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| Reportable: | YES/NO |
| Circulate to Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |
| Circulate to Regional Magistrates: | YES/NO |

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 854/2022

In the matter between:

MIRVAN REYMOND DUDLEY SCHWARTZ — Applicant

and

TORNADO BOERDERY & ALGEMENE HANDELAARS CC
(Registration number: 2006/080705/23) — 1st Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION — 2nd Respondent

THE STANDARD BANK OF SOUTH AFRICA LTD — Affected Party

Coram: Lever J

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JUDGMENT

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Lever J

1. This is an application to place the first respondent under supervision for the purpose of business rescue. The Affected Party (Standard Bank), as the applicant, brought an application for the liquidation of the first respondent under case number 131/2022 in this court. Subsequent to the launch of the liquidation application the applicant brought this application for the business rescue of the first respondent.

2. The business rescue application and the liquidation application were set down before me as separate matters on the same day. Indeed, they were argued as separate matters on the same day. Given the nature of the relief sought in both matters, it is logical that I deal with the business rescue application first, as in the circumstances, the outcome of the business rescue application will determine the outcome of the liquidation.

3. The process of business rescue proceedings is dealt with *inter alia* by section 131 of the Companies Act[1] (the Act). For present purposes, the relevant portion of the said section reads as follows:

"131(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) An applicant in terms of subsection (1) must –

(a) serve a copy of the application on the company and the Commission; and

[1] Act 71 Of 2008.

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (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.

..."

4. The definition of an 'affected party' is set out in section 128 of the Act. For present purposes, the relevant portion of section 128 reads as follows:

"128(1) In this chapter –

(a) 'affected person', in relation to a company means –

(i) a shareholder or creditor of the company; ..."

5. The applicant accepts that the first respondent owes the Standard Bank amounts under various loans and mortgage bonds in an amount in the order of ten million Rand plus interest. The applicant therefore accepts that the Standard Bank is an affected party and by virtue of that fact

has *locus standi* to oppose the application for placing the first respondent under supervision and commencing the business rescue process. Accordingly, I will refer to the Standard Bank as the affected party or the Bank as context dictates.

6. The Bank for its part accepts that the applicant is the sole member of the first respondent and on that basis the applicant is also an 'affected party' with *locus standi* to launch the present proceedings. The applicant has also raised a further ground upon which he claims to be an affected party. Applicant claims by virtue of a loan account with the first respondent, he is a creditor of the first respondent and thus also an 'affected party'. This is disputed by the Bank. However, as the Bank accepts the first ground upon which the applicant claims to be an 'affected party' there is no need for me to determine if the applicant is also a creditor of the first respondent.

7. For the purposes of the present application, it is also necessary to briefly consider the aims of business rescue as set out in section 128 of the Act.

8. The definition of business rescue reads as follows:

> "128(1)(b) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –
>
> (i) the temporary supervision of a company, and the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of the property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring it 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. It is also instructive to look at the definition set out in subsection 128(1)(h), which reads as follows:

"128(1)(h) 'rescuing the company' means achieving the goals set out in paragraph (b); ..."

10. It is evident from subsection 128(1)(b)(iii) that there are two goals envisaged by the Act. Firstly, to rearrange the company's affairs so that the company can continue its existence on a solvent basis. The second goal is to reorganise the company's affairs so that the creditors of the company and/or its shareholders achieve a better return than would result from the immediate liquidation of the relevant company.

11. The applicant in the present case relies solely on the first goal outlined above. In fact, Mr Olivier who appeared on behalf of the applicant at the hearing of this matter conceded that if applicant does

not establish a reasonable basis for rescue and its continued existence as a solvent entity, then it should be placed under provisional liquidation.

12. In the circumstances, the question to be decided by this court is what is required to be established to determine whether the applicant can reasonably be said to be a candidate to have its affairs reorganised so that it might continue its existence as a solvent entity and whether the applicant in this case has achieved that goal.

13. As can be seen from section 131, the relevant portion of which is quoted above there are three requirements in this type of application for supervision with a view to business rescue. The first requirement is that an affected person or party must be the applicant. As can be seen from what is set out above, this requirement has been fulfilled in the present case. The second requirement is any one of the alternatives set out in subsection 131(4)(a) Roman (i) to (iii). In the present case it is common cause that the first respondent is financially distressed, as contemplated in subsection 131(4)(a)(i). Accordingly, this requirement has been met in the present case. Finally, the third requirement, as set out in subsection 131(4)(a), is that this court must be satisfied that "... there is a reasonable prospect of rescuing the company; ..."

14. In the present case it is this third requirement where the dispute arises between the applicant and the affected party (the Bank). The applicant maintains that there is a reasonable prospect of rescuing the first respondent. The affected party for various reasons denies this.

Accordingly, this court must consider and decide what would constitute a reasonable prospect of rescuing the first respondent. Then this court must consider whether applicant has indeed established that there is a reasonable prospect of rescuing the first respondent on the case made out in its founding papers in this matter.

15. In writing for the unanimous Bench of the Supreme Court of Appeal (SCA), Brand JA, in the matter of OAKDENE SQUARE PROPERTIES v FARM BOTHASFONTEIN (KAYALAMI)[2] considered the meaning of the phrase 'reasonable prospect' of achieving one of the goals of 'business rescue' in the context referred to above. In particular, the following paragraph sets the framework for what is required in establishing a reasonable prospect of achieving one of the goals of 'business rescue':

> "[29] This leads me to the next debate which revolved around the meaning of 'a reasonable prospect'. As a starting point, it is generally accepted that it is a lesser requirement than the 'reasonable probability' which was the yardstick for placing a company under judicial management in terms of s 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."[3] (references omitted)

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[2] 2013 (4) SA 539 (SCA)
[3] Oakdene Case., above., para [29] at page 551H to 552A.

16. The SCA in the OAKDENE case, quote with approval the approach of Van der Merwe J in the PROPSPEC INVESTMENT'S case[4]. This is to the effect that the applicant for business rescue must place before the court a factual foundation that there indeed exists a reasonable prospect that one of the goals of business rescue can be achieved.

17. The SCA in the OAKDENE case then quote with approval the *dicta* at paragraph 15 of the PROPSPEC case, which is vital to the reasoning of the SCA in the OAKDENE case, the said paragraph in the PROPSPEC case reads as follows:

> "In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me to require as a minimum, concrete and ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day – to – day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings."[5]

18. The authorities that required a great deal of detail to establish a 'reasonable prospect' of achieving one of the goals of business rescue have been overruled in the Oakdene case.[6]

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[4] Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd & Another 2013 (1) SA 542 (FB) at para 11 thereof.
[5] Oakdene case citing Propspec at p 552E – G.
[6] Oakdene case., above at 552B – C.

19. To summarise the requirements needed to establish a reasonable prospect of achieving one of the goals of business rescue, it is required that:

19.1. Something more than a *prima facie* case but less than a case established on the probabilities is required;

19.2. It must be based on reasonable grounds;

19.3. There must at least be a coherent factual foundation laid for establishing the above reasonable grounds that takes it out of the realm of speculation and/or wishful thinking;

19.4. At the stage of an application for supervision pending the business rescue a detailed rescue plan is not required;

19.5. The rules of motion proceedings apply; and

19.6. It is not desirable or practical to set out a minimum threshold to establish 'reasonable prospects' as different types of businesses and context relating to each case may make this difficult to achieve.

20. Turning to the facts of the present case. The applicant is the sole interest holder in the first respondent. The first respondent owns certain land in the proximity of the Orange River in the area of Keimos. The land comprises different portions of certain farms. The land has water rights connected to each parcel of land. Certain areas of certain of the portions of the relevant farmland are cultivated either under grapes or under lucerne.

21. The applicant on behalf of the first respondent prepared certain cash flow projections which were dealt with in and are annexed to the founding affidavit. These cash flow projections were based on a certain area specified in hectares being cultivated under grapes or had grapes recently planted on them but whose crop would not produce optimum yields for some time.

22. At the time of filing the founding affidavit herein, the applicant indicated and undertook that out of the then current harvest a substantial amount would be paid to the affected party (the Bank).

23. The affected party (the Bank) opposed the application for supervision and business rescue on various grounds. Initially it sought to file a fourth set of affidavits, but later withdrew this application. Initially it also sought to raise a technical argument that the applicant had not served the application on all the affected parties in the prescribed manner. This technical argument was not seriously pursued at the hearing hereof and nothing further needs to be said about it as it appears that all the affected parties did indeed receive notice of this application.

24. The substance of the Banks opposition to the supervision order and subsequent business rescue proceedings is essentially that the applicant had not established that there is a reasonable prospect that the first respondent will be in a position to achieve the relevant goal of business rescue being that the first respondent will be able to continue its

existence as a financially solvent entity after the business rescue process.

25. The main issues raised by the Bank to support its argument were twofold. Firstly, the applicant had included in the area cultivated under grapes an area of some ten hectares that were not cultivated under grapes but were in fact cultivated under lucerne. This according to the Bank rendered the applicant's projections of the first respondent's cash flow to be inaccurate and overoptimistic. Secondly, that the applicant had undertaken to pay a substantial amount to the Bank from the then current harvest which did not materialise.

26. The Bank raised the issue of including ten hectares that were in fact cultivated under lucerne in the applicant's projections as being cultivated under grapes in such a way that called for more than a bare denial. In fact, the applicant in his replying affidavit simply ignores this contention. In the circumstances, this amounts to a bare denial on the part of the applicant.

27. In reply to a different part of the Bank's answering affidavit the applicant does set out the hectares alleged to be cultivated under grapes and the dates when such grape vines were planted. However, given the inconsistencies in other places where the hectares cultivated under grapes were recorded, the applicant ought at a minimum in these particular circumstances to have reconciled the hectares cultivated

under grapes together with the hectares cultivated under lucerne with other sources that did emerge from the papers or provide other sources to corroborate the area cultivated under grapes. The applicant did not do so and simply contented himself with ignoring the problems and inconsistencies raised by the Bank in this regard.

28. All of this is reinforced by the applicant's failure to deliver on its undertaking to make a substantial payment to the Bank from the proceeds of its then current harvest. It is instructive to look at the precise terms in which the said undertaking was in fact made and later repudiated by the applicant.

29. Paragraph 47 of the applicant's founding affidavit reads as follows:

> "Out of the crops currently harvested a substantial payment would be made to the Standard Bank, but provision would also have to be made for expenses for the new season. By the time this application comes before Court, it will be evident and then easy to report on the amount available to be paid to Standard Bank, which I respectfully submit would be substantial."

30. The Bank in its answering affidavit denied that any payment, substantial or otherwise, would be coming from the first respondent.

31. In response to the Banks lack of faith in both the applicant and the first respondent set out above, the first respondent replied as follows:

> "The $1^{st}$ respondent is not in a position to pay the bank which is the reason for this application. All income had to be reinvested into

farming activities. I again refer to the projected cashflow for 2023 which is very conservative due to the current market situation."

32. In my view this is an inappropriate and even flippant response to failing to fulfil an undertaking given under oath in this application. What was called for was a serious and considered response that explained to this court and the affected party concerned why such undertaking could not be fulfilled.

33. The absence of such explanation reinforces the affected party's position that the applicant has misrepresented ten hectares of his land which is cultivated under lucerne as being cultivated under grapes. In the context of the present application the misrepresentation has serious consequences as the first respondent's main business and the part of its business that generates the most income is the cultivation and drying of grapes to produce raisins. The Bank asserts that raisins produce a higher income than lucerne. This assertion has not been challenged by the applicant.

34. The applicant annexes to his replying affidavit an affidavit from a senior business rescue practitioner who expresses the view that the applicant is a candidate for business rescue. There are at least two things wrong with this approach. Firstly, this affidavit ought to have been included in the founding papers to give the affected party a fair opportunity to deal with the views expressed by the said business rescue

practitioner. As set out above, the ordinary rules of motion proceedings apply to this type of application. Secondly, the business rescue practitioner does not deal with what information he was provided with to reach that conclusion. In the circumstances, I can have no regard to this affidavit nor can I attach any evidential weight thereto.

35. In all of the circumstances of this case the applicant has not established a reasonable basis to show that the first respondent can be saved by business rescue proceedings. In particular the applicant has not set up a coherent factual foundation to make the assertion that the applicant can be saved by business rescue proceedings.

36. On the issue of costs, there is no reason why costs should not follow the result.

37. In these circumstances, the application stands to be dismissed with costs.

Order:

1. The application is dismissed
2. The applicant is to pay the costs of this application.

[redacted]

Lawrence Lever
Judge
Northern Cape Division, Kimberley

Representation:

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| *For The Applicants:* | *Adv D Olivier* |
| *Instructed by:* | *Van De Waal & Vennote* |
| *For The Respondents:* | *Adv J Els* |
| *Instructed by:* | *Roux Welgemoed & Du Plooy* |
| *Date of Hearing:* | *27 January 2023* |
| *Date of Judgment:* | *12 July 2024* |