REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

19/11/2013.

CASE NO: 68048/2013

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

19/11/2013
DATE

VRSN NKOSI

In the matter between:

ANNA MARIA VAN DYK	APPLICANT
and	
ADROIT COMMUNICATIONS (PTY) LTD	FIRST RESPONDENT
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	SECOND RESPONDENT

JUDGMENT

NKOSI AJ:

INTRODUCTION

[1] The applicant seeks an order that the first respondent be placed under supervision and that business rescue proceedings be commenced with urgently in terms of section 131 (1) of the Companies Act, Act 71 of 2008 ("the Act"), together with ancillary relief. This application was vehemently opposed by the first respondent. I had the benefit to peruse all documents filed in the court file by both parties before the commencement of the hearing.

LOCUS STANDI

[2] An answering affidavit was delivered on Thursday the 31st of October 2013.

[3] A replying affidavit was delivered on the same day.

[4] The applicant disputes the validity of the resolution in terms whereof it was resolved that the first respondent oppose the business rescue application, authorising Hall to act on behalf of the first respondent and that first respondent's attorneys be authorised to act on its behalf.

[5] The applicant further served a Rule 7 notice disputing the authority of first respondent's attorney's to act in these proceedings.

[6] There are other litigations involving various parties associated with Adroit. These applications include:

6.1 An application to declare the CEO, FN Hall and chairman of the first respondent, JJ Swart delinquent under the provisions of section 162 read with section 163 of the Act ("the delinquency application").

6.2 An application by Hall and Swart as applicants for the liquidation of the first respondent on the ground of it being "just and equitable" pursuant to section 344 (h) of the 1973 Companies Act as a result of a deadlock i.e. a breakdown in communication between members as well as directors.

[7] The above applications are to be adjudicated in the normal course as they do not form part of this application. It is, however, clear that the seven directors of the first respondent are divided into two camps. Van Dyk, the husband of the applicant, Botha and Sentso support the applicant in her application for business rescue whilst Hall, Munnik, Swart and Steyn are opposed to the relief claimed.

[8] The resolution was adopted by the executive directors of the first respondent, Hall and Munnik. The aforementioned directors of the first respondent are duty bound to exercise their powers and perform their functions as directors of the first respondent and in adopting the resolution, had a rational basis for believing and do believe that the decision is in the best interest of the first respondent.

[9] The first respondent is entitled to oppose an application for its supervision and business rescue and should not be barred from doing so where it is clear that there is a deadlock and/or breakdown in communication between members as well as directors. It is further submitted that directors of a company is empowered to oppose the liquidation of a company and these powers of directors should be extended to applications for supervision and business rescue, especially under circumstances where a Court may dismiss the application and grant an order placing the company under liquidation.

[10] Hall, Munnik, Swart and Steyn, as directors of the first respondent, oppose the relief claimed. It is submitted that these directors are properly before the Court and their opposition should be considered alternatively leave should be granted to them to intervene and oppose the relief claimed on the same papers.

[11] Affected persons for the purpose of section 1311 of the Act include employees of the company. The applicant seeks the relief as an employee and affected person and similarly it is alleged in the opposing affidavit that Hall and Munnik are employees and therefore affected persons that are entitled to participate in the proceedings and oppose the relief claimed.

[12] Although it is disputed that Hall is an employee of the first respondent, the applicant in her replying affidavit does not appear to dispute that Munnik is an affected person in terms of the Act and entitled to participate in the proceedings. The applicant merely states that Munnik has not deposed to the affidavit in his capacity as employee. It is submitted that this contention is without any merit and the affidavits can only be construed in such a fashion that it clearly states that Munnik is an affected person entitled to participate in the proceedings, who opposes the relief claimed on the grounds as stated in the affidavits.

BUSINESS RESCUE – THE LEGAL POSITION

[13] The purpose and objectives of business rescue proceedings are to be found in section 128 of the Act. The purpose of rescuing a company is to achieve the goal set out in the definition of business rescue to facilitate the rehabilitation of a company that is financially distressed by providing for:

13.1 the temporary supervision of the company (management of his affairs, business and property);

13.2 a temporary moratorium on claims against the company; and

13.3 the development and implementation of a plan to rescue the company to maximise the likelihood of the company continuing an existence on a solvent basis alternatively results in a better return for creditors and shareholders than would result from immediate liquidation.

[14] A Court may, after considering an application, make an order placing the company under supervision and commencing business rescue proceedings, if the Court is satisfied that a company is financially distressed or it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company.

[15] "Financially distressed" is also defined in section 128 (1) (f), to mean:

"...that –

(i) it appears to be reasonable unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing 6 months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 months."

[16] The legal position has been summarised by the Supreme Court of Appeal in the matter of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA).*

[17] The Supreme Court of Appeal in *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* supra, reaffirmed the well-established test in motion proceedings, that where disputes of fact arise on the papers, the matter can only be decided on the respondent's version of the disputed facts, unless that version is so far-fetched or clearly untenable that it can justifiably be rejected merely on the papers. It makes no difference to this approach that motion proceedings have been dictated by the legislature.

The legal position has not changed and there is no amendment to the Act for that purpose.

<u>THE FIRST RESPONDENT'S FINANCIAL POSITION</u>

[18] The applicant alleges that the first respondent is financially distressed and that the inference is that the first respondent is not able to pay its debts as they fall due, therefore the first respondent is commercially insolvent.

[19] In the opposing affidavit it is disputed that the first respondent is financially distressed or commercially insolvent. Hall states that:

19.1 All shareholder loans (which were required to fund the replacement of old motor vehicles, used for the ConnectNet business and equipment for new fibre business and projects) were repaid in five months.

19.2 The turnover was increased from R6.4 million to R11.2 million.

19.3 The net profit after tax (NPAT) was increased to R913 000.00 as opposed as to a loss or R178 000.00 in the previous year.

19.4 A dividend of R275 000.00 (including STC) was paid to its shareholders.

19.5 Vodacom was secured as a new client for fibre orders or R2.5 million for the 2012/2013 financial year.

19.6 Adroit became a contractor and supplier of Dark Fibre Africa (Pty) Limited.

19.7 In the 2012/2013 financial year, the first respondent achieved the following:

19.7.1 turnover increased to R15.9 million;

19.7.2 the NAV (net asset value) increased to R1.8 million from R1.3 million;

19.7.3 it successfully purchased a fixed property to the value of R2.1 million with its cash reserves, from where business is now conducted;

19.7.4 new assets (fibre equipment and motor vehicles) in excess of R2 million were acquired, again funded by cash reserves;

19.7.5 an average annual salary increase of 18% was given to all its staff;

19.7.6 an order book was secured with Dark Fibre Africa in excess of R15 million for 2012/2013 financial year;

19.7.7 for the 2013/2014 financial year, the following is relevant:

(a) budgeted an annual turnover increased to R29.5 million;

(b) staff again received an annual increase of 10%;

(c) to date as at the end of May 2013, the profit is R1.1 million;

(d) all loans acquired from the shareholders have been repaid, save for certain loans.

[20] The person best suited to adduce evidence as to whether or not the first respondent is financially distressed, is the first respondent's auditor. The auditor is objective, independent and duty bound to disclose the correct facts to assist the Honourable Court to come to a finding. The auditor confirmed the facts stated by Hall and further confirmed that:

20.1 His firm of auditors have been a duly appointed auditor of the first respondent from at least 2007.

20.2 He has been involved in the auditing of the financial records of the first respondent and prepared and audited the financial statements for the company for the financial year ending 28th of February 2013.

20.3 He has audited the bank statements of the first respondent and the first respondent has a current positive cash flow balance of R612 017.00.

20.4 The current unaudited creditors' balance amount to R2 107 689.00.

20.5 The current unaudited debtors' balance amount to R3 949 740.00.

20.6 That according to him:

(i) the first respondent is both factually and commercially solvent;

(ii) the first respondent is able to pay its creditors as and when the debts become due, conditional on the quality of the debtor's book;

(iii) the first respondent is not in financial distress; and

(iv) based on the information received and the historic performance, there are no indications that the first respondent will become distressed or insolvent with the ensuing six months.

These submissions were not contradicted by any evidence.

[21] It is submitted that, applying the test referred to *supra*, the question whether or not the first respondent is financially distressed should be determined on the facts as stated in the opposing affidavit. It therefore cannot be found that the first respondent is financially distressed and it was submitted that in the absence of such a finding the application should fail.

I could not find any merit on the submission that the first respondent is both factually and commercially insolvent in the absence of proof of the inability to pay its creditors.

THE BUSINESS RESCUE PLAN

[22] A potential business rescue plan should contemplate two objects or goals:

22.1 the primary goal to facilitate the continued existence of the company in a state of insolvency; and

22.2 a secondary goal, as an alternative, to facilitate a better return for creditors or shareholders of the company than would result from the immediate liquidation.

[23] The applicant must provide a substantial measure of detail to satisfy the requirements of a reasonable prospect. Vague averments and speculative suggestions will not suffice.

[24] The application contains no allegations as to the proposed business rescue plan and it is submitted that the only purpose for which the applicant seeks a business rescue practitioner to be appointed is to resolve the on-going disputes between

members and directors in favour of certain directors. Though a business rescue plan can be prepared later, this matter is not one for the business rescue at this stage.

URGENCY

[25] It was submitted that no grounds for urgency exist. The urgency was a self-created one by the applicant. There are no facts to indicate that the insolvency of the first respondent is imminent that requires an order on an urgent basis for the first respondent to be placed under supervision and that business rescue proceedings be commenced with.

[26] Although it was disputed that the application should be dealt with on an urgent basis, the first respondent and affected parties would abide by the decision of the Honourable Court in this regard.

CONCLUSION

[27] It was submitted that the applicant has failed to make out a case that the first respondent is financially distressed and that an order should not be granted as prayed for in the notice of motion.

[28] It was submitted that under the circumstances, an appropriate order would be to dismiss the application with costs for which I am inclined to do as supported by the submissions by the defendant's counsel. The applicant's submissions are therefore rejected as baseless but an attempt to settle a score between the warring directors one of whom is applicant's spouse. This also concerned applicant being removed from doing accounts for the first respondent for which she could have a remedy in terms of the Labour Laws of the country than to apply for a business rescue to solve Labour related matters.

[29] Having considered all submissions, it is ordered as follows:

(a) That the application is dismissed with costs.

VRSN NKOSI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR APPLICANT	*ADV. JG SMIT*
APPLICANT'S ATTORNEYS	*NATALIE LUBBE & ASSOCIATES INC*
COUNSEL FOR RESPONDENT	*ADV. MT SHEPHERD*
RESPONDENTS' ATTORNEYS	*CILLIERS & REYNDERS ATTORNEYS*
DATE OF HEARING	*6 NOVEMBER 2013*
DATE OF JUDGMENT	*19 NOVEMBER 2013*