IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **7987/2024P**

In the matter between:

GIAN SINGH **APPLICANT**

and

TIPPERTECH PROPRIETARY LIMITED **RESPONDENT**

BUSINESS PARTNERS LIMITED **AFFECTED PERSON**

(REG NO: 1981/000918/06)

Coram: Mossop J

Heard: 21 January 2025

Delivered: 21 January 2025

ORDER

The following order is granted:

1. The applicant's business rescue application is dismissed.
2. The suspension of the liquidation proceedings of the respondent under case number 5164/2023P is consequently lifted.
3. The applicant is to pay the costs of Business Partners Limited on the attorney and client scale.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] On 21 February 2024, P Bezuidenhout J granted a rule *nisi* (the rule) at the instance of the party cited in the heading to this application as being the affected person, namely Business Partners Limited, placing the respondent in provisional liquidation.[1] Because the applicant at some stage in his founding affidavit in this application also refers to himself as an affected person, I shall refer to Business Partners Limited in this judgment as 'BPL' and not as it is cited in this application.

[3] The return date fixed for the rule was 21 May 2024. On that date, the rule was not made final because this application, being an application for business rescue in terms of the provisions of s 131(1) of the Companies Act 71 of 2008 (the Act) was brought by the applicant. In bringing it, the applicant seeks an order placing the respondent in business rescue proceedings and an order that a registered business rescue practitioner, Mr Ranjith Choonilal (Mr Choonilal), be appointed as the business rescue practitioner to the respondent, a nomination that Mr Choonilal has accepted in the event that the respondent is placed in business rescue by this court.

[4] The liquidation application has, through the efforts of BPL's attorneys, also been placed on my motion court roll for this morning. Its fate is dependent on what becomes of this application. In the event of this application failing, BPL seeks a final order of liquidation against the respondent. In the event of the business rescue application succeeding, the liquidation application must, of necessity, be further adjourned.

[1] The liquidation application bore case number 5164/2023P.

[5] In framing the business rescue application, the applicant states that he relies specifically upon s 131(4)(a)(i), (ii) and (iii) of the Act. It may well be helpful not to just consider the wording of that specific section but the entirety of s 131, which reads as follows:

'(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

(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.

(5) If the court makes an order in terms of subsection (4)(a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until -

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.

(7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time

during the course of any liquidation proceedings or proceedings to enforce any security against the company.

(8) A company that has been placed under supervision in terms of this section -

(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132(2); and

(b) must notify each affected person of the order within five business days after the date of the order.'

[6] The correct approach to business rescue applications was formulated and expressed in *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others*.[2] Section 131(4)*(a)* requires a court to be satisfied that there is a reasonable prospect for concluding that the company ought to be rescued. What this means was spelled out by Brand JA in *Oakdene* when he stated that:

'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 Old 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]

[7] The applicant submits that he is entitled to invoke the provisions of s 131 of the Act as he is an affected person as defined in the Act by virtue of the fact that he is owed money by the respondent arising out of his loan account with it, he being the sole director of the respondent, and because he has not been paid a salary that is due to him by the respondent.

[8] BPL opposes the applicant's application and has submitted through its counsel, Mr van Rooyen, in both its heads of argument and in argument this morning

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[2] *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2013 (4) SA 539 (SCA) *(Oakdene)*.

[3] Ibid para 29.

that the application is simply a stratagem employed by the applicant to delay an inevitable final order of liquidation of the respondent. In other words, it is not a bona fide application for business rescue, it being submitted that rescue of the respondent is impossible given the known facts of the matter. BPL, in resisting the applicant's allegations, suggests furthermore that the applicant has been penurious with the truth.

[9] Before considering the validity of these submissions, it is necessary to record that BPL has delivered an answering affidavit in which it vigorously rebuts every allegation made by the applicant in his founding affidavit. Tellingly, BPL states that the applicant has been dishonest in the manner in which he has presented his application and in what facts he has alleged in the founding affidavit. Curiously, the applicant has not delivered a replying affidavit in which he deals with these most serious allegations. Thus, everything that is stated in BPL's answering affidavit remains undisturbed and uncontradicted and must be accepted unless those allegations are palpably far-fetched or improbable and thus capable of being summarily rejected by this court.[4]

[10] The thrust of the applicant's case in bringing this application is that the respondent is now in financial distress in that it will not be able to pay all its debts as and when they fall due within the next six months, alternatively it will become insolvent within the same period. In bringing this application, the applicant appears to acknowledge that the respondent is, indeed, indebted to BPL in an amount that exceeds R7 million. That indebtedness led to the liquidation application which resulted in the provisional order of liquidation granted by P Bezuidenhout J. In passing, it is necessary to mention that there is, in addition, a second application for the liquidation of the respondent that has been brought by SQ Commercial (Pty) Ltd (SQ) in the Johannesburg High Court arising out of a debt of R460 000 owed by the respondent to SQ. While both these liquidation applications have been opposed by the respondent, it appears that the practical realties arising out of its difficult financial situation has compelled it to bring this business rescue application.

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[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A).

[11] The respondent in better days conducted a transport business. It fell upon difficult times when the contract upon which it had primarily relied was unexpectedly terminated and it was obliged to source other work. That replacement work was not easily found and the respondent consequently found itself in a prolonged period of financial crisis. It is, however, claimed by the applicant that during 'early 2023' the respondent concluded a contract with an entity that required the transportation of chrome ore concentrate from Marikana in the North West province to Richards Bay in KwaZulu-Natal. Things allegedly thereafter began to improve for the respondent, according to the applicant.

[12] But despite this apparent upturn in its fortunes, the respondent's creditors remorselessly pursued it resulting in one such creditor, Cape Finance Corporation (Cape Finance), repossessing:

'… seventeen assets from the Respondent during or about the latter part of 2023'.

The use of the word 'assets' is intended here to refer to the horses and trailers that the respondent uses in its transportation business, and I shall also use it to mean the same.

[13] If seventeen assets were, indeed, repossessed by Cape Finance, then the question may legitimately be asked as to how the respondent managed to conduct business at all. The answer is provided by the applicant who states that during:

'… or about late April 2024, management and I succeeded in efforts to hire trailers from a third party and the Respondent was able to resume trading …'

[14] Notwithstanding these events, the applicant remains certain that the respondent enjoys reasonable prospects of being rescued from its present difficulties if this application were to be granted. His optimism is based upon the fact that the respondent has secured three new contracts with three different entities. No contracts have been put up by the applicant to establish this fact beyond question. All that has been put up is a single letter which allegedly relates to one of those contracts, to which I shall refer later in this judgment. The applicant, nonetheless, is confident that the respondent:

'… will be more than capable of repaying all its creditors, which (sic) in the near future and I am committed to ensuring that this is the case.'

[15] The applicant furthermore asserts that consequent upon the respondent being placed in provisional liquidation by the order of P Bezuidenhout J, one of the appointed
provisional liquidators of the respondent, Mr Eugene Nel (Mr Nel):[5]

'… considered it prudent and to the benefit of the general body of creditors for the Respondent to continue trading, which it continues to do.'

[16] The applicant, finally, submits that with these three new contracts secured, the respondent is allegedly 'eminently capable of being rescued'.

[17] Not so, says BPL. It asserts that the applicant has told a story in support of its application that is fundamentally untrue in all its component parts. There is no prospect of rescue, for there is nothing to rescue. It is necessary to consider each of the points of criticism raised by BPL

[18] BPL states that the allegation that only 17 of the respondent's assets were repossessed by Cape Finance is false. All the respondent's assets were repossessed by Cape Finance, not just 17 of those assets. To be entirely accurate, the respondent agreed to the voluntary surrender of all its assets and signed a written agreement with Cape Finance to that effect on 28 November 2023, a copy of which agreement is before this court. That agreement does what BPL says it does. It identifies 30 assets that includes horses and trailers. All of them are to be voluntarily surrendered to Cape Finance by the respondent. There is no suggestion that only 17 of those assets are to be dealt with in this fashion. The voluntary surrender agreement was not disclosed by the applicant, but by BPL. It ought to have been disclosed by the applicant.

[19] It is alleged further by BPL that the respondent has purposefully refused to hand over all the assets and has only surrendered 17 of them, despite the agreement to surrender all. Since April 2024, the respondent has been repeatedly

[5] There are, in fact, three joint liquidators of the respondent, namely Mr Nel, Ms Johnine Maddocks and Mr Raneel Maharaj. There is no suggestion that the consent of the other joint liquidators was sought and obtained.

requested to disclose the whereabouts of the balance of the assets that it has not surrendered but has declined or refused to do so. Copies of correspondence directed to the applicant in this regard by Cape Finance has been put up by BPL.

[20] BPL states further that if the respondent continues to trade as it alleges that it does, then it is unlawfully doing so using assets that it has already agreed to surrender.

[21] The applicant's version that only 17 assets were repossessed is, in my view, palpably untrue in the light of the undeniable written agreement to surrender all the assets. The entire basis of the application is thereby undermined, for it is predicated upon a falsehood.

[22] As regards the hiring of other trailers by the respondent, it must not be overlooked that this is not the version of BPL: it is the version of the applicant himself regarding what the respondent did. According to the applicant, this hiring allegedly occurred 'in or about late April 2024'. Significantly, the respondent was placed in provisional liquidation on 21 February 2024. In *STS Tyres (Pty) Ltd v Bamboo Rock Plant (Pty) Ltd*,[6] it was noted that:

'Primarily, the aim of a provisional liquidation order is to protect the company's assets from mismanagement or dissipation in the period between the filing of the liquidation application and the Court's final decision. The provisional liquidation order ensures that creditors and other stakeholders' interests are safeguarded during the liquidation process. When a provisional liquidation order is made, a provisional liquidator would generally take control of the company and its assets and the preservation thereof pending the appointment of a liquidator to attend to its winding-up.'

[23] The provisional order of liquidation divested the director of the respondent of his power of control of the respondent. If the applicant did enter into contracts for the hire of trailers as described by it after it had been placed in provisional liquidation, then it had no entitlement to do so and acted irregularly and unlawfully. It could only contract with the knowledge and consent of the provisional liquidators. No allegation has been made that this particular transaction was known to the provisional

[6] *STS Tyres (Pty) Ltd v Bamboo Rock Plant (Pty) Ltd* [2024] ZAGPPHC 490 para 1.

liquidators or that their consent to these contracts was sought or obtained. The same reasoning applies to the three contracts of work allegedly concluded by the respondent.

[24] Significantly in my view, Mr Nel, the liquidator that allegedly consented to the respondent continuing to trade, has stated under oath that he provided no such consent. It is reasonable to assume that had such consent been given, the applicant would have required written confirmation thereof from Mr Nel. There is no suggestion that this was requested or given, nor has any proof of this consent being given been put up by the applicant other than the applicant's assertion that it was given.

[25] The suggestion that the respondent is 'eminently capable' of being rescued is heavily criticised by BPL. The obvious criticism is that the respondent continues to unlawfully possess assets that it agreed to surrender. In my view, those assets must be surrendered. However, without any assets whatsoever how can the respondent function? What can it use to fulfil the three contracts that it claims to have?

[26] Whilst on this topic, no attempt has been made to establish the existence of the three contracts: the only document put up is a letter from an entity known as 'Bulk Dynamics', dated 22 September 2023. The single reference to the respondent in that letter appears in the third paragraph thereof and reads as follows:

'As a result of the above, ("BD") has engaged the services of Tippertech to provide capacity to fulfil our contractual obligation to Sibanye for the duration of the said contract.'

No agreement has been put up that gives substance to the comment in the letter. The terms upon which this contract, and the other two contracts alleged to exist by the applicant, were concluded remain unknown and unknowable.

[27] It is difficult to understand the letter of 22 September 2023 when regard is had to the allegations contained in the founding affidavit that this work was obtained not in September 2023, being the month and year reflected on the letter, but sometime after late April 2024. There is an apparent contradiction. The letter has also not been confirmed by its author by way of a confirmatory affidavit.

[28] In any event, the applicant has provided no particularity as to how the respondent will be rescued or how it proposes to repay its debts to its creditors. The only reference to the finances of the respondent mentioned in the founding affidavit is the following:

'As things stand, after deducting fuel used and with the vehicles currently left in the possession of the Respondent, this will translate to an income generation potential of R1,320 000.00 (One Million Three Hundred and Twenty Thousand Rand) once all the assets are fully and optimally returned to service.'

[29] This can only be described as being unacceptably vague. The proposition is, furthermore, premised on the falsehood that assets have deliberately been 'left' in the respondent's possession. They have not been: they remain in the respondent's possession only because the respondent has refused to hand them over as it had previously agreed to do. It also falls far short of establishing that there is anything worthwhile rescuing. How the figure of R1,320 000.00 mentioned in the extract above has been calculated is not disclosed and no documents demonstrating how it has been worked out have been put up. No business rescue plan has been devised or put up in support of the application. While Mr Choonilal has agreed to be appointed as the respondent's business rescue practitioner, he has not attempted to prepare a plan setting out how this task is to be achieved. Thus, the words of the applicant amount to no more than the speculative suggestions decried by Brand JA in *Oakdene*. The proposition that repayments will be made to creditors and that the respondent will trade profitably can only have a prospect of being valid if the assets remain in the possession of the respondent. The reality is that Cape Finance is actively seeking the assets and the proposition advanced by the applicant must collapse and perish if the assets are located and seized by Cape Finance.

[30] Procedurally, there are further inadequacies that attach themselves to this application. The applicant is obliged to give notice in terms of s 131(2)*(a)* and *(b)* of the Act to the respondent, the Companies and Intellectual Property Commission and to all affected persons. There is no such proof of such notice having been given.

[31] The applicant, on his own admission, is:

'… the sole director and shareholder of the Applicant.'

He consequently does not stand at an arms' length to the respondent. He is intimately involved in its existence and in its activities. From this vantage point he knows things about the respondent's business that others do not yet know. He knew, for example, that the respondent had voluntarily agreed to surrender all its assets for he, acting on its behalf, personally agreed to do so, yet he has chosen to withhold that knowledge from this court. There is no way to put it other than the applicant attempted to deceive this court into granting the relief claimed in the notice of motion. It appears to me that no replying affidavit has been delivered because the allegations made by BPL are unanswerable. Perhaps a further sign of the hopelessness of the applicant's position is that as far as I can make out, the applicant has also not regarded it necessary to deliver the prescribed heads of argument and practice note. There is no reason to disbelieve BPL's allegations, and they must accordingly be accepted. In those circumstances, no relief can be granted to the applicant, and he must pay a price for his deception.

[32] I must thus conclude that this application is not genuine and bona fide and that I can discern no basis for concluding that there is a reasonable prospect of the benefits of a successful business rescue being achieved should the relief sought be granted.

[33] In the circumstances, I grant the following order:

1. The applicant's business rescue application is dismissed.
2. The suspension of the liquidation proceedings of the respondent under case number 5164/2023P is consequently lifted.
3. The applicant is to pay the costs of Business Partners Limited on the attorney and client scale.

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MOSSOP J

APPEARANCES

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