

SOUTH AFRICA / JUDGMENT

Beer NO v Fozsa Logistics CC (23039/2013) [2013] ZAGPPHC 195 (12 July 2013) [2013] ZAGPPHC 195

COURT

North Gauteng High Court, Pretoria

BEFORE

Makume

CASE / FILE NUMBER

23039/2013

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IN THE

NORTH GAUTENG HIGH COURT,
PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE

NO: 23039/2013

DATE:12/07/2013

In the

matter between:

JOHAN

CHRISTIAAN BEER

N.O.....APPLICANT

AND

FOZSA

LOGISTICS

CC.....RESPONDENT

REGISTRATION

NUMBER: 2005/074130/23

JUDGMENT

MAKUME J

- [1] In this application the Applicant seeks an order terminating the business rescue process with regard to the Respondent and to place the Respondent under liquidation in terms of section 141(2)(a)(ii) of the Companies Act number 71 of 2008("The Act"). The facts leading to the application are set out hereunder.
- [2] On the 27th day of September 2012 a notice in terms of section 132(i)(a) of the Act was published effectively placing the Respondent company under business rescue in terms of section 129(3) of the Act.
- [3] On the 4th October 2012 the Applicant was duly appointed, the business rescue practitioner of the Respondent in accordance with section 129(3)(b) of the Act.
- [4] The appointment of the Applicant and the placing of the Respondent under business rescue went unchallenged. If there was anything amiss about the appointment and the placing of the company under business rescue any affected person could have utilised the provisions of section 130 of the Act. This is despite the fact that all such affected persons were notified of the proceedings.
- [5] A first meeting of the creditors was held on the 16th October 2012 at which meeting the Applicant in his capacity as business rescue practitioner expressed a view that having had a look at the preliminary situation of the Respondent that there was a chance that the company can be rescued. He indicated that he will soon publish his business rescue plan in accordance with the Act which business plan he will present at the second meeting of the creditors for consideration.
- [6] It would appear that this view was not well considered or was based on incorrect information. I say this because in paragraph 145 of the founding affidavit the Applicant says the following:
- "From approximately the beginning of September 2012 up until to the date hereof I had no alternative but to conclude that there no longer existed any reasonable prospects for rescuing the Respondent".
- [7] It is clear that this statement contradicts materially what the Applicant told the body of creditors who attended the first creditors meeting on the 16th October 2012.
- [8] It is common knowledge and not disputed that the Respondent conducted a logistic business specialising in transporting bulk wholesale fuel from the major petroleum companies in South Africa to end users or retailers.

- [9] To conduct its business the Respondent owned large horse and trailer fuel tankers. The Respondent's major client who accounted for almost 90 percent of its income was Total South Africa Petroleum (Pty) Limited.
- [10] As a result of theft and fraudulent activities involving deliveries of the fuel Total South Africa terminated its agreement with the Respondent in August 2012. At that time it is said that Total owed the Respondent an amount of R 1.3 million.
- [11] The Applicant says that he reached a conclusion that there no longer existed any reasonable prospects of rescuing the Respondent because of the loss of that major contract with Total South Africa. The Applicant further says that he attempted on numerous occasions to have the contract reinstated without success. He was also not successful in obtaining new contracts from various other companies.

As a result of that state of affairs the Respondent was unable to meet its reduced monthly obligations in terms of the proposed

business rescue plan.

- [12] On the 15th April 2013 the Applicant issued a notice terminating the business rescue proceedings. The notice reads that it is a termination in the manner as contemplated in section 132(2)(b); read with section 141 (2)(a)(ii) of the Companies Act.

- [13] Section 132(2) (b) reads as follows:

"Business rescue proceedings ends when;

- (b) The practitioner has filed with the commissioner a notice of termination of business rescue proceedings.

- [14] Section 141 (2)(a)(i)(ii) reads as follows:

"If at any time during business rescue proceedings the practitioner concluded that

- (a) There is no reasonable prospect for the company to be rescued, the practitioner must:

- (i) So inform the court, the company, and all affected persons in the prescribed manner and;

- (ii) Apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation".

- [15] Mr Mohammed Shabir Shaik Ebrahim the sole member of the Respondent has filed an affidavit opposing the application. In his affidavit Mohammed raised the following:

15.1. Firstly that the Applicant having filed a notice terminating business rescue now lacks the necessary locus standi to bring this application.

15.2. Secondly that the Applicant failed to carry out his statutory obligation as a business rescue practitioner in that he failed to take reasonable steps to recover the amount due to the Respondent from Total in the sum of R1.93 million.

15.3. Thirdly, that the Applicant was guilty of a general dereliction of duty as a business rescue practitioner and in various ways failed to take steps to save the company from liquidation. It is alleged that amongst others he failed to extend the period of business rescue beyond three months, also that he failed to file a report to the body of creditors.

15.4. Fourthly Mohammed continues that there are reasonable prospects of the company surviving and trading under solvent conditions but for the actions of the business rescue practitioner. In this regard Mr Mohammed says that the applicant jettisoned his endeavours to finalise a prospective deal with BP one of the major oil companies. Mr Mohammed seeks an order that an alternate business rescue

practitioner be appointed to replace the Applicant. To this end he has nominated a Mr Tshepo Mofokeng an attorney of the law firm

Mafokeng Incorporated.

15.5. Lastly it is argued that the Applicant has not made out any case for liquidation.

LOCUS STANDI

[16] In his opposing affidavit Mohammed argues that since the Applicant filed a notice to terminate business rescue it was not necessary to still approach court for an order. Mohammed has clearly misunderstood the meaning and effect of section 132(2)(b) read with section 141(2)(a)(i) and (ii). The two sections must always be read together and not separately which is what Mohammed did.

[17] It is common cause that at the second meeting of creditors held on the 6th December 2012 the Applicant still expressed a view that there seems to be reasonable prospects of rescuing the business of the company. At that meeting which was attended by more creditors a view was expressed that the Applicant should hold on to the adjusted business rescue plan and produce evidence of new contracts. Voting on the business plan was postponed to the next meeting.

[18] The business rescue plan had been circulated for consideration in November 2012 already. The deponent Mr Mohammed Shabir Shaik Ebrahim only holds 30 percent membership interest in the company whilst 70 percent interests is held by Mr Abdul Sheik Ebrahim. In the business rescue plan the total claim filed by creditors amounts to the sum of R10,523 344.99 (Ten million five hundred and twenty three rands three hundred and forty four rands and ninety nine cents only).

- [19] In the business plan the Applicant sets out proposal and strategy for returning the company to solvency and liquidity one of proposals was to secure long term contracts with fuel and oil companies.
- [20] On the 25th January 2013 the Applicant in the Business Rescue status report reports that on the 14th January 2013 there was still hope that Total South Africa would reinstate the Respondent's contract and for that reason he postponed the third creditors meeting to enable him to secure the reinstatement of the Total South Africa contract.
- [21] On the 14th of February 2013 at the Third Creditors' Meeting held in terms of Section 142 of the Act it was reported by a representative of the member that Total South Africa will reinstate the company as a preferred service provider, However there were still discussions to be held between the member and Total to discuss certain issues. On the 7th or 12th March 2013 the Applicant updated the Business Rescue plan and sent same to all the creditors and affected persons. It is significant to note that as at that date there was still hope that Total South Africa would reinstate the contract.
- [22] However finally on the 4th April 2013 Total South Africa suspended all contracts and dealings with the Respondent. This directly

translated to no income being generated by the company. The business status report states that the Applicant then held a meeting with the members of the Respondent and informed them of his decision to terminate the Business Rescue. It was clear that the company would not be able to meet its proposed creditors repayment plan. Total was the major income source of the company.

- [23] The termination of the Total deal amongst others led to the member resorting to unconventional tactics in an attempt to blackmail Total to reinstate the contract Mohammed sent an SMS to Total which reads as follows:

"Good day..... I think Total has pushed me over the cliff by leaving me

and my kids on the pavement. I have asked truth and justice. Which I will not get from KHL and Total. I will be embarking on a hunger strike till I drop dead in full glare of the TV and print media, radio and on You Tube on the 8th of April on the pavement outside Total Head Office. It is the only the only way to get someone with authority from Total to talk to me. You can tell Zahir I say he is a lying bastard when he said I could talk to him anytime when we first met. This is lie also that I was audited by mistake. I have nothing to lose anymore. With the stem that Total put me through, causing me to get a heart failure, pushed my sugar levels to skyrocket and cause my kidney to start failing. I might as well die fighting on Total sidewalk seeking truth and justice. Truth will and must prevail. I want to know when Total talks about ethics who does it apply to?"

- [24] The above is a clear message of desperation after losing the contract. It accordingly makes a mockery of the members' argument that there are prospects that the company will survive the financial crises it presently finds itself in.

[25] It is disingenuous of the member Mr Mohammed to at this last stage seek the removal of the Applicant as Business Rescue Practitioner. In the first place he is the one who signed the resolution calling for business rescue. He was represented at all creditors' meetings and was kept abreast with developments since September 2012. Three creditors' meetings were held and in between he received all the updates on the business Rescue Status. He should if he had noticed any dereliction of duties by the applicant proceeded in terms of section 130(1)(b) read with section 139(2)(a)(b)(c)(d)(e)(f).

[26] Section 130(1)(b) reads as follows:

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

- (b) Setting aside the appointment of the practitioner on the grounds that the practitioner
 - (i) Does not satisfy the requirement of section 138.
 - (ii) Is not independent of the company or its management or;
 - (iii) Lacks the necessary skills having regard to the company's circumstances".

[27] Section 139(2) a-f almost mirrors section 130(1) referred to above. What it does it elaborates and expands acts that will lead to the removal of a business rescue practitioner being the following:

- (a) Incompetence or failure to perform the duties of a business rescue practitioner to the particular company.
- (b) Failure to exercise the proper degree of care in the in the performance of the practitioner's functions.
- (c) Engaging in illegal acts or conduct.
- (d) If the practitioner no longer satisfies the requirements set out in section 138(1).
- (e) Conflict of interests or lack of independence or;
- (f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

[28] Mohammed did not avail himself of the provisions of the section referred to above and only brings up stories and incidents of incompetence and dereliction of duty when the Applicant is moving an application for termination of business rescue and conversion to liquidation. After all section 132(2) of the Act grants each debtor of a company during business rescue the duty to the company to exercise any management function within the company in accordance with the express instruction or direction of the practitioner to the extent that it is reasonable to do so. That the members including Mohammed were not cut off from the management activities of the company including how the business rescue was being

managed by the applicant.

[29] Mohammed argues further that the Applicant failed to take steps to recover the R1.93 million that he says Total owes to the company. This statement cannot be true. Conversation between Cawood Attorneys and Knowles

Husain Attorneys including the minutes of creditors as well as the business status reports bear witness to the fact that everything was done to collect that money. In the end on the 12th April 2013 Attorneys Knowles Hussain write as follows to Cawood Attorneys who are the Attorneys of the company:

"As your clients are aware it is our client's firm view that on a proper analysis of the relevant transaction, your client is in fact indebted to our client in an amount of approximately R400, 000. In the circumstances, our client does not accept your client's proposal contained in your letter under reply.

Nonetheless and in the interests of amicably resolving this matter our client is prepared to settle this matter for R800, 000.00. In this regard our client is prepared to:

- 3.1. Pay an amount of R400, 000-00 to your client and;
- 3.2. Write off its claim against your client of R400, 000-00 in full and final settlement of this matter.
4. We are instructed that this offer is not open to further negotiation".

[30] There is evidence that all the vehicles of the company have been surrendered to the financial institutions that financed their

purchasing as the company has not paid the loans in full. Without the vehicles the company is unable to conduct its business of

transporting bulk fuel. The Applicant concluded correctly so that the Respondent is an entity with little or no money, no revenue

sufficient to make repayments toward creditors and has more than Ten million Rand liability towards creditors.

[31] Mr Mohammed argues that the company was in a healthy financial position and should not be liquidated basing his argument on the year end financials as at February 2012 which period falls outside the period of business rescue. This argument is flawed for the reason stated above. The reality of the matter is that five months after year end the company was in financial distress despite the Accumulated profit at year end in the sum of R3,778 490-00.

- [32] Mohammed further argues that the Applicant did not prepare or publish a Business Rescue Plan and that none of the members ever received a Business Rescue Plan. It is correct that the plan was never published Applicant's explanation was because the creditors at a duly constituted meeting agreed that it should not be published yet. The member was present at all those meetings with his Attorney Mr Cawood. Mohammed and the members cannot now be heard to plead ignorance.
- [33] Mohammed's opposition to the present application is based in the main on lack of locus standi, secondly the Total South Africa disputed debt of R1.93 million rands and recovery thereof. I have come to the conclusion that Mohammed has completely misread sections 132 and 141 to suit his argument, accordingly I find that the Applicant never lost his locus standi. The Total debt is a disputed debt and would in any case lead to long litigation beyond the lifespan of the business rescue.
- [34] It is trite law that the initial prognosis was that the company would continue to run as a going concern and managed to financial

soundness, however, subsequent events mainly the suspension or termination of the Total contract had an adverse effect on the company's operations and profitability which resulted in a decision by the Applicant to wind up the company and cut down on

further losses.

- [35] I have come to the conclusion that the business rescue should be terminated and that the company be placed under liquidation in the hands of the Master in terms of section 141(2) (a) (ii).
- [36] Accordingly the following order is hereby made:
- (a) The business rescue with regard to the Respondent is terminated.
 - (b) The Respondent company is placed under liquidation in the hands of the Master in terms of section 141(2) (a) (ii).
 - (c) Costs of this application shall be costs in the liquidation.
 - (d) The counter application by the member Mohammed to appoint Tshepo Mofukeng as the new Business Rescue Practitioner is dismissed with costs which costs shall be paid by Mr Mohammed Shabir Sheik Ebrahim personally.

Dated at Pretoria on the 18th of June 2013.

MAKUMEjflA

JUDGE OF THE NORTH GAUTENG

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