REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

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

....
....

DATE 25-04-2025 SIGNATURE [redacted]

CASE NO. 9760/2023

In the matter between:

CAPE CONNEXIONS (PTY) LTD	Applicant
and	
WOLVES DEN FARMING (PTY) LTD (in liquidation)	First Respondent
(Registration Number: 1999/022823/07)	
NEDBANK LIMITED	Second Respondent
NURJEHAN ABDOOL GAFAAR OMAR N.O	Third Respondent
SIMON MATHLESHE SEIMA N.O	Fourth Respondent
AYESHA MAHOMED AYOB N.O	Fifth Respondent
THE MASTER OF THE HIGH COURT, MIDDELBURG	Sixth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Seven Respondent
THE TRUSTEE FOR THE TIME BEING OF LITA FAMILIE TRUST (IT 322/1996)	Eighth Respondent
BJ VENTER BOERDERY	Ninth Respondent

Heard : **27th November 2024**

Delivered : **25th April 2025 by circulation to the parties' legal representatives**

JUDGMENT

MASHAMBA AJ:

INTRODUCTION AND FACTUAL BANKGROUND

[1] On the 23rd October 2023, the Cape Connexion (Pty) Ltd ("the Applicant"), made an application in terms of Section 131(1) as read with Section 131(6) of the Companies Act[1] ("the Act"), that the Wolves Den Farming ("First Respondent") be placed under supervision and in business rescue. The First Respondent is under liquidation in terms of the order that was granted on the 06th October 2022 by the Honourable Deputy Judge President Semenya under this honourable court's case number 833/2022. On or about August 2024 the Liquidators concluded two (2) written agreements for sale in terms whereof they have disposed of certain immovable properties of the First Respondent and the registration is pending before the deeds of registry as a result of this application.

[2] This application suspended the sale agreement until its final determination and if the application fails, the liquidators will continue to dispose of the First Respondent's properties by winding up the First Respondent. If the application for business rescue succeed the First Respondent will be under the control of the Business Rescue Practitioner ("BRP") who is going to implement the draft business rescue plan ("the plan")

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[1] The Companies Act 71 of 2008, as amended

in an attempt to make the First Respondent solvent again and a better return to all creditors.

[3] Initially, the application for business rescue was not opposed, therefore, the Applicant set down the matter in an unopposed roll on the 06th February 2024.

[4] On the 06th February 2024, the matter did not proceed in an unopposed roll due to a counsel who appeared on behalf of a company called Chicken Dropping. The said counsel pleaded with the above honourable court not to finalise the matter as Chicken Dropping intended to bring an application for leave to intervene in the business rescue application. Therefore, the matter was postponed *sine die*.

[5] Subsequent to the postponement that occurred on the 06 February 2024 and on the 23rd February 2024, Nedbank Limited ("the Second Respondent") served and filled notice of intention to oppose the application.

[6] The Second Respondent should, within fifteen (15) days from the date of service of the notice of intention to oppose, serve and file his answering Affidavit in term of Rule 6 of the Uniform Rules of Court[2]. The Second Respondent's answering affidavit was not served within the stipulated time. The Applicant sent a letter to the Second Respondent on the 19th and the 27th of March 2024, respectively, and the Second Respondent was reminded to deliver his answering affidavit abruptly.

[2] Uniform Rules of Court of South Africa, as amended on the 01 July 2019 (the rules)

[7] The Second Respondent's answering affidavit was not forthcoming and the Applicant decided to set the matter down on an unopposed roll to be heard on the 06th June 2024. The notice of set down was served to the Second Respondent on the 16th April 2024.

[8] Subsequent to the receipt of notice of set down from the Applicant, and on the 21st May 2024, the Second Respondent brought a counter application seeking that this application should be accelerated and be heard as an urgent application in terms of rule 6 (12) of the Uniform Rules of Court. In the counter application the Second Respondent attached an affidavit named 'the Second Respondent's answering and founding affidavit'. The Second Respondent's counter application was set down on the 11th June 2024 and it was removed from the roll and the Applicant was ordered to serve and file its replying affidavit on or before the 19th July 2024. The parties were authorised to approach the offices of the Judge President for special allocation to expedite the finalisation of this application.

[9] The Applicant did not serve the replying affidavit as ordered, the Second Respondent wrote a letter to the office of the Judge President, requested that the matter be allocated to a special opposed motion roll.

[10] The matter was rolled on a special opposed roll on the 27th November 2024. The matter was heard and parties were directed to prepare their written heads of argument. The Applicant's heads of argument should be served and filed on or before the 06 December 2024 and the Second Respondent should send his replying heads of argument on or before the 13 December 2024.

[11] The Applicant's heads of argument were served and filed on the 06th December 2024. The Second Respondent's heads of argument were not served as directed. On the 05th March 2025 the Judge's secretary sent a correspondence email to the Second Respondent, requested the heads of argument. On the 12th March 2025 the Second Respondent indicated that he had no intention to reply or supplement the heads of argument which he had handed over to court on the 27th November 2024.

LEGAL QUESTIONS

[12] The court is called to determine the following;

(a) Whether the Applicant complied with Section 131(2) of the Act?

(b) Whether there are reasonable prospects of rescuing the First Respondent?

THE LAW

[13] In terms of Section 131(1) of the Act, states that;

"(1)…., an affected person may apply to a court 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.

(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; and 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

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

APPLICANT'S SUBMISSIONS

[14] In support of the application for business rescue the Applicant made the following submissions;

14.1. that he is an affected person as contemplated by section 128 (1) of the Act, and has a locus standi in terms of Section 131 (1) of the Act to seek the relief sought in this application.

14.2. that BRP has been proposed in terms of the Act and that no issue has been taken with the qualifications and expertise of the proposed BRP.

14.3. that the plan has been drafted by the BRP.

14.4. that the Applicant is an independent creditor and has no association with the First Respondent.

14.5. that if the First Respondent remains in liquidation, the Applicant stands to suffer a loss of R 28 000 000.00, as unsecured creditor. The Applicant contended that he has a *bona fide* motivation to seek the rescue of the First Respondent.

14.6. that the Applicant is placing itself at risk by providing post commencement finance (PCF) as commitment to have business rescue to succeed.

14.7. that there is no indication from the Liquidators that the business rescue is impossible.

14.8. that the financial distress of the First Respondent was not due to any financial mismanagement but it arose from external factors such as out of ordinary weather patterns and loadshedding. The Applicant indicated that he had come with strategies that can alleviate the risk of weather and also has considered using generator in replacement of electricity during the loadshedding. The Applicant further indicated that the situation of loadshedding in South Africa is no longer a threat as before because we had no loadshedding for over seven (7) months.

14.9. that the Applicant is knowledgeable about farming business and also familiar with international market and that the plan is going to make the First Respondent to be solvent again.

14.10. that this application was not made to abuse the court processes, but considering the aforementioned submissions, the Applicant argues that there is a reasonable prospect of rescuing the First Respondent.

THE SECOND RESPONDENT'S SUBMISSIONS

[15] The Second Respondent made the following submissions;

15.1. that the Applicant's application in terms of Section 131 of the Act does not raise *bona fide* attempt to rescue the First Respondent and further that the Applicant has crafted this application with a purpose to abuse the court processes.

15.2. The Second Respondent alleged that the Applicant works in cahoots with Chicken Dropping in order to delay the finalisation of the application and the winding-up of the First Respondent.

15.3. that the opposition by the Second Respondent to an application for business rescue cannot be ignored as Section 132(2)(c)(i), read with Section 152 of the Companies Act, rejection of the plan by majority of creditors will normally sound the death knell of the proceeding and the court is unlikely to interfere with the creditors' decision, unless the attitude was unreasonable.

15.4. that the plan is not achievable as per the evidence produced by the First Respondent's neighbours and considering the photographs attached to the Second Respondent's answering affidavit which demonstrates that the land is exploited for the benefit of the representatives of the First Respondent.

15.5. that there are certain areas of the farm which are being neglected. The Second Respondent further submitted that Mr Brede's affidavit indicates that business rescue will not prosper.

15.6. The Second Respondent argued that the Applicant did not comply with Section 131 (2) of the Act, he alleged that the application was not properly served to the employees of the First Respondent.

15.7. that the business rescue proceedings are inherently urgent and, as such, the application should have been brought on an urgent basis. The failure to bring the application on an urgent basis demonstrates the lack of intention to prosecute this application to finality.

15.8. The Second Respondent emphasised that he is a secured creditor of the amount of R 55 000 000.00 (Fifty-Five Million Rand) and he is prejudiced by the late finalisation of the matter due to the conducts of the Applicant, First Respondent and Chicken Dropping.

COURT'S DISCUSSION AND FINDINGS

[16] The court took into considerations that the Second Respondent, initially, did not oppose the application for business rescue. The Second Respondent indicated that the plan, PCF, and the farm rescue report attached to the Applicant's founding affidavit convinced him that there are reasonable prospects to rescue the First Respondent.

[17] The Second Respondent began to doubt the intentions of the Applicant's application for business rescue in terms of Section 131(6) of the Act, when the matter was postponed *sine die* from unopposed roll of the 06th February 2024 due to the involvement of Chicken Dropping. The Second Respondent alleged that the postponement was orchestrated for the purposes of delaying the finalisation of the application.

[18] The Second Respondent suspects that Chicken Dropping, the First Respondent and the Applicant are working in cahoots to delay the matter and to abuse the business rescue processes. The Second Respondent was really sceptical about the motives behind the delays and suspects that there might be some collusion to benefit from the First Respondent's assets. The Second Respondent indicated that the application for business rescue is not *bona fide* but was made to abuse Section 131 (6) of the Act.

[19] The Applicant denied having any relationship with the First Respondent nor Chicken Dropping and indicated that the Second Respondent cast aspersion and made vexatious allegations that he cannot prove.

[20] The court finds that the Second Respondent failed to link the Applicant to any collusion with the First Respondent and Chicken Dropping. The court finds that the allegation that the Applicant and Chicken Dropping unduly benefit from the First Respondent's assets was not proven because the liquidators are still responsible pending this application to secure the First Respondent's assets for the benefit of all creditors. The liquidators did not inform this court of any person who is unduly benefiting from the First Respondent's assets.

[21] In the judgement of the Supreme Court of Appeal in ***PFC Properties (Pty) Ltd v Commissioner, South African Revenue Service and Others***[3] Weiner JA found:

"From what is set out above, <u>it is clear that the DRFT trustees have sought to use the legal process provided for companies, which may legitimately be rescued, for an ulterior purpose — to thwart the winding-up proceedings</u> and the consequences for the De Robillards that may arise therefrom. This stratagem, as stated in Villa Crop, 'subverts fundamental values of the rule of law'. The conduct of the DRFT trustees and PFC is so tainted by impropriety that this court must use the power it has to 'safeguard the integrity of its process'. Para 36

[22] *In so acting, the power of this court to non-suit the DRFT trustees is warranted. As a consequence, <u>their ill-fated application should not have been entertained by reason of its use</u>*

[3] PF(Pty) Ltd v Commissioner, South African Revenue Service and Others 2024 C Properties (1) SA 400 (SCA) (PFC Properties) at para 36-38.

in a scheme of abuse. Although the application was correctly dismissed by the Pietermaritzburg High Court, it fails in this court, on appeal, for different reasons. Para 37

[23] *PFC sought to oppose the liquidation application on the basis of the moratorium provided for in s 131(6) of the Act. But the legislature could not have intended that a business rescue application, tainted by abuse, would have that effect. In essence, because the DRFT trustees were non-suited for the reasons set out above, the doomed business rescue application was not 'made', as envisaged in s 131(6). Thus, the moratorium did not come into operation and did not suspend the winding-up proceedings. That being so, there was no impediment to the winding-up proceedings." Para 38*

[24] The court is always vigilant to guard against the abuse of Section 131 (6) of the Act as highlighted in the case of PFC referred in *supra*, paragraph 21. Furthermore, in the recent case of ***Globustarr Trading CO L.L.C v Mayana Properties Pty Ltd***[4], the application for liquidation was granted and the adjournment requested by the Director of Mayana was refused as the court found that the application for business rescue in terms of Section 131 (1) of the Act was not *bona fide* but an abuse of the court process.

[25] In the case of ***GCC Engineering (Pty) Ltd and Others v Maroos and Others***[5], the SCA states the following;

"Section 131 (6) of the Act does not change the status of the company in liquidation nor does it suspend the court order that placed the company under liquidation in the hands of the Master in terms of s 141 (2)(a)(ii) of the Act. The appointed of provisional joint liquidators must

[4] Globustarr Trading CO L.L.C v Mayana Properties Pty Ltd (2021/59389) [2025] ZAGP JHC 315 (18 March 2025), para 36-38

[5] GCC Engineering (Pty) Ltd and Others v Maroos and Others (901/2017) [2018] ZASCA 178; 2019 (2) SA 379 (SCA) (3 December 2018), para 17

proceed with their duties and functions to protect the assets of the company for the benefit of all the creditors of the company". Para 15

[26] *"in terms of s 131 (6) of the Act, it is a liquidation proceedings, not the winding up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to various creditors. The winding-up order is still in place; and prior to the granting or refusing of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors". Para 17.*

[27] The court had to examine whether the application for business rescue was made in good faith. In doing so, the court examined whether there are reasonable prospects of rescuing the First Respondent. The court had the insight of the plan, PCF and the Farm Rescue report, therefore, the court concluded that the Applicant met the requirements in accordance with Section 131(4)(iii) of the Act. The court is of the view that the application for business rescue was not made to abuse Section 131 (6) of the Act. The court's view is that the First Respondent might be solvent again and yield returns to the creditors.

[28] The Second Respondent argument that the Applicant did not comply with Section 131(2) of the Act cannot be sustained due to the fact that the Applicant attached the Sheriff's return of services to various affected persons including the First Respondent's employees as required by the Act.

COSTS

[29] The general rule is that the cost should follow the successful party and the court has discretion to grant or refuse costs at the end of each matter. The court's view is that the Applicant should be compensated for his legal cost for bringing the application before this court.

ORDER

[30] In the circumstances, the court make the following Order;

1. That, in terms of Section 131(1) as read with Section 131(6) of the Companies Act 71 of 2008 ("the Act"), the First Respondent be and hereby placed under supervision and in business rescue.

2. That, in terms of Section 131(5) of the Act, Jacobus Michiel van Tonder be and hereby appointed as interim business rescue practitioner of the First Respondent.

3. That, the Second Respondent is to pay party and party costs of this application, with scale B of the Counsel's fees.

[redacted]

E MASHAMBA
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

For the Applicant	:	Adv. Charles E. Thompson
Instructing attorney	:	Martin van Vuuren Attorneys
Email	:	sec.title@vanvuurenlaw.co.za ;
		lit1@badenhorstlaw.co.za
For the Second Respondent	:	ADV MP VAN DER MERWE SC
Instructed by	:	Baloyi Swart & Associates Inc
Email	:	herman@baloyiswart.co.za
		law@cnilaw.co.za
Heard on	:	27th November 2024
Judgment delivered on	:	25 April 2025