



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **15th March 2019** Signature: _____

CASE NO: 2018/22808

DATE: 15TH MARCH 2019

In the matter between:

CARROLL, MICHAEL VINCENT

Applicant

and

MICHAEL CARROLL CC

Respondent

In Re:

In the application for the Liquidation of:

MICHAEL CARROLL CC (under supervision)

Applicant

JUDGMENT

ADAMS J:

[1]. This is an opposed application by the applicant, cited herein as a Close Corporation (under supervision), represented in these proceedings by the Business Rescue Practitioner, for an order that business rescue proceedings be discontinued and that the applicant be placed in final liquidation in the hands of the Master. The application is brought in term of the provisions of section 141(2)(a)(iii) of the Companies Act, 71 of 2008 ('the Companies Act').

[2]. The application is brought by the duly appointed Business Rescue Practitioner of the applicant, Mr T G Nell, who deposed to the founding affidavit in support of the application. This application is closely linked and interrelated to a simultaneous application for the liquidation of Vlakplaats 335 CC ('Vlakplaats'), being the second of three entities in respect of which Mr Nel is appointed as the Business Rescue Practitioner. Vlakplaats and the applicant herein are related in that the sole member in both these Close Corporations is Michael Carroll, who was responsible for these two entities being placed into Business Rescue.

[3]. On the 2nd June 2016 the sole member passed a resolution that the close corporations commence with business rescue. Thereafter, Mr Nell was appointed as the Business Rescue Practitioner in respect of all three the Close Corporations, the third CC being MPC Boerdery CC ('MPC').

[4]. The sole member ('Carrol') opposed the applications *inter alia* on the basis that the requirements set out in section 141(2)(a)(ii) of the Act for the liquidation of the applicant have not been met. He takes issue with the Business Practitioner's conclusion that there is no reasonable prospect for the applicant to be rescued. It is the contention of Carroll that, in fact, the business has already been rescued insofar as the Business Rescue Plan, which was voted

upon at a meeting of all of the Creditors and agreed to by all the relevant stakeholders, was duly implemented and the applicant complied with all of its obligations in terms of the plan.

[5]. The business rescue plan was finally adopted on the 14th of September 2016 in terms of section 151 of the Companies Act. In his report, incorporating the business rescue plan, the Business Rescue Practitioner expressed the following view:

‘Whilst there is no possibility for the Close Corporation to continue its business activities, the possibility does exist to provide a better return for affected persons than what would transpire in liquidation. This alternative is provided for in section 128 of the Act.’

[6]. Pursuant to the business rescue plan the assets of the applicant was sold and the net effect was that the sale of their assets did not result in the settlement in full of the debts of the applicant. As predicted in the business rescue plan, the only proven creditor, the Land Bank, received a dividend of 23 cents in the rand.

[7]. On the 28th of March 2018, the Business Rescue Practitioner issued a notice in terms of section 141(2)(a)(i) of the Companies Act, advising all affected parties that he had concluded that there is no longer a reasonable prospect for the applicant to be rescued and that he intends commencing with liquidation proceedings against the applicant. The basis for these assertions on the part of the Business Rescue Practitioner was *inter alia* that, in his view, full payment of the claim by the Land Bank could not be achieved as envisaged in terms of the Business Rescue Plan.

[8]. The applicant was established in 1994 and conducts its primary business within the farming and agricultural industry. During the course of February 2016, the Land and Agricultural Bank of South Africa (the Land Bank) demanded payment from the applicant of an amount of R26 910 478.93. On the 2nd June 2016 Carroll resolved that business rescue proceedings be commenced with. On the 6th of June 2016 the Business Rescue Practitioner, Mr Nell, was appointed. On the 21st of June 2016 the first statutory meeting of creditors was held at which the Land Bank was the only proven creditor. On the 16th of August 2016 a second statutory meeting of creditors was held which was subsequently postponed to the 7th of September 2016 and again postponed to 14 September 2016. In both instances the postponements were occasioned by proposed amendments to the Business Rescue Plan by the Land Bank. On the 14th of September 2016 the Land Bank voted as the only proven creditor in favour of the Business Rescue Plan, as amended.

[9]. In accordance with the basic plan envisaged in the accepted Business Rescue Plan as amended, the Business Rescue Practitioner proceeding to wind-down the affairs of the applicant. He proceeded to sell all of the known assets. The proceeds derived from the aforesaid were paid over to the Land Bank, but the Land Bank was left with a shortfall of approximately R8 427 634.21.

[10]. The Business Rescue Plan was accepted in terms of section 151 of the Companies Act on 14 September 2016.

[11]. A central issue for decision in this application relates to the interpretation of the approved business rescue plan. Importantly, the question to be asked is whether the plan envisaged a compromise, which, once implemented, would have discharged the applicant from further indebtedness to its creditors for the balances due to them. Carroll is of the opinion that this was the case and that

the question should be answered in the affirmative. The Business Rescue Practitioner is of the view that the implementation of the plan did not release the applicant from further indebtedness to its creditors. The Business Rescue Practitioner therefore contends that the plan has not been implemented or even substantially implemented because given its wording the plan will only be implemented once the Land Bank is paid in full.

[12]. The Business Rescue Practitioner cannot in the business rescue proceedings do anything further in order to assist the Land Bank to get what it wants namely payment in full. The Business Rescue Practitioner is accordingly of the opinion that a liquidator will be better equipped than a Business Rescue Practitioner.

[13]. The case of the Business Rescue Practitioner is that a Business Rescue Plan could only be implemented in respect of MPC. In that matter the Land Bank was paid in full. The Business Rescue Plans in respect of Vlakplaats and the applicant could not be implemented, since the sale of assets could not return a 100% settlement of the claims by the Land Bank as envisaged in terms of the Business Rescue Plans in its amended form.

[14]. The Business Rescue Practitioner contends that the liquidation of the applicant will result in the appointment of a liquidator who can use the mechanisms of the Companies Act in liquidation to locate hidden movable assets, conduct investigations and enquiries to proceed with the pending litigation.

[15]. Section 141(2)(a)(ii) of the Act provides as follows:

'If, at any time during business rescue proceedings, the practitioner concludes that there is no reasonable prospect for the company to be rescued, the

practitioner must ... apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation'.

[16]. Mr Van Nieuwenhuizen, Counsel for the Respondent, submitted that the aforesaid section may only find application when certain prerequisites are met.

[17]. In terms of Section 128(1)(b)(iii) of the Act, 'business rescue' is defined as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for 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. Alternatively, 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.

[18]. Section 128(1)(h) of the Act provides that 'rescuing the company' means achieving the goals as set out in the definition of 'business rescue' as per section 128(1)(b) of the Act.

[19]. In this matter, as was the case with the other two related entities, the business rescue proceedings constituted the development and implementation of a plan approved where it was not possible for the applicant to so continue in existence. This means that the purpose of the business rescue proceedings was to achieve better returns for the creditors or shareholders than would result from the immediate liquidation of applicant. In other words, the business rescue plan envisaged the above alternative scenario and same was approved as required in terms of Section 150(2)(a)(iii) and (b)(vi) of the Act.

[20]. It was submitted on behalf of Carroll that in terms of the approved business rescue plan Land Bank would receive a probable dividend of 23.25 cents in the rand compared with 16 cents in the rand should the applicant be liquidated. This was expressly provided for in the business rescue plan. The applicant made the foregoing proposals and undertook to comply with its obligations in terms of that settlement. The Land Bank would, in consideration for the right to receive the amounts in terms of the business rescue plan, upon the applicant fulfilling the conditions contained in the business rescue plan, which confines Land Bank's right to claim payment from the applicant, so Carroll submitted, in terms of the business rescue plan. The proposed payment to Land Bank would be the proposed higher dividend compared with a dividend that would be achieved upon the liquidation of applicant.

[21]. Clause 11.1 of the business rescue plan expressly provides and contemplates that the proceeds from the sale of the applicant's assets would be available for settlement of the claims of the Land Bank. The Land Bank approved the plan. Therefore, on the full implementation of the business rescue plan, the applicant would be released from its indebtedness for the amount owed to Land Bank. Mr Van Nieuwenhuizen therefore submitted that at the time when the full amount as set out in the business rescue plan had been paid, Land Bank's claim would become compromised. I find myself in agreement with these submissions.

[22]. I am persuaded that the business rescue plan contemplated a compromise which was conditional upon the applicant meeting its obligations to Land Bank as set out in the business rescue plan, failing which, the full balance due to Land Bank in terms of Land Bank's original claim would be immediately due, owing and payable. The business rescue plan would come to an end upon all payments being made in terms of the business rescue plan.

[23]. Therefore, in my judgment, having regard to the wording and the phraseology of the business rescue plan, it must be accepted that the approved business rescue plan expressly contemplated a settlement or compromise.

[24]. The contention of the Business Rescue Practitioner that the business rescue plan contemplated that the full amount outstanding to Land Bank was to be paid is not sustainable. It flies in the face of the express wording of the plan. There is no express and unambiguous provision that full payment of all outstanding debts must be achieved in terms of the business rescue plan. Had the parties intended this agreement, they would undoubtedly have said so.

[25]. Furthermore, if the business rescue plan in fact intended to record the extent of the payment required, it would have followed the same tenor of the remainder of its provisions, which were in fact very clear and exact. I therefore agree with the submission by Mr Van Nieuwenhuizen that the failure to expressly record the requirement for a complete payment of the outstanding debt of Land Bank is a deliberate change from the tenor of exactitude otherwise employed and must be accepted to have been done deliberately.

[26]. In any event the interpretation contended for by the Business Rescue Practitioner, in my view, disregards completely the express wording of the plan. Our law requires meaning to be ascribed to every word and phrase used in a document. The interpretation of an instrument always starts by having regard to the ordinary syntax and grammar of words and phrases.

[27]. The context in which the plan was hedged also belies the interpretation contended for by the Business Rescue Practitioner. The circumstances surrounding the adoption of the business rescue plan, notably the fact that the final plan was approved only after same incorporated certain proposals by the

Land Bank, support the interpretation contended for by Carroll. In that regard, the business rescue practitioner's subsequent conduct in preparing and finalising the first and final liquidation and distribution account, is instructive and lends credence to Carroll's contention that all three business rescue plans were to be considered jointly in determining whether Land Bank's debt would be compromised.

[28]. Once the dividend sought to be achieved in terms of the business rescue plan was realised, the applicant would then be 'rescued' as envisaged by Sections 128(1)(b)(iii) and (h) as a dividend better than that which would have been achieved in the case of a liquidation.

[29]. 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.

[30]. The application of the applicant for its liquidation therefore stands to be dismissed.

Costs

[31]. It was argued by Mr Van Nieuwenhuizen that the costs *de bonis propriis* should be awarded against the Business Rescue Practitioner. In launching this application for the liquidation of the applicant, so the argument went, he acted *mala fide*.

[32]. I am not persuaded that a proper case has been made out for such an Order. It may be that Mr Nel was somewhat overzealous, whilst under pressure from the Land Bank, and in his mind he may genuinely have believed that he was acting in the interest of the applicant and its creditors when he launched this application. However, I do not believe that it has been demonstrated that he acted *mala fide*.

[33]. In the exercise of my discretion, I therefore intend ordering the applicant (under supervision) to bear the cost of the application.

Order

In the result, I make the following order:-

1. The applicant's application for its liquidation be and is hereby dismissed.
2. The applicant (under supervision) shall pay the Mr Michael Carrol's cost of this opposed application.



L R ADAMS
Judge of the High Court
Gauteng Division, Pretoria
