

SOUTH AFRICA / JUDGMENT

Ally v Firststrand Bank Limited and Others (1209/2024P) [2024] ZAKZPHC 36 (1 February 2024) [2024] ZAKZPHC 36

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

P C Bezuidenhout

CASE / FILE NUMBER

1209/2024P

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IN THE HIGH COURT OF

SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE NUMBER 1209/2024P

In the matter between:

RIAL
ALLY
APPLICANT
And
FIRSTRAND
BANK
LIMITED
FIRST RESPONDENT
GLEN VIVIAN USHER
N.O
SECOND RESPONDENT
KRISHNA RUBEN
VENGADESAN
THIRD RESPONDENT
WASEELA DISTRIBUTORS

CLOSE CORPORATION
FOURTH RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

- [1] Applicant brought an urgent application to place Fourth Respondent under business rescue. He is the sole member of Fourth Respondent and accordingly an affected party. This was not in dispute. Fourth Respondent was provisionally wound up on 12 September 2023 and the return date is 31 January 2023.
- [2] The application in this matter was issued on 26 January 2024 and two service affidavits were provided setting out service to the relevant parties. Accordingly in terms of section 131(6) of the Companies Act 71 of 2008 (the Act) further legal proceedings against Fourth Respondent are stayed at this stage.
- [3] Mr Moodley, who appeared on behalf of Applicant, submitted that the matter was urgent as it was only on 25 January 2024 that a business rescue practitioner filed a report, after investigating the affairs of Fourth Respondent at the request of Applicant, and concluded there was a reasonable prospect that Fourth Respondent can return to normality. Accordingly that made the application urgent as the final order was to be heard on 31 January 2023. It was submitted by Mr Combrinck, appearing on behalf of First Respondent, that the urgency was self-created and that Applicant had substantial time since the granting of the provisional order to have brought an application of this nature. I accept that the report of the business rescue practitioner was only received on 25 January 2024 and that as a result thereof the matter became urgent and therefore accept that there was sufficient urgency for the matter to be heard.
- [4] Mr. Flemming, appearing on behalf of the twenty-six employees of Fourth Respondent, submitted that they supported the application for business rescue as set out in the affidavit of Applicant as they were of the opinion that the business could be saved and that it would also ensure that they would not lose their jobs.
- [5] Second and Third Respondents were appointed as the liquidators of Fourth Respondent and commenced with their functions. On 12 December 2023 they brought an application against First and Fourth Respondents together with two other Respondents seeking further relief and granting them certain powers to investigate the affairs of Respondents and inter alia appoint forensic investigators. A Rule nisi was granted which is returnable on 9 February 2024.
- [6] It was submitted by Mr Moodley that business rescue would be the correct procedure in this case and that there was sufficient evidence to indicate that Fourth Respondent could be turned into a profitable business. He referred to the assets of Fourth Respondent which includes inter alia various properties and for which two of them offers have been received in

the amount of R11 million. There is further monthly rental collected of approximately R270 000 and there is stock of R5 million and 26 employees. He therefore submitted that this was all indicative that the business could be rescued and referred to the report of the business rescue practitioner and submitted that that must be considered in deciding the matter. He further submitted that there would be no prejudice to First Respondent because if the business rescue did not succeed it would return to court for a final winding up order.

The application was also not opposed by the two liquidators.

[7] Mr Combrinck on behalf of First Respondent, the only party opposing the application, referred to the decision of *Oakdene Square Properties Pty (Ltd) and others v Farm Bothasfontein (Kyalami) Pty (Ltd) and others* 2013 (4) SA 539 (SCA). He submitted that on a reading of this decision there had firstly to be factors indicating that the business can trade and has reserves and secondly if not that there would be a greater advantage to creditors. There must be a reasonable prospect of survival of a business and not merely a *prima facie* one. He submitted that no such case was made out and there was no factual basis set out by the business rescue practitioner. Further he submitted that it was self-created urgency which I have dealt with above. He therefore submitted that the application should be dismissed with costs.

[8] Mr Flemming, appearing on behalf of the 26 employees, supported the relief sought and submitted that there had been substantial compliance as required in terms of the Oakdene decision and the Act.

[9] Section 131(1) of the Act entitles an affected party to approach the court at any time for an order placing the company under supervision and commencing business rescue. This was not disputed. Section 131(4) states as follows:

“After considering an application in terms of subsection (1) the court may

- (a) make an order placing the company under supervision and commencing business rescue proceedings if the court is satisfied that;
 - (i) the company is financially distressed
 - (ii) the company has failed to pay over any amount in terms of an application under or in terms of public regulation, or contract with respect to employment related matters or;
 - (iii) it is otherwise just and equitable to do so for financial reasons, and there is reasonable prospect for rescuing the company or;
- (b) dismissing the application together with any further necessary an appropriate order including and order placing the company under liquidation.”

[10] In paragraph 23 of Oakdene judgment it held:

“The potential business rescue plan section 128(1)(b)(iii) thus contemplates two objects or goals, a primary goal, which is to facilitate the continued existence of a company in a state of insolvency and, secondary goal which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable namely to facilitate a better return for creditors or shareholders of the company than would result from immediate liquidation.”

[11] It continues in paragraph 26:

“As I understand the said section it says that business rescue means to facilitate with rehabilitation, which in turn means the achievement

of one of two goals (a) to return a company to solvency or (b) to provide a better deal with the creditors and shareholders than what they would receive through liquidation.”

[12] It further held in paragraph 30 that it was not practical nor prudent to be prescriptive on the way in which an Applicant must show a reasonable prospect in every case. In paragraph 31 it held that it was not required that a detailed plan be set out by Applicant but that Applicant must establish grounds for the reasonable prospect of achieving one of the two goals.

[13] Much of the founding affidavit of Applicant concerns what transpired prior to and at the time when the provisional winding up order was granted. This, in my view, is not relevant to the issues which has to be decided namely whether to grant an order for business rescue or not. Applicant mainly relies on the report of the business rescue practitioner and requested that it be incorporated into the affidavit. In the affidavit filed on behalf of First Respondent it refers to certain factors which were established by the liquidators such as the trading of two spares businesses from a business premises occupied by Fourth Respondent. It also sets out that the liquidators shut down the business operations on 12 December

2023. It is therefore common cause that the business is not operating at present. It contends that there must be a factual basis to assess if there are reasonable prospects of recovery. It is contended that the approach proposed by the business rescue practitioner does not set out how it will facilitate the continued existence of Fourth Respondent. It does not refer to the day to day expenditure of Fourth Respondent and what all of that would amount to.

[14] The Master reported that he that it abides the decision of the court.

[15] It is also common cause that Fourth Respondent is financially distressed.

[16] Attached to the founding papers is an affidavit by one France Khumalo who sets out that he wishes to purchase the one property at 213 Church Street Vryheid for an amount of R6 million and has previously requested Applicant to sell the property to him but he was reluctant to do so. There is also an offer to purchase. There is also an affidavit by one Anthony Lennard Broadfield of Future Turning CC trading as Urban Steel at 2[...] N[...] Street, Vryheid, KwaZulu-Natal, which property is owned by Fourth Respondent. He has been operating from there for approximately 8 years as a tenant and to secure his future he wishes to purchase the said property for the sum of R5 750 000.00. There is also a sale

agreement in that regard. The offer to purchase has been given to Applicant and a 10 % deposit would be paid. The offer to purchase is attached to his affidavit.

- [17] Mr. Partab a business rescue practitioner filed a report at the request of Applicant and states that there is a reasonable prospect of resurrecting the business. He sets out that the sale of the two properties would amount to just over R11 million and First Respondent, who is the largest creditor, is owed approximately R7 million. There is R650 000.00 owed to other creditors and by reopening the business it would prevent its permanent closure which would be prejudicial. There is stock of approximately R5 million and this is enough to pay creditors and also to operate the business without prejudice to creditors. There is debt outstanding to Fourth Respondent in the sum of approximately R2.1 million which is recoverable and the business can be rehabilitated in short period of time as it has been operating for 20 years and has various employees. He further suggests that the business will be able to operate as all the staff are there.
- [18] It must also be considered that the staff members entered the application seeking the order to be granted, as they do not wish to lose their employment, and that there is stock of R5 million. The premises from which the business can trade is still there and Fourth Respondent receives a substantial monthly rental. The various properties according to the valuation is worth about R28 million.
- [19] As set out in the Oakdene case referred to above it cannot be prescriptive of how an Applicant must show reasonable prospects in a case such as this. Applicant must establish grounds for the reasonable prospect of achieving one of the two goals in section 128(1)(b). In my view considering the above which has been set out by the business rescue practitioner and Applicant in his founding affidavit there is sufficient grounds set out for a reasonable prospect that it can be achieved. There is substantial stock, there are employees, there is business premises and there is substantial properties that can be sold to help the cash flow and allow it to trade. It is indeed so that it was not set out what the monthly expenses are but it appears that some of the properties are freehold, that First Respondent would be paid and therefore in my view it has been shown that there are facts to accept that there is a reasonable prospect that it could achieve what is set out in the Act and in the Oakdene case.
- [20] In my view it would accordingly be just and equitable to grant such an order rather than to liquidate the business as that may be more prejudicial to the creditors.

Order:

I accordingly grant a rule nisi in terms of paragraphs 2 and 3 of the notice of motion with the return date being 29 February 2024.

P C BEZUIDENHOUT J.

JUDGMENT

RESERVED: 29 JANUARY 2024

JUDGMENT

HANDED DOWN: 1 FEBRUARY 2024 COUNSEL FOR THE APPLICANT: V MOODLEY Instructed by: Karrian Attorneys Pietermaritzburg Tel 067 059 9882 Ref MK/HC006WASEELA COUNSEL FOR FIRST RESPONDENT: P J COMBRINCK SC Instructed by: Edward Nathan Sonnenbergs Inc. Umhlanga Tel: 031 536 8616 Ref: A Khan/ 0501671 c/o Stowell Pietermaritzburg Ref: S Myhill COUNSEL FOR (employees of) FOURTH RESPONDENT: A G FLEMMING

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