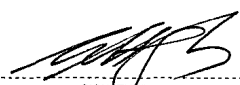


IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case Number: 10581 / 2012

4/2/2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO.
(3)	REVISED.
4/02/2013	
DATE	SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2013 -02- 04
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

PIETER GERHARDUS BREEDT

APPELLANT

Vs

P G BREEDT BOORKONTRAKTEURS CC

1ST RESPONDENT

ALTAS COPCO SOUTH AFRICA (PTY) LTD

2ND RESPONDENT

ATLAS COPCO CUSTOMER FINANCE AB

3RD RESPONDENT

Coram: **HUGHES AJ**

JUDGMENT

Delivered on: 04 February 2013

Heard on: 19 November 2012

HUGHES AJ

1. In this application the applicant seeks that P G BREEDT BOORKONTRAKTEURS CC, the first respondent, be placed under supervision and that business rescue proceedings as envisaged in terms of Section 131 of the Companies Act 71 of 2008 ("the Act") commence as envisaged by Section 131 and 138 of the Act, Mr. Grant Chittenden be appointed as the business rescue practitioner. The second and third respondents opposed the application.
2. As this area of Company law is fairly new as the Act only came into operation in 2008, there is not much case law on the topic of supervision and business rescue. It is therefore prudent that I set out broadly when is a court permitted to place a company under supervision and commence business rescue proceeding in the absence of a resolution adopted in terms of section 129. The requisites are:
 - 2.1. a court must be satisfied that the company is in financial distress;
 - 2.2. the company must have failed in respect of employment-related matters to pay over any amount in relation to its obligation under or in terms of any public regulation or contract; or

2.3. if it is just and equitable to do so financially and there is a reasonable prospect for rescuing the company. See Section 131(4)(a)(i-iii) of the Act.

3. An applicant in rescue proceedings in terms of section 131(4) the court in KOEN V WEDGEWOOD VILLAGE GOLF AND COUNTRY ESTATE 2012(2) SA 378 WCC at Para [17], [19] and [20] on page 383-384 made the following observations with which I align myself:
- "[17] ... must satisfy the court that there is a reasonable prospect that the subject company can be rescued in the relevant sense by being placed under supervision. The information or evidence that will suffice to meet this requirement will depend on the object of the proposed business rescue, viz whether it is to achieve the continued existence of the company on a solvent basis; alternatively, to allow the company's business to be managed for an interim period to allow for a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. Whatever the object of the proposed business rescue, however, in order to succeed in the application the applicant must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved. While it is the function of the business practitioner, if appointed, to draw up a business rescue plan to be considered by*

the 'affected persons', the founding papers in a business rescue application must nevertheless contain sufficient factual detail to enable the court to determine whether the business rescue practitioner will probably have a viable basis to undertake the task, or, at the very least, make out a case for the court to hold that an investigation by a business rescue practitioner to the end, in terms of s141(1) of the Act, as appears justified..

[19] In an application in which the object is to secure a better return than would be obtained under immediate liquidation the applicant would be required to set out in the founding papers a reasoned factual basis for the alternative scenarios that the court will have to consider, and lay a cogent foundation to enable the court to determine that there is a reasonable prospect that the better return evident on one of those scenarios can be achieved.

[20] Vague and speculative averments in the founding papers will not suffice to provide a proper basis for a court to make the required determination that there is a reasonable prospect, if the company were to be placed supervision, that the contemplated business rescue objective could be achieved."

4. The applicant in the present matter launches this application as an affected person as he holds a 70% membership in the first respondent and as a creditor. He alleges that, as at 31 January 2012 the first respondent owed him an amount of R4.74 million.
5. In the founding papers the applicant alleges, as at 20 February 2012, that the business of the first respondent "*is currently in financial distress*" in that its not able to pay its debts as and when they become due and payable and that the respondent "*will become insolvent in the immediate ensuing six months or is trading under insolvent circumstances*". According to the applicant the second and third respondents instituted an application for the winding-up of the first respondent on or about October 2010, which the applicant opposed. The snowball effect of that winding-up application was that the applicant's major banker First National Bank Ltd ("FNB") called up its credit with immediate effect an amount of R2.9 million had to be paid back to FNB by the first respondent.
6. According to the applicant as at February 2011 financial year-end the first respondent recorded an accumulated loss of R7.521 million. In addition, in this period, the company had assets to the tune of R22, 89 million and liabilities of R22, 92 million. The second and third respondent's submit that as at 31 January 2012 the first respondent's total liabilities including member's loans exceeded its

total assets by R18, 94 million and as such the company was hopelessly Insolvent.

7. The applicant has attached to his application a "45- month cash flow forecast" that amounts to a proposed business rescue plan drawn up by the applicant and considered by the proposed business rescue practitioner. This plan illustrates the expected cash to be injected in the first respondent as a result of a new contract with Tharisa Chrome Mine, managed by Mutual Construction Co Pty Ltd (MCC). The first respondent is alleged to have concluded a contract with MCC and MCC has provided a drilling schedule.
8. Of significance is the fact that the only assurance filed with regards to this contract between MCC and the first respondent, is a letter of appointment date 24 January 2012 which states the following:
*"We hereby confirm that MCC have awarded a drilling contract to P G Breedts Boorkontrakteurs at the Tharisa Chrome Mine Contract near Marikana for an intended 72 month duration.
The project will entail the total drilling of initially 12 500m of 165mm diameter holes per month and will increase to 35 000m per month by November 2012 and will peak at 55 000m per month by September 2013."*

9. Though a glowing picture is painted by way of the founding affidavit, what is lacking in my view is supporting papers indicating the progression on the work undertaken and the funds received from January 2012 to November 2012, when this application was heard. What is of further concern is the fact that the second and third respondents have requested sight of the contract entered into by the first respondent and MCC but up until the hearing of this matter the information was not forthcoming. The lack of transparency in respect of this crucial contract that the applicant relies on leaves much to be desired. This leads to the conclusion that the contract as at the time of this hearing had not been formalized. This application was a delay tactic to stall the inevitable.
10. The first respondent has in the past concluded contracts with MCC in but they had not assisted the financial dilemma. How then would this contract, the terms and conditions of which are not known to the court, the other affected parties, the creditors, (for scrutiny) assist the first respondent.
11. One of the purposes of business rescue is to "provide for efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders"- s7 (k) of the Act. Therefore it is safe to say that these proceedings are designed to facilitate the rescue and

rehabilitation of businesses in financial distress. This procedure is clearly available for businesses that are showing signs of pending insolvency but not actual insolvency. It provides temporary supervision and management of the business and its affairs and also places a temporary moratorium on the rights of the creditors enforcing their claims against the business concerned- s128 (1)(b) of the Act.

12. The business rescue plan, its preparation by a business rescue practitioner for consideration and adoption is at the heart and soul of these proceedings.
13. The second and third respondent also take issue with the fact that the applicant drew up the business rescue plan as opposed to a business rescue practitioner. - S 150(1) of the Act.
14. S128 (1)(d) defines Business rescue practitioner as "*a person appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and 'practitioner' has a corresponding meaning*";

In addition

Section 138 (1) goes a step further and sets out the qualifications of a practitioner

"(1) A person may be appointed as the business rescue practitioner of a company only if the person-

(a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission;

(b) has been licensed as such by the Commission in terms of subsection (2);

(c) is not subject to an order of probation in terms of section 162(7);

(d) would not be disqualified from acting as a director of the company in terms of section 69(8);

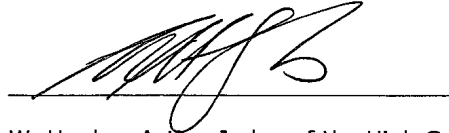
(e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of the person is compromised by the relationship; and

(f) is not related to a person who has a relationship contemplated in paragraph (d)."

15. Thus in order to qualify as a business rescue practitioner one has to comply with the requirements set out in sections 128 and 138 of the Act. The applicant also states in his founding affidavit that "the provisional plan was drafted by him and reviewed by Mr. Chittenden". Mr. Chittenden whom the applicant proposes be appointed is a chartered accountant and accredited by the

Commission. On 8 February 2012 he was engaged as a business rescue practitioner in the rescue proceedings of another business. However, it would seem that he had prior dealings with the provisional plan drafted by the applicant. Section 138 (e) prohibits the appointment of a practitioner who has had prior dealings with the business.

16. It should be borne in mind that a business rescue practitioner is appointed to look into and investigate the affairs of the business and then express an opinion as to whether the business could still be rescued- S 141(1). In this instance the business rescue practitioner is perceived to be conflicted. To a third party the actions of the rescue practitioner may be justifiably indicative of him serving the interest of the company rather than the creditors as he approved a provisional plan drafted by the director of the company without consultation with the other affected parties and the creditors.
17. In the circumstances I can only conclude that this rescue application is flawed for the stated reasons and is lacking in essential averments or is vague as regards pertinent issue that might have assisted me in reaching the conclusion sought by the applicant.
18. **In the result the application is dismissed with costs.**

A handwritten signature in black ink, appearing to be 'W. Hughes', is written over a horizontal line.

W. Hughes Acting Judge of the High Court

Delivered on: 04 February 2013

Heard on: 19 November 2012

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