

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2024-112016

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: ~~YES~~/NO

.....
SIGNATURE [REDACTED]
DATE

...27/11/2024.....
DATE

In the matter between:

MACSTEELSERVICE CENTRES SA (PTY) LTD

APPLICANT

Registration Number: 2005/016292/07

and

URBAN, BARRY CLAUDE

FIRST RESPONDENT

(c/o Sagacity Corporates Services (Pty) Limited)

BERMINE SUPPLIES SERVICES (PTY) LTD (under supervision)

Registration Number: 2013/181601/07

SECOND RESPONDENT

CREDITORS OF SECOND RESPONDENT

INTERESTED PARTIES

JUDGMENT

Manoim J

[1] The applicant in this matter is a creditor of the second respondent, Bermine Supplies Services (Pty) Ltd (“Bermine”), a company presently in business rescue. The first respondent Barry Urban is its business rescue practitioner (“BRP”). In a separate procedure, not currently before me, the applicant has brought an application that seeks the following:¹

- a. To end the business rescue process;
- b. To remove the first respondent as the BRP; and
- c. To wind up the second respondent.

[2] Since this matter, which I will refer to as the main matter, has only been set down for a hearing on the unopposed roll-on February 2025, and may be heard later if it goes to the opposed roll, the applicant seeks interim relief. That is the background to the present matter. The applicant seeks an order in the following terms in the present matter:

“The First Respondent is ordered to cease and desist from further proceedings in the Business Rescue Process of Second Respondent until the Main Application has been determined.”

[3] Bermine was placed in business rescue on 2 August 2022. At a meeting of creditors on 14 September 2022 Urban presented a business plan which was voted on and accepted by the creditors. The applicant was recognised as a creditor and the claims of its various business units were accepted. Amongst

¹ For the sake of clarity, I will refer to the first respondent from now on as Urban and the second respondent as Bermine.

those who voted in favour of the plan was Josias Blignaut the credit manager of the applicant who has deposed to the founding affidavit on its behalf.

- [4] On 24 October 2024 Urban announced that he intended to convene a further meeting of creditors to present a further business plan and to this end he would be scheduling a meeting in terms of section 151 of the Companies Act, 71 of 2008 (“the Act”). It must be noted that Urban’s announcement was made after the applicant had served its papers in the main matter. It is clear that he was acting responsively to the application although he does acknowledge the existence of the application in the announcement.
- [5] The applicant states that Urban has taken two years to implement the current business plan which has proved a failure. It is clear from this announcement that the company is no longer trading, has moved from its premises and that Urban is now in a process of winding down the company. Indeed, this is acknowledged by the BRP in the announcement. His conclusion is that *“Bermine will be wound down and become a shell company without assets or liabilities”*. But what troubles the applicant is that it is concerned that the BRP is selling off its assets piecemeal at below market rates.
- [6] Urban does not deny the demise of the company. Rather this is the rationale for the need for a new business plan. Bermine could no longer be saved he concedes, not due to his neglect as the BRP, but due to the change in external economic circumstances in the markets in which the company operated. He asserts that in terms of the Ac, business rescue has dual aims. Either to trade the company out of its financial straits with the benefit of the moratorium or to wind up its affairs. He locates his current efforts in the latter. His contention is

that the winding down he seeks to achieve will result in a better return for creditors than liquidation.

[7] Urban apart from defending his actions on the merits also raises several in limine points. The two most pressed in argument were that the application was not urgent and the second that the applicant had failed to get leave of the court in terms of section 133(1) of the Act, the latter being the section that deals with a moratorium on claims against the company.²

[8] I can deal with the urgency issue briefly. The main application which is set down for February next year is unlikely to be heard then if it is opposed. If the applicant is correct in its contentions, then it is unlikely to get relief in due course and this justifies its urgency. The question is of course whether it has made out a case for an interim interdict, a subject I return to after first considering the section 133(1) argument.

[9] Urban contends that the relief sought in this application is subject to the moratorium set out in section 133(1) of the Act. That section states:

“133(1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company or lawfully in its possession, may be commenced or proceeded with in any forum, except –

² Those that I have not need to consider is a complaint that the BRP’s company, as opposed to just him, was served with the application and that the creditors had not been notified. The former point is a trivial one which the applicant explains, the latter has no factual basis the application was served on creditors and the applicant has shown proof of this.

a. with the written consent of the practitioner;

b. with the leave of the court and in accordance with any terms the court considers suitable....³

[10] It is common cause that the applicant has not got the permission of Urban to bring this action nor has it sought the leave of the court. The issue is whether such permission was needed. The applicant argues that it is not enforcing an action against the company nor seeking relief against any property belonging to the company; its relief is against Urban as the BRP. But Urban contends that the relief which would prevent him from continuing to sell the assets of the company and hence is an indirect form of restraint affecting the property of the company. The argument is that preventing the BRP from selling the assets of the company is notionally equivalent to making a claim on the assets.

[11] Neither party was able to come up with a decision that is directly in point in relation to an application for interim relief of this kind. There are certainly decisions where relief is sought against the BRP, and the courts have not required the applicant to seek permission from the court to do so.

[12] Thus, in *Moodley* a court of this division held that:

“The language of s 133, when read in context with the other relevant provisions in ch 6 and having regard to its purpose, does not include within its ambit proceedings relating to the development, adoption or implementation of a business rescue

³ It is common cause that the remaining provisions of section 133(1), sub paragraphs (c) to (f), are not relevant *in casu*.

plan. It is the business rescue practitioner who must develop a business rescue plan and implement it if adopted, and the company, under the direction of the practitioner, must take all necessary steps to attempt to satisfy any conditions on which the business rescue is contingent and implement the plan as adopted. Legal proceedings, such as the present case, which seek that an adopted business rescue plan be executed and implemented strictly according to its terms and in accordance with the applicable provisions of the Companies Act, are legal proceedings against the business rescue practitioner and the company in business rescue in connection with the business rescue plan. They are not legal proceedings against the company or property belonging to the company or lawfully in its possession within the meaning of s 133(1).⁴

- [13] But there are also two other decisions, one also of this division, *Redpath*⁵, and one of the Western Cape, where Sher AJ, in *Booyesen*, declined to follow *Moodley*, and reasoned that:⁶

“To my mind and with all due deference, the distinction which is sought to be made is an artificial one. Any plan which is adopted and which needs to be implemented by a company in business rescue, is a plan which belongs to that company and the business rescue practitioner merely seeks to give effect thereto as the

⁴ *Moodley v On Digital Media (Pty) Ltd and Others* 2014 (6) SA 279 (GJ), paragraph 10.

⁵ *Redpath Mining Limited v Marsden* 2013 JDR 1410 (GSJ)

⁶ *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd* 2017 (4) SA 51 (WCC) .

manager in charge of the company. To this end, the business rescue practitioner steps into the shoes of the board of the company and its management during the period when it is temporarily under supervision for the purposes of business rescue. But, any proceedings taken in relation to such plan, i.e. to set it aside or to enforce its implementation, are proceedings taken against the company, which is represented by the business rescue practitioner, and, to my mind, there is no justification in seeking to distinguish such proceedings or to hold that they are not the kind of proceedings covered by the provisions in question.”⁷

- [14] In turn, the authors of Henochsberg criticise the rationale given in the *Booyesen* decision. They say:

“This may be so, but the purpose of s 133 is still to grant the company a moratorium and so to provide it with breathing space while the business rescue practitioner attempts to rescue the company by designing and implementing a business rescue plan.”⁸

- [15] Thus, the two contrasting rationales can be summarised thus. Is the relief sought preventing the ordinary running of the company and hence although the BRP is the ostensible target, the reality is it constitutes legal proceedings against the company. The other view is that if the rationale of business rescue

⁷ Supra, paragraph 57.

⁸ See *Henochsberg on the Companies Act 71 of 2008*, discussion on section 133(1).

is to afford “breathing space” to the company in rescue then if a business plan is being implemented in a manner contrary to such an intention, in other words to extend the metaphor the BRP is ‘choking the company’, then an action against the errant business practitioner cannot be considered to be legal action against the company and hence does not fall foul of the section 133(1) moratorium.

[16] In the present case the factual record on these issues is too sparse for me to come to a conclusion on either scenario with any certainty. What is common cause however is that the company is no longer trading and that in Urban’s own words in the October announcement, is in the process of being wound down.

[17] For this reason, I will assume in the applicant’s favour that the relief it seeks does not implicate the moratorium. If that is so, then prior consent in terms of section 133(1) from either the BRP or the court was not required. Hence the point in limine must fail.

The merits

[18] I turn now to the question of whether the applicant has made out a case for an interim interdict. I start with considering whether it has made out a prima facie case. The applicant’s case is that Urban has served the narrow sectarian interests of one of the directors and not the body of creditors as a whole. It sets out how the initial business plan involved a return for creditors considerably more generous than that which Urban contends for now. Moreover, the business rescue process has proved unacceptably long (two years since the plan was approved) and has undergone a change from rescuing the company

to winding it down. The applicant is also concerned that the BRP is selling assets at below market prices.

[19] But Urban relies on the change in market conditions to justify both the delay in finalisation of the business rescue, the need for a changed business plan and to explain why he has had to sell assets. He says there has been a decline in demand from industries on which Bermine's business was predicated; platinum mines and cement factories in the vicinity, the latter being responsible for the demand of the company's main product, personal protective equipment. This explanation is plausible. The consequence is I am not on these facts able to conclude that the BRP has been derelict in his duties.

[20] What appears to be the applicant's real motivation for wanting the main application are two issues. First it holds security from a Mr Gerrit Olivier who is one of the directors of Bermine. Under the business plan creditors and this includes the applicant, have agreed to waive their security against the directors. The relevant clause states:

"2.3.1.6 Securities held and cancellation thereof; Any contract executed in relation to any cession, collateral, suretyship, lien or any other kind of security arrangement, executed by the Company, which seeks to secure monies owed by Bermine Supplies and Services (Pty) Ltd prior to the date of the Business Rescue plan will be cancelled on payment in full to the relevant creditors settled in terms of the adopted Business Rescue Plan."

[21] The problem for the applicant is that it voted in favour of the business plan. Blignaut who attended the meeting said he did not appreciate the import of the

clause when he voted in favour of it. That may be so, but he could have taken advice and he voted in favour of it. There is also another clause in the business plan which is problematic for the applicant. This provides for amendments to the business plan and states:

“Should an amendment to the Published Business Rescue Plan be contemplated, then the Practitioner shall be entitled to propose the amendment for consideration and voting at a subsequent meeting of those Affected persons who would be prejudiced by such amendment. The proposed amendment shall only be effective if the Affected Persons vote in favour thereof and it is adopted in the same manner as provided for in section 152 of the Companies Act.”

- [22] Thus, by proposing an amendment to the plan, Urban is acting in accordance with the existing business plan to which the applicant had agreed. I therefore see nothing unlawful in his proposal to call a new meeting to propose the new plan. That process is contemplated in the original plan.
- [23] The next issue which animates the applicant is that if the company is wound up, creditors will be able to interrogate directors at an enquiry. This however is speculative and does not without more distinguish this situation from any other. The applicant advances an interest unique to its situation which may not be beneficial to any other creditor given that the evidence is that liquidation will prove more expensive for creditors than the conclusion of the business rescue.
- [24] The BRP states that the immediate liquidation of the company would result in creditors receiving a zero dividend. If the business rescue process continues

creditors will stand to get 15 cents in the rand. The BRP makes no claim to be nursing the company back to health. Rather he makes it clear that he relies on the alternative rationale for business rescue provided for in section 128(1)(b)(iii) of the Act, that if it is not possible for the company to continue in existence on a solvent basis, the business rescue nevertheless results in a better return for creditors or shareholders than would result from the immediate liquidation of the company. Nor is there sufficient evidence to suggest that he is selling assets at below market values. Clearly winding down suggests expedition is required and hence the sales are not being concluded under normal market circumstances. I cannot on this record rush to the conclusion that the sales are irregular.

- [25] The applicant has not established that Urban as the BRP is acting unlawfully. Accordingly, the applicant has not been able to make out a prima facie right for its relief. For this reason, the application must fail.

Costs

- [26] I see no reason for any punitive award of costs. The applicant has through the main application induced Urban to make the October announcement and hence precipitated a further step in the business rescue process. An ordinary order of party and party costs will suffice. Both parties considered that counsel's fees should be at Scale C. I agree with this.

ORDER: -

- [27] In the result the following order is made:

1. The normal manner and form of service provided for in the Rules of this Court be dispensed with, and this matter be heard as one of urgency in terms of Rule 6(12); and
2. The application is dismissed with costs on a party and party scale, such costs to include the costs of counsel on Scale C.


N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 13 November 2024

Date of Reasons: 27 November 2024

Appearances:

Counsel for the Applicant: C D Roux

Instructed by: R C Christie Incorporated

Counsel for the First Respondent: J Smit

Instructed by: Gothe Attorneys Inc