



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 11530/2021P

In the matter between:

NILE DUTCH AFRICA B.V.

APPLICANT

and

**CRYSTAL PIER SHIPPING PROPRIETARY LIMITED
(IN BUSINESS RESCUE)**

1st RESPONDENT

JOHNINE WINSOME ELSIE MADDOCKS N.O.

2nd RESPONDENT

**THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

3rd RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 14 September 2022 (Wednesday) at 12h30.

ORDER

It is ordered that:

- 1 The resolution passed by the directors of the first respondent on 28 January 2021 in terms of s 129(1) of the Companies Act, 2008 voluntarily beginning business rescue proceedings and placing the first respondent under supervision is set aside.
- 2 The first respondent is placed under provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg.

- 3 A *rule nisi* be and is hereby issued calling upon the first respondent and all other interested persons to show cause, if any, to the above Honourable Court on or before the date to be secured from the registrar, or so soon thereafter as counsel for the applicant may be heard:
- (a) why the first respondent should not be placed under final liquidation, and;
 - (b) why the costs of this application (including the costs of the two counsel) should not be costs in the liquidation.
- 4 A copy of the provisional winding up order be:
- (a) published in the Government Gazette and the Witness newspaper on or before 15 October 2022; and
 - (b) served in compliance with the provisions of s 346A of the Companies Act, 1973 on or before 15 October 2022.

JUDGMENT

Mlaba AJ:

Introduction

- [1] The applicant brings an application for the following:
- (a) An order setting aside the resolution in terms of which the first respondent was placed under business rescue on the ground that there is no reasonable prospect for rescuing the first respondent, alternatively, that the first respondent has failed to satisfy the procedural requirements set out in s 129 of the Companies Act 71 of 2008 ("the Act"), as contemplated in s 130(1)(a)(ii) and (iii) of the Act, and having regard to all of the evidence in the application, is just and equitable, as contemplated in s 130(5)(a)(ii) of the Act, to set aside the resolution; and
 - (b) An order placing the first respondent in liquidation on the basis that it is unable to pay its debts as and when they fall due for payment as contemplated in s 344(f) of the Companies Act 61 of 1973 ("the Companies Act 1973"),

alternatively, that it would be just and equitable to place the first respondent in liquidation in terms of s 344(h) of the Companies Act 1973.

[2] The applicant and first respondent entered into an Agency Agreement in terms of which the first respondent acted as an exclusive agent for the applicant's owned and/or chartered vessels operating to and from South Africa. The Agency Agreement was in place during the period from 1 June 2009 to 31 January 2021. The applicant did not extend the agreement beyond 31 January 2021 and, in terms of the agreement, the first respondent had to provide a full and final statement of account on termination of the agreement, and further effect payment of the closing balance to the applicant. The first respondent failed to do so despite numerous requests by the applicant and as a result, the applicant made its own calculations of amounts due by the first respondent. The amount due and owing to the applicant by the first respondent was USD 1 262 355.

[3] The Agency Agreement was the main source of the first respondent's income. On 28 January 2021, the board of directors of the first respondent passed a resolution to voluntarily commence business rescue proceedings and to place it under supervision as contemplated in s 129(1) of the Act and, on 4 February 2021, the business rescue proceedings commenced in respect of the first respondent.

[4] The first respondent has not carried on business since business rescue commenced and the first business rescue plan ("the Plan") was published by the second respondent on 31 May 2022, fifteen months after the commencement of the business rescue proceedings. This was after a court order was issued on 2 February 2022 directing the second respondent to publish a business rescue plan on or before 31 May 2022. The second respondent accepted the claim by the applicant against the first respondent as being correct. The first respondent admitted that it owes the applicant a total amount of R19 384 859 and this amount is reflected in the first respondent's Plan. The first respondent, however, registered a counter-claim against the applicant for the total amount of R24 500 000, which the applicant disputes.

[5] The Plan lists a potential claim against SARS in the sum of R10 500 000 as an asset, this amount is part of the R24 500 000 claim. The dispute between SARS and the first respondent dates back to December 2015 and there is no prospect that it will

come to an end anytime soon as an offer by the first respondent to have the matter resolved was rejected by SARS in January 2022. A meeting in terms of s 151 of the Act was held on 14 June 2022 where the Plan was rejected, however, the second respondent advised that the first respondent intended to move an application for the setting aside of the vote on the grounds that the rejection of the Plan was inappropriate.

Applicant's submission

[6] The applicant submits that it is a creditor to the first respondent and that the first respondent is unable to pay its debts. The debt arose out of the failure by the first respondent to pay the outstanding amount due to the applicant at the termination of the Agency Agreement.

[7] The applicant disputes that it owes the first respondent. The first respondent's counter-claim against the applicant in the sum of R24 500 000 is made up as follows:

- (a) R10 500 000 attached by SARS in 2016;
- (b) R8 000 000, an amount unilaterally withheld by the applicant;
- (c) R4 100 000 as interest incurred on an overdraft facility which the first respondent required to continue to service the Agency Agreement; and
- (d) R1 900 000 as legal fees incurred in defending the SARS claim.

[8] In disputing the counter-claim the applicant submits that the first respondent produced an internal audit report in May/June 2019 wherein it assured the applicant that the R10 500 000 attached by SARS during 2016 had nothing to do with the applicant and that it did not constitute an exposure to the applicant. Further, the applicant submits that even if the claim had any merit, it has now clearly prescribed since it dates back to 2015.

[9] The claim for R8 000 000 has no merit as the first respondent and applicant agreed that any monies owed by the applicant to the first respondent would be set off against the R 8 000 000 owed by the first respondent to the applicant. The second respondent confirmed this agreement in her answering affidavit.

[10] The R 4 100 000 is an unliquidated claim and has no legal basis.

[11] The alleged legal fees amounting to R1 900 000 is a non-existent claim as the first respondent had informed the applicant that it had no exposure to the SARS dispute. The applicant, therefore, submits that it cannot be held liable for the legal costs incurred by the first respondent in defending that claim.

[12] It is for the above reasons that the applicant submits that the counter-claim by the first respondent is without any substance and cannot be regarded as an asset of the first respondent. The first respondent has liabilities of R19 384 859, a claim by the applicant that it has accepted and has enlisted in its Plan, whilst its assets are no more than R11 170 845. therefore, the first respondent is insolvent.

[13] According to the applicant there are no reasonable prospects for rescuing the first respondent. The first respondent earned no income during March 2021 to February 2022. Its sole source of income was the applicant, and since the termination of the Agency Agreement, the first respondent has had no other source of income. The second respondent, has had fifteen months to rescue the first respondent and has failed as the first respondent has no business to be rescued. The first respondent is therefore commercially and factually insolvent having admitted liabilities in the Plan in the sum of R19 384 859.

[14] The applicant argued that it is just and equitable to set aside the resolution as the conduct of the first respondent was clearly an abuse of the business rescue procedure by the directors of the first respondent, who were aided and abetted by the second respondent. The second respondent delayed the proceedings and published a business rescue plan only when she had been compelled by a court order. The second respondent further misled the creditors of the first respondent in respect of its trading status and its assets position. She further denied the applicant of its right to vote in respect of the Plan.

[15] The second respondent represented to the creditors that the first respondent was carrying on business and that it had secured new business when this was not the case. The second respondent only disclosed in her answering affidavit that the first respondent had not traded since the commencement of the business rescue proceedings and had not earned an income during the period. She failed to explain her misrepresentations which were prejudicial to the first respondent's creditors. The applicant submits that had the first respondent been informed of the true state of affairs

of the first respondent it would have taken steps to terminate the business rescue proceedings and place the first respondent in liquidation.

[16] The second respondent also misled the creditors about the first respondent's assets. She informed them that the first respondent only had movable assets such as furniture and computer equipment. She failed to disclose that the first respondent had a claim of R11 144 380 against a company known as Intrax Investments 274 (Pty) Ltd ("Intrax") and a claim of R1 253 093 against one of its directors, Pravin Bechan Parsad. Had she disclosed these claims the creditors would have compelled the second respondent to take steps to recover these amounts.

[17] For the above reasons the applicant submits that the second respondent failed in her duties as a business rescue practitioner. The applicant further submits that having a holistic regard to the insolvency of the first respondent, and length of time that has lapsed, it is not likely that the first respondent can be rescued. It is, therefore, just and equitable to have the resolution set aside. The first respondent should also be liquidated by virtue of it not being able to pay its debts.

First respondent's submissions

[18] The first respondent argued that the court has to look at the business itself as well as the prospects of success that the first respondent has if it is afforded time and allowed to trade. Its only creditor is the applicant and if, having no assets, the first respondent is placed into liquidation then it will be a dead end for the applicant. If, however, the first respondent is allowed to trade then any money that is made will be put into a trust for payment to the applicant.

[19] The court must also have regard to all the evidence in order to determine if it would be just and equitable to place the first respondent under liquidation. The applicant has not discharged the onus that the first respondent has no probability to be rescued. The applicant delayed the business rescue proceedings by instituting court proceedings against the first respondent. A further delay was caused by the Covid 19 pandemic. The first respondent is and has been trying to secure business but needs more time.

[20] The first respondent submits that the SARS claim is against the applicant as the first respondent is not an importer of goods. The letter was addressed to the first respondent only because the first respondent is the one that had presence in the

country, however, there is no dispute about the fact that at all times the first respondent was acting as an agent of the applicant, the importer of goods. The first respondent, therefore, has a genuine counter-claim against the applicant.

[21] The first respondent submits that there is hope of securing new contracts and, in fact, it had secured some contracts, however, the effective dates thereof were delayed by the effects of Covid 19. There are three contracts in the pipeline and there is one that has taken effect that currently brings in an income of R27 000 per month. The first respondent is also in the process of recovering the debt owed to it by Intrax.

[22] In conclusion, the first respondent submitted that it requires more time to secure new business and that it had good prospects in that regard.

Evaluation

[23] In order for the provisional liquidation application to succeed the applicant must satisfy the applicable requirements. The applicant has demonstrated that it has the necessary locus standi in that it was admitted by the first respondent that it owes the applicant an amount above R100. The applicant is the creditor to the first respondent.

[24] The first respondent admitted in its Plan that an amount of R19 384 859 remains outstanding and due to the applicant, that amount having been due since 31 January 2021. The first respondent is therefore unable to pay its debt.

[25] It is common cause that the Agency Agreement was the only source of income for the first respondent and upon its termination the first respondent has not been trading.

[26] The first respondent passed a resolution to commence business rescue proceedings upon confirmation that the Agency Agreement would not be extended beyond January 2021. The effect thereof was to afford the first respondent protection against its creditors. The business rescue procedure was designed to assist businesses that had the potential of being rescued while protecting them from possible legal action by creditors.

[27] The first respondent has been under business rescue since February 2021 and within that period there has been no definite progress in rescuing the business. The first respondent has not traded since the business rescue proceedings commenced and it has not secured any new businesses. The Plan was published only after legal

action, and a court order was issued against the second respondent. The prospect that the proceedings will be a success do not appear to favour the first respondent.

[28] The first respondent requests more time to secure new business. In *Koen and another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others*, the court expressed a view which has been applied consistently in matters where the duration of business rescue proceedings is in issue or relevant to the determination of a matter: 'It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings – however dubious might be their prospects of success in a given case – materially affects the rights of third parties to enforce their rights against the subject company.'¹

[29] These views are appropriate in the determination of this matter.

[30] In the matter of *South African Bank of Athens Ltd v Zennies Fresh Fruit CC and a related matter*,² the court posed this question, 'Can it be that a company enjoys the protection of business rescue indefinitely to the detriment of its creditors?'

[31] In my view, the answer to the above question is negative. The rights of creditors cannot be denied indefinitely. The first respondent has failed to demonstrate that the business rescue proceedings are assisting in any way and that the first respondent is on its way to recovery. After approximately fifteen months the first respondent has yet to secure new business and generate income. Further, there is no approved Plan in place. In light of the above, there is no probability that in the next three or six months the first respondent will be able to pay its debts.

[32] Despite the first respondent's attempts to oppose this application, its defence is based only on its request for more time. There is no explanation as to why the second respondent has not yet recovered the debts owed to the first respondent from Intrax and the first respondent's director. There is no guarantee that in three months'

¹ *Koen and another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others* 2012 (2) SA 378 (WCC) para 10.

² *South African Bank of Athens Ltd v Zennies Fresh Fruit CC and a related matter* [2018] 2 All SA 276 (WCC) para 34.

new business will be effective and that income will be generated. The first respondent acknowledges that it is making R27 000 per month and this is the only income that the first respondent currently has.

[33] The first respondent depends on the hope that it will somehow secure new business, however, the court must bear in mind that there are other stakeholders, such as creditors, whose interests must also be considered and respected. In terms of s 132(3) of the Act, the business rescue proceedings end within a period of three months unless the period is extended by the court on application.

[34] Section 129(1)(b) of the Act allows the board of directors of a company to resolve that the company begin voluntary business rescue proceedings and place the company under supervision, if it has reasonable grounds to believe that there are reasonable prospects of rescuing the company.

[35] Having considered the actual state of the first respondent's affairs at the time that the resolution was taken, and the position approximately fifteen months thereafter, there appears to be no reasonable prospects that the first respondent may be rescued.

[36] Section 130(1)(a)(ii) allows an affected person to apply to a court for an order setting aside the resolution on grounds that there is no reasonable prospect for rescuing the company. It is my view that the applicant has submitted sufficient grounds upon which it believes that there are no reasonable prospects that the first respondent may be rescued.

[37] In the result, the court is satisfied that the applicant has made out a case for the relief sought.

[38] Accordingly, I make the following orders:

- 1 The resolution passed by the directors of the first respondent on 28 January 2021 in terms of s 129(1) of the Companies Act, 2008 voluntarily beginning business rescue proceedings and placing the first respondent under supervision is set aside.
- 2 The first respondent is placed under provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg.

- 3 *A rule nisi* be and is hereby issued calling upon the first respondent and all other interested persons to show cause, if any, to the above Honourable Court on or before the date to be secured from the registrar, or so soon thereafter as counsel for the applicant may be heard:
- (a) why the first respondent should not be placed under final liquidation, and;
 - (b) why the costs of this application (including the costs of the two counsel) should not be costs in the liquidation.
- 4 A copy of the provisional winding up order be:
- (a) published in the Government Gazette and the Witness newspaper on or before 15 October 2022; and
 - (b) served in compliance with the provisions of s 346A of the Companies Act, 1973 on or before 15 October 2022.



Mlaba AJ

Appearances

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