

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-063817

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
_____	_____
DATE	SIGNATURE

In the matter between:

SALMON DANNHAUSER NEL N.O First Applicant

MUKS BUSINESS ENTERPRISE CC
T/A MUKS AUTOBODY (in business rescue) Second Applicant

and

MUKELA MULAUDZI First Respondent

MAXIMUM INVESTMENTS (PTY) LTD Second Respondent

ANTKORS (PTY) LTD Third Respondent

THE SOUTH AFRICAN REVENUE SERVICES Fourth Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 05 May 2025.*

Summary: A Business Rescue Practitioner (BRP) is statutorily empowered to conclude that there is no reasonable prospects for the company to be rescued and to apply to Court for an order (a) discontinuing the business rescue proceedings and (b) placing the company into liquidation. Once a company is under business rescue, the BRP has full management control of the company in substitution for its board and pre-existing management. A Court must discontinue business rescue proceedings on the strength of the conclusions made by the BRP. The replaced board or pre-existing management cannot conclude otherwise. The view that there are no reasonable prospects for the company to be rescued is to be solely formed by the BRP and no one else.

Where a company is unable to pay its debts when they become due, such a company is liable to be wound up by the Court. A company that enters the business rescue proceedings is one that would have formed a view that it is reasonably unlikely to pay all of its debts as they become due and payable within the immediately ensuing six months. The reasonable likelihood is that such a company will become insolvent within the immediately ensuing six months. It has been proved to the satisfaction of this Court that the company is, taking into account its contingent and prospective liabilities, unable to pay its debts and it appears to be just and equitable that the company should be wound up. Held: (1) The draft order presented by the applicants is made an order of Court.

JUDGMENT

MOSHOANA, J

Introduction

- [1] By definition, business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed by amongst others providing for the temporary supervision of the company, and management of its affairs, business and property¹. A company is financially distressed if 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 to be reasonably likely that the company will become insolvent within the immediately ensuing six months².
- [2] A company faced with a financial distress is entitled to resolve that it voluntarily begin business rescue proceedings and place itself under supervision, if its board has reasonable grounds to believe that (a) the company is financially distressed; and (b) there appears to be a reasonable prospect of rescuing the company. A rescue must mean a facilitation to rehabilitate the company from the doldrums of financial quandaries.
- [3] The above said, before this Court serves two applications. The first application is launched by Mr Salmon Dannhauser Nel (BRP) in his official capacity as a business rescue practitioner, appointed in terms of section 138(1) of the CA, for Muks Business Enterprise CC t/a Muks Autobody (Muks). In the first application, the BRP and Muks seek an order discontinuing the business rescue proceedings and placing Muks under final or alternatively provisional liquidation, together with an order of costs. The second application is launched by Mr Mukela Mulaudzi (Mr Mulaudzi), the sole member of Muks. In the second application, Mr Mulaudzi is seeking an order setting aside the resolution adopted by Muks to begin business rescue proceedings and placing itself under supervision on the grounds that there is no reasonable basis for believing that it is financially distressed as envisaged in section 130(1)(a) of the CA. Alternatively, that the BRP is removed in terms of the provisions of section

¹ See section 128(1)(b)(i) of the Companies Act 71 of 2008 as amended (CA).

² See section 128(f)(i)(ii) of the CA.

139(2) of the CA. Mr Mulaudzi also sought punitive costs order against the BRP.

- [4] Another feature of the two applications is that upon observing that Mr Mulaudzi was allegedly dissipating the funds of Muks, the first application was accelerated to be heard as one of urgency. As a result, the present application was converted into a special motion, which served before me. Additionally, Muks Logistics (Pty) Ltd (Logistics), an alleged creditor of Muks, was joined after seeking an intervention. In relation to the intervention application, what remained as a live issue before me was the issue of costs.
- [5] It must be stated upfront that should this Court place Muks under liquidation, be it provisional or final, the entire second application will be rendered moot. Effectively, this Court as contemplated in section 132(2)(a)(ii) of the CA would have ended the business rescue proceedings. Once ended, the resolution of beginning business rescue and the appointment of a BRP would become academic and moot.

Brief factual exposition and evidence

- [6] In the present application a lot which was unnecessary has happened. A simple liquidation application generated in excess of 500 pages to a point that such a simple application was crowded out of the urgent Court. Accordingly, it is obsolete in this judgment to punctiliously narrate all the happenings in this application. Only salient facts will be rendered in this judgment. On 31 October 2023, Mr Mulaudzi signed a resolution which was supported by a sworn statement. Importantly, the resolution stated the following:

“RESOLVED THAT

- (1) By unanimous agreement of the members and with effect from 31 October 2023, MUKS Business Enterprise (hereinafter referred to as the ‘Close Corporation’) **voluntarily** begins business rescue proceedings and that the Close Corporation be placed under supervision as envisaged

in Section 129(1)..., as the member has **reasonable grounds to believe** that:

- (a) The Close **Corporation is financially distressed**; and
- (b) There appears to be a reasonable prospect of rescuing the Close Corporation.

[7] Under oath, Mr Mulaudzi stated amongst other things, the following:

“7.2 The Close Corporation has been facing significant cash flow challenges, which in the main can be attributed to delayed client payments, unexpected expenses, and market fluctuations, resulting therein that the Close Corporation’s cash flows have been insufficient to meet its operational and financial obligations. This in turn has negatively impacted the Close Corporation’s working capital reserves, limited its ability to effectively adapt to market changes, and hamstrung its ability to seize identified growth opportunities.

7.3 The aforementioned led to a sharp decrease in revenue which ultimately resulted in trading losses that are systematically eroding the Close Corporation’s working capital and cash reserves.

7.4 Although austerity measures have been put in place to mitigate its financial burdens, the severely restrained cash flow situation is untenable and has led to accumulation of substantial arrears.

7.6 As a result of the factors mentioned hereinbefore the Close Corporation will not be in a position to settle trade and other creditors in full in the short term. **As such the Close Corporation is financially distressed** as defined in section 128(f) of the Act, as amended, in that it appears reasonably unlikely that the Close Corporation **will be able to pay all its debts as they become due and payable** within the next six months.

[8] As a sequel of the above, on 2 November 2023, the first BRP was appointed. For reasons not to be fully entertained in this judgment, on 1 February 2024, the first BRP resigned. Whereafter, Mr Mulaudzi resolved to appoint the first applicant as a BRP effective 1 February 2024. From 7 February 2024 up to 7

June 2024, the BRP placed various requests in order to facilitate the rehabilitation of Muks. These attempts, on the version of the BRP, were fobbed and stonewalled. It is unnecessary for the purposes of this judgment to considerably entertain the reasons for and against the fobbing and stonewalling. It suffices to mention that in that period of five months, a business plan was not produced as required by the CA. Such failure to produce a plan is evidence enough that rehabilitation was not facilitated.

[9] The BRP discovered that the funds of Muks were syphoned out of its bank account by Mr Mulaudzi. In an attempt to prevent a further haemorrhage, the BRP resolved to freeze the bank account. With considerable regret, the BRP was outwitted. Invoices were issued where the funds belonging to Muks were diverted to another bank account. In the midst of all these happenings, on 19 June 2024 an invisible and unidentified person masquerading as the BRP filed with the CIPC of the Republic of South Africa, a notice terminating the business rescue proceedings. Given the approach this Court takes at the end, it is unnecessary for this Court to unmask the invisible.

[10] On the version of the BRP, Muks has about 12 creditors which Muks is unable to pay. The total amount owing to those creditors is in the region of R8 000 410.12. The version of Mr Mulaudzi with regard to these creditors is so far-fetched and untenable. It must be rejected on the strength of the evidence exposed by the BRP on affidavit. It is equally unnecessary for the purposes of this judgment to discuss the version of Mr Mulaudzi herein. The BRP alleged that Muks is both factually and commercially insolvent. With considerable respect, for very flimsy reasons, Mr Mulaudzi disputes this.

[11] As indicated elsewhere in this judgment, Mr Mulaudzi alleged that he was alerted by his counsel that he made a *bona fide* mistake by alluding that Muks owes a substantial amount of rental. The discovered facts are that Logistics is the *de jure* tenant whilst Muks is a *de facto* tenant. As such, Mr Mulaudzi was in error when he contended that the landlord has an executable judgment against Muks. On the basis of that revelation, the second application was launched. On

Mr Mulaudzi's version Muks is now liquid and is able to pay its debts when they become due and payable.

Analysis

[12] Given what was stated at the dawn of this judgment, it is apposite for this Court to consider the liquidation application first. It must be stated upfront that the prevailing legislation dealing with winding up of companies does not provide for provisional or final liquidation. Section 344 of the Companies Act (Old Act)³ sets out the circumstances under which company may be wound up by Court. In terms of section 344, a company may be wound up if any of the eight circumstances exists. In the present application, the BRP alleges that Muks is unable to pay its debts and that it is just and equitable for it to be wound up.

Is Muks unable to pay its debts?

[13] As a departure point, in October 2023, the sole member of Muks, under oath, stated in no uncertain terms that for a barrage of reasons, it is financially distressed and unable to pay its debts when they fall due. The fact that, for obvious reasons, the member seeks to make a *volte face*, is of no moment. The statement made by the member had legal consequences. One such consequence is that a BRP was appointed. A BRP is appointed to facilitate the rehabilitation of a financially distressed company. Most importantly, section 140(1)(a) of the CA provides that the full management control of the company vests within the powers of the BRP of a company under business rescue. Accordingly, it is the BRP who can indicate to any Court that a company under business rescue is no longer in financial distress and is able to pay its debts when they fall due.

[14] The version of Mulaudzi that Muks does not have creditors is far-fetched and inconsistent with a statement he made under oath that Muks was financially distressed. By way of an example, it is undisputed that South African Revenue

³ Act 61 of 1973.

Services (SARS) is being owed money. Because Muks is unable to pay the SARS debt it allegedly sought to enter into arrangements for payment of the debt owed and due to SARS. Section 345(1)(a) of the old Act provides that a company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted in the sum has served a demand and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Other than a bare denial, Mulaudzi provides no evidence that SARS has compounded the debt to its satisfaction. Instead there is evidence in the form of correspondence dated 24 July 2024 from SARS indicating that no arrangements with SARS were captured on its system.

- [15] Accordingly, this Court is satisfied that Muks is unable to pay its debts, as such the circumstances contemplated in section 344(f) read with section 345(1)(a) of the old Act has arisen. Such circumstances give rise to a winding up of Muks.

Is it just and equitable that Muks must be wound up?

- [16] As a departure point, it is just and equitable for the benefit of the body of creditors to wind up a company that is unable to pay its debts when they fall due and payable. Although Mr Mulaudzi seeks to justify his conduct of not cooperating with the BRP, there is clear evidence of non-cooperation. Twenty five days after the appointment of the BRP, no plan was developed as required by section 150(5) of the CA. This Court disagrees with a submission or view that the lapse of the twenty five days marks the automatic lapse of the business rescue proceedings. Section 132 deals with the duration of business rescue proceedings. Section 132(3) implies that the lifespan of business rescue proceedings is three months, which period is extendable by a court order. Given what the plan must contain, as prescribed by section 150(2) of the CA, absent cooperation from member(s) of a company, it is an arduous or impossible task to develop a plan. Section 137(2)(b) of the CA expressly impels Mr Mulaudzi to exercise any management function with the express instructions or direction of the BRP. All the instructions and directions issued by the BRP cannot be viewed to be unreasonable. A submission that the BRP could have

obtained certain of the requested information from third parties is, with respect, preposterous to the extreme. Cumulatively the non-cooperation must lead to a just and equitable basis to wind up a company. Regard being had to the purpose of business rescue process, lack of cooperation simply deepens and accelerates the need to wind up a financially distressed company.

[17] Mr Mulaudzi admits that during the business rescue proceedings, in clear contradiction with section 140(1)(a) of the CA, he had to divert the funds of Muks in order to pay the debts of Muks. This conduct on its own justifies and provides equitable basis for Muks to be liquidated. This Court, in *STS Tyres (Pty) Ltd v Bamboo Rock (Pty) Ltd (STS Tyres)*⁴, expressed itself in the following terms, which supports the requirements of just and equity:

“[28] A company that begins business rescue proceedings is one that is financially distressed. A company that is financially distressed is no different from a company that is unable to pay its debts when they fall due in terms of section 344(f) of the Companies Act, 1973. A company that is unable to pay its debts may be wound up by a Court. The reality is that a company in financial distress is a candidate for both winding up and business rescue. Should one of the possible processes commence before the other, different legal consequences may arise. For an example, a company which is unable to pay its debts, although a candidate for winding up, may be rescued to a point of being able to pay its debts. However, in my view, such does not detract from the fact that a Court may, if it is proved to its satisfaction that a company is unable to pay its debts, taking into account the contingent and prospective liabilities, wound up that company.”

[18] Accordingly, on application of the just and equitable barometer, this Court is satisfied that it is just and equitable for Muks to be placed under liquidation.

The jurisdictional requirement to apply to Court

⁴ (2024-012285) [2024] ZAGPPHC 490 (30 May 2024)

[19] There was a debate before this Court that since the BRP failed to investigate the affairs of Muks, he should be removed and shall not be in a position to approach this Court under section 141(2) of the CA. There is no merit in that debate. The jurisdictional requirements of the section are (a) a conclusion by the BRP that (i) no reasonable prospect of rescue exists; (ii) business rescue must discontinue. A conclusion arises after an assessment of facts. Conclusion simply means the end or finish of an event or a process. The conclusion that there is no reasonable prospects of rescue is solely that of the BRP. It ought to be accepted that the BRP is a member in good standing of a legal, accounting or business management profession and he is accredited by the CPIC. The discontinuation of the business rescue proceedings axiomatically happens when the BRP concludes that no reasonable prospects of rescue exists. It is for those reasons that section 141(2)(b)(ii) of the CA provides that if there are reasonable grounds to believe that the company is no longer in financial distress, the business rescue proceedings may terminate by notice. Regard been had to the standing of the BRP, it is befitting for him to make the conclusions alluded to above. A member of a company under business rescue has no legal standing to make the conclusions. Equally, a member lacks a standing to conclude that a company under business rescue is no longer financially distressed. Without necessarily deciding the issue of the setting aside of the resolution of October 2023, this Court takes a preliminary view that Mr Mulaudzi fails to meet the higher threshold set in section 130(2) of the CA. *En passant*, this Court states that the belated advice by counsel is nothing but legal machination. Even if, for some weird reasons, this Court accept that the rental liability was false and misleading, the resolution of October 2023 was perspicuously predicated on a variety of reasons.

[20] Accordingly, in my view, the jurisdictional requirements to launch the liquidation application exists. This Court is satisfied that the conclusion to apply for liquidation is the correct one.

The counter application

[21] Since this Court is minded to place Muks under liquidation, the prayers in the counter application will become moot and academic. In terms of section 132(2)(a)(ii) of the CA, once a Court has converted the proceedings to liquidation proceedings, as this Court is of that mind, business rescue proceedings end. This Court has taken a view to entertain the liquidation application first, thus the business rescue proceedings must end. The ending thereof spells the end of the role of the BRP and the resolution to begin business rescue proceedings becomes ineffective in law. Thus, the counter application stands to be dismissed. This Court holds a view that applications to set aside a resolution and the removal of a BRP must of necessity precede the application contemplated in section 141(2) of the CA. To my mind, the counter application ought to have been withdrawn or not launched in the face of an application for termination of the business rescue proceedings and an application to place Muks on liquidation. To this Court's mind a challenge to a resolution contemplated in section 129 must be mounted before a BRP is appointed. Once a BRP is appointed, water sails quietly under the breach. The proverbial horse would have bolted. This is particularly the case if the provisions of section 129(3) of the CA are appropriately considered. It would be foolhardy for a sole member like Mr Mulaudzi to within 5 days take another resolution to appoint a practitioner in the circumstances where he may have acted on false and misleading information. In the counter application no order is sought to set aside the two resolutions to appoint the BRPs.

[22] On account of all the above reasons, I make the following order:

Order

- 1. The draft order marked X and annexed to this judgment is hereby made an order of this Court.**

GN MOSHOANA
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

As per the annexed draft order marked X.

Date of the hearing: 29 April 2025

Date of judgment: 05 May 2025