

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022/046904

Reportable: No

Of interest to other judges: No

24 January 2023

Vally J

In the matter between:

Engen Petroleum Ltd

Applicant

and

Jai Hind EMCC t/a Emmarentia Convenience Centre
(In Business Rescue Reg No.: 2[...])

First Respondent

Igolikiisshore Ragunandan N.O

Second Respondent

Intellectual Property Commission of SA

Third Respondent

Affected persons in the First Respondent's Rescue

Fourth Respondent

JUDGMENT

Vally J

Introduction

[1] Two questions lie at the centre of this matter: (i) should the resolution to commence business rescue proceedings by the first respondent, a close corporation, be set aside?; and, (ii) should the first respondent be wound-up? The application is brought by Engen, a creditor of the first respondent.

[2] The matter was called before me on 8 December 2022 in the urgent court. After reading the papers and receiving lengthy oral submissions from the parties' respective counsel I decided to postpone the matter to 16 January 2023. This decision was prompted by the fact that it was common cause that the second respondent, the Business Rescue Practitioner (BRP), was to place a Business Rescue Plan (Plan) before a meeting of the creditors of the first respondent on 9 January 2023. The BRP was ordered to file a supplementary affidavit, which he did on 16 January 2023. The matter was heard on 18 January 2023.

The resolution placing the first respondent in business rescue

[3] The first respondent was placed in business rescue by a resolution taken at a meeting of Trustees of the JHG02 Trust (Trust). The Trust, it is claimed by the BRP and the trustees of the Trust, is the owner of the first respondent. However, the Trust is not listed as member of the first respondent in the records of the Companies and Intellectual Properties Commission of South Africa (CIPC), but more of this issue later. The resolution was passed on 22 September 2022. The relevant part of the resolution reads:

'PASSED AT A MEETING OF THE TRUSTEES FOR THE TIME BEING OF THE JH0G2 Share Trust TRUST NO IT (8[...]) ("The Trust")

WHEREAS at a duly constituted meeting of the Trustees of the ***JHG 02 Share Trust TRUST NO 8[...]*** in the presence of a properly convened quorum and having satisfied **itself** that proper notice of such meeting, the Trustees were called upon to consider the following matters which were tabled for the purposes of passing the Resolutions set out herein.

...

Having given proper consideration to the aforementioned matters and the relevant issues in question, the trustees tabled and passed the following Resolutions, which shall be effective immediately and which resolutions the trustees ratify and declare that this resolution shall constitute valid and proper authority to implement the resolutions passed as follows:

1. Jai Hind will commence business rescue proceedings and be placed under supervision in terms of Section 129 of the Companies Act with immediate effect;
2. Jai Hind forthwith lodges the requisite documents for the commencement of business rescue proceedings with the Companies and Intellectual Properties Commission of South Africa (CIPC) and any documents ancillary thereto and/or necessary for the commencement of or continuation of business rescue proceedings;
3. [the second respondent] is nominated as the business rescue practitioner as contemplated in Section 129(3)(b) subject to his acceptance of his appointment.
4. ...
5. **AVISHKAR HARILAL DUKHI** is authorised to do all things necessary, or to procure the doing of all things necessary, to sign any and all documents, as is necessary to give effect to the resolutions aforesaid of behalf of the trust, including deposing to the sworn statement contemplated in Section 129(3)(a) of the Companies Act on the basis that the trustees believe there are reasonable prospects of rescuing Jai Hind.

DATED ON THIS THE 22ND DAY OF SEPTEMBER 2022 AT JOHANNESBURG

We certify, approve and authorize the above Resolutions of the **JHG 02 SHARE TRUST TRUST NO. 8[...]**

[4] It is signed by Mr Avishkar Harilal Dukhi (Mr Dukhi) in his capacity as 'DÚLY AUTHORISED TRUSTEE' and by Mr Desigan Naidoo (Mr Naidoo) in his capacity as 'TRUSTEE'. Mr Naidoo is also the attorney of record for the first respondent. It is notable from the resolution that (i) it was taken and passed by Trustees of the Trust at a meeting of the Trust; (ii) the second respondent was nominated as the BRP on the same day – 22 September 2022.

[5] In terms of s 129(3) of the Companies Act 71 of 2008 (Act) the first respondent was to publish a notice to every affected person, including a sworn statement of the facts and relevant grounds on which the resolution was founded. Thus, on the same day Mr Dukhi signed a sworn statement outlining the facts relevant to the grounds on which the trustees took the resolution. Importantly, he signed the document in his capacity as 'Trustee' of the Trust.

[6] The CIPC records show that the members of the first respondent are Mr Dukhi and the BRP. Mr Dukhi, who only filed a confirmatory affidavit in this matter, claims to be the 'Trustee member and Director of the first respondent'. He does not explain what he means by 'Trustee member'. The BRP it can be safely assumed became a member after the resolution to commence business rescue proceedings had been taken. The BRP deposed to the answering affidavit. He too does not explain what is meant by 'Trustee member' although he insisted that the resolution had complied with the provisions of s 129(1) of the Act. He claims that the resolution was passed by 'the member' of the first respondent. The member, according to him, is the Trust. In elaboration he says that:

'I repeat for the sake of certainty that the trustees as members of the close corporation and by virtue of holding such office are directors of the first Respondent. This is not in dispute. The trustees have accepted their appointment as directors and have carried out their duties as directors diligently.' (Underlining supplied)

[7] The BRP does not say who the trustees of the Trust are, and who the members of the first respondent are. We know from the resolution that two trustees of the Trust are Mr Dukhi and Mr Naidoo, and from the CIPC record that only Mr Dukhi was the member of the first respondent at the time the resolution was taken. Had the BRP

been a little more alert he would have discovered these two facts. In fact, he should have been able to do so with minimum effort. More importantly, it is disturbing that he is willing to aver that these 'trustees have accepted their appointment as directors', when he is fully aware that the first respondent is a close corporation, which does not have directors. And, in the same averment he says, 'and have carried out their duties as directors diligently' without furnishing any detail or evidence to support such a sweeping testimonial. It is simply baseless.

[8] Section 129(1) of the Act provides for a board of a company to resolve that the company voluntarily commences with business rescue. As the first respondent does not have a board, reference to the board in this sub-section should be reference to members of the first respondent.

[9] Mr Dukhi was the only natural person that was a member of the first respondent at the time the resolution to place it into business rescue was taken. The BRP could only have become a member – if that is possible, but I wish to say nothing of that for the moment as it is not relevant to what is before me – after his appointment as a BRP. In which case, Mr Dukhi should have solely taken the decision to place the first respondent into business rescue. The resolution then would have been one of the first respondent, which is a separate legal personality from that of the Trust. Further, the resolution was taken by Mr Dukhi and Mr Naidoo in their capacities as trustees of the Trust. But Mr Naidoo is not a member of the first respondent. To sum up: the resolution was taken by the Trust and not the first respondent, and it was taken by a member in conjunction with a non-member of the first respondent.

[10] The resolution, I therefore hold, does not comply with the provisions of s 129 of the Act. It is null and void and should be set aside.

[11] It was contended on behalf of the applicant that the resolution should be set aside on the ground set out in s 130(1)(a), i.e. that there is no reasonable prospect for rescuing it. On the analysis set out below, I agree.

[12] There are other concerns regarding the business rescue proceedings. In terms of s 129(3) of the Act the first respondent was to file a notice of appointment of the

BRP within two days of 22 September 2022, and to publish the notice to, amongst others, the applicant. This it seems was not done. However, given that I have concluded that the resolution was not taken by the first respondent, there is no need to delve further into the issue of non-compliance with sub-section 129(3) of the Act.

Should a final winding up order be made?

[13] There is no doubt that the first respondent is financially incapable of meeting its obligations. This is spelt out in no uncertain terms in the sworn statement of Mr Dukhi. The sentiment is echoed in the Plan that was filed by the BRP. In the sworn statement Mr Dukhi states that the business of the first respondent commenced in 2005. Its business involved the trading in petroleum products (selling petrol and diesel as a retailer), selling consumer goods (in the form of a convenience store) and providing car wash services. In 2014 it commenced delivering diesel to members of the public who use generators as back-up for electricity supply. At present its business 'involves the supply and delivery of diesel to customers in the Randburg areas and surrounding areas as well as other patrons requiring the supply of diesel based on exclusive supply contracts.' He does say that the first respondent supplies (which can only mean sells), as well as delivers diesel to its customers. The applicant says that the first respondent is trading unlawfully as it does not have a licence to 'sell, deliver or distribute petroleum products'. In the face of this allegation, the BRP, responding on behalf of Mr Dukhi and the first respondent, says that it only delivers diesel on behalf of suppliers to customers of the suppliers. Neither the BRP nor Mr Dukhi provide any details of the business of delivering diesel. Crucially, though, in his sworn statement Mr Dukhi lists two factors motivating the decision to have the first respondent commence with business rescue proceedings: (i) 'Jai Hind is procuring diesel at wholesale prices and it is in a position to wholesale diesel to customers at substantially reduced prices (which would be cheaper than the retail cost price)' and (ii) the '(c)ollection of all monies due to Jai Hind from its current diesel supply business to facilitate its ongoing business operations.' The averments in the sworn statement clearly support the contention of the applicant that the first respondent is unlawfully selling diesel as a wholesaler.

[14] In his sworn statement Mr Dukhi admits that the first respondent is not able to pay its debts, which according to him are a R7m (seven million rand) claim from the

applicant, a R9m (nine million rand) claim from its 'shareholder' – he says this even though he should have been aware that a close corporation does not have a shareholder - and 'additional claims by third party creditors which relate to debt incurred in the course of normal business operations'. This third category of debt is not quantified nor are the 'third party creditors' identified. According to the BRP the claim of the applicant is well above that of R7m (seven million rands).

[15] According to the BRP the first respondent has assets to the value of R147 834.30. At the same time, it faces claims of approximately R19 765 433.00. The BRP makes much of the fact that the major part of these claims lies with the applicant, and that the applicant's claim is subject to an application for leave to appeal to the Constitutional Court against an order of this court which, *inter alia*, requires the first respondent to vacate the premises from where it conducted its business of selling fuel to retail customers, which business has ceased. He does however say that should the application for leave to appeal fail then he would commence placing the first respondent into liquidation.

[16] The BRP tabled the Plan at the meeting of the creditors held on 9 December 2022. The applicant is a majority creditor. It voted against the adoption of the Plan. Accordingly, the Plan was not adopted. The meeting re-convened on 13 December 2022. An offer to purchase the applicant's debt – which is in the region of R15m – at a price of one thousand rand (R1000.00) was tabled at the meeting and rejected by the applicant.

[17] The Plan is quite frankly speculative in the extreme. There is absolutely no factual foundation for it. The BRP speculates that the first respondent would be producing an income of R121 937 500.00 by 28 February 2024 from the delivery of diesel. At the same time, he states that the current assets of the first respondent as at 30 November 2022 is R804 626.00.¹ To expect any concern with a mere eight hundred thousand rands to produce an income of R121m in fifteen months is, to say

¹ On my reading of the Plan, the BRP seems to be unsure of the financial status of the first respondent. At one point he states that its current assets total R147 834.30 and later on when presenting a 'PROJECTED BALANCE SHEET', he lists the current assets as at 30 November 2022 as totalling R804 626 – made up of Inventories (R49 781.00), Trade and Other Receivables (R234 020.00) and 'Cash and cash equivalents' (sic) (R77 825.00).

the least, a preposterous expectation. Further, the BRP does not say who the potential purchasers of the first respondent's delivery services would be, or even who they presently are, how much it would cost the first respondent to finance its operations and how it intends to do so.

[18] On the versions set out in the sworn statement of Mr Dukhi and the proposed plan of the BRP the first respondent is hopelessly insolvent. Of this there can be no doubt. Its assets are meagre. In contrast thereto, its liabilities are huge. In the circumstances, there is no rational or reasonable basis to believe that the first respondent can be rescued. It would therefore be just and equitable to wind it up.

Order

[19] The following order is made:

- a. The resolution placing the first respondent in business rescue is declared to be null and void and is set aside.
- b. The first respondent is finally wound up and placed into the hands of the Master of this court.
- c. The costs of the application are to be recovered in the liquidation.

Vally J

Gauteng High Court, Johannesburg

Dates of hearing: 8 December 2022, 18 January 2023

Date of judgment: 24 January 2023

For the applicant: S Aucamp on 8 Dec 2022 and
E Theron SC with M Tshetlo on 18 Jan 2023

Instructed by: Mathopo Moshimane Malungaphuma Inc

For the 1st and 2ND respondents: R Solomon SC with A Raw

Instructed by: Des Naidoo and Associates