

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4949/2012

In the matter between:-

MAN FINANCIAL SERVICES (SA) (Pty) LTD
(Registration Number: 1997/011686/07)

Applicant

and

BLOUWATER BOERDERY CC
(Registration Number: 2002/014845/23)

First Respondent

MR JOHAN CHRISTIAAN DE BEER
(Identity Number:)

Second Respondent

HEARD ON: 31 JANUARY 2013

JUDGMENT BY: DA ROCHA-BOLTNEY, AJ

DELIVERED: 28 FEBRUARY 2013

JUDGMENT

- [1] This is an application to set aside a resolution by the members of first respondent placing it under business rescue proceedings. The application is opposed by the first respondent and the second respondent, who is the appointed business rescue practitioner.

- [2] The application was initially brought as one of urgency, set down for hearing on 20 December 2012. On that day the matter was by agreement postponed to 31 January 2013, costs reserved.
- [3] On 29 January 2013 the applicant served and filed a notice of motion stating that it would at the hearing apply for an order admitting a further replying affidavit. In the affidavit in support of the notice of motion it is stated that applicant will apply for an amendment of the notice of motion to include prayers set out in the letter by its attorneys dated 23 January 2013 so as to include alternative relief and a prayer for the return of vehicles to applicant. On 29 January 2013 the first and second respondents filed a notice to object to the proposed amendment.
- [4] In my view the applicant has failed to make out a case for the amendment it proposes at this late stage and for admission of the supplementary replying affidavit.
- [5] Mr Potgieter, for applicant, advances the following grounds for setting aside the business rescue resolution:
- (1) **Nullity of the Resolution:**
- Mr Potgieter contends that notice of the appointment of the business rescue practitioner was filed three business days after the appointment, not two as required by section

129(4)(a) of the Companies Act 71 of 2008 read with section 129(5)(a), and therefore the resolution is a nullity.

The response of Mr Van der Merwe, for the respondents, is that a business rescue resolution can only be set aside on the grounds listed in section 130(1)(a).

“130. Objections to company resolution.

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-

- (a) setting aside the resolution, on the grounds that –
 - (i) there is no reasonable basis for believing that the company is financially distressed;
 - (ii) there is no reasonable prospect for rescuing the company; or
 - (iii) the company has failed to satisfy the procedural requirements set out in section 129;”

[6] As to (i), it is not in dispute that the first respondent is financially distressed. Regarding (ii), there are reasonable prospects of rescuing the first respondent, as appears from paragraphs 2.45.23 and 2.45.31 (pages 90 and 92). The procedural requirements referred to in paragraph (iii) were substantially complied with and the notification of the appointment of the business rescue practitioner one day out of time, cannot constitute a reason to set aside the business rescue resolution with the attendant proceedings which followed.

[7] (2) **No reasonable prospect to rescue**

The second ground relied upon by Mr Potgieter for setting aside the resolution, is that there are no reasonable prospects to rescue the first respondent. In support of this contention Mr Potgieter says that the vehicles are the backbone of first respondent's business, but first respondent is not the owner of the vehicles, applicant is the owner. Also, first respondent is not in lawful possession of the vehicles because applicant has cancelled the credit agreements.

[8] There is no merit in this argument. It remains to be seen whether the cancellation was lawful, particularly with regard to section 133, which places a moratorium on legal proceedings and section 134, which deals with the protection of property interests.

[9] In my view it is just and equitable that the first respondent remains under business rescue proceedings.

[10] I accordingly make the following order:

10.1 The application is dismissed with costs, including the costs reserved on 20 December 2012.

P.W. DA ROCHA-BOLTNEY

On behalf of applicant:

Adv MvR Potgieter SC
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of respondents:

Adv Van Der Merwe
Instructed by:
Cawood Attorneys
c/o Botha & De Jager Inc
BLOEMFONTEIN

/sp