

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 123253/2023

In the matter between:

STEPHEN ROBERT DUPONT N.O.

First Applicant

DONYA DUPONT N.O.

Second Applicant

KOSTA GEORGIEV N.O.

Third Applicant

and

LEHLOBO'S TRADING AND ENTERPRISE (PTY) LTD t/a

LEHLOBO AUTO BODY REPAIRS (IN BUSINESS RESCUE) First Respondent

HERBERT BONGANI MATHIBELA N.O.

Second Respondent

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

Third Respondent

This judgment was handed down electronically by circulation to the parties legal representatives by email, and uploading on Caselines. The date and time for hand-down is deemed to be 10h00 1 July 2024

JUDGMENT ON LEAVE TO APPEAL

[1] On 12 June 2024 I delivered an *ex tempore* judgment in which I granted the following orders:

- “1. The applicants are granted leave to amend their notice of motion.*
- 2. The applicants non-compliance with the Uniform Rules of Court relating to forms, service and time periods is condoned and the matter is heard on an urgent basis in terms of Rule 6(12)(a).*
- 3. The applicants are granted leave, to the extent necessary, in terms of s 133(1)(b) of the Companies Act 71 of 2008 ('Companies Act') to bring this application and to request the relief sought in paragraphs 2 to 9.*
- 4. Setting aside in terms of s 130(1)(a)(ii) and (iii) and 130(5)(ii) of the Companies Act*
 - a. the resolution of the respondent dated 19 June 2023 placing the first respondent under business rescue as provided for in s 129 of the Companies Act; and*
 - b. the appointment of the second respondent as business rescue practitioner.*
- 5. Placing the first respondent under provisional winding-up.*
- 6. All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding-up of the respondent on 16 July 2024 at 10h00 or as soon thereafter as the matter may be heard.*
- 7. A copy of this order must be served on the first respondent at its registered office. A copy of this order must be published forthwith in the Government Gazette.*
- 8. A copy of this order must forthwith be forwarded to each known creditor by prepaid registered post or by email.*
- 9. A copy of the provisional winding-up order must be served on –*

- a. *every registered trade union representing the first respondent's employees, if any*
 - b. *the employees of the first respondent by affixing a copy of the application to any notice board to which the employees have access inside the first respondent's premises or if there is no access to the premises by the employees, by annexing a copy to the front gate, where applicable, failing which to the front door of the premises from which the first respondent conducted any business at the time of the presentation of this application, and*
 - c. *The South African Revenue Service.*
10. *Any person who is entitled to respond to this rule nisi is also entitled to apply on notice to the applicants to anticipate the return date and to set the matter down for determination on an earlier date as one of urgency, if circumstances justify it.*
11. *The costs of this application are to be costs in the winding-up."*

[2] The respondents in this application, to which I will refer as the "main application" filed an application for leave to appeal to a Full Bench on Thursday 20 June 2024. I shall continue to refer to the parties as they were in the main application.

[3] Because my term as an Acting Judge of this Division was due to end on 21 June 2024, I set the application for leave to appeal down for a hearing on that day. However, I received an email from the respondents' attorneys advising that Mr Mantsha, who appeared for the respondent in the main application, was unable to be present at court due to family funerals. In the circumstances, I directed the parties to file heads of argument in relation to the application for leave to appeal and indicated that I would deal with the matter on the papers, as I am entitled to do. (See *Mogale and others v Seima* 2008 (5) SA 637 (SCA) at para 2).

[4] Applications for leave to appeal are determined by section 17 of the Superior Courts Act 10 of 2013. Leave to appeal may only be given, *inter alia*, where "*the appeal would have a reasonable prospect of success*". After some debate as to whether this provision postulated a higher bar than was previously the case, the Supreme Court of Appeal has settled that issue, stating:

"I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for

granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court."

Ramakatsa v African National Congress [2021] ZASCA 31 (31 March 2021) at para 10

- [5] The application for leave to appeal raises eight grounds of appeal including appeals against the two purely procedural matters dealt with in my judgment, namely, the admission of a supplementary affidavit, to which the respondents filed an answer, and allowing the amendment to the notice of motion, which was occasioned by the changed circumstances set out in the supplementary affidavit. These grounds of appeal, even if they raise appealable issues, which is doubtful, are devoid of merit. In the hearing on the merits and in light of the fact that the respondents had filed an answer to the supplementary affidavit, I asked counsel for the respondents to identify what prejudice the respondents had suffered. He was unable to point to any prejudice and none is identified in his heads of argument on leave to appeal. I accordingly ordered the admission of the supplementary affidavit and allowed the amendment to the notice of motion by exercising a discretion to do so. That disposes of the sixth and seventh grounds of appeal.
- [6] The remaining grounds of appeal go to the substance of the order granted. (I focus on those grounds of appeal addressed in the heads of argument). In my *ex tempore* judgment, I was at pains to point out that the resolution of factual disputes in motion proceedings is governed by well settled rules. I gave particular attention to the question of whether the business rescue plan had been adopted. On the papers there was no evidence that the plan had been adopted and Mr Mantsha informed me from the bar that it had not been adopted. Accordingly, the contention that I erred in not considering the business rescue plan (the second ground of appeal) is without merit. In his heads of argument on leave to appeal, counsel contended that regard should have been to the business rescue plan which, according to counsel "had all the details and facts to show that the 'company' can be reasonably .. rescued". There are two problems with this

contention. First, the business rescue plan had not been adopted. Accordingly, it has no status beyond a recommendation. Second, the business rescue plan was prepared on 15 November 2023. Accordingly, the business rescue plan does not take account of the changed circumstances necessitating the urgent approach to the court, some seven months later.

- [7] As to the remaining grounds of appeal, they all essentially turn on whether the company has any reasonable prospects of being rescued. That is a factual enquiry. I referred in my *ex tempore* judgment to *PFC Properties (Pty) Ltd v Commissioner of the South African Revenue Service and others* 2024 (1) SA 400 (SCA) where the point was made at paragraph 27 that:

“Business rescue proceedings are aimed at restoring a company to solvency and are not to be abused by a company with no prospect of being rescued, but mainly to avoid a winding-up or to obtain some respite for creditors.”

- [8] At the level of fact, I reached the conclusion that on the facts of the present case, business rescue was incapable of meeting the stated objective. This issue fell to be determined by the established rules for resolving factual disputes in motion proceedings. On this score, the respondents have simply not come to grips with the facts put up by the applicants which demonstrated that the company was beyond rescue.
- [9] In the first ground of appeal, it is contended that I “erred in concluding that there was no reasonable basis for believing that [the Company] was financially distressed” at the time of the resolution to place it under business rescue. I made no such finding. It was common cause that the company was financially distressed. The core issue before me was whether there remained any reasonable prospect of it being rescued. Indeed, the orders I granted flow from my acceptance, on the facts, that the company was financially distressed, but with no reasonable prospect of recovery.
- [10] In the fourth ground of appeal, it is contended that I erred in “concluding that it was just and equitable to set aside the resolution to place [the Company] under business rescue proceedings without having regard to all the evidence”. Again, this is not correct. The setting aside of the resolution flowed from the conclusion I reached on the facts that there was no reasonable prospect that the company

could be rescued. In this regard, the heads of argument do not come to grips with the changed circumstances that emerged after the business rescue plan was tabled (regardless of the fact that it was not adopted). In my judgment, I referred to the undisputed evidence in this regard. Logically, the enquiry cannot be confined to the date when the resolution was adopted. The relevant time is when the resolution is challenged in a court of law in the light of changed circumstance (Cf *Nedbank Ltd v Pacinamix (Pty) Ltd and other* 2023 JDR 4563 (GJ) at para 21). Accordingly, the orders granted are accommodated by my just and equitable discretion.

- [11] The third ground of appeal was that I erred “by concluding that the First Respondent failed to satisfy the procedure requirement set out in section 129 of the Companies Act and by so doing disregarding the administrative process as outlined by the first Respondent, in the business rescue plan.” No argument was addressed on this ground of appeal. Indeed I did not make the finding alleged.
- [12] The fifth ground of appeal is that I “erred by setting aside the appointment of the second Respondent with due regard to the requirements of section 138 of the Companies Act”. No argument was addressed to this ground of appeal. Once I had concluded that the Company was beyond rescue, the setting aside of the appointment of the business rescue practitioner was a logical consequence.
- [13] The eighth ground of appeal is that I “erred by granting the order in terms of section 133(1)(b) of the Companies Act while the jurisdictional requirements of granting such was absent”. No argument was addressed to this ground of appeal. Accordingly no attempt was made to identify which jurisdictional facts were allegedly absent. As already indicated, the facts demonstrated that there was no reasonable prospect of the company being rescued.
- [14] In the circumstances I make the following order:

The application for leave to appeal is dismissed with costs.

MARCUS AJ

Gauteng Division, Johannesburg

JUDGMENT DATE: 1 July 2024

FOR THE APPLICANTS:

(Respondents in leave to appeal)

Adv M Gwala

FOR THE RESPONDENTS:

(Applicants in leave to appeal)

Mr L Mantsha