

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 2024-142409

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



Date: 25 February 2025

In the matter between:

DAIMLER TRUCK FINANCIAL SERVICES SA (PTY) LTD

Affected Creditor

IN RE:

LEHLOHONOLO MOABI

First Applicant

LIPALISA KOMOTA

Second Applicant

AFFECTED EMPLOYEES

Third Applicant

and

AMOGELANG LOGISTICS CC

First Respondent

(Registration No: 2008/044614/23)

(In Liquidation)

KAL TIRE MINING TYRE SERVICES SA (PTY) LTD

Second Respondent

(Registration No: 2011/008778/07)

REASONS

DE VOS AJ

[1] On 23 January 2025 this Court granted an order in the following terms:

1. The urgent business rescue application of the First, Second and Third Applicant is dismissed.
2. The costs of this application be costs in the administration of the insolvent estate of Amogelang Logistics CC.

[2] On 5 February 2024, the applicant requested reasons for the order. These are the reasons for the order.

CONTEXT

[3] The applicants sought, urgently, to place Amogelang Logistics CC (“the business”) under Business Rescue. The business was finally liquidated in terms of a court order granted on 10 April 2024. The order stands. The central legal issue to be decided is whether the applicants have shown that it would be just and equitable to order business rescue and that there is a reasonable prospect of rescuing the business in terms of section 131(4)(a)(iii) of the Companies Act 71 of 2008.

[4] The applicants, who allege they are employees of the business, emphasise the objects of the Companies Act. In particular, section 7(1) which states that the purpose of the Companies Act is to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law and to provide for the efficient rescue of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. The applicants contend that, as employees, their ability to earn a living is in jeopardy whilst the business is in liquidation – but that they have means to put food on the table if the business is placed in business rescue. In

addition, the applicants submit that they have shown that the business bears reasonable prospects of recovery and it would be just and equitable to grant business rescue.

[5] Daimler Truck Financial Services (Pty) Ltd (“the affected creditor”) accepts the purpose of business rescue within which the applicants frame their case. However, the affected creditor submits that, factually, the applicant has not shown a prospect of recovery and that it would not be just and equitable to order business rescue in this context.

[6] The Court considers, firstly the issue of reasonable prospects of recovery.

REASONABLE PROSPECTS OF RECOVERY

[7] A court may not grant an application for business rescue unless there is a reasonable prospect for rescuing the company. There must be a reasonable prospect of facilitating its rehabilitation so that it continues on a solvent basis or, if that is not possible, yields a better return for its creditors and shareholders than what they would receive through liquidation. (*Newcity Group (Pty) Limited v Pellow N.O. and Others* (577/2013) [2014] ZASCA 162 para 15).

[8] In deciding that question the court exercises a discretion in the wide sense – it makes a value judgment. As to what “reasonable prospect” means, it is a yardstick higher than “a mere prima facie case or an arguable possibility” but lesser than a “reasonable probability”. It must be a prospect based on reasonable grounds to be established by a business rescue applicant in accordance with the rules of motion proceedings. (*Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA)).

[9] Vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. (*Oakdene* para 16).

[10] Our courts have not approached the test by setting general minimum particulars of what would constitute a reasonable prospect in this regard. However, the Supreme Court of Appeal has held that the standard does not require:

“concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.”

- [11] The applicant need not provide a detailed plan, but must establish grounds for the reasonable prospect of achieving recovery. The recovery must be realistic. Particularly where, a court has already found that it is just and equitable for the insolvent business to be wound up and, as in this case, importantly, it did so without any objection from shareholders, creditors or employees.
- [12] One would not want to send a hopelessly insolvent company with little prospect of commercial rehabilitation through a process of business rescue only for its winding-up to be later resumed after an unnecessary waste of time and resources to the prejudice of the waiting creditors. (*Forty Squares (Pty) Ltd and Another v Noris Fresh Produce (Pty) Ltd t/a Golden Harvest and Others*; 2023 (5) SA 249 (WCC) para 20).
- [13] The Court must then determine if this standard has been met. The Court will consider the evidence relied on by the applicants and the affected creditor, as well as certain information placed before the Court by the provisional liquidators.

Provisional liquidators

- [14] The provisional liquidators were joined to these proceedings on 31 December 2024. The matter was set down for the urgent week of 14 January 2024. Given these timeframes, the provisional liquidators had not yet been able to apply in terms of section 18(3) of the Insolvency Act for leave to have their powers extended, to appoint attorneys and to defend against any legal action. In this context, the provisional liquidators presented a report on its findings in relation to the business. The report was presented in the late afternoon on 8 January 2025. The affected creditor then incorporated the report into a supplementary affidavit and itself presented further evidence based on the information contained in the report, under oath. The applicants did not file a response to the report or the supplementary affidavit filed by the affected creditor.

- [15] The status of the evidence contained in the report and incorporated into the supplementary affidavit has to be determined. The applicants object to the admissibility of the evidence on the basis that it is hearsay as it has not been presented under oath or in the format of an affidavit.
- [16] The affected creditor submitted that in its supplementary affidavit the contents of the report had been placed under oath – albeit as hearsay. In this supplementary affidavit, the affected creditor explicitly relied on the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 which permits the admissibility of hearsay evidence in certain circumstances.
- [17] The evidence in the supplementary affidavit relating to the report is hearsay. The court must consider the relevance of this report. It is a report filed by the provisional liquidators in this matter and relates to the financial affairs of the business. It is directly relevant. The Court must also weigh the reason the evidence is hearsay. The common cause explanation is that the provisional liquidators have not had the time to be granted the necessary powers to appoint lawyers in order to place the evidence before court in the format of an affidavit. The explanation is sound and weighty. The Court considers whether the applicants will be prejudiced by the admission of the evidence. The applicants have not presented such prejudice. The applicants had the opportunity to respond to the supplementary affidavit and choose not to.
- [18] The hearsay evidence is relevant. The reason it is not presented by the person on whose credibility it relies, is clearly explained – and not disputed. There is no prejudice to the applicant in this context. The Court admits the hearsay evidence contained in the affected creditor's further affidavit in terms of section 3(1)(c) of the Law of Evidence Amendment Act.
- [19] Aspects of the report need to be quoted directly. The report makes several points, the first is that the basic premise that under liquidation the employees would not be able to earn a living is disputed:
- “11. With the limited powers as per our certificates of appointment and the limited information and documents received to date, we, the liquidators, specifically report on the inconsistencies in the founding affidavit of the applicant and our preliminary findings on the bank statements of Amogelang Logistics CC.
12. I will refer to the paragraphs of the applicant's founding affidavit and comment thereupon ad seriatim.

13. At paragraph 26, the applicant states that all the employees of Amogelang Logistics CC will effectively have their employment contracts terminated by virtue of the winding-up order.

14. This is, in essence, incorrect. Section 38 of the Insolvency Act 24 of 1936 deals with the effect of liquidation on employment contracts and provides that employment contracts are suspended from the date of the provisional order of liquidation of the employer.

15. I further refer you specifically to section 98A(1)(a), (b) and (3) of the Insolvency Act 24 of 1936(quoted in full). Therefore section 98A entitles the employees to preference claims in liquidation for arrear salaries, wages, leave and payments due for any other form of paid absence.

16. At paragraph 43, the applicant states that no payments will be made towards employees' salaries, provident fund, and medical aid benefits. I refer you to section 386 of the Companies Act, specifically subsection 4(f) and (i).

17. The liquidators may elect to trade the company in liquidation if it would be to the benefit of the generally body of creditors and therefore would be able to continue payment towards the employees' salaries, provident fund, and medical aid benefits should such payments and/or benefits be contained in the employees' employment contracts.

[20] The liquidators contend that the premise of the application, that the employees would be better off under business rescue rather than liquidation is contradicted by specific provisions in the Insolvency Act and Companies Act.

[21] Second, the liquidators raise grave concerns regarding aspects of the applicants' founding affidavit:

"24. At paragraph 45, the applicant attached the financial statements for the year ended 30 April 2024 of Amogelang Logistics (CC).

25. We did not have adequate time prior to this report to investigate the financial statements and compare them to the actual source documents in an attempt to confirm the figures reflected in the financial statements: therefore, we would not be able to comment on the correctness of the statements.

26. Notwithstanding the above, we proceeded to do a simple comparison of the financial statements and historical bank statements. From the financial statements attached to the applicant's founding affidavit, the statements confirmed income tax payable to SARS exceeding R 250 000, and after the perusal of the historical bank statements, no payment to SARS was made for the income tax due.

27. Therefore, Amogelang Logistics is not tax compliant and/or diligently attending to the statutory duties in terms of the Tax Administration Act, and further investigations will be conducted hereon."

[22] Third, the bank statements raised "some questionable transactions flagged on the statements" which included the following:

“30. Several significant payments referenced as “loan to ATS” were made on a monthly basis from Amogelang’s account, and these payments should be calculated and recovered. ATS does not appear as a recovery in the account receivable age analysis attached to the applicant’s founding affidavit, and these transactions should be investigated.

31. In addition to the payment of salaries for Amogelang’s employees, several payments referenced as “Farm Worker Salaries” are made from Amogelang’s account. These payments should be investigated, and if it is confirmed that Amogelang Logistics CC is paying for another entity’s employees and not receiving any benefit for the payment, then those payments would constitute a disposition in terms of the Insolvency Act.

32. Each month, two debit orders with descriptions SBsa Homel xxx3449 and SBsa Homel xxx2073 are paid from Amogelang’s account.

33. SBsa Homel is the abbreviation for a home loan with Standard Bank.

34. These payments total more than R 43 000 per month, and the significance thereof is that there is no bond registered on Amogelang’s immovable property and therefore no bond payments.

35. Therefore, there may be a possibility that Amogelang Logistics CC is paying a bond on a third party’s immovable property. These payments will be investigated and dealt with accordingly.”

[23] The core issue is that the liquidators conclude, based on these paragraphs:

“38. Consequently, I believe there exists sufficient factual cause to establish reasonable suspicion that the trade dealings and affairs of Amogelang Logistics CC warrant investigation through the mechanism of section 417/418 of the Companies Act.”

[24] The liquidators then refer the Court to the matter of PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others 2024 (1) SA 400 (SCA). Therein Weiner JA carefully considered the stratagem of the applicants in the application for business rescue together with the relevant timeline of events leading to the business rescue applications to ensure the business rescue application was not abuse of court process. Weiner JA further considered the matter of Villa Crop Protection (Pty) Ltd Bayer Intellectual Property GmbH 2023 (4) BCLR 461 (CC) where the Court dealt with the fate of proceedings launched by a party with an ulterior motive.

[25] The liquidators state –

“42. Considering the recent applications launched in the matter of Amogelang Logistics CC, namely the application for liquidation, application for leave to appeal, and the two business rescue applications, the court should consider if the launch of the business rescue application was again a stratagem of the member of the entity,

and whether the applicant had any intention of prosecuting the application to its conclusion and that it does not constitute an abuse of court process.

46. As previously mentioned, we believe there exists sufficient factual cause to establish reasonable suspicion that the trade dealings and affairs of Amogelang Logistics CC warrant investigation through the mechanisms of Section 417/418 of the Companies Act and should the application for business rescue be dismissed, the liquidators will immediately approach court and obtain leave to convene the enquiry.

[26] Fourth, the liquidators state that the court must consider if there is any prospect of success should the company be placed in business rescue. In this regard the liquidators state that -

“44. The current liabilities of Amogelang Logistics are as follows:

44.1 Mercedes Benz Financial Services	R 1, 809, 098.99
44.2 Daimler Truck Financial Services	R 4, 841, 377.98
44.3 Ticktech (Pty) Ltd	R 104, 246. 41
44.4 SARS PAYE	R 1, 799, 819.00

45. SARS further confirmed the taxpayer declared a loss for Income Tax purposes and not a profit as per the financial statements attached to the applicant's founding affidavit.

[27] In summary, the liquidators state –

- 27.1 The premise that employees will be prejudiced under liquidation and remain gainfully employed under business rescue, is not borne out by the statutory scheme.
- 27.2 They have grave concerns regarding aspects of the applicant's founding affidavit and whether it squares with the financial information in the liquidators' possession.
- 27.3 They have identified questionable transactions, in particular that salaries of non-employees and third party's home loans have been paid from the account of the business. These transactions ought to be investigation in terms of section 417/418 of the Companies Act.
- 27.4 The prospect of recovery must be considered in light of the debt owed by the business and that it has declared no profit for tax purposes.

[28] The affected creditors submit that based on the further findings presented in the report and the supplementary affidavit, it is clear that it would not be in the interest of any of the affected parties to have the business placed in business rescue, that the entity should remain in liquidation and that the liquidators should be allowed to conduct the necessary section 417 / 418 enquiries. A business rescue practitioner would not be able to do so. The liquidators, upon being provided with all information, would be able to assess if it would be in the best interest of all affected parties and the general body of creditors for them to continue to conduct the business whilst they continue with the required enquiries. If it is so determined that it would be in the best interest of the parties, the liquidators would then be able to continue to pay the salaries of the employees until all enquiries and matters are finalised.

[29] The Court gave the applicants an opportunity to make submissions based on the evidence. The applicants pointed out that one aspect of the report relates to a creditor of another entity, being Amogelang Transport (Pty) Ltd, and not the present business.

Prospect of recovery presented by the parties

[30] The applicants contend the business stand a prospect of recovery. The main points they rely on this regard are:

- 12.1 The applicants present the Court with two contracts with the Department of Education, one in Limpopo and one in Gauteng. The contracts are for a period of five years, this being the first year of the contract. The applicants then attach the contracts. They contend that the business will be able to generate an income based on these contracts.
- 12.2 The applicants attach the financial statements for the year ending in April 2024 and submits that this shows that business does make a profit and can cover its obligations.
- 12.3 The applicants also rely on the general benefits of a business being placed under business rescue and contend that this would place the business in a “far better position”.
- 12.4 There is a list of creditors – which shows only a “few creditors”.
- 12.5 There are assets owned by the business which can be sold to assist in the turnaround. The asset value is approximately R 26 000 000.

12.6 The business generally generates a profit.

[31] The applicants submit that they have shown a prospect of recovery.

[32] The affected creditor responds as follows. In relation to the contracts with the Department of Education:

32.1 The contract was entered into after the business had been finally liquidated, which was known to Mr Mere who signed the contract at the time. The contract is therefore invalid.

32.2 The contract is incomplete (as attached to the FA). The omitted pages make it impossible to see what the actual value of the contract income is.

32.3 Lastly, on the terms of the contract itself, it provides in clause 21 that it would be terminated immediately in the event of liquidation or if it was unable to pay any amounts due to their creditors as and when they fell due.

[33] The second “agreement” is not a contract, but a letter from the Department indicating that they accepted a bid from the business. In any event, the letter provides that the bid was accepted on condition that the business sort out their tax matters. This has not happened – and the failure to comply with the condition means that the acceptance is invalid.

[34] The affected creditor submits that these are, on the applicants’ version the only income generating contracts to support the applicants’ case for prospects of recovery. They are, according to the affected creditor no true contracts as they are invalid on their own terms.

[35] As for the “few creditors” the affected creditors plead that Mr Moabi places no documents or records before the Court in which all amounts due to creditors or employees on a monthly basis are stated, nor does he place the actual recent statements from the creditors of the business before the court, in order to ascertain the true amounts in arrears.

[36] The affected creditor also refers to another set of creditors. Whilst the business was placed in liquidation by one creditor (Kal Tires), another set of creditors (Kalamazoo Coaches) who were unaware of the existing liquidation proceedings, sought to place

the business in liquidation, as well. This second set of creditors do not appear on the list of creditors provided by the applicants.

[37] The affected creditor submits that Mr Moabi appears almost elusive in what he wants to present to the above Honourable Court in support of the application for business rescue. He is clearly not forthcoming with any information which proves that there are any reasonable prospects of success through business rescue.

[38] Mr Moabi provides a list of available assets for alleged turn around which includes an overgrown stand and funds available in the bank account. But it is clear that these funds, if one has consideration for what was said by Mr Moabi, will be utilised towards salaries. There is still absolutely no list of all available assets which can serve as security for their indebtedness to creditors. Despite providing a little bit more of the information related to the contracts with the Department of Education, Mr Moabi still does not all or the full 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.

[39] The affected creditor presses on the court that the applicants rely on speculative suggestions – such as the effect of business rescue will place the applicant in a “far better position” and that the applicant will be able to secure “funding” and “further contracts” once under business rescue. This, contends the affected creditor, is not enough.

Prospect of recovery

[40] The standard demanded from the applicants is not to prove a probability of recovery. It is lower. It need also not provide detailed plans of how the business will be turned around – that will come with the business practitioner. However, the applicants must show the Court some basis for its submission that there is a prospect of recovery.

[41] The applicants pressed, particularly at the hearing, the right to earn a living of the employees of the business. This must weigh with the Court. The ability to earn a living provides the wherewithal to exercise many of the rights in the Bill of Rights.

[42] In addition, in *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 27 the Supreme Court of Appeal has specifically linked the right to work with the right to dignity:

“[t]he freedom to engage in productive work... is indeed an important component of human dignity... for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.”

- [43] The ability to earn a living is a component of the right to dignity.
- [44] It is further clear that section 7 of the Companies Act demands that the Court must consider the ability to earn a living of employees as a factor in considering whether to grant business rescue.
- [45] The difficulty is that the report provided statutory provisions which contradicted the premise of the applicants’ submission: that employment is certain under business rescue and unemployment certain under liquidation. Specifically, the report refers to section 98A which entitles the employees to preferential claims in liquidation for arrear salaries, wages, leave and payments due for any other form of paid absence.
- [46] In relation to the applicants’ allegation that no payments will be made towards employees’ salaries, provident fund, and medical aid benefits, the liquidators refer to section 386 of the Companies Act, specifically subsection 4(f) and (i) which provide that the liquidators may elect to trade the company in liquidation if it would be to the benefit of the generally body of creditors and therefore would be able to continue payment towards the employees’ salaries, provident fund, and medical aid benefits should such payments and/or benefits be contained in the employees’ employment contracts.
- [47] The statutory scheme does not support the applicants’ submission. The applicants could not counter these statutory provisions or the conclusion drawn by the liquidators in this regard. The applicants have not identified the specific basis on which they contend that these sections would not sufficiently protect them based on the facts of this case.
- [48] In addition, even if the applicants’ submission was sound, that employment was secure under business rescue and that there was no safeguarding of the employees’ rights under liquidation – it had to be weighed against the clear jurisdictional requirement of section 131 which is that there had to be a prospect of recovery. It cannot be that the impact on workers, which weighs heavily with this Court, overrides

the jurisdictional requirement of section 131 of the Companies Act. If there is no prospect of recovery, the Court cannot grant business rescue – even in the face of an impact on employees' rights.

[49] It further weighs with the Court that the applicants have not disputed the contents of the liquidator's report relied on by the affected creditors. The Court therefore has concerns regarding transactions made from the business' account. The applicants provided the Court no comfort in response to this evidence. The liquidators raised concerns regarding aspects of the founding affidavit. Again, the applicants provided the Court with no counter to these allegations. The liquidators flagged certain payments as being paid for third parties from the business' account, which should be investigated in a section 417/418 process. And again, the applicants provided no response to these serious allegations.

[50] The applicants' have not shown a prospect of recovery, particularly in light of the uncertainty of the validity of the contracts with the Department and the flow of money to be expected from these contracts. These are – save for the hope of fundraising referred to by the applicants – the only source of income identified. In any event, the liquidators' report and evidence of a longer list of creditors diminishes the prospect of recovery.

[51] The Court is in the position where there is nothing reliable before it showing any flow of money in terms of valid agreements into the business. The Court also does not have any sense of how much money will be flowing in and no true sense of what the business' obligations or creditors are. The applicant has in this way failed to show a prospect of recovery.

[52] The Court is also left with changing and conflicting evidence regarding the business' tax compliance and list of creditors. With no clarity and no comfort in this regard, the Court is left without a basis to conclude that there is a prospect of recovery.

[53] In addition, the report clearly identified the case law and the basis on which it contends that the present application is an abuse to avoid the investigation powers which comes with section 417/418 of the Companies Act – which are needed based on the flagged transactions. The applicant has also failed to dispel these serious allegations in the report that the present application is an abuse of process.

[54] The applicants do not have to provide a clear plan, and do not have to meet a general list of requirements. It would set the bar too high. However, in the circumstances of this case, where there is so much which weighs against the applicants' case, more was required from the applicants to show a prospect of recovery.

[55] On this basis the application is dismissed. The scheme of section 131 is that the applicant has to prove that it is just and equitable and that there is a prospect of recovery. This means that, even assuming that the applicants had made out a just and equitable case, the Court cannot grant the relief as there are no prospects of recovery.

COSTS

[56] The affected creditor did not press for costs and submitted that costs be costs in the liquidation. There was no opposition to this proposal by the applicants in the event the Court dismissed their application. In light of this position of the parties, the Court grants an order that costs be costs in the liquidation.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

For the applicant: K Matshwane
Instructed by: Lebese Attorneys

Counsel for respondents: CLH Harms
Instructed by: Strauss Daly Attorneys

Date of hearing: 16 January 2025
Date of order: 23 January 2025
Date of request for reasons: 5 February 2025

Date of reasons:

25 February 2025