they became due and payable within the immediate ensuing six months. The applicant submits further that if respondent is not placed under supervision and the execution process of the second intervening creditor is to continue, there is no reasonable prospect that respondent can pay its debts as they became due, within the next six months.

[11] The applicant further submits that if the respondent is placed under supervision, the business rescue proceedings commence and a business plan is implemented in order to rescue the affairs of the respondent, all the creditors of respondent would be fully paid in due course and respondent would be granted the opportunity to proceed with its business.

[12] The second and third intervening creditors oppose the application on the grounds that the application for business rescue is in itself an abuse of process and is a culmination of a number of attempts to avoid and postpone payment of the respondent's debts. That the applicant demonstrates in this application a complete negation of the rights of creditors and has carried on the business of the

respondent company under admittedly insolvent circumstances recklessly and under circumstances where a number of transactions ought to be set aside in terms of the Insolvency Act read together with the Companies Act, 61 of 1973, in turn read together with the Companies Act 71 of 2008.

[13] The opposing creditors submit that the applicant, Mr Swart, has used this company (respondent) as if it were his alter-ego and has conducted the affairs of the company without paying due and proper attention as would be expected from a director of a company to ensure that creditors are not prejudiced by his actions and in fact simply ignoring the rights of such creditors and the company's obligations to it.

[14] A business rescue plan is a novelty brought about by the new Companies Act 71 of 2008 which came into operation on 1 May 2011. The business rescue proceedings are provided for in Chapter 6 of this Act. Section 128(1)(b) defines a "**business rescue**" as 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 maximises 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.

[15] For purposes of this judgment it is appropriate to set out the provisions of section 131 of the Companies Act 71 of 2008 in full:

"131. ***Court order to begin business rescue proceedings***

(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) An applicant in terms of subsection (1) must-

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1) the court may-

(a) *make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-*

(i) *the company is financially distressed;*

(ii) *the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or*

(iii) *it is otherwise just and equitable to do so for financial reasons,*

and there is a reasonable prospect for rescuing the company or

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

(5) *If the court makes an order in terms of subsection (4)(a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138 and who has been nominated by the affected person who applied in terms of subsection (1) subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.*

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

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

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

(7) In addition to the powers of a court on an application contemplated in this section a court may make an order contemplated in subsection (4) or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.

(8) A company that has been placed under supervision in terms of this section-

(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132(2); and

(b) must notify each affected person of the order within five business days after the date of the order."

[16] The preamble to the Act *inter alia* reads:

"to provide for sufficient rescue of financially distressed companies".

[17] Section 128(1)(a) defines an "affected person" in relation to a company and within the context of this application as a shareholder or creditor of the company.

[18] From the definitions referred to above it is clear that the purpose of Chapter 6 of the Act with regard to business rescue, is to assist a financially distressed company by means of a business rescue plan as contemplated in section 150 of the Act, in order to maximise the possibility of the company continuing on a solvent basis, or to achieve a better return for the company's creditors or shareholders in comparison to a liquidation.

[19] The procedure prescribed by Chapter 6 of the Act are to some extent similar to liquidation procedure, with the important distinction that the aim is to protect the company in that it will continue to exist on a solvent basis, after payment of creditors. In this regard the appointment of a practitioner is similar to the appointment of a liquidator and the participation of creditors and affected persons at a meeting of creditors are similar to the rights accruing to creditors in the event of liquidation.

[20] It is common cause in the present case that the respondent is financially distressed. In the founding affidavit as well as the replying affidavit the applicant states that the respondent merely needs some time in order to dispose of movable assets, in order to pay all creditors and continue with business. The applicant then

submits that there will be no prejudice to creditors if business rescue proceedings are ordered and commenced.

[21] The requirements for the granting of an order sought by the applicant are contained in section 131(4)(a)(i) to (iii) which can be summarised as follows:

1. that the company is financially distressed; and
2. that with respect to an employment-related matter the company failed to pay any amount; or
3. it is otherwise just and equitable to do so for financial reasons,

and there are reasonable prospect of rescuing the company.

[22] In the event of the requirements as set out and summarised above being met, the court should exercise its discretion in favour of granting the order sought.

In casu, however, the question arises as to whether the respondent has met the requirements.

[23] As pointed out earlier, the aspect of a business rescue plan brought about by the new Companies Act is a new innovation and without precedent in our law, in particular with regard to case law. In my view section 427 of the now repealed Companies Act 61 of 1973 can be of assistance in this regard.

[24] Section 427(1) of the old Act provides for the circumstances in which a company may be placed under judicial management. It provides that when any company by means of mismanagement or for any other cause-

(a) is unable to pay its debts or is probably unable to meet its obligations; and

(b) has not become or is prevented from becoming a successful concern;

and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the court may, if it appears just and equitable, grant a judicial management order in respect of that company.

[25] Essentially, in relation to section 427(1) of the old Act, what must be reasonably probable is that the company is viable and capable of ultimate solvency – see ***Millman NO v Swartland Huis Meubileerders (Edms) Bpk*** **1972 1 SA 741 (C) at 774** – and that it will, within a reasonable time, become a successful concern ***Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd*** **2000 4 SA 598 (C) at 616.**

By "successful concern" it is intended, in my view, that it will be able effectively to carry on its operations in accordance with its main object and yield a return to its shareholders and creditors.

[26] The question whether the applicant in this case has made out a proper case that the respondent is financially distressed (which is common cause) and there exists a

reasonable prospect that through business rescue proceedings respondent can be rescued and continue business in solvent circumstances should be weighed against the requirements and/or principles set out above and the evidence presented in the papers before me.

[27] The opposing creditors submitted that the present application is an abuse of the process of the court and simply an attempt to prevent the sale of the assets and/or the winding-up of the respondent which must take place. That the applicant, who is in control of the respondent, has sought to prevent the first and second intervening creditors from exercising their rights in terms of the law *inter alia* by:

1. giving notice of intention to oppose the winding-up application but never filing papers therein, while on common cause facts, it is clear that the respondent is insolvent and has not been able to make payments of its debts;
2. making promises to pay to both first and second intervening creditors but never making payment thereof; and
3. seeking to prevent the sale of the aircraft by way of auction by seeking an interdict in this court notwithstanding the court order and agreement giving rise to such auction, which application was dismissed with costs.

The above submissions made by the opposing creditors are sound, correct and relevant in the adjudication of this matter.

[28] It is quite clear that the respondent is insolvent and that the movable and immovable property belonging to it will be insufficient to make payment of its creditors. In the founding affidavit the applicant refers to a proposed agreement which the applicant says the respondent attempted to enter into which provided for the sale of the aircraft, the helicopter, the farm belonging to the respondent and all the game for a purchase price of R15 000 000,00. The R15 000 000,00 is insufficient to make payment of the admitted creditors. On his own version in paragraph 9 of the founding affidavit the applicant states that the respondent's total indebtedness is R16 148 000,00.

[29] The only other asset of any note is a loan account of some R72 343 000,00 (as set out in annexure "RS3") where monies have been lent to a related company known as Biz Africa 111 (Pty) Ltd (trading as Business Solutions Africa) of which the applicant is the sole director. The applicant steadfastly refuses to give any information, does not indicate the nature of the transaction and places nothing before court to indicate that such money can or ever will be repaid.

[30] If one scrutinises annexure "RS3" being the statement of assets and liabilities of the respondent as at 30 April 2011, one comes to a conclusion that the total assets amount to R87 843 000,00 while there are admitted liabilities of R16 148 000,00 and a shareholder's loan of sum R165 517 000,00, thereby indicating that the company is hopelessly insolvent. A rhetorical question may arise as to whether a

business rescue plan as envisaged and sought by the applicant is feasible in the circumstances.

[31] Mr Leathern SC, on behalf of the first and second intervening creditors, correctly submits with reference to the allegations in paragraph 45.5 of the first intervening creditor's answering affidavit that annexure "1A1(a)" thereof indicates that the value of the property belonging to the respondent is no more than R15 000 000,00 and that respondent is unable to raise any finance whatsoever. The applicant does not join issue with the intervening creditor in regard thereto, nor is any explanation given regarding the huge discrepancy between the figures provided by him and the value as reflected in annexure "1A1(a)". I agree with Mr Leathern's submission that the applicant is being less than frank and lacks the *bona fides* in bringing this application.

[32] This application was launched on the basis that the respondent was possessed of assets which exceed its liabilities and that it would be able to continue with the charter business and to sell a substantial amount of game in order to pay its debts. This entire basis for the application falls away *inter alia* as a result of the following:

1. the total assets of the respondent, for the reasons set out hereinbefore, amount to only R15 000 000,00, this taking into account the movable property, immovable property, aircraft and game;

2. the second intervening creditor is in possession of the King Air aircraft as well as the Bell helicopter and in terms of section 134(1)(b) of the Companies Act 71 of 2008 is entitled to retain possession thereof and thus such will not be available for use in the charter business to enable the respondent to earn income; in any event, the income from the "charter business" has been ceded to the second intervening creditor and will not be utilised for payment of other creditors.

[33] Mr Leathern furthermore raised an interesting issue regarding the value of the game owned by the respondent. Apart from the clear indication of R15 000 000,00 as the value of all the assets of the respondent put together, it is also quite clear that the valuations on which this application is based hold very little relationship to reality.

[34] In this regard Mr Leathern submits: while the female buffalo are valued in annexure "RS5" to the applicant's founding affidavit at an amount in excess of R1 000 000,00 per buffalo, the respondent in August 2010 sold buffalo, three female together with three calves for an amount of R310 000,00 each at one auction. A buffalo bull which according to applicant is valued at in excess of R700 000,00 was sold for R70 000,00 and five buffalo cows for an amount in excess of R180 000,00 each, none of which is disputed by the applicant, thus the cows which were used in the calculation of the value of the game as thirty in excess of R1 000 000,00 per price could have a value as low as R5 400 000,00

(if they still exist) and the male buffalo (if they exist) instead of being valued at R5 606 957,00 could be valued at as little as R560 000,00.

[35] Based on this good argument by counsel, I come to the conclusion that the value of the game as given by the applicant in annexure "RS5" is inflated and thus rejected.

[36] I need to mention that even the existence of this game is seriously disputed. In his supporting affidavit the attorney for the second intervening creditor stated that very little game could be found after they had attended at the farm. The manager there had discussed the matter for ten minutes with the applicant and his legal advisor. The only answer is a vague allegation that while the legal representative may have visited a farm Klipvlei, there is a denial that they went to the correct farm.

[37] The court has a discretion as to whether to order supervision or business rescue even if it is found that the requirements therefor as set out in section 131(4)(a)(i) to (iii) of the Act have been made out in the application.

In exercising my discretion in this matter I have to determine whether a case has been made out that the respondent company will be able to carry on business on a solvent basis and/or whether any case has been made out that the granting of business rescue will result in creditors achieving a better dividend.

[38] The applicant has studiously avoided making payment of the respondent's debts, incurred further debts and has simply advanced funds in excess of R72 000 000,00 to Business Solutions Africa while under insolvent circumstances and steadfastly refuses to give any explanation to his creditors, to the respondent's creditors or the court. On his own version the applicant has steadfastly refused to sell any assets to make payment to his creditors.

[39] In my view it is the applicant himself as sole director and shareholder who is the only interested party in the continuation of the respondent as a going concern but he steadfastly carried on business in a reckless manner. The applicant does not take this court or his creditors into his confidence by giving any detail regarding the loan of a substantial amount in excess of R72 000 000,00 to an entity known as Business Solutions Africa, of which he is the sole director.

[40] It is common cause that the respondent has been in financial distress for at least a year. While this was obvious to all involved, the applicant did nothing about it, refused to sell any assets, incurred further debts, making loans and refused to sell any assets to make payment to his creditors.

[41] Where an application for business rescue, as was the case in applications for judicial management, entails the weighing-up of the interests of the creditors and

the company (or the applicant in this case, they being the same) the interests of the creditors should carry the day.

[42] I accordingly come to the conclusion that there is absolutely no basis for contending that the respondent will be able to carry on business on a solvent basis or that there is any prospect thereof.

No case has been made out that the granting of a business rescue will place the creditors of the respondent in a better position than what they would be in winding-up.

[43] I grant the following orders:

1. The application for postponement of these proceedings by the fourth intervening creditor is refused.
2. The main application by the applicant, Mr Swart, is dismissed with costs such costs to include the costs of senior counsel where applicable.

E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

26597-2011

HEARD ON: 26 & 30 MAY 2011
FOR THE APPLICANT: M M W VAN ZYL SC
INSTRUCTED BY: DIEMONT INC
FOR 1ST & 2ND INTERVENING CREDITORS: D M LEATHERN SC
INSTRUCTED BY: RORICH WOLMARANS & LUDERITZ INC AND LAAS DOMAN INC
FOR 3RD INTERVENING CREDITOR: ADV PRINSLOO
INSTRUCTED BY: SERFONTEIN VILJOEN & SWART
FOR 4TH INTERVENING CREDITOR: ADV R REUBENHEIMER
INSTRUCTED BY: J A KRUGER ATTORNEYS