

SOUTH AFRICA / JUDGMENT

Carmody v Kudumela N.O. and Another (2022/17204;2022/2448) [2022] ZAGPJHC 591 (18 August 2022) [2022] ZAGPJHC 591

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

2022/17204;2022/2448

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO:2022/17204

2022/2448

REPORTABLE:

No

OF

INTEREST TO OTHER JUDGES: No

NOT

REVISED

18/08/2022

In

the matter between:

MATHILDA
CARMODY
Applicant
and
JUSTICE
EPHRAIM KUDUMELA. N.O.
First Respondent
And
MATSWAY
STEEL (PTY) LTD (in business rescue)
Second Respondent
(Registration
Number:2018235719/07)
JUSTICE
APHRAM KUDUMELA N.
O.
Applicant
MATSWAY
STEEL (PTY) LTD (in business
rescue)
First Respondent
MATHILDA
CARMODY
Second Respondent
COMPANIES
AND INTELLECTUAL PROPERTY
Third Respondent
COMMISSION
THE
AFFECTED PERSONS RELATING TO
MATSWAY
STEEL (PTY) LIMITED (in business rescue)
Fourth Respondent

JUDGMENT

YACOOB J:

INTRODUCTION

1. The applicant (“Ms Carmody”) in case number 2022/17204 is a director and sole shareholder in Matsway Steel (Pty) Ltd (“Matsway”). Matsway is in business rescue, and is the second respondent in case 2022/17204, and the first respondent in case 2022/2448. The applicant seeks the removal of the business rescue practitioner, Mr Kudumela, on the basis of inaction and incompetence on his part, in terms of section 139(2) of the Companies Act, 71 of 2008 (“the Act”).

2. Mr Kudumela, in his capacity as business rescue practitioner, seeks in case 2022/2448 the conversion of the business rescue to liquidation in terms of section 141(2)(ii) of the Act, on the basis that there is no prospect that Matsway may successfully be rescued.
3. The removal application was brought on an urgent basis. The conversion application is submitted to be urgent should the removal be found to be urgent. Taking into account the chronology of events in this matter, I am not satisfied that it is urgent. Nevertheless, having read the papers and heard full argument, I consider that it is in the interests of justice for me to hear the matter, rather than to cause the parties to incur further costs and impose further on judicial resources in having this matter heard on another date.
4. The removal application was issued and set down before the conversion application, while the conversion application was not set down. Nevertheless the parties agreed that both applications should be heard, although it was submitted by Mr Fourie for Mr Kudumela that the conversion application should be heard first as it would determine all the issues. I ruled that both applications be argued together. The two applications are so intertwined that there is no point in having them heard separately.
5. The removal application having been instituted first, I ruled that Ms van der Linde (for Ms Carmody) should begin. Mr Fourie submitted that it would make sense for the liquidation application to be heard and determined before the removal application was dealt with, since if I found that the business rescue should be converted to liquidation that would do away for the need for a new business rescue practitioner. This is true, but logistically both applications had to be heard.
6. On balance, it is clear that this court must decide whether it is appropriate to continue business rescue proceedings, because there is a prospect of rescue, or whether there is no prospect of rescue and Matsway must then be liquidated. Even if Ms Carmody has established that Mr Kudumela ought to be removed, this does not mean that this court must make the order removing him, as the court has a discretion in terms of section 141(3) of the act. Nor does it mean that the liquidation application cannot then succeed. If

I conclude that there is no point in continuing the business rescue, and that the requirements for liquidation are present, it is open to me to order that the business rescue be converted into liquidation.

7. I consider first the removal application, and then the conversion application.

FACTUAL BACKGROUND

8. Matsway offers steel finishing services of various kinds. It was established in 2006 and started falling into financial difficulties in October 2018.

9. Matsway was placed in voluntary business rescue by way of a resolution taken on 11 October 2021, on the basis that it was financially distressed and that there was a reasonable prospect of rescue. Mr Kudumela accepted appointment as business rescue practitioner on 14 October 2021 and the CIPC confirmation of his appointment records his appointment date as 23 October 2021.
10. A first meeting of creditors was held on 4 November 2021 at which an extension was sought and granted for the submission of the business rescue plan. Further extensions were granted until 15 December, when Capitec, the largest creditor, declined a further extension.
11. Mr Kudumela's attorneys informed Ms Carmody of the intention to bring an application for conversion at the beginning of May 2022.
12. The removal application was issued on 13 May 2022. The conversion application was served on 21 May 2022.

HAS A CASE BEEN MADE OUT FOR REMOVAL OF THE PRACTITIONER?

13. The facts set out below form the basis of Ms Carmody's contention that Mr Kudumela ought to be removed in terms of section 139(2)(a), which allows the business rescue practitioner to be removed on the grounds of "incompetence or failure to perform the duties of a business rescue practitioner" of Matsway.
14. On 3 November 2021 Matsway's bank, which was then Mercantile and is now Capitec,[1] complained that it had not been informed of the business rescue and would therefore no longer extend to Matsway the existing overdraft

facility. It is contended that Mr Kudumela failed in his duty to inform the bank of the business rescue.

15. At the first meeting of creditors on 4 November 2021 Mr Kudumela requested an extension for filing the business rescue plan, maintaining that there were still prospects of rescue.
16. At some point in November Capitec enforced its cession over the book debts of Capitec, writing to Matsway's debtors and requiring that payments be made into Matsway's Capitec account, while Mr Kudumela wrote to debtors asking that payments be made into Matsway's Nedbank account.
17. Mr Kudumela embarked on some negotiations with Capitec, and also asked for a four-day extension for filing the business rescue plan. He was however only supplied with the management accounts on 8 December 2021. He alleges that he established then that Matsway was hopelessly insolvent. He did not then bring a conversion application. He even requested a further extension for filing the plan on 15 December, and Capitec declined. Ms Carmody suggests that this is because Mr Kudumela alienated Capitec and that this was part of the reason the business rescue may not succeed.
18. Mr Kudumela employed a former salesperson in a managerial position at Matsway.

19. He then in January instituted an urgent application seeking to interdict Capitec from enforcing its cession of book debts, which was found not to be urgent.
20. At the end of March, Mr Kudumela suspended Ms Carmody as a director, took her laptop away from her and prevented her from accessing Matsway's premises.
21. Throughout April, Ms Carmody's attorneys requested various documents from Mr Kudumela, only some of which were provided. Mr Kudumela's attorneys then advised Ms Carmody's attorneys at the beginning of May that Mr Kudumela would apply to convert the business rescue to a liquidation. Ms Carmody suggests that this was not a bona fide application because if it was it would have been brought in December when Mr Kudumela first saw the management accounts. This is, she submits, yet another example of Mr Kudumela not doing his job.
22. Ms Carmody received letters from two creditors expressing dissatisfaction with the failure to present a business rescue plan.
23. Mr Kudumela failed to produce monthly reports when the business rescue proceedings lasted longer than three months, as he was obliged to do in terms of section 132(3) of the Act.
24. Ms Carmody suggests that Mr Kudumela has not responded to the allegations of incompetence and inaction that are contained in her founding affidavit, but rather has retaliated by instituting the liquidation application. It is true that the answering affidavit contains very little by way of substantive response to the removal application, and refers to the liquidation application more than a little. This does not necessarily mean that the liquidation application was only brought in retaliation, or to avoid removal.
25. Mr Kudumela's response to Ms Carmody's allegations is, essentially, that Capitec cut off credit lines because Ms Carmody signed for a new line of credit after the business rescue without informing it of the business rescue, that the business is factually insolvent and that without post-commencement finance, which Capitec has declined to provide, there is no prospect of rescue. He also suggests that the business rescue has failed because Ms Carmody interfered in the process, including herself informing customers to make deposits into the Nedbank account, and signing with Capitec for a facility without informing them of the business rescue.
26. He does not explain why, having become aware that the business was insolvent in December 2021, he only brought the liquidation application in May 2022, seven months later. In terms of section 141(2)(a)(ii) he is obliged to bring an application to convert the business rescue into proceedings. In fact, in his answering affidavit in the removal application, he himself acknowledges that the provision is peremptory and he has no discretion to seek another solution. The fact that section 132(3) provides that either a court must allow business rescue proceedings a longer period than three months or the practitioner must provide monthly reports if it lasts longer than three months is an indication that proceedings are not

ordinarily intended to last longer than three months, and in any event a six month delay is certainly outside the bounds of what may be considered permissible.

27. According to Mr Kudumela he did not suspend the Ms Carmody from being a director, he merely revoked her authority. It is clear that this is mere semantics. Ms Carmody was prevented from being a director, the question is whether this was justified. In addition to the interference referred to above, Mr Kudumela alleges that Ms Carmody paid large sums of money to herself from Matsway's accounts, and did not allow anyone else to use the invoicing software, the licenced copy of which was only on her laptop.
28. Mr Kudumela explains his failure to produce monthly reports after the three-month period had expired by contending that he was intending to bring a conversion application so there was no need to produce those reports. There is no authority for that proposition, and where the conversion application was brought four months after the expiry of the three month period the failure to produce reports is certainly not justified. Reporting is intended to ensure transparency and action, and where there was no business rescue plan and no report, creditors and interested parties would certainly have cause to complain that they were not being kept informed of what was happening.
29. It is clear that Mr Kudumela has not complied with his obligations, timeously or at all. He has been unable to provide satisfactory explanations for his non-compliance.
30. Section 139(2) gives the court a discretion. A finding that Mr Kudumela has failed to perform his duties does not automatically mean that the court must order his removal. In this particular case, if the liquidation application demonstrates that there is no prospect of rescue, the removal becomes moot, as the prolonging of the business rescue will simply slow down the death of the company, rather than allowing it to be rescued.

SHOULD THE BUSINESS RESCUE BE CONVERTED TO LIQUIDATION?

31. The question, essentially, is whether there is a prospect of rescuing Matsway.
32. According to Mr Kudumela Matsway was already insolvent before business rescue was embarked upon. The management accounts demonstrated this. The only prospect of rescue is if post-commencement finance is provided, and Capitec has declined to provide that. There is no other investor on the horizon.
33. Ms Carmody denies that Matsway is hopelessly insolvent and also denies that Mr Kudumela is able to come to such a conclusion. She relies also on Mr Kudumela's delay in bringing the application for conversion, submitting that the application is not bona fide or it would have been brought sooner. Of course the delay is not on its own a reason to conclude that Matsway should not be liquidated.
34. Ms Carmody's answering affidavit consists primarily of recriminations, blaming Mr Kudumela for the failure of the business rescue. It does not deal directly with the prospects of rescue.

35. There are however some relevant allegations, namely that another company of which Ms Carmody is sole shareholder (“SSD”) has a property that will be sold, and money provided to Matsway from that to apply to the Capitec debt, and that there are three companies which have agreed to act as post-commencement financiers and to continue providing steel to Matsway. There is also a company that is interested in purchasing machines from Matsway.
36. However, the confirmatory affidavits annexed from two of the companies Ms Carmody relies on only say that they are willing to provide steel, not that they would provide post-commencement finance. The third affidavit does mention that it will be willing to provide post-commencement finance but not to what extent.
37. Mr Kudumela points out that SSD is in any event a surety for the Capitec debt, and that the sale of its property would not materially change that situation, and that in any event Capitec would need to approve the sale which is unlikely since the sale contemplates that SSD would only receive 75% of market value for the property. He also points out that Capitec would attach all receivables until its debt is extinguished, so that the recovery of Matsway will be stymied.
38. I am satisfied that the only prospect of rescue for Matsway is if post-commencement finance is procured, and I am not satisfied that there is sufficient evidence that sufficient post-commencement finance is available.
39. It is therefore appropriate that the business rescue proceedings be converted to liquidation.
40. It is evident from reading the affidavits in both applications that there have probably been irregularities in the business rescue proceedings. The liquidator can investigate that.

COSTS

41. The general rule is that costs follow the results. Ms Carmody has been notionally successful in the removal application, although I do not make the order she sought. She seeks costs against Mr Kudumela personally. Although Ms Carmody did not obtain the relief sought, I consider she should recover costs. The primary reason is that Mr Kudumela’s answering affidavit had very little substance and was unhelpful to the court. It did not consist of any real opposition. No reason was given why Mr Kudumela should not bear costs in his personal capacity and it would not be just or equitable for Matsway to bear those costs in light of my findings.
42. In the removal application, Mr Kudumela asks that costs be in the liquidation but that costs be awarded against any party that opposes it. I consider that Ms Carmody should pay costs of opposition, save for what is set out below.
43. I found the heads of argument submitted by Mr Fourie on Mr Kudumela’s behalf singularly unhelpful. They were 90 pages long, clearly not heads at all, and appeared to be some kind of hybrid between heads and an affidavit, since they occasionally referred to Mr Kudumela in the first person. They neither crystallised the issues nor provided any helpful structure or

authority. I do not consider that costs should be recovered for that. In my view those costs should be borne by Mr Kudumela personally, since it appears to be a document at least partly prepared by him, for which I can see no reason.

CONCLUSION

44. For the reasons set out above I make the following order:

- (a) The removal application, case 2022/17204, is dismissed, Mr Kudumela to pay the costs in his personal capacity.
- (b) The business rescue proceedings of the first respondent are converted to liquidation proceedings in terms of section 132(2)(a)(ii) of the Companies Act, 71 of 2008, placing the first respondent under final liquidation.
- (c) A copy of this order shall be forthwith served on the respondent company at its registered office and be published in the Government Gazette and in the Beeld Newspaper.
- (d) A copy of this order is to be forthwith forwarded to each known affected person by e-mail, where such email address exists and is known to the applicant or his attorney, alternatively send by pre-paid registered post or hand delivered, and
- (e) That the costs of the application 2022/2448 are costs in the liquidation, save that:
 - a. Ms Carmody shall bear costs consequent on opposition, and
 - b. Mr Kudumela in his personal capacity shall bear the costs of the heads of argument filed on his behalf.

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant:

C Van Der Linde

Instructed by:

Gittins Attorneys

Counsel for the 1st Respondent: J Fourie

Instructed by:

Saltzman Attorneys

Date of hearing:

08 June 2022

Date of judgment:

18 August 2022

[1] It is still the same entity.

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