

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: NO

DATE 18 November 2024
SIGNATURE

CASE NR: B1842/23

In the matter between:

NEDBANK LIMITED

Applicant

and

MERISMA TRADING ENTERPRISES (PTY) LTD
(IN BUSINESS RESCUE)

First Respondent

JOHANNES FREDERIK VAN DEVENTER N.O.

Second Respondent

CHRISTELLE KEEVY N.O.

Third Respondent

PHILLEMONT TERENCE THWALA

Fourth Respondent

SETHEMBILE IMMACULATE NCEDISA THWALA

Fifth Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 18 November 2024.

JUDGMENT

COLLIS J

INTRODUCTION

[1] The present application is for the return date of a *rule nisi* that was issued on 1 November 2023.¹

[2] As per the Notice of Motion, the following relief was prayed for:

“1. An order confirming the cancellation of the following agreements between the Applicant and the First Respondent:

1.1 The Master Operating Agreement dated 25 January 2017, with schedules:

1.2 The Instalment Agreement dated 9 February 2018;

¹ Caselines 007-3.

2. That the First Respondent through the Second and or Third Respondent return of the following vehicles to the Applicant immediately from and/or any person who is found in possession thereof:

2.1 a new Interlink with engine number AE9[...]4 and VIN number AE9[...]3;

2.2 a new GW26 450TT ESCOT with engine number GH1[...]0 and VIN number ADD[...]8;

2.3 a new UD TRUCK GW26 450TT ESCOT with engine number GH1[...]1 and VIN number ADD[...]3;

2.4 a new GW26 450TT ESCOT with engine number GH1[...]3 and VIN number ADD[...]5;

2.5 a new GW26 450TT ESCOT with engine number GH1[...]2 and VIN number ADD[...]4;

2.6 a new GW26 450TT ESCOT with engine number GH1[...]2 and VIN number ADD[...]6;

2.7 a new Interlink with engine number AE9[...]0 and VIN number AE9[...]9;

2.8 a new Interlink with engine number AE9[...]8 and VIN number AE9[...]7;

2.9 a new Interlink with engine number AE9[...]2 and VIN number AE9[...]1;

2.10 a new Interlink with engine number AE9[...]6 and VIN number AE9[...]5;

2.11 a new IVECO TRAKKER with engine number F3B[...]0 and VIN number AAN[...]1;

2.12 a new Trailer AFRIT Side Tipper with VIN number ADV[...]4 /5;

2.13 a new IVECO TRAKKER with VIN number AAN[...]5;

2.14 a new IVECO TRAKKER with engine number FJE[...]7;

2.15 a new Trailer AFRIT Side Tipper with VIN number ADV[...]6 /7;

2.16 a new Trailer AFRIT Side Tipper with VIN number ADV[...]8 /9;

2.17 a new IVECO TRAKKER with VIN number AAN[...]1;

2.18 a new Trailer AFRIT Side Tipper with VIN number ADV[...]2 /3;

2.19 a new UD Truck QUON E15- GW26 450 TT ESCOT QUON with engine number GHJ[...]9 and VIN number ADD[...]8;

2.20 a new UD Truck QUON E15- GW26 450 TT ESCOT QUON with engine number GH1[...]8 and VIN number ADD[...]9;

2.21 a new Ford Ranger 2.2XL 4 x 2 with engine number QJ2[...]4 and VIN number AFA[...]4;

("the vehicles")

3. An order that if the vehicles is not returned to the Applicant immediately, that the sheriff of this Honourable Court is authorised to immediately take all the necessary steps to take possession thereof and return it to the Applicant.

4. An Order authorising the Applicant to apply to the Court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages and further expenses incurred by the Applicant in the repossession of the said vehicles against the First, Fourth and Fifth Respondent, which amount can only be determined once the vehicle has been repossessed by the Applicant and has been sold;

5. Cost of suit on an attorney client scale, only in the event of any opposition by any of the Respondents."

[3] The *rule nisi* made provision for any party to show cause on the return date why the order should not be made final. The main reason for the issuing of a *rule nisi* was as a result of a pending section 153 application, for the approval of a business rescue plan, that could play a role in the outcome of the current application, as contended to by the First Respondent.

[4] The order so issued by the Court relates to the return of 21 vehicles belonging to the Applicant, which vehicles were subject to a Master Operating Agreement concluded between the Applicant and the First Respondent and subsequently cancelled by the Applicant.

[5] On 14 November 2023 and after the granting of the *rule nisi*, the section 153 application brought at the instance of the Respondents was granted.

BACKGROUND

[6] The First Respondent (*in business rescue*) leased and financed motor vehicles from and through the Applicant in terms a Master Operating Agreement dated 25 January 2017 ("*the Rental Agreement*"), with schedules, and a further Instalment Agreement ("*the Instalment Agreement*") dated 9 February 2018.

[7] It is alleged by the Applicant that the First Respondent breached these agreements which prompted the Applicant to cancel the agreements and to

institute action proceedings for payment. This all transpired before the First Respondent went into business rescue.

[8] The requisite percentage of the First Respondent's creditors did not approve a business rescue plan and the Fourth and Fifth Respondent approached the Court for approval of a business rescue plan in terms of section 153.

CONDONATION

[9] At the commencement of the proceedings the parties informed the court that they agreed to condoning their respective Answering and Replying Affidavits which were filed late, and consequently they requested this Court to also condone same. In order to progress the matter condonation is hereby granted to the parties for the late delivery of their respective Answering and Replying Affidavits.

[10] In addition, both parties further sought leave of this Court to consider as part of the evidence presented a Supplementary Affidavit and the reply filed in respect thereto. Consent of the Court was also granted in respect of this request.

CHRONOLOGY

[11] Pursuant to the Master Agreement being concluded between the parties, the First Respondent committed a breach with the result that the Applicant then cancelled the agreement and to retain all amounts made in terms of thereof. As

at 1 January 2022 the total amount owing to Applicant amounted to R9,427,274.07.

[12] On 8 April 2022 the Applicant then proceeded to issue summons against the First Respondent.

[13] On 28 April 2022 the First Respondent was then placed in business rescue. Upon commencement of the business rescue the practitioners filed a business rescue plan dated 26 July 2022. This plan was rejected by 37% of the creditors and a revised plane was published on 24 August 2022. Another vote followed on 31 August 2022 and then 38% of the creditors voted against the plan. The meeting was then again adjourned for a revised plan.

[14] On 14 October 2022 another revised plan was published and another meeting held on 21 October 2022 to consider this revised business rescue plan. At this meeting the plan was again rejected by 38% of the creditors and not adopted.

[15] In consequence, the Fourth Respondent brought an application on 28 October 2022 to set aside the vote of creditors and to apply for the approval of the plan that was published on 14 October 2022. Absa was the only party who opposed this application.

[16] In April 2023, the current application was issued and served by Applicant. On 1 November 2023 the application was argued and a *rule nisi* then issued.

[17] Some two weeks thereafter on 14 November 2024 the Section 153 application granted by the Court.

APPLICANT'S SUBMISSIONS

[18] On behalf of the Applicant, counsel had argued that in essence the question that remains to be decided by this Court is whether the cancellation of the agreement, that was cancelled before the First Respondent went into business rescue, remains valid.

[19] Differently put, whether the granting of the Section 153 application change the situation if at all?

[20] In this regard it was argued by counsel, that the vehicles do not form part of the concursus creditorium of the First Respondent, as the agreements were cancelled before the decision was taken to place the company in business rescue. Furthermore, that the event of cancellation, is not and cannot, be denied by the Respondents.

[21] In *casu*, the Business Rescue Practitioners, being the Second and Third Respondents, are in agreement that this is the legal position. They are not opposing the relief sought in this present application.

[22] As for the order granted by Holland-Muter J in the section 153 application,

counsel had argued that this order so made, makes no difference to the merits of the Applicant's case as its agreements were cancelled before business rescue of the First Respondent.

[23] In terms of the agreements concluded between the parties, the Applicant remains the lawful owner of the vehicles, which vehicles have not been voluntarily returned or surrendered by the Respondents and that the First Respondent remains in possession of the vehicles despite the agreements being cancelled.

FOURTH AND FIFTH RESPONDENTS' SUBMISSIONS

[24] On behalf of the Respondents opposing to this application, the following submissions were placed before this Court. In this regard, counsel had argued that the Applicant had not opposed the Revised Business Rescue Plan which was considered on 21 October 2022,² and in fact supported the adoption of the Business Rescue Plan.³

[25] Had it not been for the opposition to this Revised Business Rescue Plan which was given only by Absa, the plan would have been approved which would have resulted in the First Respondent having retained possession and the use of the commercial vehicles in order to facilitate the successful realisation of the Revised Business Rescue Plan.

² Para 25 p 05-13.

³ Para 34 p 05-19.

[26] In October 2022, as mentioned, an application was launched by the Fourth Respondent to set aside the vote taken on 21 October 2022 and for the adoption of the Revised Business Rescue Plan.⁴

[27] In the event of the Section 153 application brought in terms of the Companies Act being successful, it will result that the vote will be set aside and the Revised Business Rescue Plan will be approved. The consequence thereof is that the First Respondent will retain possession and use of the commercial vehicles to give effect to the implementation of the Revised Business Rescue Plan.

[28] In addition, counsel further submitted, that as the application in terms of Section 153 of the Companies Act was only opposed by Absa Bank, and not by the Applicant itself, it must follow that the Applicant herein has seemingly decided to abide by the decision and outcome of that application.⁵

[29] In this application, counsel had argued, the Applicant attempts to renege on its election to support the Revised Business Rescue Plan, i.e. and also the continued possession and use of the commercial vehicles by the First Respondent for purposes of realising the Revised Business Rescue Plan.

⁴ Para 35 p 05-19.

⁵ See: para 36 p 05-19.

[30] To grant the present relief in this application, will in effect scuttle the Section 153 application and will undermine the intended implementation of the Revised Business Rescue Plan.⁶

ANALYSIS

[31] The First Respondent before Court, has taken no issue with the default and the amounts owing to the Applicant. It has also not been disputed by the First Respondent that the Rental and Instalment Sale Agreements were duly cancelled by the Applicant. In fact, the First Respondent has not opposed the present application and it is the First Respondent who will be affected by the return of the vehicles.

[32] As the cancellation of these agreements took place before the First Respondent was placed under business rescue, the vehicles fall outside the scope of the legal moratorium.

[33] In addition the Respondents have not denied that more than a year has passed and that the Practitioners have failed to make any payment towards the debt of the First Respondent.⁷

[34] Now with the passage of time, the outcome of the Section 153 application is now known.

⁶ See: para 40 p 5-20.

⁷ Replying Affidavit para 2.3 p 07-7.

[35] In terms of the order so made by Holland-Muter J, the Applicant is also a recipient of proposed payments and the order specifically provided for the Applicant to receive payments by the end of November 2023, December 2023 and the end of January 2024 and if payments are not received, that the Applicant would have sufficient reason and be entitled to go to court and to convince a court that the *rule nisi* previously ordered should be made final.

[36] Herein, counsel for the Applicant had argued that as of date of hearing that no payments in terms of the approved plan had been received by the Applicant this notwithstanding that the order given by Holland-Muter J, provided for such payments to be made.

[37] This Court agrees with the Applicant that the Business Rescue Plan adopted was merely a ruse which strengthens and justifies the relief sought by the Applicant. I further agree, that in fact that there is no plan before this Court to even take into consideration. In addition to the above, no evidence has also been placed before this Court to show that the First Respondent is still a going concern due to the lapse of time since inception of the Business Rescue proceedings.

[38] On behalf of the Respondents, as mentioned, it was argued that given the Applicant's clear election not to retrieve the vehicles after the cancellation and default judgment, coupled with its clear support for the Revised Business Rescue Plan, which entitled the First Respondent retaining possession and use of the commercial vehicles, amounted to an election not to proceed for the recovery of

the vehicles until either the successful execution of the Revised Business Rescue Plan, alternatively cancellation of the business rescue process. This preposition as put forward by counsel for the Respondents, I cannot agree with. If payments are not being made as set out in the Business Rescue Plan the Applicant as creditor rights cannot as a consequence be stifled.

[39] In returning then to the question to be answered by the Court, i.e. whether the adopted business rescue plan in any way impact on the cancellation of the agreements, the answer must therefore be in the negative. Support for this contention is also found in the decision *Schickerling NO and Another v Chickenland (Pty) Ltd t/a Nando's* (22712/2016) [2016] ZAGPPHC 208 (15 April 2016).

[40] It as a result must follow that the cancellation of the agreements before the First Respondent was placed in business rescue remains valid and consequently the Applicant will be entitled to the relief it seeks.

ORDER

[41] The rule nisi granted and issued on 1 November 2023 under case number B1842/2023 is hereby made final in the following terms:

41.1 An order confirming the cancellation of the following agreements between the Applicant and the First Respondent:

41.1.1 The Master Operating Agreement dated 25 January 2017, with schedules; 14-17

41.2.1 The Instalment Agreement dated 9 February 2018.

[42] That the First Respondent, through the Second and/or Third Respondent, return the following vehicles to the Applicant immediately from and/or any person who is found in possession thereof:

42.1 a new Interlink with engine number AE9[...]4 and VIN number AE9[...]3;

42.2 a new GW26 450TT ESCOT with engine number GH1[...]0 and VIN number ADD[...]8;

42.3 a new UD TRUCK GW26 450TT ESCOT with engine number GH1[...]1 and VIN number ADD[...]3;

42.4 a new GW26 450TT ESCOT with engine number GH1[...]3 and VIN number ADD[...]5;

42.5 a new GW26 450TT ESCOT with engine number GH1[...]2 and VIN number ADD[...]4;

42.6 a new GW26 450TT ESCOT with engine number GH1[...]2 and VIN number ADD[...]6;

42.7 a new Interlink with engine number AE9[...]0 and VIN number AE9[...]9;

42.8 a new Interlink with engine number AE9[...]8 and VIN number AE9[...]7;

42.9 a new Interlink with engine number AE9[...]2 and VIN number AE9[...]1;

42.10 a new Interlink with engine number AE9[...]6 and VIN number AE9[...]5;

42.11 a new IVECO TRAKKER with engine number F3B[...]d VIN number AAN[...]1;

42.12 a new Trailer AFRIT Side Tipper with VIN number ADV[...]4 / 5;

42.13 a new IVECO TRAKKER with VIN number AAN[...]5;

42.14 a new IVECO TRAKKER with engine number FJE[...]7 and VIN number AAN[...]7;

42.15 a new Trailer AFRIT Side Tipper with VIN number ADV[...]6 / 7;

42.16 a new Trailer AFRIT Side Tipper with VIN number ADV[...]8 / 9;

42.17 a new IVECO TRAKKER with VIN number AAN[...]1;

42.18 a new Trailer AFRIT Side Tipper with VIN number ADV[...]2 / 3;

42.19 a new UD Truck QUON E15- GW26 450 TT ESCOT QUON with engine number GHJ[...]9 and VIN number ADD[...]8;

42.20 a new UD Truck QUON E15- GW26 450 TT ESCOT QUON with engine number GH1[...]8 and VIN number ADD[...]9;

42.21 a new Ford Ranger 2.2XL 4 x 2 with engine number QJ2[...]4 and VIN number AFA[...]4;

("the vehicles")

[43] An order that if the vehicles are not returned to the Applicant immediately, that the Sheriff of this Honourable Court is authorized, to immediately take all the necessary steps to take possession thereof and return it to the Applicant.

[44] An order authorising the Applicant to apply to the Court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages and further expenses incurred by the Applicant in the repossession of the said vehicles against the First, Fourth and Fifth Respondents, which amount can only be determined once the vehicles have been repossessed by the Applicant and has been sold.

[45] Cost of suit on an Attorney and Client scale, including the appearance on 1 November 2023.

C.J. COLLIS
JUDGE OF THE HIGH COURT GAUTENG
DIVISION PRETORIA

APPEARANCES

Counsel for Applicant: Adv. CJ WELGEMOED

Instructed By: VDT Attorneys

Counsel for Fourth and Fifth Respondents: Adv. B. GRADIDGE

Instructed By: J J VILJOEN Attorneys

Date of Hearing: 15 February 2024

Date of Judgment: 18 November 2024