



**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.: 675/2017

In the matter between:

DANIël THEODORUS VAN JAARVELD NO.

Applicant

and

Q-CIVILS (PTY) LTD

[in business rescue]

1st Respondent

THE COMMISSIONER OF THE COMPANIES

AND INTELLECTUAL PROPERTY COMMISSION

2nd Respondent

HEARD ON:

16 MARCH 2017

JUDGMENT BY:

MBHELE, J

DELIVERED ON:

30 MARCH 2017

INTRODUCTION AND BACKGROUND

- [1] This is an application for liquidation against the first respondent brought in terms of Section 141 of the Companies Act 71 of 2008 (The Act).
- [2] The application is opposed by the first Respondent. The opposing affidavit deposed to by O. Fortune (Omar) has been filed in support of the first Respondent's opposition of the application.
- [3] Omar is the sole director and Chief Executive Officer of the first Respondent.
- [4] The application was set down for hearing on an urgent roll on 14 February 2017 where it was postponed as per agreement between the parties to afford the first respondent an opportunity to file its opposing papers.
- [5] On 13 February 2017 the applicant filed a Rule 7 notice objecting to the authority of Marius Van Zyl Incorporated to act on behalf of the First Respondent.
- [6] On the 15 February 2017 the first respondent filed a resolution taken on 10 February by the sole director of the first respondent authorising Marius Van Zyl Incorporated to act on its behalf.
- [7] Subsequent to the liquidation application, the first Respondent filed a conditional application for the removal of the applicant as a business rescue Practitioner.

- [8] Further three intervention applications were filed by O Fortune, CPMS Civil Road Rehabilitation (PTY) LTD and the O & R Fortune Family Trust respectively.
- [9] The applicant raised a point *in limine* challenging the first Respondent's *locus standi in judicio*.
- [10] The parties requested me to adjudicate the point in *limine* separate from the main application.
- [11] I am called upon to determine whether the opposing affidavit of the first Respondent is properly before me.
- [12] The first Respondent was placed under Business rescue following a resolution by its sole director, Omar. Applicant was appointed as a business rescue Practitioner to investigate the possibility of rescuing the first Respondent.

CONTENTIONS BY THE PARTIES

- [13] Mr. Zietsman, on behalf of the applicant, submits that the Act precludes Omar from acting on behalf of the first Respondent without the authorisation from the applicant. He contends further that without express authorisation from the applicant in his capacity as a business rescue practitioner the action by the first respondent is a nullity. He contends that the first respondent has no authority to be heard by this court.

- [14] Mr. Ploos Van Amstel, on behalf of the first respondent, submits that the fact that the applicant entered into an agreement with the first Respondent to have the matter postponed to give the first respondent time to file its opposing papers, is an indication that the applicant gave permission to the first respondent to oppose this application. He further contends that the first respondent is estopped in law from raising lack of authority when he acquiesced to the actions of the first respondent. He contends, further, that the Act does not preclude the company from defending itself in liquidation applications. He painstakingly contends that in the current matter Omar does not require the approval of the applicant to take action on behalf of the first respondent in defending its liquidation.

Applicable Legal Principles

- [15] Business rescue is a rescue tool provided for a struggling business which could survive should it be given breathing space.
- [16] Section 128 defines Business rescue as a process aimed at rehabilitating a company that is financially distressed by providing for-
- (a) The temporary supervision of the company, and of the management of its affairs, business and property;
 - (b) a temporary moratorium on the rights of the claimants against the property or in respect of the property in its possession and
 - (c) 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

a company continuing in existence on a solvent basis or, if it is not possible, for a company to so continue in existence , results in a better return for the company and its shareholders than would result from the immediate liquidation of the company.

[17] Section 137 (2) of the Act provides as follows:

‘(2) During a company's business rescue proceedings, each director of the company:

- (a) Must continue to exercise the functions of director subject to the authority of the practitioner.
- (b) Has a duty to the company to exercise any management functions within the company in accordance with the express instructions or directions of the practitioner to the extent that it is reasonable to do so.

Section 137 (4)

“If during a company's business rescue proceedings the board or one or more directors of the company purports to take any action on behalf of the company that requires the approval of the practitioner that action is void unless approved by the practitioner.”

[18] The business rescue practitioner has wide management powers of the company bestowed on him by the Act. The directors must in terms of the Act exercise their functions and powers with the authority and direction of the Practitioner.

[19] Section 140 (1) provides that during a company's business rescue proceedings , the practitioner , in addition to any powers and duties set out in the Act has full management control of the

company in substitution for its board and pre-existing management.

APPLICATION OF THE LEGAL PRINCIPLES

- [20] It is apparent from the aforementioned provisions of the Act that the intention of the legislature in prescribing the appointment of a business rescue practitioner for a company under financial distress was to give authority to an individual who will provide an objective and independent analysis of the financial status of the company. The directors may exercise their powers as directors but such powers may only be exercised with the express authorisation of the business rescue practitioner. In essence, the business rescue practitioner assumes a position of authority over the directors as their actions are invalid unless authorised by him.
- [21] Business rescue is aimed at limiting the powers of the people who played a role in plunging the company into the position it finds itself in. The legislature gives the directors constricted powers so as to afford the practitioner enough room to investigate the financial position of the company. It can never be business as usual once the company has been placed under business rescue.
- [22] If there is no reasonable prospect that the company may be rescued, the practitioner must inform the court, the company and all affected persons. The question to ask is who represents the company during business rescue proceedings. It is clear from section 140 that the practitioner takes over the supervision, management and oversight of the company during the business

rescue proceedings. Directors function at the instance and instruction of the practitioner. It follows that the practitioner represents the company during business rescue. Directors of a company under business rescue are excluded in the definition of the affected persons in terms of section 128 of the Act.

- [23] The Act provides that the practitioner must give express authority not implied authority. The argument that the applicant acquiesced to the actions of the first respondent is without basis. In my view, Omar requires the authority of the applicant to act on behalf of the first respondent. The applicant's point in *limine* must be confirmed.

The following order is made.

Order

1. Applicant's point in *limine* is confirmed
2. Costs to be costs in liquidation.



N.M. MBHELE, J

On behalf of applicant:
assisted by:
Instructed by:

Adv. P Zietsman SC
Adv. Van der Merwe
Honey Attorneys
Bloemfontein

On behalf of respondents: Adv. Ploos Van Amstel SC
Assisted by: Adv. Greyling
Instructed by: Marius Van Zyl Inc.
Bloemfontein