

SOUTH AFRICA / JUDGMENT

**ABSA Bank Limited and Another v
Ikageng Construction (Pty) Ltd
(61235/2014, 61236/2014 , 61237/2014)
[2014] ZAGPPHC 684 (5 September 2014)
[2014] ZAGPPHC 684**

COURT

North Gauteng High Court, Pretoria

BEFORE

Potterill

CASE / FILE NUMBER

61235/2014

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IN

**THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)**

Case Number:

61235/2014

Date: 5 September
2014

Not reportable
Not of interest to
other judges
In the matter

between:

ABSA BANK

LIMITED.....Applica
nt

COMMISSIONER FOR
THE SOUTH AFRICAN
REVENUE
SERVICE.....Intervening

party
and
IKAGENG
CONSTRUCTION (PTY) LTD
(Registration
number: 2006/033086/07
.....Respondent

Case Number: 61236/2014
CONTRAU PROJECTS
CC
(Registration
number: 1998/064406/23
.....Respondent

Case Number: 61237/2014
WERMAR
KONSTRUKSIE CC
(Registration
number: 1988/011498/23.....Respondent

JUDGMENT

POTTERILL J

- [1] The applicant is on an urgent basis applying for the following relief against Ikageng Construction (Pty) Ltd (hereinafter referred to as “Ikageng”), Contrau Projects CC (hereinafter referred to as “Contrau”) and Wermar Konstruksie CC (hereinafter referred to as “Wermar”):
1. That the application be entertained as one of urgency and that the non-compliance with the rules of Court with regard to service and time periods be condoned;
 2. That leave be granted to the Applicant to institute this application in terms of section 133(1) (b) of the Companies Act No. 71 of 2008 (“the Act”);
 3. That the resolution of the board of directors of the Respondent in terms of section 129 of the Act placing the Respondent under supervision of a business rescue practitioner, is hereby set aside in terms of section 130(1)(a)(ii) & (iii), read with section 130(5)(a)(i) alternatively, (ii) of the Act;
 4. That the Respondent company be placed under final winding-up into the hands of the Master of the High Court;
 5. That the costs of this application be costs in the liquidation.
- [2] Ikageng is the trading entity in the Ikageng Group of Companies. Contrau and Wermar are the sureties for the liability of Ikageng to the applicant. The applicant also has registered covering mortgage bonds over the properties of Contrau and Wermar. It is thus prudent to consider all the applications together.
- [3] Mr. Klein acted on behalf of Ikageng and Mr. Jagge on behalf of Contrau and Wermar.

- [4] The Commissioner for the South African Revenue Services (hereinafter referred to as “SARS”) acted as an intervening party and filed papers in support of the applicant’s application. It is common cause that both SARS and the applicant are creditors of the three entities.
- [5] On behalf of the respondents it was argued that there was not sufficient reasons set out for urgency and therefore the court should not entertain it as an urgent application. By entertaining it as an urgent application the respondents are forced to upon short service and short time periods answer to lengthy notices of motion. On behalf of Contrau and Wermar it was conceded that if they fail on the argument pertaining to urgency and the court finds that the business rescue proceedings are null and void that Contrau and Wermar attract the same fate as Ikageng i.e. liquidation.
- [6] It was submitted that the application may only be 30 pages but the respondent had to go through all the attached documents rendering it to be an application running into hundreds of pages. The respondent is then afforded from the 18th of August 201U to the 25th of August 2014 to file answering affidavits thereto. The applicant’s main ground of urgency is the fact that R17 million was dissipated by the business rescue practitioner derived from the sale of assets over which the applicant holds registered covering mortgage bonds. As no response to questions raised by the applicant to the business rescue practitioner is forthcoming the application is urgent to protect its interests and assets and to place the respondent under liquidation to ensure urgent investigation enquiry into the affairs of the group of companies. However the applicant and SARS were at the first creditors meeting and thus created its own urgency by only thereafter relying on urgency. Furthermore, nothing was said in this meeting, or in the letter addressed to the business rescue practitioner by the applicant on the 5th of August 2014 about the nullity of the business rescue proceedings.
- [7] On behalf of the applicant it was argued that the bank was obliged to attach the copies of the suretyships, mortgage bonds and copies of the sale agreements etc., but the application itself is only 30 pages. The respondent had a full week within which to answer; thus rendering the respondent sufficient time to do so. The applicant did not self create the urgency as only after the 5th of August 201 k did they receive the bank statements alerting them to further dissipations of monies.

Furthermore, the nullity of the business rescue proceedings is per se a ground for urgency.

- [8] I find this matter to be urgent and that the applicant did not create its own urgency. The business rescue practitioner’s conduct is not beyond criticism; he does not, as expected of an officer of court, provide answers to material questions. He acted contrary to his statutory duties in terminating the business rescue proceedings in terms of section 132(2)(b) of Contrau and Wermar. He did not comply with the basic requirements of initiating business rescue proceedings thus placing relevant parties at risk and at great expense to the respondents if regard is had to the business rescue practitioner’s fees alone. The papers are not more voluminous than need be. A week to answer in urgent court is in fact a luxury and

the nullity of the business rescue proceedings renders the application per se urgent.

- [9] On behalf of Ikageng two other points in limine were raised. However, if the business rescue proceedings are in fact a nullity I need not address them and I accordingly find it appropriate to address this issue first.
- [10] The first point raised is that when the board of Ikageng adopted the resolution to commence business rescue proceedings the board consisted of four directors. It is common cause that only two directors were present and only two directors out of four adopted the resolution. In terms of section 73(5)(b), (c) and (d) a resolution is adopted by the majority of directors each having one vote. This clearly was not complied with i.e. a majority of votes did not cast on a resolution. The reliance by Ikageng on section 73(1) and (2) is bad in law as it relates to meetings to be called and not to resolutions to be adopted. I agree with Gorven J in *DH Brothers Industries (Pty) Ltd v Gribnitz N.O.* [2014] 1 All SA 173 (KZP) where he founds the following in paragraph 16:

"This brings the matter within the ambit of a failure to satisfy the procedural requirements of section 129. That is effectively the end of the matter and the Applicant has, accordingly, made out a case for the resolution to be set aside. "

- [11] The business rescue practitioner has also not complied with section 129(U) to file a notice of his appointment within two business days after the CIPC appointed him as such. Such notice was also not published by the company to each affected party within 5 days after the notice was filed. I agree with Fabricius J in *Advanced Technologies & Engineering Company (Pty) Ltd v Aero Nautique Et Technologies & Others* unreported case number 72522/2011 (NGHC) in paragraph 27 as follows:

"The purpose of s 129(5), is plain and blunt. There cannot be an argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129(3) or (U) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to 'substantial compliance'. The requirements contained in the relevant sub-sections were either complied with or they were not. In this case they were not, for the reasons stated herein above."

This was followed by Khumalo J in *Jan Hendrik Net N.O. and another v Panamo Properties (Pty) Ltd and 5 others* under case number 56399/2013. Ikageng thus failed to comply with the notice and publication requirements relating to the appointment of a business rescue practitioner by not despatching a form CoR123.2. The resolution to initiate business rescue proceedings to place the company under supervision thus lapses and is a nullity.

- [12] Furthermore, the business rescue plan was published on 10 April 2014 thus outside the period of 25 days prescribed by section 150(5) of the Act. The failure to publish a plan in the given or extended period resulted in the termination of the business rescue proceedings and the time to publish a plan cannot be extended after it had lapsed. No coherent arguments countering these common cause facts was provided by Ikageng and the applicant has thus

successfully contended that the applicant and SARS are entitled to an order setting aside the resolution of the board of directors.

[13] Ikageng have liabilities in total of approximately R29,8 million. Contrau and Wermar are sureties for the liabilities of Ikageng to the applicant which on 13 June 201U-amounted to R10,6*44,537.00. The business rescue practitioner on the day that the applicants served their urgent applications terminated the business rescue proceedings relating to Contrau and Wermar purportedly on the basis that the close corporations are now both

solvent. I have no doubt that the business rescue proceedings are a nullity, that the entities are commercially insolvent, and that this is an example par excellance where the hands of the law must be laid on the companies.

[14] I grant final liquidation as the entities are not operational, there would be no employees to serve on and most creditors are aware of the entities' position.

[15] I accordingly make the draft orders marked "X1", "X2" and "X3" orders of court.

S. POTTERJLL

JUDGE OF THE HIGH COURT

CASE NO: 61235/2014

HEARD ON: 3 September 2014

FOR THE APPLICANT: ADV. M.A. BADENHORST SC

INSTRUCTED BY: Rorich Wolmarans & Luderitz Attorneys

FOR SARS: ADV. M.A. BADENHORST SC

ADV. H. KOOVERJIE

INSTRUCTED BY: Mothle Jooma Sabdia Inc

FOR THE RESPONDENT: ADV. M. KLEIN

INSTRUCTED BY: Helandie Calaca Attorneys

DATE OF JUDGMENT: 5 September 2014

FOR SARS: ADV. M.A. BADENHORST SC ADV. H. KOOVERJIE

FOR THE RESPONDENT: ADV. N. JAGGA

INSTRUCTED BY: Vardakos Attorneys

IN THE HIGH COURT OF SOUTH AFRICA

CASE No: 61235/2014

Before the Honourable POTTERILL J

On this the 5th day of SEPTEMBER 2014

ABSA BANK

LIMITED.....Applicant

COMMISSIONER FOR THE SOUTH AFRICAN.....Intervening
Party

REVENUE SERVICE

IKAGENG CONSTRUCTION (PTY)

LTD.....Respondent

(Registration number: 2006/033086/07)

DRAFT ORDER

Having read the documents filed of record, heard counsel and considered the matter:

IT IS ORDERED THAT:

1. That leave be granted to the Applicant to institute this application in terms of section 133(1) (b) of the Companies Act no. 71 of 2008 ("the Act");
2. That leave be granted to the South African Revenue Services to intervene in the application of the Applicant;
3. That the resolution of the board of directors of the Respondent in terms of section 129 of the Act dated 28 February 2014, placing the Respondent under supervision of a business rescue practitioner, is hereby set aside in terms of section 130(1)(a)(ii) & (iii), read with section 130(5)(a)(i) alternatively, (ii) of the Act;
4. That the Respondent company be placed under final winding-up;
5. That the costs of the Applicant and of the Intervening Applicant SARS, be costs in the liquidation.

BY ORDER

REGISTRAR

CONTRAU PROJECTS

CC.....Respondent

(Registration number: 1998/064406/23)

1. That the Respondent company be placed under final liquidation;
2. That the costs of the application be costs in the liquidation.

On this the day of 5th SEPTEMBER 2014

WERMAR KONSTRUKSIE

CC.....Respondent

(Registration number: 1988/011498/23)

IT IS ORDERED THAT:

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