IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

Case no: 17260/22P

In the matter between:

ABSA BANK LIMITED **Applicant**

and

BENRITE PROPERTY INVESTMENTS CC **First Respondent**
(Registration Number 1987/029348/23)
ANUSHA PILLAY **Second Respondent**
ANUSHA PILLAY NO **Third Respondent**

JUDGMENT

Ainslie, AJ.

[1] This application was brought by the applicant for the winding up of the first respondent. The applicant loaned the first respondent monies under two loan agreements, secured by mortgage bonds, while surety was provided by the third respondent and her now deceased husband. The second and third respondent are the shareholders of the first respondent.

[2] An application to intervene by the members was brought by Ms Pillay in her own capacity, and in her capacity as the executrix of her husband's deceased estate. This application was not opposed and was granted at the hearing of the opposed

motion. The respondents brought a counter application and opposed the liquidation application.

[3] The first to third respondents shall collectively be referred to as the respondents herein, while the second and third respondents shall be referred to collectively as the members.

[4] The initial demand by the applicant to remedy its breach, being the default of payment of the loans, was made to the first respondent in June 2021. This resulted in four payments being made, totalling just under R2.5 million. Thereafter letters of demand were despatched, including by service by the sheriff, on 22 August 2022, followed by statutory demands on 19 October 2022, without the first respondent making any further payment.

[5] The application for liquidation was launched on 16 January 2023 and on 26 August 2024, the order provisionally winding up the first respondent was granted.

[6] The application for the winding up of the first respondent was opposed, and a counter application was brought by the respondents for the first respondent to be placed under business rescue. It is common cause that should the counter application fail, the liquidation was to be confirmed. It is furthermore common cause that the first respondent is both commercially insolvent and financially distressed, even if its assets exceed its liabilities, which is not evident on the papers. Common cause also is that the first respondent is no longer trading as a property development company, with its activities restricted now to that of a property-owning close corporation.

[7] Not in dispute is the respondents' intention to sell off the properties owned by the first respondent and to pay the debts owed from the proceeds of the sales. To clarify, there are two main creditors, that is to say the applicant, whose loans are secured by mortgage bonds and the personal suretyships of the members, and the body corporate of the sectional title properties. The debt to the body corporate on the respondents' own version was just over R1.7 million[1] at the time of their affidavit commissioned on 1 November 2024. The debt to the applicant is disputed, without

[1] Counter application, founding affidavit para 59.6.

addressing that discrepancy here, suffice to say at present it is between R7 million and R12 million.[2]

[8] It became evident that the crux of the decision to be made was, as the argument went, between 'winding up' and 'winding down'. Put differently, is the close corporation to be placed in liquidation or under the stewardship of a business rescue practitioner?

[9] Counsel for the respondents referred to and placed reliance on aspects of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*.[3] The respondents place reliance on the second of two objects or goals of s 128(1)(*b*)(iii) of the Companies Act 71 of 2008 ('the Act'), in particular that although the primary goal is that of the continued existence of the business, the secondary goal of facilitating a better return for creditors or shareholders is also a valid reason to allow for business rescue. This is accepted. The respondents must establish grounds for the reasonable prospect of achieving this goal.

[10] How the respondent is to show reasonable prospects is not prescriptive. The requirement is a lesser requirement than 'reasonable probability' but more than 'a mere prima facie case or an arguable possibility' based on reasonable grounds, not mere speculation.[4]

[11] It has been noted[5] that since implementation of the Act, while business rescue may not commence by resolution of the company after the commencement of liquidation proceedings,[6] it can be brought by affected persons even thereafter.[7] This is mentioned as background as regards the 'narrow' discretion the court has when unpaid creditors seek a winding up order, being entitled, as a right, *ex debito justitiae*, to a winding up order.

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[2] Counter application, founding affidavit para 35.
[3] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA) ('*Oakdene*').
[4] *Oakdene* para 29.
[5] *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD) paras 16-19.
[6] Section 129(2)*(a)* of the Companies Act 71 of 2008.
[7] Section 131(1) of the Act.

[12] The respondents state that appointment of a rescue practitioner, 'will lead to a far better return for the First Respondent's creditors and its members'.[8] The respondents contend the first respondent would be better positioned to realise the value of the properties with the appointment of a business rescue practitioner, stating that a forced sale price will be lower than what can be achieved on the open market. In response, the applicant's counsel reminded the court that the liquidator too is able to sell the property on the open market, and it does not necessitate a forced sale by the sheriff.

[13] In *Oakdene*[9] the court specifically held:

'[33] My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 *Companies Act* which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.

[34]. . .In motivating this proposal the appellants relied on two grounds. The first was that a business practitioner would be able to obtain a better price for the property than a liquidator. But I share the court a quo's difficulty in understanding why this should be so. . . In short, this ground appears to rest on no more than pure speculation.' (References omitted.)

[14] With reference to *Ally v FirstRand Bank Limited and Others*[10] on which the respondents placed reliance, the reasonable prospects and the goal to be attained through business rescue here make it distinguishable. In that matter a detailed report from business rescue practitioner had been prepared, the company was a going concern, had 26 employees, who were represented and opposed the winding up, they had two purchase and sale offers for the immoveable property in hand and had realisable stock of some R5 million. Here, there are several immoveable properties which have to be sold separately and only three employees. These employees are:

[8] Counter application, founding affidavit, para 6.2.
[9] *Oakdene* paras 33 and 34.
[10] *Ally v FirstRand Bank Limited and Others* [2024] ZAKZPHC 36.

the third respondent, who is a member of the first respondent; her son; and one other.[11]

[15] This application for business rescue is more similar to the facts presented in *Oakdene,* such as the promised sale of bonded immovable property, with a likelihood of the sale of the property taking time, currently sans any actual and realistic offers.

[16] On the respondents' own version, the members will either personally have to pay their own personal monies into the close corporation, or the first respondent will have to borrow monies elsewhere – referred to by the applicant as 'borrowing from Peter to pay Paul'. As set out clearly in the applicant's heads of argument, while the ability to do so may show creditworthiness, it 'corroborates the [first] respondent's inability to pay its debts and vindicates the applicant's application for the respondent's winding-up'.[12]

[17] Submissions were made regarding the suretyships signed by the members for the loans, in the event that the company was wound up instead of wound down, ie placed under supervision of a business rescue practitioner. The respondents' submissions were that capital would likely have to be made available from the member's personal estates, and their application for business rescue ensures that there is sufficient capital available, just not immediately realisable.

[18] The court was invited to consider the applicant's ability to call on the suretyships as a reason that the business rescue is of benefit to the shareholders as referred to in the Act, as members of the close corporation. Although it is admitted that the suretyships were signed by the members qua members of the close corporation, sight must not be lost of the first respondent being a separate legal entity to its members, and that the suretyships are in their personal capacity. Be that as it may, the concerns regarding the applicant's ability to call on those suretyships remains unchanged by either liquidation or business rescue, other than the timing thereof.

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[11] Counter application founding affidavit annexure APB.

[12] Applicant's heads of argument, para 29 with reference *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* [2014] ZASCA 17; 2015 (6) SA 224 (SCA) para 16.

[19] As the major creditor, the applicant is entitled to seek the liquidation of the first respondent. The application for liquidation can be suspended by a reasonable prospect of business rescue, even if it is applicable only to the secondary goal of greater benefit to the creditors or shareholders.

[20] I refer again to *Oakdene*, as that judgment also provides authority in response to the applicant's submission that it will oppose any business rescue plan:

'[37] In these circumstances I do not believe Nedbank and Imperial can be branded unreasonable in their declared intent to oppose any business plan in line with either of the two options proposed by the appellants. The court a quo regarded this declared intent by the two major creditors — and the holders of 60% of the shareholding in the company — as one of the reasons why business rescue was doomed to fail. . .

[38] If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s 132(2)*(c)*(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs.'

[21] It is therefore evident, that there are little to no prospects of a successful business rescue. That option will entail not only extra costs and cause further delay; it will in fact cause a not insignificant increase in the amount owed through the accumulation of further interest which is already substantial. As was noted above, the applicant has not received payments since 2022, and only sporadic payments during 2021. The amount owing to the applicant is said, on the respondents' own version, to be 'a large portion of which is made up of interest and associated charges for the period 2021 to present'.[13] The respondents dispute this amount, attributed by the respondents to the applicant's interest and charges being 'excessive', despite that these charges are contractually agreed.

[13] Counterclaim founding affidavit para 35.

[22] This court therefore rejects the submission made in the respondents' heads of argument that the application for winding up is persisted with to 'perhaps … punish its members (shareholders)'. I hold the view that the applicant's liquidation application ought not to be delayed, to achieve a benefit for the members, insofar as least as it brings finality and curbs, at the earliest possible time, the continued interest on the loans, entered into by the first respondent, and the suretyship of the members.

[23] In the circumstances, the respondents have failed to show reasonable prospects that business rescue will be to the advantage of creditors or shareholders.

ORDER:

Based on the above, the following order is granted:

1. The respondent's counter application is dismissed with costs including the reserved costs of 5 November 2025.
2. The rule nisi granted on 26 August 2024 is confirmed.

AINSLIE AJ

Heard: 29 August 2025

Delivered: 5 September 2025

APPEARANCES

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