



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

CASE NO: 124343/2024

Date of Hearing: 15 November 2024

Handed down: 13 November 2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
<u>22/11/2024</u>	
DATE	SIGNATURE

In the matter between:

DAIMLER TRUCK FINANCIAL SERVICES

SA (PTY) LTD

FIRST INTERVENING CREDITOR

SIZA BANTU COACH LINES (PTY) LTD SECOND INTERVENING CREDITOR

CLASSY TRADE AND INVEST 9 (PTY) LTD

T/A KALAMAZOO COACH LINES

THIRD INTERVENING CREDITOR

IN RE:

MOROENG NEHEMIAH MERE

FIRST APPLICANT

MOROENG NEHEMIAH MERE NO
 KENNETH MOHULE NDLOVU NO
 DAPHNE CHARLOTTE LEBESE NO
 AND

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

AMOGELANG LOGISTICS CC

FIRST RESPONDENT

KAL TIRE MINING TIRE SERVICES

(PTY) LTD

SECOND RESPONDENT

THE COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

THIRD RESPONDENT

JUDGMENT

Strijdom J

1. Amogelang Logistics CC (in liquidation, hereunder referred to as "Amogelang") was finally liquidated on 10 April 2024.¹
2. On 12 September 2022 the third applicant was declared a delinquent director for a period of seven years.²

¹ Final liquidation order: Caselines 01-41

² Judgment: Caselines 05-96 to 111

3. An application to rescind the final liquidation order was issued on 7 August 2024.
4. The first applicant (hereinafter referred to as (Mr Mere) deposed to the founding affidavit in the rescission application and in this application. The first intervening creditor opposed the rescission application on 22 October 2024.
5. Mr Mere on behalf of Amogelang thereafter did not proceed with the rescission application. As a result of the opposition to the rescission application the applicants proceeded to issue an urgent application on 30 October 2024 to set aside the final liquidation order and to place Amogelang under Business Rescue.
6. The prayer for having the final liquidation order set aside was abandoned by counsel in Court.
7. The applicants' conceded in Court that the intervening parties have *locus standi* to intervene and to participate in the hearing of this application.
8. This Court on 13 November 2024 found that the matter was urgent and that only the papers which were served and filed by 7 November 2024 in compliance with the Practice Directive will be allowed.
9. Section 131(4) of the New Companies Act states as follows:

“(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 contract ... or
- (iii) It is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing a company; or

(b) Dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.”

10. The crisp issue in this matter is – did the applicants establish a reasonable prospect of achieving any one of the two goals contemplated in section 123(1)(b) on the facts of this case?

11. It was stated in *Oakdene Square*³ *Properties v Farm Bothasfontein (Kyalami)* that:

³ 2013 (4) SA 539 (SCA)

“... ‘business rescue’ means to facilitate ‘rehabilitation’, which in terms means the achievement of one of two goals: (a) to return the company to solvency, or (6) to provide a better deal for creditors and shareholders than what they would receive through liquidation. This construction would also coincide with the reference in section 128(1)(h) to the achievement of the goals set out in section 128(1)(b).”

12. It is trite that the applicants are not required to set out a detailed plan. That can be left to the business rescue practitioner after proper investigation in terms of section 141. The applicants must establish grounds for the reasonable prospect of achieving one of the two goals in section 128(1)(b).⁴
13. It is not in dispute that the Amogelang is currently financially distressed as defined in the Act. The definition of “financially distressed”, as set out in section 128(1)(f), in reference to a particular company at any particular time means that-

“It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or it appears reasonable likely that the company will become insolvent within the immediately ensuing six months.”⁵

⁴ *Newcity Group (Pty) Ltd v Pellow NO and Others* (577/2013) [2014] ZASCA 162 (1 October 2014) *Oakdene Square Properties (Pty) Ltd and Others v Farm Bolhasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA).

⁵ Caselines: 01-19 FA paras 41-42

14. It was stated by Mr Mere that the current liabilities of the Amogelang are R2710 000 (two million, seven hundred and ten thousand Rands). There are numerous creditors whose accounts are 180 days old, which accounts are due and payable. It was submitted by the applicants that it is unlikely that the accounts would be paid within the next ensuing six months, if business rescue proceedings are not commenced with and the winding up order suspended.⁶
15. It was stated by Mr Mere that the key issues which led to this undesirable situation were, *inter alia*, the inaction of the management of Amogelang to make immediate payments when called upon to do so.
16. “The applicants verily believe that on appointment of a Business Rescue Practitioner to take, *inter alia*, the following steps-
- 16.1 an immediate temporary moratorium on all payments to creditors;
 - 16.2 a detailed financial analysis of the viability of the first respondent and the operation costs;
 - 16.3 the cancellation of transactions that are not viable;
 - 16.4 the reorganisation of the management and the adoption of new strategies to wow the customer base; and
 - 16.5 raising of further funding, would place Amogelang in a far better position.”⁷

⁶ Caselines: 01-19 para 43 FA

⁷ Caselines: 01-23 para 57 FA

17. The applicants argued that there still exists a reasonable prospect of Amogelang continuing running a profitable business, alternatively rescuing the business of Amogelang, if action is taken immediately and such action being the commencement of business rescue proceedings.
18. It was argued by the first intervening creditor (Daimler Truck Financial Services (Pty) (Ltd)) that there are no details or plan provided by the first applicant (Mr Mere) in how he proposes or assumes that there would be any reasonable prospects of success that would either save Amogelang from its current financial predicament or which will result in a better return for creditors.
19. Mr Mere in his founding affidavit stated that the first respondent has employees but does not provide any information or list of names, their income or their period of employment. It was only stated that Amogelang had not paid the PAYE related to their employees to SARS for a considerable period and is indebted to SARS for outstanding PAYE to the amount of R1 100 000,00 (One million Rand).
20. Mr Mere provides no list of available assets which can serve as security for their indebtedness to creditors except for one stand purchased for R850 000 in 2014 registered in his name.
21. Despite mentioning contracts with the Department of Education, Mr Mere did not attach these contracts to determine their value or if these contracts and

income earned from same will be sufficient to pay all creditors and expenses on a monthly basis.

22. What is not contained in the founding affidavit is the following:

- 22.1 Who are the creditors, and what amounts are due to the creditors including the amounts that are due on a monthly basis?
- 22.2 How much funds are outstanding that is due by clients such as the Government to Amogelang?
- 22.3 Who are the clients, and what amounts are due on a monthly or quarterly basis due to Amogelang?
- 22.4 What is the true asset value which would serve as security for creditors in the event of business rescue failure?
- 22.5 Would the debt situation of Amogelang, in the hands of a Business Rescue Practitioner, improve or become even worse if there is not sufficient income to pay all general monthly expenses such as rental, insurance, salaries, maintenance costs, etc. as well as creditors such as SARS, Daimler, Mercedes Benz and Others?
- 22.6 Are there any available unnecessary assets which can be sold to assist in paying creditors?
- 22.7 What is the condition of the assets, such as the busses, and how much funding would be required to restore them to a safe and reliable state to offer the services to clients?
- 22.8 What is the current value of existing contracts with clients and the Government, and would the income earned from same be sufficient

to pay all creditors in future as and when any indebtedness becomes due?

22.9 Would there be reliance on post-commencement finance and who would be responsible for same?

23. On a conspectus of all the evidence placed before me the applicants failed to place before me a factual foundation for the existence of a reasonable prospect of achieving any one of the two goals contemplated in section 128(1)(b). I am also of the view that it is not just and equitable to place Amogelang under supervision.

24. In the result, I make the following order:

1. The urgent application of the applicants is dismissed with costs on a party and party scale as on Scale C.
2. The Master of the High Court is requested to appoint a Provisional Liquidator in the insolvent estate of Amogelang Logistics CC (in liquidation) with Registration Number 2008/044614/23.



JJ Strijdom
Judge of the High Court
Gauteng Division Pretoria

Appearances:

For the Applicants : Adv. K Motshwane
Instructed by : Lebesse Attorneys

For the first intervening creditor: Adv CLH Harms

(DAIMLER TRUCK FINANCIAL SERVICES)

For the second intervening creditor: Adv Mayet A (Attorney)

(SUZA BANTU COACH LINES (PTY) LTD)

Instructed by: Mayet Attorneys Inc