

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No 62712/2021

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

DATE: 24 January 2022

SIGNATURE: 

In the matter between:

Ben Venter

Applicant

and

M K Africa Plant and Equipment Pty (Ltd)

Respondent

Summary: Company to be placed under supervision and business rescue proceedings in terms of section 131(4) of the Companies Act 2008: (Act No: 71 of 2008) – The Act. Interim Business Rescue Practitioner be appointed as intended in section 131 (5) of the Act, pending ratification of such appointment by the creditors at their first meeting.

JUDGMENT

Maumela J.

1. This matter came before court in the urgent roll. In it, the Applicant sought an order in the following terms:
 - 1.1. That this application be heard as an urgent application in terms of rule 6 (12) of the rules of this court and that applicant's non-compliance with the applicable time-periods under rules pertaining to service be condoned.
 - 1.2. That the Respondent company, ("MK AFRICA PLANT AND EQUIPMENT PTY (LTD)") be placed under supervision and business rescue proceedings in terms of section 131(4) of the Companies Act 2008: (Act No: 71 of 2008) – The Act.
 - 1.3. That Gideon Slabbert is appointed as Interim Business Rescue Practitioner as intended in section 131 (5) of the Act, pending ratification of such appointment by the creditors at their first meeting.
 - 1.4. That any person opposing the granting of the relief be ordered to pay the cost of this application on a scale as between Attorney and Client.

BACKGROUND.

2. The applicant charges that the company: M K Africa Plant and Equipment Pty (Ltd) is financially distressed. He contends that the company has received no less than 5 (five) summonses in respect of which it is unable to meet payment. Where the Respondent claims that debts were paid, no receipts can be produced.
3. It is contended that even where payments have been effected, it still does not imply that the company is not financially distressed. The parties are in dispute about whether the Applicant ever resigned in his capacity as a director or not. The applicant also charges that the Respondent is oppressive against him in conduct.

4. It was argued that once a director obtains a judgment, other directors get disadvantaged. The applicant submitted that instead of acting in good faith, the Respondent is unwilling to take the court into its confidence and that it is not likely to do so in the future.
5. Through this urgent application, the Applicant purposes to obtain a relief in terms of Section 163 (2) (c) of The Act. In terms of this section, the Applicant intends to have the 'Respondent Company' – "The Company"; placed under 'business rescue'. He alleges that the 'The Company' is currently financially distressed and the court's intervention can ensure that it be rescued within a period of 12 to 18 months. The applicant contends that the Respondent Company carries out business in a manner oppressive.
6. The Respondent contends that there is no urgency in the matter. It makes the point that no prejudice stands to be occasioned if the order sought is not granted. He also alleges that the Respondent also resigned in his capacity as Director and he left the office on the 6th of November 2021. It, (the Respondent), contends that what the Applicant alleges is a falsity, and it is unfounded. It denies that he ever refused to engage in the meeting of January 2022.
7. The Applicant submits that around October 2015, he became involved in the affairs of the Respondent Company where he was appointed in the position of director of the company. His duty was that of managing the day-to-day affairs of the company. He was also to acquire new clients for the company. Up until 2020, when the repercussions of the Covid 19 pandemic which had an adverse global effect, the company was operational and everything was in order. However the effect of the Covid 19 pandemic was that construction operation works in South Africa got halted.
8. The Respondent Company was involved in the project with M K Africa Infrastructure, ("the Infrastructure") during the latter part of 2020. Infrastructure became the Respondent that was to pay the accounts. As time went by, it became abundantly clear that Infrastructure is no longer capable of honouring the accounts

through payment. The Applicant submits that in discussions with the Respondent, the latter impressed it on him to find new clients so as to acquire capability to honour payments.

9. Around October 2020, he approached Mr. Venter to inform him that he received information to the effect that Grinaker-LTA as well as G4 Civils are no longer prepared to do business with him. This directly affected all projects in which Mr. Venter is in dealings with both Grinaker-LTA and G4 Civils. He then suggested that Smart-Site-Support, which was registered in 2013, should be created in order for it to lease out the equipment, engaging both Grinaker-LTA and G4 Civils. The Respondent would generate invoices and relate them to Grinaker-LTA and G4 Civils. According to the Applicant, Mr. Venter became agreeable to this plan.
10. Through this arrangement, Smart-Site-Support achieved a small profit and this kept the Respondent going. The Respondent would be paid only as and when Smart-Site-Support got paid. Around September 2021, the relationship between him and Mr. Venter became strained when the Respondent no longer made profit and in fact started running at a loss on a month-to-month basis. Realizing these developments, he approached Mr. Venter and suggested that some of the equipment be sold so that some of the creditors be paid.
11. He said that initially, Mr. Venter was agreeable to this suggestion and indeed, some of the equipment got sold and as such, some of the creditors received payment on a 40-cent-to-the-Rand basis. This exercise was aimed at convincing the creditors that the Respondent remains purposed to settle debts and that if allowed more time, it will be able to pull out of indebtedness. Thereafter, Mr. Venter simply and flatly refused to continue with this process of paying debts. He expressed strong scepticism about the Respondent's ability to settle all debts, using the above method.
12. Mr. Venter's view was that the Respondent would be able to be lift out of indebtedness by simply using the methods there were in place before the financial constraints and the indebtedness took effect. The Applicant submits that this would never have become

possible and the fact that the Respondent now stands indebtedness to various creditors to the tune of R 3,200,000.00 bears testimony to such conclusion.

13. Around the 7th of October 2021, Mr. Venter wrote a letter to the Applicant, accusing him of having created the company Smart-Site-Support without his, (Mr. Venter's) knowledge and against the best interests of the company. The Applicant was further accused of having acted in breach of the Directors' Governance Agreement. He was given 14 days' notice to remedy the breach. A copy of that letter is attached as Exhibit "C". His legal representative responded to Mr. Venter's letter, denying the allegations made against him.
14. It is then that legal representatives of Mr. Venter's wrote back, pointing out that there are company resolutions in place which provide that going forward, directors' resolutions should be obtained for each transaction undertaken. All parties involved committed to a round-table meeting in order to resolve the problem. On a later date Mr. Venter's legal representative wrote a letter urging the Applicant to reconsider the aspect of business rescue. From then on, Mr. Venter denied the Applicant access to the day to day transactions in which the company was involved. The Applicant was urged to call a Board Meeting if not satisfied.
15. From that time onward, Mr. Venter became reluctant to attend at a meeting on the 9th of December 2021, or any other suggested date. In that way Mr. Venter refuses to abide by company principles. The Applicant submits that from that time onwards, Mr. Venter refuse to grant him access to attend whenever company business is underway. Applicant is also denied access in order to attend meetings of directors.
16. The applicant submitted that Section 163 of The Act. renders it necessary for the court to place companies under business rescue if such company is in financial distress. He alleges that the state of financial distress in which the company finds itself is a direct result of the prejudicial conduct of Mr. Hannes Venter.

17. While it is disputed by the Respondent, the Applicant's urgency is premised upon the fact that the Respondent company is in financially distressed and unable to pay its debts as and when same falls due. No less than 5 (five) summonses have been issued against the Respondent company for its outstanding debts.¹ The Applicant attempted to engage with Mr. Venter, his co-director regarding the affairs of the company, however this proved to be futile because despite numerous undertakings to engage the Applicant which Mr. Venter gave, for purposes of discussing the affairs of the business, Mr. Venter came through in none².
18. The applicant thereafter invited Mr Venter to a meeting scheduled for the 9th of December 2021 to *inter alia* discuss and/or resolve "*High-Level determination of the solvency of and liquidity of the Company in terms of the Companies Act 71 of 2008*"³ and to discuss the possible litigation to be instituted by one of the creditors;
19. The Applicant submitted that Mr. Venter pleaded unavailable for a meeting on the 9th of December 2021 and instead suggested the 28th of January 2022 for the same meeting. The Applicant in turn suggested alternative dates to Mr. Venter for the meeting whereupon the latter simply did not respond to;⁴
20. It is submitted that the above developments hinge on the aspect of urgency. In the matter of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁵, the Court dealt with the test to be applied in urgent application and stated as follows: "[7]. It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.

1. See: Annexure "F", Section 001-41 to 43

2. See: Annexure "G", Section 001-44 to 45

3. See: Annexure "K", Section 001-54 to 56, Paragraph 2.1.3.

4. See: Annexure "M", Section 001-67

5. (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[8]. In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.¹

[9]. It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.”

21. The Applicant further makes the point that the Respondent has a duty in terms of section 76 of The Act to act with the utmost good faith and in the best interest of the Company. To this effect, the Applicant seeks that the Respondent be placed under business rescue which will be in the best interest of both the Respondent company as well as the general body of creditors.
22. As already pointed out, it is further trite that business rescue proceedings are inherently urgent because the purpose thereof is to facilitate the rehabilitation of companies that are financially distressed.⁶
23. Financial distress is defined in section 128(1)(f) of The Act as follows:
“financially distressed”, in reference to a particular company at any particular time, means that—
 - (i). it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six*

⁶. Section 128(1)(b) of The Companies Act.

months; or

(ii). it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

24. Therefore, business rescue cannot be heard in the normal course as the Applicant is required to show that the Respondent company will be unable to pay its debts within the ensuing six months. The Applicant points out that it is important to emphasise that it is undisputed that the Respondent company is unable to pay its debts as and when same fall due. Applicant further points out that where Mr. Venter alleged that he had agreements in place with all of the creditors, this has proven to be untrue because the Applicant made contact with one of the creditors who confirmed that Mr. Venter never made any arrangements with them for payment. The Applicant further provided a statement that contradict the amounts provided by the Respondent.⁷
25. It is not disputed that the Respondent Company stands indebted. It is also fact that currently, it does not have sufficient resources to be able to pay off the debts. The Applicant has provided some of the details that go to prove that the Respondent Company is currently not able to pay off all the debts on its shoulders. That notwithstanding, it is trite that the provisions under section 131(4) of The Act do allow for court a discretion to exercise regarding whether there are reasonable prospects of success in place or not for a company to be able to pull out of indebtedness.
26. The Court, in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*⁸, evaluated the question as to reasonable prospects of success in the context of section 131(4) of The Act and stated as follows:
“[19]. *In terms of section 131(4) of the new Act, a court may make an order placing a company under supervision and commencing business rescue proceedings if the court is satisfied that:*
19.1. *the company is financially distressed;*
19.2. *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*

⁷. See: Para 34 replying affidavit, Section 004-13 to 14.

⁸. (Registrar of Banks & another intervening) [2012] JOL 28893 (WCC).

19.3. *it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company, or, it may dismiss the application together with any further necessary and appropriate orders, including an order placing the company under liquidation.*

[20]. *The meaning of the term "reasonable prospect" as used in this subsection falls to be considered. In terms of section 427(1) of the previous Companies Act 61 of 1973, a rather cumbersome and ineffective procedure was provided for reviving ailing companies. That section of the 1973 Companies Act used the phrase "reasonable probability" in respect of the recovery requirement. It read: "427(1) When any company by reason 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."

[21]. *In contrast, section 131(4) of the new Act uses the phrase "reasonable prospect" in respect of the recovery requirement. The use of different language in this latter provision indicates that something less is required than that the recovery should be a reasonable probability. Moreover, the mind-set reflected in various cases dealing with judicial management applications in respect of the recovery requirement was that, prima facie, the creditor was entitled to a liquidation order, and that only in exceptional circumstances would a judicial management order be granted. The approach to business rescue in the new Act is the opposite – business rescue is preferred to liquidation.*

[22]. *However, even if the substantive test with its lower threshold is satisfied, the court still has a discretion not to grant the order. In exercising this discretion, the court should give due weight to the legislative preference for rescuing ailing companies if such a course is reasonably possible. It would therefore be inappropriate for a court faced with a business rescue application to maintain the mind-set (from the earlier regime) that a creditor is entitled ex debito justitiae to be paid or to have the company liquidated.*

27. Section 131(4) of The Act, clearly leaves room for the court, having evaluated all defects, to exercise its discretion with regard to whether or not to place a company under supervision by subjecting it to business rescue. The reason behind this approach is to protect the interest of innocent third parties who engage in business dealings with the company especially, at a time when that company is not demonstrating maximum ability to pay off its debts.
28. *In casu*, the Respondent Company has proven to be struggling if to keep up with the debts at hand. While the Respondent disputes the allegations by the Applicant that it is not in a financial position to contend with the current level of its indebtedness, it has not presented any proof that it is indeed in a position to pay off the debts at hand unless there is some kind of intervention. The objective behind this application entails an intervention which the Applicant regards to be capable of pulling the Respondent Company out of its current indebtedness. Given the need to protect the interests of innocent third parties who may have to engage in business dealings with the all Respondent Company, it behoves the court to carefully apply his mind with regards to whether or not to grant the application at hand.
29. The above facts confirm that this matter is urgent in nature in that they make it evident that the company is financially distressed and that Mr. Venter intends to trade with the company as he wishes and without any input from the Applicant. He even interfered with a method put in place at the instance of the Applicant according to which some of the company's assets were being sold so as to acquire funds with which to pay off debts of the company. This is not only prejudicial to the Applicant, but it is also prejudicial to the general body of creditors whose interests require protection.
30. The Respondent disputes urgency in this matter. It submitted that the delay in launching this application is proof of the fact that it is not urgent. However, the Applicant gave an account about a number of steps he took to try and save the company from succumbing to its indebtedness. He outlined efforts taken to sell assets of the Respondent Company in order to acquire funds with

which to settle the company's indebtedness. The Applicant also submits that in the event where the court does not intervene, there shall be no substantial redress at hand and that the interests of innocent third parties who stand to innocently engage in deals of a financial nature with the Respondent Company shall be severely compromised.

31. In the matter of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁹, the Court dealt with the test to be applied in urgent application and stated as follows:
- "[7]. It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.*
- [8]. In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.¹*
- [9]. It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.*

⁹. (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

32. It cannot be disputed that the Respondent Company is financially distressed. The Respondent made bold assertions that payments were made to various creditors, however, it failed to attach any evidence to show that there are indeed arrangements in place to pay the debts off. It further failed to attach any evidence to prove that payments were indeed made. The Respondent's only evidence was a statement that was compiled by Mr. Venter, which has been shown to be a misstatement of the true state of affairs.
33. A further cause of concern is in that Mr. Venter denies the Applicant access the documents of the Respondent Company, much as it fails to engage with the Applicant regarding the affairs of the Respondent Company. The above such of facts completely inconsistent with prospects of the Respondent Company's recovery from indebtedness. Under these circumstances, the Applicant could not have simply accepted the conduct of Mr. Venter. The deadlock which eventuated between the Applicant and Mr. Venter directly placed the interest of innocent third parties will stand to engage in dealings with the Respondent Company in jeopardy.
34. Based on the above, the application stands to be granted in the following order is made:

ORDER

- 35.1. The respondent company ("MK AFRICA PLANT AND EQUIPMENT (PTY) LTD") is hereby placed under supervision and business rescue proceedings commence in terms of section 131(4) of the Companies Act, Act 71 of 2008.
- 35.2. Gideon Slabbert is appointed as interim business rescue practitioner as intended in section 131(5) of the Companies Act, with all the powers and duties entrusted to him in terms of the Act, pending ratification of such appointment by the creditors at their first meeting.
- 35.3. The respondent is ordered to pay the costs of the application as on the scale between attorney and client.



T. A. Maumela.
Judge of the High Court of South Africa.

REFERENCES

For the Applicant:
Instructed by:

Adv. A A Basson
Barnard Inc.

For the Respondent:
Instructed by:

Adv. M LOUW
Jl Van Niekerk Inc. Attorneys

Judgment heard:

21 December 2021

Judgment delivered:

24 January 2022