

SOUTH AFRICA / JUDGMENT

**Alderbaran (Pty) Ltd and Another v
Bouwer and Others (19992/2017) [2018]
ZAWCHC 38; [2018] 3 All SA 71 (WCC);
2018 (5) SA 215 (WCC) (22 March 2018)
[2018] ZAWCHC 38**

COURT

Western Cape High Court, Cape Town

BEFORE

D M Davis

CASE / FILE NUMBER

19992/2017

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

CASE

NO: 19992/2017

In

the matter between:

ALDERBARAN
(PTY) LTD
First
Applicant
FAIZEL
NOOR N.O.
Second
Applicant
and
GIDEON
PHILLIPUS BOUWER
First
Respondent
THE
DEEDS REGISTRY, CAPE TOWN
Second
Respondent
TRADE

OFF 118 (PTY) LTD
Third
Respondent

JUDGMENT

DELIVERED ON 22 MARCH 2018

DAVIS, AJ

1. This matter aptly illustrates the potential for abuse of the remedy of business rescue. There are two related applications before me:

1.1. The main application is one brought by Alderbaran (Pty) Ltd, the first applicant (“Alderbaran”), and Faizel Noor, the second applicant, in his capacity as the business rescue practitioner of Alderbaran (“Faizel Noor”), to interdict the transfer to the third respondent, Trade Off 118 (Pty) Ltd (“Trade Off”), pursuant to a sale in execution, of an immovable property belonging to Alderbaran, and to declare such transfer unlawful in terms of section 133 of the Companies Act 71 of 2008 (“the Act”) on the grounds that Alderbaran is in business rescue (“the main application”).

1.2. The second application is a counter-application brought by the first respondent in the main application, Gideon Phillipus Bouwer (“Bouwer”), being the execution creditor in respect of the aforementioned sale in execution, for the setting aside of the resolution placing Alderbaran under business rescue and the termination of the business rescue in terms of section 130 of the Act (“the counter-application”).

2. The immovable property lies at the heart of the dispute is Portion 241 (a portion of Portion 63) of the farm Melkhoute Fontein Nr 480, in the Hessaqua Municipality, Division Riversdale, Western Cape, 79,7029 hectares in extent (“the property”).
3. For purposes of this judgment it is necessary to refer in some detail to the history of the matter. I must at the outset state that the averments in the affidavits filed on behalf of the applicants are bald and vague, and there is a paucity of supporting documentation.

The facts set out hereunder are for the most part gleaned from Bouwer’s answering affidavit in the main application and his

founding affidavit in the counter-application – neither of which was answered by the applicants.

THE RELEVANT BACKGROUND

4. Alderbaran purchased the property from Bouwer in 2014 in terms of a written agreement which stipulated a purchase price of R 1 000 000.00

payable by a way of a deposit of R 50 000.00 and the balance payable over five years in monthly instalments (“the sale

agreement”). A mortgage bond was registered over the property in favour of Bouwer as security for Alderbaran’s obligations in respect of the balance of the purchase price.

5. The property was purchased with a view to development by subdivision thereof into 50 separate title portions. The subdivision was delayed, and Alderbaran failed to pay any of the monthly instalments due to Bouwer in terms of the sale agreement.
6. Bouwer sued for payment of the balance of the purchase price and obtained default judgment against Alderbaran on 25 April 2016 in the Riversdale Magistrates Court for payment of the amount of R 950 000.00, plus interest and costs (“the default judgment”). Pursuant thereto the property was attached and advertised for sale in execution on 15 September 2016.
7. On 31 August 2016 Alderbaran launched an application for the rescission of the default judgment as well as the setting aside of any warrant of execution issued in respect of the property and the staying of any sale in execution pending the determination of the rescission (“the rescission application”). As a result the sale in execution scheduled for 15 September 2016 did not proceed.
8. On 13 September 2016 the Riversdale Magistrates’ Court dismissed the rescission application.
9. On 13 September 2016, the same day the rescission application was dismissed, Shaheed Noor, the sole director of Alderbaran, passed a resolution in terms of section 129(1) of the Act to place Alderbaran under business rescue. Annexed to Bouwer’s answering affidavit in the main application are a Notice of Beginning of Business Rescue Proceedings (Form CoR 123.1) and a Notice of Appointment of Business Rescue Practitioner (Form CoR 123.2) appointing Faizel Noor as business rescue practitioner, both dated 13 September 2016 and signed by Shaheed Noor.[1] (I shall refer to the section 129(1) resolution adopted on 13 September 2016 as “the first resolution” in order to distinguish it from a subsequent resolution to place Alderbaran under business rescue purportedly adopted on 16 August 2017, which I shall refer to as “the second resolution”).
10. The notices of commencement of business rescue and appointment of a BRP dated 13 September 2016, referred to above to above, do not bear the receipt stamp of the Companies and Intellectual Properties Commission (“the Commission” or “CIPC”) but it appears from a certificate issued by the Commission on 19 June 2017[2] that the first resolution was filed on 15 September 2016. In the same certificate the enterprise status of Alderbaran is reflected as “Business Rescue”.
11. On 14 September 2016, Alderbaran lodged a notice of appeal against the dismissal of the rescission application. The appeal was dismissed by this Court on 21 April 2017.
12. A second sale in execution of the property was scheduled for 15 June 2017, and the property was duly sold to Trade Off on that date for R 1 150,000.00 (“the sale in execution”).

13. On 19 July 2017 Attorney Gavin Langenhoven (“Langenhoven”), acting on behalf of Faizel Noor, wrote to Bouwer’s attorneys and gave notice that the sale in execution of the property was invalid because Alderbaran was in business rescue, and the sale in execution was therefore precluded by the moratorium on “legal action or execution of judgments already obtained”. This was presumably a reference to section 133(1) of the Act, which states that “During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any

property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum ...”.

14. Attorney Janse van Rensburg (“Van Rensburg”), representing Bouwer, on the same day replied to Langenhoven requesting proof that Alderbaran was under business rescue. He asked for copies of the CoR 123.1 Form filed with CIPC, the resolution passed by the board of directors to commence business rescue proceedings, the affidavit setting out the facts on which the resolution was founded, and the notice of the resolution published to all affected persons. In other words, Van Rensburg sought proof of compliance with the requirements of sections 129(3)(a) and (4) of the Act.
15. On 27 July 2017 Langenhoven reverted to Van Rensburg with the copies of the first resolution and the CoR 123.1 and CoR 123.2 Forms dated 13 September 2016 referred to above. No statement of facts relevant to the first resolution was furnished; nor was proof provided of publication to all affected persons of the notices of commencement of business rescue and appointment of a BRP, as required by sections 129(3)(a) and 129(4).
16. On 31 July 2017 Van Rensburg replied to Langenhoven pointing out that there was no sworn statement of facts supporting the first resolution, and that Bouwer, an affected person, had not received notice from Alderbaran of the commencement of business rescue until July 2017. Van Rensburg stated that the first resolution was nullity in accordance with section 129(5) of the Act, and that he had instructions to proceed with the transfer of the property pursuant to the sale in execution. Van Rensburg notified Langenhoven that his client would have to apply for an interdict, if so advised, to prevent the transfer of the property to Trade Off.
17. Faizel Noor alleges in a supplementary affidavit deposed to on 6 February 2018 (which I deal with below) that Alderbaran’s legal adviser conducted an online search of the CIPC website on 10 August 2017 and discovered that Alderbaran was described as being “In Business”, i.e., no longer in business rescue. He believed that this occurred as a result of a processing error on the part of CIPC when Alderbaran’s arrear annual returns were submitted to CIPC on 22 June 2017.

18. As proof of the fact that Alderbaran's annual returns were submitted on 22 June 2017, a document emanating from CIPC entitled "Abridged Certificate for Annual Returns" is annexed to the said supplementary affidavit. It appears from this document that Alderbaran had zero turnover during the years 2014, 2015 and 2016. The relevance of this will become apparent later on in this judgment.
19. Faizel Noor alleges that, subsequent to the discovery on 10 August 2017 that Alderbaran was no longer in business rescue according to the records of CIPC, and acting in the belief that this was in fact the case, he advised Shaheed Noor to "make a new application [to] place [Alderbaran] into Business Rescue."
20. On 16 August 2017 Alderbaran, represented by its sole director Shaheed Noor, passed another resolution in terms of section 129(1) of the Act to being business rescue proceedings ("the second resolution"). The second resolution was supported by an affidavit deposed to by Shaheed Noor on 14 August 2017 ("the sworn statement") in which it was alleged that:
 - 20.1. Alderbaran conducts business as a services provider in the electrical industry.
 - 20.2. Alderbaran was financially distressed because it had fallen into arrears with payment to certain suppliers/credit providers on account of cash flow problems, and would not be able to pay its debts within 6 months.
 - 20.3. The board had reasonable grounds to believe that the company could be rescued because:

"15. The Company relies on its debtors to make full and timeous monthly payments of the amounts payable to the Company. While the majority of debtors make proper payments to the Company, certain debtors have failed to make timeous and/or full payments of these amounts to the Company, leading to the negative cash flow presently being experienced by the Company. It is envisaged that the Company will, during the preceding [sic] months, take the necessary steps to obtain payment from these debtors."
16. The Director/s can now focus on obtaining and implementing further contracts in order to improve the cash flow situation of the Company."
21. A CoR 123.1 form together with the second resolution and the sworn statement, as well as a CoR123.2 form, was filed with the Commission on 16 August 2017.
22. Thereafter a meeting of alleged creditors of Alderbaran was held on 29 August
2017. The meeting was attended by Shaheed Noor, with an alleged claim on loan account in an amount of R 1 490 000.00, Mr Zayd Noor, the son of Shaheed Noor, with an alleged claim in the amount of R 38 000.00, and Mr Faizel Begg with an alleged claim in the amount of R 5 800.00 for services rendered. There are no supporting documents before me substantiating these alleged claims.

23. Bouwer was convinced that the resort to business rescue was not genuine and was a delaying tactic aimed solely at preventing the transfer of the property in satisfaction of the judgment debt. He refused to halt the transfer of the property pursuant to the sale in execution, and the transfer documents were lodged at the deeds office on 24 October

2017. This led to the launching of the main application.

THE LITIGATION HISTORY

24. The applicants on 1 November 2017 launched the main application as a matter of urgency, setting it down for hearing on 2 November

2017. It was struck from the roll for lack of urgency on that date, and was subsequently re-enrolled and came before me in the urgent lane of the motion court on 22 November 2017. By that time Bouwer had delivered his answering affidavit in the main application, which was deposed to on 15 November 2017.

25. At the hearing on 22 November 2017 there was a great deal of confusion about whether or not Alderbaran was indeed in business rescue, and if so, when the business rescue commenced. The applicants' founding affidavit did not state when Alderbaran was placed in business rescue and the only indication in this regard was an email dated 3 October 2017 annexed to the affidavit in which it was stated that business rescue commenced on 16 August 2017. Bouwer's answering affidavit, however, made reference to both the first resolution (dated September 2016) and the second resolution (dated August 2017), and it was not clear at that stage which, if any, of these resolutions was operative. (I pause to mention that my attention had not yet been drawn to the decision of the Supreme Court of Appeal in *Panamo Properties (Pty) Ltd and another v Nel NO and others* ("Panamo"),^[3] which would have clarified matters in this regard.)

26. To add to the confusion, Mr Monzinger, who appeared for Bouwer, handed up a Windeed CIPC report in respect of Alderbaran which contained the following entry under the history of the company:

"2017/08/08 Cancellation of Business Rescue

(BR Practitioner not appointed on time which resulted in nullity)

27. In these circumstances I thought it best to grant an interim order preventing the transfer of the property and to postpone the matter with directions to the applicants to file an affidavit containing proof that Alderbaran was indeed in business rescue and that the requirements of section 129 (3) and (4) had been complied with.

28. When the matter came before me again on 5 December 2017, Faizel Noor at the eleventh hour filed a supplementary affidavit alleging that Alderbaran had been placed in business rescue on 16 August 2017 and that the requisite formalities in section 129 (3) and

- (4) had been complied with. Copies of the relevant documents were annexed to the affidavit. By that time Bouwer had already launched the counter-application on 1 December 2017 in which it was sought to set aside the resolution commencing business rescue proceedings.
29. At the hearing on 5 December 2017, Mr Monzinger contended that Alderbaran could not rely on the second resolution since the effect of the judgment in Panamo was that, a) even if the first resolution had lapsed and become a nullity in terms of section 129(5)(a) of the Act, the business rescue commenced thereby had not terminated and would only be terminated if and when a court set the first resolution aside, and b), the second resolution was invalid and inoperative because it was purportedly passed during the operation of an existing business rescue. Mr Monzinger came prepared with written heads of argument and was ready to proceed with argument then and there.
30. Ms Khoza, who appeared for the applicants, was taken by surprise by this line of argument. The applicants were, by that stage, placing heavy reliance on the second resolution – no doubt because they had been alerted to the difficulties with the first resolution – and the Panamo

judgment

pulled the proverbial rug out from under that particular carpet. It appears that Mr Khoza was unaware of the decision in Panamo, and he contended that his clients would be prejudiced if the matter were to be argued without his having had an opportunity to consider Mr Monzinger's written submissions and prepare a response. In the circumstances I felt it only fair to postpone the matter to the semi-urgent roll so as to afford both parties the opportunity to prepare proper heads of argument.

31. At the postponed hearing on 7 February 2018 Mr Khoza sought leave to hand up the supplementary affidavit deposed to by Faizel Noor on 6 February 2018, to which I have already made reference. This affidavit contained relevant facts which should properly have been included in the applicant's founding affidavit. The purported explanation for the supplementary affidavit reads as follows:

"5. In reading the heads of argument, it transpired to me that there is a need for the explanation of the facts and events that led this matter to court.

6. My understanding was initially that the counsel for both parties would only deal with the law, and there would not need [sic] for further facts to be dealt with. However, after reading the heads of argument, I was advised by my legal team that I should have this affidavit placed on record."

32. In the supplementary affidavit it is explained that the second resolution was passed because it came to the attention of Shaheed Noor that the business rescue initiated by the first resolution appeared to have been cancelled by CIPC. It is alleged that a draft business rescue plan has been prepared but has not yet been adopted, and, more importantly, has not yet been published to affected parties as required in terms of section 150(5). Nor has a meeting been convened in terms of section 151 for purposes of considering the business rescue plan.
33. It is further alleged in the supplementary affidavit that there are good prospects for the rehabilitation of Alderbaran, because the Hessaqua Municipality (“the Municipality”) has approved the inclusion of the property within the urban edge of Stilbaai with a view to development thereof, and an application has been submitted to the Municipality for permission to subdivide the property into 57 small holdings, each valued at R 650 000.00 after the provision of services on the vacant lots. On this basis, so it is it is contended, Alderbaran stands to make a significant profit on the sale of the plots, and all its creditors will be paid up. The affidavit does not say, however, that the proposed subdivision has been approved; nor is any indication given as to how Alderbaran intends to finance the costs of installing services on the land.
34. At the hearing on 7 February 2018 Mr Khoza conceded in view of the Panamo decision that the business rescue initiated by the first resolution had not been terminated and was still operative, and that the second resolution was accordingly a nullity. This concession was correctly made in my view. He changed tack, however, and argued that the sale of the property in execution on 15 June 2017 was “enforcement action” which is prohibited in terms of section 133(1) of the Act, and that this Court should therefore declare the sale in execution null and void and prohibit any transfer of the property pursuant thereto.

THE ISSUES TO BE DETERMINED

35. On the view I take of the matter it is not necessary for me to decide whether the sale in execution of the property constitutes “enforcement action” for the purposes of section 133(1). If I had to decide the question, I would hold that it does, since in *Cloete Murray and Another NNO v Firststrand Bank Ltd t/a Wesbank*,^[4] Fourie AJA commented, albeit obiter, that “‘enforcement action’ relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment.” I respectfully agree that with this view. I consider that an interpretation of section 131(1) which includes sales in execution

within the notion of “enforcement action” is consonant with the overriding objectives of the remedy of business rescue. It would, in my view, work against the efficacy of the remedy to hold that a sale in execution of property belonging to the company is not covered by the general moratorium, since that would permit a situation where assets essential to the production of company income, such as plant and machinery, could be sold in execution to satisfy prior judgment debts, thereby bringing the business of the company to a halt and scuppering any prospects of rescue.

36. I shall therefore assume, for purposes of argument, that the sale in execution of the property on 15 June 2017 constituted “enforcement action” of the type envisaged in section 133(1). The question then, as I see it, is whether the relief sought in the counter-application should be granted, more particularly:

36.1. whether the first resolution should be declared invalid and set aside, in terms of section 129(5)(a) read with section 130(1)(a), and the resultant business rescue proceedings terminated in accordance with 132(2)(a)(i) of the Act, and, if so

36.2. whether a consequential order should be granted confirming the validity of the sale in execution as a necessary and appropriate order of the type envisaged in section 130 (5)(c) of the Act.

SHOULD THE FIRST RESOLUTION BE SET ASIDE AND THE BUSINESS RESCUE PROCEEDINGS TERMINATED

37. Section 130

(1) of the Act provides that:

“Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129(1), until the adoption of a business rescue plan in terms of section 152, an affected person may apply to court for an order –

(a) setting aside the resolution, on the grounds that –

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company failed to satisfy the procedural requirements set out in section 129.”

38. Section 130(5)(a) of the Act states that:

“When considering an application in terms of subsection (1)(a) to set aside the company’s resolution, the court may –

(a) set aside the resolution –

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so; ...”

39. As Wallis JA made clear in *Panamo*, the provisions in subsections 130(5)(a)(i) and (ii) must be read conjunctively, and the word “or” must be read as if it were “and”, so that the just and equitable requirement referred to in section 130(5)(a)(ii) must not be understood as an independent ground for

setting aside a resolution in terms of section 130(1)(a), but as an additional requirement to be satisfied along with the need to establish one or more grounds for setting aside in terms of section 130(1)(a)(i), (ii) and (iii).

40. I must therefore be satisfied that Bouwer has made out a case that a) there is no reasonable ground for believing that Alderbaran is financially distressed, or
 - b) there is no reasonable prospect for rescuing Alderbaran, or
 - c) Aldebaran failed to satisfy the procedural requirements of section 129, and that it would be just and equitable to set aside the resolution having regard to all the evidence in this particular case.
41. It is important to note that there was no statement under oath regarding the facts relevant to the grounds on which the first resolution was based, as required in section 129(3)(a) of the Act. It can be accepted on the papers that no business plan was adopted pursuant to the first resolution. Indeed, it is clear from the supplementary affidavit that there has been no attempt to have a business rescue plan adopted pursuant to the second resolution, let alone the first.
42. The real business of Alderbaran is not clear from the papers. The statement on oath signed by Shaheed Noor in support of the second resolution refers to the provision of services in the electrical industry. The veracity of this allegation is doubtful, however, when one considers that Alderbaran submitted annual returns to CIPC for the 2014, 2015 and 2016 years which indicated zero turnover. This is incompatible with the notion of a services provider actively engaged in the electrical industry which has hit upon cash flow problems due to non-payment by its debtors. This description of the business of Alderbaran also appears to be inconsistent with the contents of the supplementary affidavit which strongly suggest that Alderbaran is, in truth, nothing more than a property holding company seeking to exploit an opportunity to make a profit through the subdivision of the property into plots for sale.
43. The full extent of Alderbaran's assets and liabilities has not been disclosed by the applicants. The only liability of which one can be certain is Bouwer's claim under the default judgment for R 950 000.00, excluding interest and costs. In my view the documents which purport to substantiate the alleged claims of Shaheed Noor, Zayd Noor, Faizel Begg and Attorney P F Sonnenberg against Alderbaran, all dated 21 August 2017, are inadequate and unreliable. It seems to me that the alleged claims may well be contrived in an attempt to lend credence to the second resolution and the subsequent attempts to comply with the formalities relating to business rescue. (At that stage the applicants were evidently not aware that reliance on the second resolution was a futile exercise in the light of the Panamo judgment.)
44. What is clear on the papers is that the procedural requirements set out in section 129 were not satisfied by Aldebaran in respect of the first resolution, for it is not disputed that:

44.1. no statement on oath was signed in support of the first resolution, as envisaged in section 129(3)(a)(i);

44.2. there was no publication of the first resolution to affected persons, as required in section 129(3)(a)(i);

44.3. there was no publication of notice of the appointment of Faizel Noor as business rescue practitioner to affected persons, as required in section 129(4)(b).

45. In the circumstances I am satisfied that the first resolution falls to be set aside in terms of section 129(5)(a) read with section

130(1)(a)(iii).

46. The next enquiry is whether, in the light of all the facts, it would be just and equitable to set the first resolution aside and terminate the business rescue.

47. In my view the enquiry postulated in section 130(5)(a)(ii) is similar to that in section 344(h) of the Companies Act 61 of 1973 ("the old Act") which dealt with the liquidation of companies on the ground that it appeared just and equitable to the Court. As in the case of section 344(h) of the old Act, the conclusion that the termination of the business rescue would be just and equitable involves the exercise, not of a discretion, but of a judgment on the relevant facts, but once that conclusion has been reached, the making of an order to set aside the resolution and terminate the business rescue does involve the exercise of a discretion. (See Henochsberg on the Companies Act, commentary on section 344(h) of the old Act.)

48. In my judgment the following facts and circumstances are relevant in relation to the question whether or not it would be just and

equitable to set aside the first resolution and terminate the business rescue.

48.1. In the first instance, the timing of the first resolution is suspicious: it was passed on the same day the rescission application was dismissed, which suggests that it was motivated by the ulterior purpose of warding off execution of the default judgment. That suspicion is compounded when one considers that no steps were taken to comply with the procedural requirements of section 129 after the passing and filing of the first resolution. No business rescue plan was drafted let alone adopted pursuant to the first resolution. Indeed it appears that Faizel Noor took no steps whatsoever to implement the business rescue after 13 September 2016.

48.2. Second, it emerges from correspondence attached to the supplementary affidavit that Faizel Noor, although nominally in control as the BRP, was not truly in control of the affairs of Alderbaran, and that the real driving force behind the efforts to promote the subdivision and development of the property was Shaheed Noor, the director of Alderbaran.

48.3. Third, the circumstances referred to in the two preceding paragraphs lead me to the ineluctable conclusion that first resolution was not passed in good faith in that there was no genuine intention to attain the objectives of the Act in regard to business rescue. The remedy of business rescue was used as a stratagem to defeat Bouwer's enforcement of the default judgment. (See *Griessel and another v Lizemore and others* [2015] 4 All SA 433 (GJ) at paras 83 and 84, where it was held that a resolution to commence business rescue must be passed in good faith, and that business rescue must not be used as a "litigation strategy" or to prevent a creditor from enforcing a claim to the full extent.) In my view the real reason for the resort to business rescue in this case is clear: Alderbaran is desperate to hold onto the property as it hopes to subdivide the property and make a handsome profit on the sale of the subdivided units. Its ambitions in this regard will be dashed if the property is transferred to Trade Off pursuant to the sale in execution, allowing Trade Off to pursue the development and reap the rewards.

48.4. Fourth, Bouwer has not been paid what he is owed for the property. If the business rescue is not set aside, the result will be that he is effectively compelled to act as Alderbaran's banker against his wishes inasmuch as he will be prevented from enforcing his right to payment in terms of the default judgment. And it is significant in this regard that no indication is given in the supplementary affidavit as to whether the installation of services on the property has commenced, how this work is to be financed, when the approval of the subdivision is anticipated, and how long it will take for the plots to be sold and sufficient funds generated to pay Bouwer - and other possible creditors of Alderbaran.

49. In view of these circumstances I consider that justice and equity will best be served by setting aside the first resolution and terminating the resultant business rescue.

SHOULD AN ORDER BE MADE IN TERMS OF SECTION 130(5)(a) REGARDING THE SALE IN EXECUTION?

50. Having determined that it would be just and equitable to set aside the first resolution and terminate the business rescue, the next question is whether any further order is necessary and appropriate.

51. Section 130(5)(c) provides that:

"If [the Court] makes an order [setting aside a resolution in terms of section 129(1) [it] may make any further necessary and appropriate order including –

(i) an order placing the company under liquidation; or

(ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith ..."

[Emphasis added.]

52. I do not regard the specific orders contemplated in subsections (i) and (ii) as a *numerus clausus* of the orders which a Court may make when setting aside a resolution to commence business rescue and terminate business rescue. Furthermore, because business rescue, once validly initiated, remains operative until set aside by a Court - even if affected persons have not been notified thereof as required in section 129 - I do not consider that there should be a blanket rule that the setting aside of a section 129 resolution and termination of business rescue operates *ex tunc*, i.e. retrospectively with effect from the date of the section 129 resolution.
53. In my view circumstances may differ from case to case, so that a different approach is required in order to ensure that justice is done. For instance, there may be uncertainty regarding the status of legal proceedings or enforcement action taken against the company while the company was in business rescue at a stage when affected persons were unaware thereof. This is just such a case, where the sale in execution occurred on 15 June 2017 at a stage when Bouwer was ignorant of the business rescue, since he had not been duly notified of the first resolution. Or there may be instances where a business rescue practitioner has taken steps during the course of the business rescue which affect the rights of third parties and/or are beneficial for the company which should not be invalidated when the section 129 resolution is set aside and the business rescue terminated.
54. To my mind the rationale for the wide discretion conferred on the Court in section 130(5)(c) to grant “any further necessary and appropriate order” is to equip the Court to deal equitably with the various circumstances which may arise and require regulation following the setting aside of a section 129 resolution and termination of business rescue. The discretion must be exercised judicially, and the only
- limit on the further order which may be made is that it must be both necessary and appropriate.
55. The applicants contend that the sale in execution of the property on 15 June 2017 was unlawful because Alderbaran was still in business
- rescue at the time and should therefore be declared invalid and set aside. It is therefore necessary for me to make an order dealing with the status of the sale in execution.
56. The Supreme Court of Appeal held in *Chetty t/a Nationwide Electrical v Hart NO* and another “Chetty”[5] that there was no indication in section 133 that non-compliance carries with it the implication that the proceedings are a nullity,[6] and that the failure to obtain the leave of the BRP or the Court to initiate or continue with legal proceedings does not, in and of itself, invalidate the proceedings.[7] I therefore do not accept the submission that the sale in execution was a nullity which must be set aside.
57. To my mind it is both necessary and appropriate, in all the circumstances of this case, to make an order confirming the validity of the sale in execution of the property on 15 June 2017 and authorising the finalisation of transfer of the property in terms thereof.

SERVICE AND NOTICE IN TERMS OF SECTION 130(3)

58. An affected person who applies in terms of section 130(1) of the Act to set aside a company resolution to commence business is obliged to comply with the requirements of section 130(3) of the Act, which reads as follows:

“An applicant in terms of subsection (1) must –

- (a) serve a copy of the application on the company and the Commission; and
- (b) notify each affected person of the application in the prescribed manner. [Emphasis added]

59. The Court in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others*[8] considered the meaning of section 131(2) which is identical to section 130(3) although the context is different. (Section 131(2)

deals with service and notice requirements where an affected person applies to Court to place a company under business rescue.)

60. As regards the requirement of service on the company and the Commission, Boruchowitz J held that both the company and the Commission have a direct and substantial interest in any order the Court might make and are required to be joined as parties to the business rescue application.[9] In my view that applies equally in the case of an application to set aside and terminate a business rescue in terms of section 130, although I am prepared to accept that it may be appropriate to dispense with the requirement of formal joinder of the Commission as a respondent in proceedings where the Commission has been properly served with a copy of the proceedings and the Court is satisfied that the Commission has waived any right to be joined as a party to the proceedings.[10]
61. Boruchowitz J accepted that service for purposes of section 131(2)(a) of the Act means service in terms of Rule 4(1)(a) of the Uniform Rules of Court (“the Uniform Rules”), which requires service by the Sheriff on both the company and the Commission.[11] This approach was endorsed by Hartzenberg AJ in *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*. [12]
62. While I agree that the word “service” in sections 131(2)(a) and 130(3)(a) envisages service by sheriff on the company in terms of rule 4(1)(a) of the Uniform Rules, I do not agree that it therefore necessarily also envisages service by the sheriff on the Commission.
63. It has been drawn to my attention (in the context of an application in terms of section 131 of the Act) that the Commission is not willing to accept service by sheriff of hard copy documents, and insists on service in electronic format. The reason is not difficult to fathom: one can readily appreciate that the logistical burden and expense involved in storing and retrieving documents in electronic format is much less than that involved in storing large volumes of paper documents. The Commission has issued practice note 9 of 2017 which deals with the service of subpoenas and other court documents on the Commission. It reads as follows in relevant part:

“In some instances it is required for legal documents such as Notices of Motion, Subpoenas to provide documentation, etc. to be served on CIPC as an interested party, as the outcome of court proceedings may entail action to be taken by CIPC.

Uniform Rules of Court, specifically Rule 4 and 4A describes the requirements of service of legal documents in detail and allows for service of documents by way of electronic means. Annexure 3, Table CR3 of the Companies Act, 2008 details the methods and times for delivery of documents, and provides for service thereof by electronic means. To this end, CIPC has provided for a dedicated e-mail box to receive legal documentation – corporatelegalservices@cipc.co.za.

Any legal documents where CIPC is stated to be an interested party, and must be provided with a copy of the document for record purposes, may be sent to the dedicated e-mail address as valid service thereof.

With regard to subpoena's, where specific action is required by CIPC, service via corporatelegalservices@cipc.co.za is also accepted.”

64. The practice note is a clear indication by the Commission of the manner in which it wishes to receive service and notice of Court documents. The practice note refers to Rule 4A, which allows for the service of documents by way of email. The difference between Rules 4(1)(a) and 4A is that Rule 4(1)(a) applies to documents initiating application proceedings, which must be served by sheriff in one of the manners provided for in Rule 4(1)(a), whereas Rule 4A applies to the service of documents which do not fall under Rule 4(1)(a), and allows for service by hand delivery, registered post and electronic mail. It seems to me that where an application is brought in terms of section 130 or 131 of the Act for relief against a company, the notice of motion is vis a vis the company, a document initiating application proceedings, whereas it is not such a document vis a vis the Commission if no relief is sought against the Commission and it is only cited as an interested party.
65. Therefore, if one interprets the word “service” in sections 130(3)(a) and 131(2)(a) as meaning service in terms of Rule 4, then it is possible to hold that service in terms of Rule 4(1) is required in the case of the Company, whereas service in terms of Rule 4A is sufficient in the case of the Commission. This construction makes sense, in my view, having regard to the fact that the role and interest of the Commission in the proceedings is formal and peripheral, whereas the company directly affected and may well wish to oppose the relief being sought. In addition, this interpretation of the provisions requiring service on the Commission respects the Commission's preference in the matter, which I regard as an important consideration.

66. In my view, therefore, the word “service” in section 130(3)(a) means service in terms of Rule 4, more particularly service in terms of Rule 4(1)(a) in the case of the company, that is service by sheriff in one of the manners referred to in Rule 4(1), and, in the case of the Commission, service in terms of Rule 4A (c) as read with practice note 9 of 2017, that is service by electronic mail at the dedicated email address provided by the Commission, namely corporatelegalservices@cipc.co.za.
67. Turning to section 130(3)(b) which requires that notice be given to affected persons “in the prescribed manner”, regulation 124 of the Companies Regulations, 2011 (“the Regulations”) sets out the manner in which an applicant is

required to notify affected persons in terms of section 130(3)(b). It states that:

*“An applicant in court proceedings who is required, in terms of either section 130(3)(b) or 131(2)(b), to notify affected persons that an application has been made to a court, must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant.
[Emphasis added]*

68. Regulation 7(1), in turn, provides that:

“A notice or document to be delivered for any purpose contemplated in the Act or these Regulations may be delivered in any manner –

- (a) contemplated in section 6(10) or (11); or
- (b) set out in Table CR 3.”

69. In terms of section 6(11)(b) of the Act, where a document, such as this application, is required to be delivered, it may be provided in electronic form if it can be printed reasonably quickly and cheaply by the recipient; alternatively a notice of the availability of the document with a summary of its contents may be sent, together with instructions for receiving the complete document.[13]
70. Alternatively, notice may be given as set out in Table CR 3 of the Regulations, which lists a number of different delivery methods for notices or documents required to be delivered under the Act including, inter alia, fax, electronic mail and registered post. Importantly for present purposes, one of the permitted delivery methods set out in Table CR 3 is “any other means authorised by the High Court”.
71. Also relevant is regulation 7(3)(a) of the Regulations, which allows for application to be made to the High Court for an order of substituted service if, in a particular matter, it proves impossible to deliver a document in any manner provided for in the Act or the Regulations.
72. Therefore this Court is empowered, in terms of regulation 124 as read with regulations 7(1) and 7(3) and Table CR 3, to determine the manner in which notice of the application is to be given to affected persons in terms of section 130(3)(b).

73. In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening*[14] Rogers AJ (as he then was) criticised Regulation 124 which he said “[e]ffectively ... requires service of the whole application on all affected parties” and, in so doing, “may well travel beyond what may lawfully be prescribed under s131(2)(b).”[15] This criticism was endorsed by Coppin J in *Kalahari Resources (Pty) Ltd v Arcelormittal S.A. and Others*. [16]

74. I respectfully agree that the regulation 124 might well be ultra vires what may lawfully be prescribed under section 131 (2)(b) (and 130(3)(a)) if, properly construed, it requires service of the whole application on all affected parties. However I humbly disagree with this interpretation of regulation 124. It seems to me that regulation 124 requires

delivery of a copy of the application in accordance with regulation 7 to all affected persons known to the applicant. Regulation 7 specifically refers to section 6(11) of the Act, which, in terms of section 6(11)(b)(ii), allows for a summary of the contents of the application to be delivered by email where the whole application cannot be printed conveniently by the recipient, for instance because it is too voluminous to be printed quickly and cheaply. Furthermore regulation 7(1) permits delivery in any manner referred to in Table CR 3, which provides for a number of delivery options and includes any method of delivery authorised by the High Court. It therefore seems to me inaccurate to say that regulation 124 requires service of the whole application on all affected parties. The scope of regulation 124 is limited to affected persons known to the applicant, and delivery in accordance with one of the methods sanctioned in section 6(11) or Table CR 3, read with regulation 7(1), is what is required.

75. In this case the counter-application for the setting aside and termination of business rescue in terms of section 130 was served on the applicants’ attorneys of record. That constitutes proper service in terms of rule 4(1)(aA) of the Uniform Rules, and I am therefore satisfied that there has been due compliance with section 130(3)(a) insofar as Alderbaran is concerned. However the Commission has not been joined as a party to the counter-application and there has been no service whatsoever of the application on the Commission. The requirements of section 130(3)(a) have therefore not been met.

76. I cannot grant an order in terms of section 130(5) until I am satisfied that the Commission has been duly served with a copy of the counter-application and that it has waived its right to be joined as a party to the proceedings. In the circumstances I intend to deal with this difficulty by issuing a Rule Nisi with directions regarding service of the counter-application and the Rule on the Commission.

77. The requirements of section 130(3)(b) have also not been met inasmuch as a copy of the counter-application was not delivered in any manner or form to any affected persons as defined in section 128 (1)(a) of the Act. In the nature of things Bower cannot reasonably be expected to know the identity of the shareholders, creditors and employees of Alderbaran. However, an attempt could and should have been made to obtain the information from Alderbaran through its attorneys. At the very least Bower’s attorney ought to have

furnished a copy of the counter-application to the alleged creditors of Alderbaran who were named in annexures “X” and “Y” to Bouwer’s answering affidavit, namely Shaheed Noor, Zayd Noor, Faizel Begg and Sonnenberg & Associates. I intend to deal with this omission by directing that the applicants’ attorney furnish Bouwer’s attorney with email and/or physical addresses for these particular creditors and ordering that a copy of the counter-application and the Rule Nisi be delivered to these creditors by email or registered post, as permitted in Table CR 3.

78. The reason why I have decided not to dismiss the counter-application for non-compliance with the peremptory requirements of section 130(3) and to rather issue a Rule Nisi with directions as to service and notice, is that there is a good case on the merits for the relief sought in the counter-application. I have found that it would be just and equitable in all the circumstances to grant the relief, and it follows that it would not conducive to justice and equity to refuse the relief on the technical ground of defective service. I am satisfied that the interests of all affected persons can satisfactorily be catered for by way of the service and notice directions which I intend to make.

COSTS

79. It follows from what has been set out above that the application stands to be dismissed while the counter-application succeeds. The costs must follow the event in accordance with the ordinary rule.
80. Mr Montzinger requested that costs on the attorney and client scale be ordered against Shaheed Noor and Faizel Noor in their respective

personal capacities, the one paying the other to be absolved.

81. For reasons already referred to in this judgment I consider that both Shaheed and Faizel Noor have been guilty of an abuse of the business rescue process. I have found that Shaheed Noor did not act in good faith in passing the first resolution. Faizel Noor’s conduct is, in my view, equally reprehensible. He took no steps whatsoever to comply with the requirements of the Act in relation to the first resolution, and no attempt has been made to explain his supineness. In my view the inference is inescapable that he had no intention of implementing the business rescue pursuant to the first resolution, and that he was a party to Shaheed Noor’s stratagem to prevent Bouwer from executing the default judgment in order to preserve the property in the name of Alderbaran.
82. Another aspect which requires mention is the failure of both Shaheed and Faizel Noor to make full disclosure of the real business and financial position of Alderbaran. The founding affidavit is woefully devoid of relevant details pertaining to the business rescue. Selective portions of the truth – like the contents of Pandora’s Box – emerged piecemeal in response to pertinent enquiries from the Court and challenges by Bouwer. I am left with the uneasy feeling that the full story has not been told. The supplementary affidavit of 6 February 2018 was a desperate attempt to ward off the relief sought in the counter-application, but even

then the facts put up were bald and skimpy and raised more questions than they answered. More importantly, these facts should have been put up in the applicants' founding affidavit, and there was no explanation at all – let alone an acceptable one – why they had not been disclosed at an earlier stage.

83. In all the circumstances I have no hesitation in ordering that the costs of this application be paid on the attorney and client scale by Shaheed and Fazel Noor jointly and severally in their personal capacities, both as a mark of disapproval at the manner in which they have abused the business rescue process, and also because it would not be fair to saddle Alderbaran (and therefore possibly its creditors) with these costs.
84. There is another issue in relation to costs which I feel should be addressed. Given the particular circumstances of this case, I consider that it would not be right for Faizel Noor to charge Alderbaran for remuneration as BRP. But since no relief was sought in this regard, and since the issue was not argued, fairness requires that I give Faizel Noor an opportunity to be heard before making any order in this regard in terms of section 130(5)(c) of the Act. He will be afforded such an opportunity on the return day of the Rule Nisi which I intend to issue.

CONCLUSION

85. In the result I make the following order:

1. The Rule Nisi issued on 22 November 2017 is discharged.
2. The application is dismissed.
3. A Rule Nisi is issued calling upon any interested person to appear before this Court at 10h00 on TUESDAY 24 APRIL 2018 and give reasons, if any, why this Court should not make an order that:
 - 3.1. It is declared in terms of section 129(5)(a) of the Companies Act 71 of 2008 ("the Act"), as read with sections 129(3) and (4) of the Act, that the first applicant's resolution dated 13 September 2016 to begin business rescue proceedings and place Alderbaran 11 (Pty) Ltd under supervision ("the resolution") has lapsed and is a nullity.
 - 3.2. The resolution is set aside in terms of section 130(5)(a) of the Act as read with sections 130(1)(a)(iii) and 129(3) and (4) of the Act and it is declared that the business rescue has ended in accordance with section 132(2)(a)(i) of the Act.
 - 3.3. It is declared in terms of section 130(5)(c) of the Act that the sale in execution on 15 June 2017 of Portion 241 (a portion of Portion 63) of the farm Melkhoute Fontein Nr 480, in the Hessaqua Municipality, Division Riversdale, Western Cape, 79,7029 hectares in extent ("the property") to the Third Respondent is valid and operative.

3.4. The Sheriff, Riversdale is authorised to proceed with transfer of the property to the Third Respondent in accordance with the sale in execution.

3.5. The costs of the first respondent in the application and the counter-application are to be paid on the attorney and client scale

by Shaheed Noor, the director of the first applicant, in his personal capacity, and by Faizel Noor, the second applicant, in his personal capacity, jointly and severally, the one paying the other to be absolved.

3.6. The second applicant is precluded from claiming any remuneration from Alderbaran 11 (Pty) Ltd for his services as business rescue practitioner.

4. A copy of the counter-application and of this Order shall be served on the Companies and Intellectual Property Commission (“the

Commission”) by electronic mail directed to corporatelegalservices@cipc.co.za, or such other electronic mail address as may be sanctioned by the Commission for purposes of service of legal process.

5. A copy of the counter-application and of this Order shall be delivered by electronic mail or registered post to Shaheed Noor, Zayd Noor, Faizel Begg and Sonnenbergs & Associates, and to that end the applicants’ attorney is directed to furnish the first

respondent’s attorney with electronic mail addresses or physical addresses for these persons within 7 (seven) days of the

granting of this Order.

6. A copy of this Order is to be sent by electronic mail to the second applicant, whose electronic mail address is to be furnished by the applicants’ attorney to the first respondent’s attorney within 7 (seven) days of the date of the granting of this Order

7. A copy of this Order shall be served on Alderbaran 11 (Pty) Ltd by delivery at the offices of its attorneys of record.

8. A copy of this Order shall be published in the Cape Times and Die Burger newspapers.

9. A copy of the counter-application shall be made available on written request by any shareholder, creditor, employee or registered trade union representing any employee, of Alderbaran 11 (Pty) Ltd, directed to the first respondent’s attorney, Mr Wynand Janse Van Rensburg of Attorneys S A Hofmeyr & Son, Riversdale, at wynand@riversdal.com or fax number (028) 713-1774. (Telephone number (028) 713-2424.)

D M DAVIS

Acting Judge of the High Court

Court Date: 5 December 2017 & 7 February 2018

Judgment

Delivered: 22 March 2018 in Court 25 by Davis AJ

[1] Annexures “Q” and “R”.

[2] Annexure “S” to the answering affidavit in the main application.

[3]

[2015] 3 All SA 274 (SCA).

[4] 2015 (3) SA 438 (SCA).

[5]

[2015] 4 All SA 401 (SCA).

[6] Id para 41.

[7] Id para 42.

[8] 2012 (5) SA 596 (GSJ).

[9] Id para [15].

[10] See Rosebank Mall (Pty) Ltd v Craddock Heights (Pty) Ltd 2004

(2) SA 353 (WLD) paras 11 – 13.

[11] Id para [18].

[12] 2013 (6) SA 141 (KZP) at para [10].

[13] Section 6(11)(b) reads as follows: “If, in terms of this Act, a document, record or statement, other than a notice contemplated in subsection 10, is required – (b) to be published, provided or delivered, it is sufficient if – (i) an electronic original or reproduction of that document, record or statement is published, provided or delivered by electronic communication in a manner and form such that the document, record or statement can conveniently be printed by the recipient within a reasonable time and at a reasonable cost; or (ii) a notice of the availability of that document, record or statement, summarizing its content and satisfying any prescribed requirements, is delivered to each intended recipient of the document, record or statement, together with instructions for receiving the complete document, record or statement.”

[13] Section 6(11)(b) reads as follows:

“If, in terms of this Act, a document, record or statement, other than a notice contemplated in subsection 10, is required –

- (b) to be published, provided or delivered, it is sufficient if –
- (i) an electronic original or reproduction of that document, record or statement is published, provided or delivered by electronic communication in a manner and form such that the document, record or statement can conveniently be printed by the recipient within a reasonable time and at a reasonable cost; or
- (ii) a notice of the availability of that document, record or statement, summarizing its content and satisfying any prescribed requirements, is delivered to each intended recipient of the document, record or statement, together with instructions for receiving the complete document, record or statement.”

[14] 2011 (5) SA 600 (WCC).

[15] Id para [16].

[16]

[2012] 3 All SA 555 (GSJ) at para [60].

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