



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 083584/2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 6 September 2024
SIGNATURE: [REDACTED]

In the matter between:

STANDARD BANK OF SOUTH AFRICA

INTERVENING APPLICANT

In re:

BENJAMIN CHARLES JOSEPH VISAGE

APPLICANT

and

INTALIAN FRESH PRODUCE (PTY) LTD

FIRST RESPONDENT

COMPANIES AND INTELLECTUAL PROPERTY

SECOND RESPONDENT

COMMISSION

JUDGMENT

MKHABELA AJ

Introduction

[1] The applicant, Benjamin Charles Joseph Visagie ("Visagie"), brought an urgent application to place the first respondent, Italian Fresh Produce (Pty) Ltd under

business rescue as envisaged by Section 131 of the Companies Act 71 of 2008(the Companies Act).

- [2] The application was predicated on the assertion that Mr Visagie is a Managing Consultant whom the first respondent owed him money in the form of unpaid invoices as a Managing Consultant and therefore was a creditor of the first respondent.
- [3] The application was brought on an urgent basis. When the matter was called, Mr Constant Leon van der Merwe (“Van der Merwe”) who is the counsel for the applicant addressed the Court on the question of urgency.
- [4] Mr Van der Merwe contended that applications to place a company under business rescue are inherently urgent.
- [5] Before I allowed him to develop his argument on the question of urgency, I then enquired from counsel for the first respondent, Mr WP Venter as to whether the first respondent was opposed to the application. I did so because the first respondent had filed a notice to abide and I was not expecting any legal representation from the first respondent.
- [6] Counsel for the first respondent conceded that the application was urgent and further that the first respondent was not opposing the relief that the applicant was seeking and was in fact in agreement that the first respondent should be placed under business rescue.
- [7] In the absence of opposition from the first respondent, I then granted the application on the strength of the averments that the applicant was a creditor of the first respondent concomitant with the lack of opposition from the first respondent.

- [8] According to the service affidavit deposed to by the applicant's attorney of record, Mr Wouter Stefanus Badenhorst ("Badenhorst"), service was effected to the Companies and Intellectual Property Commission, being the second respondent.
- [9] Furthermore, Mr Badenhorst confirms in his affidavit that service was effected to all known creditors and attached annexure WSB4 as proof thereof. Annexure WSB4 contains approximately 6 emails sent to various creditors. The intervening or affected party is not one of the recipients of those emails attached as annexure WSB4.
- [10] Unbeknown to the Court that the intervening party was a creditor of the first respondent, the Court granted the application placing the first respondent under business rescue.
- [11] However, on the 23rd of August 2024, the intervening or affected party filed a notice in terms of Rule 6(12)(c) of the Uniform Rules of Court for the reconsideration of the order that the Court granted on 20 August 2024.
- [12] The notice for the reconsideration of the order that the Court granted on 20 August 2024 was accompanied by the sworn affidavit by Yonder du Preez ("Du Preez").
- [13] Mr Du Preez asserted that he was an attorney of record for the affected party, being Standard Bank South Africa (Pty) Ltd ("Bank"), and as such the Bank is an affected party as defined in terms of Section 128(1) of the Companies Act of 2008 and ought to have been given notice of the application to place the first respondent under business rescue as envisaged by Section 131(2) of the Companies Act.
- [14] Moreover, Mr Du Preez asserted that the Bank is currently involved in a pending litigation in the Limpopo Division of the High Court, Polokwane (Polokwane High Court) to have the first respondent liquidated. He cited case number 0131219/2024.

[15] The affidavit also reveals that there is also a summary judgment application that is pending under case number 10850/2023 in the Polokwane High Court.

Awareness that the Bank was a creditor of the first respondent

[16] It is not in dispute that the deponent to the founding affidavit, who is coincidentally the applicant in the application to place the first respondent under business rescue was or is the Managing Consultant of the first respondent.

[17] Now, as the managing agent of the first respondent, it is improbable on the evidence before this Court that the applicant was not aware that there was a pending litigation between the Bank and the first respondent.

[18] On the contrary there is evidence that the applicant was aware of the pending litigation in the Polokwane High Court. This conclusion is fortified by the fact that on 21 August 2024, a day after this Court granted the application to place the first respondent under business rescue, Werner Cawood ("Cawood"), the appointed business rescue practitioner, wrote to the Bank's attorneys of record.

[19] In his correspondence with the Bank's attorneys of record, Mr Cawood requested that the summary judgment that was due to be heard on 22 August 2022 be postponed in the light of his appointment as a business rescue practitioner as per Court order dated 20 August 2024.

[20] It is therefore not in dispute that Mr Visagie as the applicant in the application to place the first respondent under business rescue, must have known that the Bank was an interested party as envisaged by Section 128(1) of the Companies Act, and ought to have been given notice of the application as contemplated by section 131(2)(b) of the Companies Act.

The issue

[21] The only issue that arises crisply for determination is whether based on the evidence gathered from the Bank's affidavit, the application placing the first

respondent under business rescue falls to be recalled and revoked on the ground of the failure to give notice to the Bank as an affected party.

- [22] Apart from the failure to notify the Bank, the order ought to be recalled based on the overarching principle of justice.

The law

- [23] Section 128 of the Companies Act defines affected parties and there is no doubt that the Bank is one such affected party by virtue of the pending litigation in the Polokwane High Court and as the secured creditor of the first respondent.

- [24] Section 131(3) of the Companies Act is unequivocal that each affected party has a right to participate in the hearing of an application for placing a company under business rescue.

Opposition to the notice for reconsideration in terms of Rule 6(2)(c) of the Rules

- [25] Mr Van der Merwe, on behalf of the applicant, urged me to dismiss the notice to have the order granted on 20 August 2024 reconsidered on the basis that the Bank is not a party against whom an order was granted.

- [26] The fact of the matter is that the Bank is an affected party who was not given notice of the application to place the first respondent under business rescue.

- [27] In this context the Bank was denied its *audi alteram partem* right to participate. Accordingly, the overarching interests of justice dictate that the order ought to be set aside on this basis alone.

- [28] It is therefore not strictly necessary for the Court to pronounce authoritatively whether the Bank was a party whom an order was granted for purposes of setting aside the order.

- [29] In addition, the Court is entitled in terms of Rule 42 to mero motu rescind its order if it was erroneously granted.

[30] For all these reasons the order is susceptible to be recalled and set aside because of the failure by the applicant to give the Bank notice as envisaged by Section 131(1) read with Section 128(1) of the Companies Act. Concomitant with the fact that the Bank was denied its *audi alteram partem*.

Order

[31] In the result, I make the following order:

1. The order granted by the Court on Tuesday, 20 August 2024, is recalled and set aside.
2. The affected party shall file its answering affidavit within ten (10) Court days from the date of this order.
3. All actions or steps taken by the appointed business rescue practitioner pursuant to the order granted on Tuesday, 20 August 2024, is hereby set aside and declared as void and of no legal effect.
4. The costs are reserved to be determined by the Court hearing the main application to place the first respondent under business rescue.

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R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **6 September 2024**.

APPEARANCES

For the Affected Party:	Mr L W de Beer Mr H Marais Instructed by Vezi & De Beer Inc
For the Applicant:	L K van der Merwe Instructed by Stefan Badenhorst Attorneys
For the First Respondent:	W P Venter Instructed by Lacante Inc Attorneys
Date of Hearing:	23 August 2024
Date of Judgment:	6 September 2024