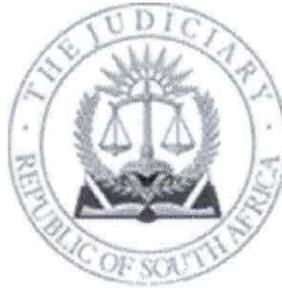


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-055592

CASE NO: 2023-018259

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

Date: 14 August 2023

E van der Schyff

In the matter between:

RH PLANT HIRE CC

APPLICANT

and

KOBUS VLOK

FIRST RESPONDENT

BCG CONSTRUCTION AND CIVILS (PTY) LTD

SECOND RESPONDENT

COMPANIES AND INTELLECTUAL PROPERTIES
COMMISSION

THIRD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicant (RH) approached the urgent court seeking an order that the business rescue application of the first respondent (Mr. Vlok) under the same case number, and the applicant's liquidation application against the second respondent under case number 2023-018259 be heard and determined simultaneously; that the business rescue application be dismissed and that the second respondent (BCG) be placed under provisional liquidation.

Background facts

- [2] RH let certain equipment to BCG on agreed terms, resulting in BCG becoming indebted to RH in the amount of R679 085.00 as of 6 February 2023. Since the debt was not settled, RH commenced liquidation proceedings on 22 February 2023. The application was served on 13 March 2023.
- [3] BCG belatedly filed a notice of intention to oppose on 14 April 2023 but failed to deliver its answering affidavit. The matter was subsequently enrolled in the unopposed motion court for hearing on 14 June 2023.
- [4] On 9 June 2023, Mr. Vlok, a shareholder and director of BCG, served a business rescue application on RH. Mr. A. Sesweni served a notice to oppose the liquidation application as an intervening party on 14 June 2023. Mr. Sesweni is represented by the same attorneys representing BCG and Mr. Vlok. On 14 June 2023, the presiding judge removed the liquidation application from the unopposed motion court roll.

The parties' contentions

- [5] RH takes issue with the fact that the business rescue application was emailed to the affected parties without reflecting the intended hearing date. RH avers that, to date, a hearing date has not been applied for, and neither is an interim business rescue practitioner nominated to be appointed to take over BCG's affairs should an order of supervision be made. RH further contends that the business rescue application has not been served on BCG or the third respondent, the CIPC. RH disputes Mr. Vlok's claim that he has the necessary *locus standi* to have launched the business rescue application. RH claims that no primary evidence supports assertions in the business

rescue application that BCG is financially distressed or that business rescue proceedings would deliver a better result for creditors than liquidation.

- [6] As for urgency, RH states the following in its founding affidavit to this application:
- 'under circumstances where it is apparent that the business rescue application by Vlok has been designed to protract the inevitable liquidation of BCG and constitutes a flagrant abuse of process, it is inherently urgent to have this matter determined on an expedited basis in the interest of the affected parties.'
- [7] RH contends that the creditors cannot be left in a 'fictitious loop of a putative moratorium whilst Vlok does nothing to bring the matter to finality.' BCG's affairs must either be managed by a business rescue practitioner or a liquidator as soon as possible to protect the interests of the affected parties. Having the application decided in the ordinary course will not afford RH substantial redress as BCG will be 'rudderless' until the matter is finally determined.
- [8] Mr. Vlok deposed to the answering affidavit as the applicant in the business rescue application. He disputes the contention that the application is urgent. He explains that the matter was fully ventilated in the unopposed motion court before the liquidation application was removed from the roll. Mr. Vlok states that RH could simply have enrolled the application on the unopposed roll, launched irregular step proceedings, or compelled the respondent 'like every other litigant that feels frustrated by the conduct of an opponent.'
- [9] Mr. Vlok asserts in the business rescue application that he is one of two directors of the first respondent and, as such, has the necessary *locus standi* to bring the application. He does not state explicitly in this application that he is a shareholder of BCG, although he states, 'the applicant and all remaining directors/shareholders verily believe ... that the BCG can be successfully rescued.' RH contends that directors are not included in the definition of affected persons as contained in the Companies Act 71 of 2008. Directors can, in my view, however, be considered employees.

[10] Mr. Vlok submits that the grounds for business rescue have been set down in the business rescue application, are *bona fide*, and were accompanied by the supporting documentation confirming the amounts due to BCG and 'the plan to proceed to secure those funds to rescue the company'. He claims that BCG's financial distress is attributed to the non-payment of its clients and the economic disaster the country is experiencing.

[11] The following submission contained in the answering affidavit is of importance:

'The respondent never intended on delaying the matter and it is intent on securing the business rescue and ultimately rescuing the company, *but it simply took a little longer than hoped for in securing the necessary funds* to pursue the matter through the legal steps.' (My emphasis)

[12] Mr. Vlok explains that his personal financial woes contributed to the delay in obtaining a date for the business rescue application to be heard, as he first had to pay his attorneys. He claims that he is BCG's 'main funder/ operator'. He laments that RH has a 'vendetta' against him and is also pursuing litigation against him in his personal capacity in terms of an 'alleged suretyship' that he concluded with it.

[13] Mr. Vlok submits that business rescue proceedings would be more advantageous because it would allow for the completion of existing contracts. BCG's total asset value is R20 000.00, and RH's claim alone amounts to R618 871,00, with the complete creditor balance exceeding R7 500 000.00. Due to the highly technical nature of BCG's business operations, a liquidator could not see any existing business operations to finality. Mr. Vlok claims that 'even if my intentions are not pure (as alleged by the applicant), the respondent owes me personally an amount twice as much as being claimed by the applicant.'

[14] As for RH's claim that the business rescue application was served without containing a hearing date, Mr. Vlok explains:

'Since it was unknown were there any party would oppose the application, my attorneys saw it fit not to apply for a date beforehand.'

This explanation does not accord with the explanation proffered by counsel when the matter was argued before me when the process of electronically issuing applications was put forward as the reason why the application was served without containing a hearing date.

- [15] Mr. Vlok denies that the business rescue application was not served on CIPC or the BCG. Service on the CIPC was affected through email. Service on BCG is alleged to have been 'physical', and it is stated in the service affidavit that 'proof of acceptance of service is found on the Notice of Motion of the Application.' However, the notice of motion uploaded to the caselines' file does not reflect any acceptance note on behalf of BCG.

Discussion

- [16] Section 131(2)(a) of the Companies Act prescribes that a business rescue application must be served on the company and the CIPC. I accept that email service on the CIPC is sufficient in light of the CIPC's position that it accepts and requested email service.
- [17] The same can, however, not be said regarding service on the company. A company is a separate legal entity from its directors and shareholders. As a result, a director's knowledge of a business rescue application does not imply that service on the company is not necessary. Service, in turn, is service by Sheriff.
- [18] Section 132(1)(b) of the Companies Act determines that business rescue proceedings begin when an affected person applies to the court for an order placing the company under supervision. The question that arises in this application is when an application is 'made' in terms of s 131. Can it be said that an application is made if an application is issued but a hearing date is not reflected in the notice of motion, served on the company and the CIPC, if the application remains unopposed?

- [19] Rule 6(1) of the Uniform Rules of Court prescribes that save where proceedings by way of petition are prescribed by law, every application must be brought on notice of motion supported by an affidavit. Rule 6(5) provides that every application other than one brought *ex parte* must be brought on notice of motion in accordance with Form 2(a) of the First Schedule. Rule 6(5)(b)(iii) prescribes that the applicant must in the notice of motion –

'set forth a day, not less than five days of the service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and **must** further state that if no such notification is given the application will be set down for hearing on **a stated day**, not being less than 10 days off the service on the said respondent of the said notice' (my emphasis)

- [20] In the authoritative work *Erasmus Superior Court Practice*, it is succinctly explained that the requirement that the notice of motion contains a stated date for hearing in the event that the matter remains unopposed, is not a formalistic application of procedural rules –

'The subrule, whilst procedural in nature, protects a fundamental principle of fairness - that generally a person be afforded an opportunity to be heard before a court grants any relief against it.'

- [21] In *Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen*,¹ the court held that a notice of motion which is not substantially in material respects as near as may be in accordance with Form (2)(a) is a nullity. In *Gallagher v Norman's Transport Lines (Pty) Ltd*² Flemming DJP held that Rule 6(5)(a) is peremptory.

¹ 1978 (1) SA 779 (T) at 782B.

² 1992 (3) SA 500 (W) at 502E-503C.

- [22] An omission to set out a stated date is fatal to the application in question, and a subsequent notice of set down cannot cure the defect.³ As a result, the omission to include a stated date in the notice of motion pertaining to the business rescue application renders the application, as it stands, of no-consequence. It cannot be said that the business rescue application was 'made' for it to suspend liquidation proceedings.
- [23] The liquidation application was removed from the roll by the presiding judge on 14 June 2023. In light of the fatal defect in the current business rescue application, which is exacerbated by the fact that no business rescue practitioner is proposed, there is no impediment on RH to re-enroll the liquidation application for hearing.
- [24] The next question is whether a case was made out that renders the hearing of the liquidation application sufficiently urgent to be enrolled in the urgent court. It is evident that BCG is indeed in financial distress, if not commercially and factually insolvent.⁴
- [25] In the circumstances, I am of the view that a case for urgency has been made out. The discrepancy between the explanation proffered from the bar as to why the business rescue application was served and issued without containing a stated date for hearing if it remains unopposed, and the explanation proffered in the answering affidavit give rise to a feeling of discomfort. Despite a submission from the bar that a date for set-down relating to the business rescue application was since obtained, no proof thereof was provided that substantiates such a submission – this is notwithstanding the question as to whether a belated set-down can cure the fatal defect in the application. RH's counsel's contention that creditors cannot 'be left in a

³ *Meme-Akpta v The Unlawful Occupiers of ERF 1168, City and Surban, 44 Nugget Street, Johannesburg* 2023 (3) SA 649 (GJ) at par [18]. *Mashaba v The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud In The Public Sector, Including Organs of State* (14261/21) [2022] ZAGPPHC 586 (16 August 2022) at paras [12] and [14].

⁴ Mr. Vlok contends that it has assets of R20 000.00 and liabilities exceeding R7 million. In fact, Mr. Vlok states under oath: 'The difference between the combined asset value of the First Respondent and the liabilities of the First Respondent is negative R7 543 132.67'. Mr. Vlok also states that on current pending projects more than R13.5 million in work remains to be commenced with or completed, and that more than R5.4 million remains unpaid to the First Respondent.

fictitious loop of a putative moratorium', underpins the necessity to hear this application in the urgent court.

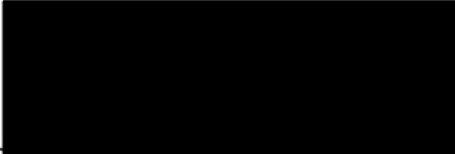
[26] Since I am of the view that the business rescue application is defective, and that no business rescue application was 'made' I need not deal with the business rescue application.

[27] As for the provisional liquidation application, RH's claim that BCG owes it an amount in excess of R600 000.00 stands uncontested and is confirmed in the founding affidavit to the defunct business rescue application. On 3 February 2023, BCG communicated in writing to RH, indicating that it is waiting for outstanding payments from their clients. It is evident from the affidavit attached to the business rescue application that BCG is currently not able to pay its debt towards RH.

ORDER

In the result, the following order is granted:

1. The application is heard as an urgent application in terms of Rule 6(12) and any non-compliance with forms and service is condoned;
2. The second respondent is placed under provisional winding-up;
3. All persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final winding-up of the second respondent company in the unopposed motion court on 07 November 2023 at 10h00;
4. A copy of this order is to be forthwith served on:
 - a. The second respondent company at its registered office;
 - b. The Master of the High Court;
 - c. The South African Revenue Service;
 - d. The second respondent's employees and employees' trade unions if any;
 - e. To each known creditor by prepaid registered mail;
5. The order granted in this application must be published in the *Government Gazette* and in a local newspaper in circulation in the area of the second respondent's registered address;
6. Costs of the application are costs in the second respondent's winding-up.


E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	Adv. J. Van Rooyen
Instructed by:	Donn E Bruwer Attorney
For the first and respondents:	Adv. J. Schoeman
Instructed by:	Van der Walt Attorneys
Date of the hearing:	10 August 2023
Date of judgment:	14 August 2023