



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

NOT REPORTABLE

Case No: 8706/2016

In the matter between:

LUMKILE MONDE MTOLO

FIRST APPLICANT

DEVANUNDHAN PILLAY

SECOND APPLICANT

LEILA MOODLEY NO

THIRD APPLICANT

KITESH MOODLEY NO

FOURTH APPLICANT

RIYA MOODLEY NO

FIFTH APPLICANT

KALAPPEN VEDACHALLAM MOODLEY NO

SIXTH APPLICANT

YOGANANDA DHANPAL NAIDOO NO

SEVENTH APPLICANT

TQM CONTSTRUCTION SERVICES CC

EIGHTH APPLICANT

and

GUILDER INVESTMENTS 10 (PTY) LTD

FIRST RESPONDENT

LAND AND AGRICULTURAL DEVELOPMENT

BANK OF SOUTH AFRICA

SECOND RESPONDENT

COMPANIES INTELLECTUAL PROPERTY

COMMISSION

THIRD RESPONDENT

Coram: Kruger J

Heard: 21 February 2017

Delivered: 2 March 2017

ORDER

1. The application is dismissed with costs, such costs are:
 - (a) to be paid jointly and severally, the one paying, the other to be absolved; and
 - (b) to include the costs of senior counsel.
2. The first respondent is hereby placed under provisional winding up.
3. A Rule Nisi be and is hereby issued calling upon all persons concerned to appear and show cause, if any, to this Court at **09h00** on the **9th May 2017** why the first respondent company should not be placed under final winding up order.
4. That service of the Rule Nisi be effected on the first respondent as follows:
 - 4.1 By service at its registered office and by publication forthwith once in each of the Government Gazette and the Natal Mercury newspaper and
 - 4.2 By service upon the employees of the first respondent and the relevant trade union and any other employee representative, if any.
5. Costs of the liquidation application are costs in the liquidation.

JUDGMENT

KRUGER J:

[1] The applicants seek an order, in terms of Section 131(1) of the Companies Act, 71 of 2008 (“the Act”), placing the first respondent (“Guilder”) under supervision and commencing business rescue proceedings. In this regard, the applicants also seek an order that Ms Simi Maharaj be appointed as the business rescue practitioner. The application is opposed by the second respondent (“the Land Bank”).

[2] This matter has a long and chequered history. I will attempt to briefly summarise same. During or about June 2006, the Land Bank agreed to lend Guilder the sum of R100 000 000,00. Pursuant to the conclusion of this agreement, the Land Bank advanced various amounts to Guilder. As at 2nd July 2007, the amount advanced to Guilder was the sum of R45 672 674,00. In terms of the agreement, Guilder was required to repay all amounts advanced to it, by the Land Bank, within twenty four months of the first advance. The first advance was made on the 20th September 2006. Therefore, the entire amount advanced by the Land Bank to Guilder was payable on the 20th September 2008.

[3] Guilder did not repay the sum of R45 672 674,00 on the 20th September 2008. Following negotiations, an agreement was reached, on or about the 26th February 2009, in terms of which the Land Bank agreed to accept payment of the sum of R53 000 000,00 in full and final settlement of Guilder’s indebtedness to the Land Bank. (as at 31st January 2009, this indebtedness was the sum of R66 135 455,68). Payment of the agreed amount was to be secured by a guarantee to be furnished by ABSA Bank Limited, in favour of the Land Bank. The said guarantee was duly furnished by ABSA Bank Limited but was subsequently cancelled and withdrawn by ABSA Bank allegedly upon failure by Guilder to procure the fulfilment of the conditions precedent stipulated therein.

[4] During March 2012, summons was issued and served on Guilder by the Land Bank, in respect of the amount due. This summons/action was withdrawn on or about 8th March 2016. On or about 1st April 2015 the Land Bank instituted an application in the KwaZulu-Natal Division of the High Court of South Africa, Durban, (Case No. 3548/2015) for the provisional liquidation of Guilder. This liquidation application was opposed by Guilder.

[5] The liquidation application was enrolled for hearing on the 12th May 2016. On that day, the parties sought and obtained the following order by consent:

- “1. The application is postponed sine die.
2. The respondent shall pay the wasted costs occasioned by the postponement which shall include the costs of the employment of senior counsel.
3. The respondent shall deliver to the applicant by 7th June 2016 an unconditional and irrevocable bank guarantee for payment of the sum of R53 000 000,00 (Fifty three million rand) payable upon cancellation of the mortgage bond registered against the immovable properties of the respondent in favour of the applicant with the Registrar of Deeds, under Mortgage Bond No. B06/57473.
4. Should the respondent fail to deliver the bank guarantee referred to in paragraph 3 above, on the date mentioned in paragraph 3 above, then by agreement the respondent consents to the applicant taking a provisional winding up order against the respondent on an unopposed basis.”

[6] On the 7th June 2016 Guilder sought, and was granted an indulgence until the 30th June 2016 to deliver the guarantee foreshadowed in the aforesaid court order. However the guarantee was not furnished by the 30th June 2016.

[7] Acting in terms of the provisions of paragraph 4 of the court order, the Land Bank enrolled the liquidation application, on the unopposed roll, for

hearing on the 6th September 2016. On the day of the hearing, the present application for business rescue was served on the Land Bank.

[8] One of the purposes of the Act is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”. (Section 7(k) of the Act). Business rescue is defined in Section 128(1)(b) of the Act as:

““Business rescue” means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

- i. The temporary supervision of the company, and of the management of its affairs, business and property;
- ii. A temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- iii. 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 or, 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;”

[9] In terms of Section 131(1) if a company has not adopted a resolution contemplated in Section 129(1) of the Act, an affected person may apply to Court for an order placing the company under supervision and commencing business rescue proceedings. In terms of section 131(6) any such application has the effect of suspending liquidation proceedings which have already commenced.

[10] Section 131(4) is important and provides:

“(4) After considering an application in terms of sub-section (1), the Court may –

- (a) Make an order placing the company under supervision and commencing business rescue proceedings, if the Court is satisfied that –

- i. The company is financially distressed;
 - ii. 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
 - iii. It is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the company; or
- (b) Dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.”

[11] It is not in dispute that (a) One or more of the applicants are affected persons as defined in Section 128(1)(a) of the Act and (b) that Guilder is financially distressed¹.

[12] The sole issue for determination is whether or not, on the papers before me, the applicants have demonstrated that “there is a reasonable prospect for rescuing the company”.

[13] The Act defines “rescuing the company” as “achieving the goal set out in the definition of “business rescue” in paragraph (b)”. (Section 128(1)(h). (paragraph (b) is quoted supra).

[14] In **Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and another** 2013(1) SA 542(FSB) the Court, in attempting to define the concept of “reasonable prospects”, held (at 545, paragraphs 11 and 12):

“I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt, that in order to succeed in an application for business rescue, the applicant must place before the Court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. In my view, a prospect in this context means an expectation. An expectation may come true or it may

¹ Although this element was challenged in the answering affidavit, the second respondent has agreed, for purposes of the argument, to accept that Guilder is financially distressed.

not. It therefore signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable. In my judgment, a reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds.”

See also **Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd** 2012(2) SA 423 (WCC); **Koen and another v Wedgewood Village Golf and Country Estate (Pty) Ltd and others** 2012(2) SA 378 (WCC).

[15] The Supreme Court of Appeal, in **Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others** 2013(4) SA 539 (SCA), approved of the approach adopted in **Propspec Investments (Pty) Ltd** (supra). At paragraphs 29, Brandt JA held:

“It is generally accepted that it is a lesser requirement than the “reasonable probability” which was a yardstick for placing a company under judicial management in terms of Section 427(1) of the 1973 Companies Act On the other hand, I believe it requires more than a mere *prima facie* case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on “reasonable” – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the Court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings, which, generally speaking, require that it must do so in its founding papers.”

[16] The applicants contend that their proposed business plan reveals that Guilder can be rescued from its present financial distress should it be placed in business rescue. There are two aspects of this proposed business plan that require consideration.

[17] Firstly, the applicants contend that the sandstone in the Shandon Quarry could be profitably mined. In their founding affidavit, the applicants have

devoted only one paragraph on the subject. In paragraph 14(d), the applicants aver:

“There is a mining component to the development where the property has a potential to mine sandstone.

- i. The first respondent has the requisite mining licence.
- ii. A report prepared by geologist Dr R Uken which is contained in the business plan projects that the mine has a potential capacity of sandstone of approximately 46.8 million tons.
- iii. The mining project can yield in excess of R2.3 billion calculated at a base selling price of R50 per ton.”

[18] No further averments or elaboration has been made in the replying affidavit.

[19] It is noted that the averments in paragraph 14(d)(iii) *supra* are not supported by Guilder’s expert, Dr R Uken. His report (dated January 2008) merely estimates the existence of about 18 million cubic metres of sandstone available to be mined. There is no indication, on the papers, of where the applicants obtained the figures quoted in the business plan nor is there any indication of how the figures referred to in paragraph 14(d)(iii) are arrived at.

[20] During argument and in the heads of argument, counsel for the applicant submitted that:

- (a) There is interest from various entities to mine the quarry;
- (b) These entities have expressed a willingness to pay Guilder a royalty at a minimum of R10 per cubic metre;
- (c) The project manager has confirmed that the quarry can be mined in five years which would result in a royalty income of R180 million; and

- (d) The business rescue practitioner will not need funds to commence this activity because the interested parties will provide their own equipment and sales team to mine and sell the material.

[21] These submissions unfortunately are not supported by any averments in the founding affidavit or for that matter in the replying affidavit. It is noted that Guilder has the requisite mining licence (granted 29th May 2012). The applicants have failed to explain why the “interested entities” have not commenced mining operations in the last five years.

[22] In the circumstances I am not persuaded that the applicants have shown that there is a reasonable prospect of rescuing Guilder by ceding the mining rights or of it conducting the mining operations itself.

[23] Secondly, the applicants contend that a business rescue practitioner will be able to rescue Guilder by selling off the individual platforms. In this regard it was submitted that most of the surveying of the area has been completed and that the township will soon be registered in the Deeds Office. Thereafter the individual platforms could be sold to interested “potential purchasers” and would yield a return of approximately R600 260 000,00. Apart from a reference in the business plan of a potential yield of R600 260 000,00 from the sale of individual platforms, neither the founding affidavit or the replying affidavit confirm or support these submissions. It is not, for example, known when the survey commenced; at what stage it has progressed, nor when the township plans are to be lodged in the Deeds Office. Counsel has submitted that the costs of finalising this process is in the region of R1,75 million to R2 million and that the directors have “committed themselves” to sourcing the sum of R2 million for this purpose. Once again these submissions are not supported by any averments in the founding affidavit or the replying affidavit. It is further noted that the figures

mentioned in the business plan are speculative and are dependant upon a variety of circumstances. There is also a lack of detail relating to the actual proposed development of the area.

[24] I am once again of the view that the averments and submissions relating to the rescue of the business in this regard are vague and speculative and that the applicants have failed to show a reasonable prospect of rescuing Guilder by means of the sale of the individual platforms.

[25] As an alternative the applicants contend that a business rescue practitioner may sell the properties together with a development plan to an investor in the open market. In the founding affidavit it is averred that there are interested purchasers and that the property could be sold for at least R100 million. This, they allege, would result in a better return for Guilder's creditors and/or shareholders than would result from the liquidation of the company. The applicants have assumed that a sale of the property for R100 million would result in costs in excess of R10 million should the company be sold by a liquidator. Should the property be sold by a business rescue practitioner, they assume a costs saving of 50%.

[26] The difficulty that I have with these submissions is that the applicants have not laid any factual basis upon which these assumptions are made. In their costs assumptions, they have failed to disclose the proposed fees of the business rescue practitioner or how same is to be assessed and calculated. The source of funding for payment of the business rescue practitioner's fees is also unknown. It surely cannot come from Guilder itself as Guilder is not trading. Its only assets are the underdeveloped land and the sand mine. There is accordingly no way of knowing whether a sale of the property by a business rescue practitioner will result in a better return for Guilder's creditors and/or shareholders.

[27] There is also a lack of particularity in the founding affidavit relating to the “interested buyers” – viz: Who are they? When did they make an offer to purchase the property? How much did they offer? And the progress made in finalizing the sale. An attempt has been made in the replying affidavit to substantiate these averments. However these relate to interest shown by prospective purchasers years ago and from which nothing further materialised. I conclude that the applicants have failed to show that the sale of the property by the business rescue practitioner would result in a better return for Guilder’s creditors and/or shareholders. I am fortified in my conclusion by the remarks of Brandt JA in **Oakdene Square Properties (Pty) Ltd** (*supra*) where he held, at paragraph 33:

“My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding up of the company, outside the liquidation provisions of the 1973 Companies Act I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue.”

[28] I am of the view that the basis upon which the applicants have applied for the rescue of Guilder, do not meet the threshold for the test of “reasonable prospect for rescuing the company” as set out in Section 131(4) of the Act. The application for business rescue must accordingly fail.

[29] Given the consent order obtained on the 12th May 2016 (cited *supra*) I am of the view that a provisional liquidation order is to be issued in terms of the provisions of Section 131(4)(b) of the Act.

[30] I accordingly grant the following order:

1. The application is dismissed with costs, such costs are:
 - (a) to be paid jointly and severally, the one paying, the other to be absolved; and
 - (b) to include the costs of senior counsel.
2. The first respondent is hereby placed under provisional winding up.
3. A Rule Nisi be and is hereby issued calling upon all persons concerned to appear and show cause, if any, to this Court at **09h00** on the **9th May 2017** why the first respondent company should not be placed under final winding up order.
4. That service of the Rule Nisi be effected on the first respondent as follows:
 - a. By service at its registered office and by publication forthwith once in each of the Government Gazette and the Natal Mercury newspaper and
 - b. By service upon the employees of the first respondent and the relevant trade union and any other employee representative, if any.
5. Costs of the liquidation application are costs in the liquidation.

KRUGER J

DATE OF HEARING: 21 February 2017

DATE OF JUDGMENT: 2 March 2017

FOR THE PLAINTIFF: Y N Moodley SC instructed by K Maharaj
Incorporated

FOR THE DEFENDANT: A E Bham SC instructed by Mkhabele
Huntley Adekeye Inc c/o Shepstone &
Wylie