



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES / NO
Of Interest to other Judges:	YES / NO
Circulate to Magistrates:	YES / NO

Case No: 2391/2019

In the matter between:

GOITSEONE JONAS MOSELANE

Applicant

and

IKAGENG ELECTRICAL CONTRACTORS (PTY) LTD 1st Respondent

**VOLTEX (PTY) LTD T/A
LIGHTING STRUCTURES AND ATLAS GROUP** 2nd Respondent

ABSA BANK (PTY) LIMITED 3rd Respondent

CORAM: MOROBANE, AJ

JUDGMENT: MOROBANE, AJ

HEARD ON: 13 JUNE 2019

DELIVERED ON: 18 JUNE 2019

- [1] The applicant launched an urgent application seeking an order placing the first respondent under supervision and business rescue in terms of section 131 of the Companies Act 71 of 2008 (*“the Act”*). The application is opposed by the second respondent.

- [2] At issue is that the applicant alleges that the first respondent is financially distressed within the meaning of section 128(1)(f) of the Act in that it appears to be reasonably unlikely for it to pay all of its debts as they become due and payable. The first respondent is indebted to the second respondent in the amount of R10 148 241.49 and to the third respondent in the amount of R16 000 000.00, which amounts are respectively due, owing and payable. The first respondent, a large trading enterprise specialising, among others, in the installation and maintenance of electrical equipment and wiring, has two shareholders. That is, the applicant, who is also the sole director, with 90% of the shares and his wife with the remaining 10% of the shares. He also alleges that the business rescue application is urgent.
- [3] There was no appearance for the third respondent, but a "Clarification Affidavit" was filed on its behalf and abides the decision of the Court. The third respondent explained that its exposure to the first respondent's business as at 27 May 2019 from a cheque account with an overdrawn balance of R17 490 595.00 to arrears in other accounts. The third respondent disputes the applicant's averments that 'the third respondent is not enforcing its rights and claims at this stage but prefers to await the outcome of this application which it supports before doing so' and others as incorrect. It further confirmed that on 10 May 2019, the third respondent has issued summons under case number 2052/2019 against the first respondent with the applicant as surety on ten instalment sale agreements regarding which it fell in arrears with the instalment payments.

- [4] The third respondent has denied the averments that it is not enforcing its rights and claims against the first respondent. To the contrary, it has already issued summons against the first respondent and cancelled all the agreements. The return of the financed items and other remedies are thereby claimed.
- [5] Prior to the issuing of this application, the second respondent launched an application for the winding-up of the first respondent (*“the liquidation application”*) under the case number 2247/2017. On 22 May 2019 the liquidation application was served on the first respondent and it filed its opposition. The liquidation application is pending before the Court.
- [6] The issue in these proceedings is that of urgency. Counsel for the second respondent, submitted that these proceedings lacked urgency as contemplated in the Uniform Rules.
- [7] An urgent application must be brought in terms of provisions of Rule 6(12) of the Uniform Rules, which read as follows:
- ‘(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.
- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.’

- [8] The applicant must demonstrate to the Court that the matter is urgent and, if not treated as such, he/she would suffer a loss. In ***Caledon Street Restaurant CC v Monica D' Aviera [1988] JOL 1832 (SE)*** at 7-8 the court said:

'It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6 (12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these rules". That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case.'

- [9] On the urgency of the application, the applicant relies on the following grounds: he was confident that the negotiations with the second respondent to enter into a payment plan would result in the first respondent's ability to receive money from its trade debtors; the third respondent supports these proceedings; he expects the score rating of the first respondent will be the highest and that there is a strong likelihood that it will be awarded the majority of tenders; the pending liquidation application is potentially prejudicial to the first respondent's prospects of being successful in its bids; he seeks to suspend the pending liquidation proceedings in order to preserve the first respondent's business; and the relief sought is the only available remedy to him.

- [10] The applicant does not give tangible evidence about the harm the first respondent would suffer if the normal procedure of the Court were to be followed. He stated that there is a strong likelihood that the majority of the tenders 'will' be awarded to the first respondent. Given the processes involved in the bidding of tenders, the statement by the applicant is highly speculative. No evidence to that effect was placed before me in support of the statement. The applicant further stated that the second respondent created the urgency of these proceedings when it issued the liquidation application. By launching these proceedings, the applicant sought to suspend the liquidation application which is pending before the Court.
- [11] At the outset, the applicant failed to set forth the circumstances which renders his application urgent and the reasons why substantial redress could not be afforded to him at a hearing in due course. The matter has long lost any urgency in March 2019 when the first respondent showed signs of financial distress when it found itself unable to pay its debts to the second respondent. The liquidation application was served on 22 May 2019 and these proceedings were initiated eight days later. He failed to give a satisfactory explanation as to the delay in launching this application since March 2019. I am of the view that the matter is not urgent to justify dispensing with the form and service prescribed by the Uniform Rules of Court. The alternative remedy is available to him by way of opposing the liquidation application or the granting of the final order of liquidation.

[12] A proper case for urgency has not been made and the application stands to be struck off the urgent roll.

[13] I accordingly make the following order:

1. The application is struck from the roll for lack of urgency, with costs.

V.M. MOROBANE, AJ

On behalf of the applicant: Adv. I Miltz SC with Adv. RG Cohen
Instructed by:
Blair Attorneys
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On behalf of the 2nd respondent: Adv. CD Pienaar
Instructed by:
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On behalf of the 3rd respondent: Symington & De Kok Attorneys
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