

SOUTH AFRICA / JUDGMENT

Dolphin Management and Others v Belmont Development Company (Pty) Limited and Others (4704/2015) [2015] ZAECGHC 151 (10 December 2015)

[2015] ZAECGHC 151

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge

CASE / FILE NUMBER

4704/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO: 4704/2015

In

the matter between:

DOLPHIN

MANAGEMENT AS

.....
1st

Applicant

ROBERT

IVERSEN HOLFING

AS.....2nd

Applicant

JEMI

HOLFING

AS.....3rd

Applicant

ARNE

FORSTAD HOLDING

AS.....4th

Applicant

GENI

HOLDING

AS.....5th
 Applicant
 STALE
 INVEST
 AS.....6th
 Applicant
 JAMES
 ALEXANDER RICHARD
 WILLIAMSON.....7th
 Applicant
 and
 BELMONT
 DEVELOPMENT COMPANY
 (PTY)
 LIMITED.....
 1st
 Respondent
 STARFAIR
 162 CC trading as
 INZENZO.....
 2nd
 Respondent
 DAVID
 BARRY
 DAVIES.....3rd
 Respondent

JUDGMENT

MBENENGE J:

[1] This application is for the placement of the first respondent under supervision and for the commencement of business rescue proceedings

in respect of the first respondent.

[2] Before delving into the substance of the issues that arise for determination, a setting out of the relevant background facts is called for. The Grahamstown golf course was identified as being a desirable site for commercial and residential development. In order to bring that desire to fruition, the third respondent, then a member of a close corporation registered as Belmont Development CC, approached the seventh applicant, a business partner of the first to sixth applicants who, together with the seventh applicant, hold 50% of the total issued shares in the first respondent, proposing that-

(a) Belmont Development CC intended acquiring the then Grahamstown golf course which was then owned by the Grahamstown Golf Club (the Club);

- (b) once acquired, the golf course would be rezoned for residential purposes and could be sold to a potential developer for a sum of between R350 million and R500 million;
 - (c) the acquisition of the old golf course would be achieved through a land swap with the club;
 - (d) the land swap would require that another property be bought and developed as a golf course (the new gold course); and
 - (e) by agreement with the club the new golf course would then be swapped for the old golf course.
- [3] It was anticipated that R6 million would be required so as to get the proposed project off of the ground, but the third respondent lacked the necessary funds. The applicants were persuaded to fund the project. To that end, a written agreement was concluded by and between the applicants, duly represented, and the second respondent, represented by the third respondent. The agreement is referred to in the papers as the Belmont Project Agreement.
- [4] The applicants thereafter duly funded the project by loaning sums to the first respondent. It is common cause that the transfer of the respective properties has taken place. The first respondent has become owner of the old golf course. The applicants, in their capacity as shareholders of the first respondent and thus “affected persons” in relation to the first respondent, are of the view that the first respondent is no longer a profitable entity and falls to be rescued from the parlous situation it finds itself in.
- [5] In pursuit of this application the applicants contend that-
- (a) the third respondent has failed to cause a mortgage bond to be registered over the old golf course, thereby causing the applicants to lose their security for loans made to the first respondent;
 - (b) the third respondent has grossly misled the applicants to their prejudice concerning the potential value of the project in which they invested;
 - (c) the third respondent failed timeously to divulge the existence of creditors of the first respondent to the applicants and has thereby placed the first respondent at risk of liquidation;
 - (d) the third respondent has conducted the business of the first respondent in a manner which caused the first respondent to be financially distressed;
 - (e) the third respondent has made or caused unjustified payments to the second respondent (of which he is a member), which payments have contributed to the first respondent’s financial distress; and

- (f) the third respondent has manipulated or caused the manipulation of the first respondent's financial statements, which has distorted the true extent of the first respondent's financial status.
- [6] Quite apart from and independently of the contentious adumbrated in paragraph 5 above, the applicants further contend that the first respondent –
- (a) is financially distressed;
 - (b) has creditors to a value of approximately R6.5 million;
 - (c) does not have the means to discharge such debts and it presently is not an income-generating entity; and
 - (d) can be rescued by way of post –commencement finance to ensure that the first respondent's creditors are paid.
- [7] The contentions raised in paragraph 5 above, goes the applicants' case, bring this application within the ambit of section 163(1)(a) and (b) of the Companies Act 71 of 2008 (the Act), whilst those mentioned in paragraph 6 above establish a case founded purely on section 131 of the Act.
- [8] The second and third respondents are opposed to the grant of the relief sought by the applicants. Various contentions have been raised in pursuit of such opposition. Not only have the second and third respondents delivered answering papers which were replied to at the opportune stage by the applicants, but on the eve of the hearing date further affidavits were delivered and the leave of court sought to condone the filing of these affidavits.
- [9] This makes me interpose to consider whether the further affidavits should be admitted. The applicants' replying affidavit was delivered and pleadings closed on 22 October 2015. The further affidavits sought to be admitted were attested on 29, 30 and 31 October 2015. The relevant interlocutory application was launched on 4 November 2015.
- [10] The information contained in the further affidavits was at the respondents' disposal at the stage of deposing to their

answering affidavits. No acceptable explanation has been proffered regarding why the affidavits were only placed before court after the close of pleadings. Condonation applications of this nature are not granted merely for the asking. There should in each case be a proper and satisfactory explanation which negates the existence of mala fide or culpable remissness as to the cause of the facts or information not having been put before the court at an earlier stage. In my view, the respondents have not explained why the further affidavits sought to be admitted are out of time or that in all the

circumstances of this case they should be received. Moreover and in any event, having considered the issues raised in the further

affidavits, and in the light of the view I take of this matter, the degree of the materiality of the evidence sought to be introduced is not sufficiently compelling.

[11] The second and third respondents' application for leave to file the further affidavits is therefore refused.

[12] I now cross to deal with the merits of the matter on the basis of what is contained in the parties' affidavits and the arguments advanced at the hearing of the matter, but before doing so it is apposite to contextualise the parties' contentions.

[13] In their founding papers the applicants pertinently state that they "rely upon the provisions of sections 163(1) and (b) of the Act", whilst in their heads of argument the point is made that "they also rely upon the provisions of section 131 of the Act independently from the provisions of section 163 of the Act".

[14] Not taking kindly to this approach, the respondents have adopted the stance that it is not available to the applicants to found their case on section 163 on the papers and then at the hearing to advance a case also founded on section 131 which the respondents were never called upon to meet in answer at pleading stage. The respondents' concern has juridical support. It remains to be seen, however, whether in this instance the respondents have been deprived of the opportunity to answer a case founded on section 131. The answer to that question hinges on a proper interpretation of the two sections.

[15] In so far as relevant hereto, section 163 (1)(a) and (b), provides:

"(1) A shareholder or a director of a company may apply to a court if-

- i. any act or omission of the company, or a related person, has had a result that it is oppressive or unfairly prejudicial, or that unfairly disregards the interests of, the applicant;
- ii. the business of the company, or a related person is being or has been carried or conducted in a manner that is oppressive or unfairly prejudicial, or that unfairly disregards the interests of, the applicant".

[16] In terms of section 163(2)(c), upon considering an application in terms of section 163(1), the court may make any interim or final order it considers fit, including an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, "if the court is satisfied that the circumstances set out in section 131(4)(a) apply." Section 163(2)(c) refers to section 131(4)(a), which reads:

"(4) After considering an application in terms of [section 131(1)], the court may-

- iii. make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-
- iv. the company is financially distressed;

- v. the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract,

with respect to employment – related matters; or

- vi. it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company”.

[17] Section 163 encompasses section 131(4)(a). For an application founded on section 163 to succeed it is incumbent on the applicant to also establish that the company concerned is financially distressed. Therefore, much as there was no pertinent reference to section 131 in the applicants’ founding papers, it hardly lies with the respondents to contend that they were never called upon to answer a case that the first respondent is financially distressed.

[18] The respondents put forth nothing in their papers to gainsay the allegation that the first respondent is financially distressed. The first respondent has creditors. None of the creditors has been paid. It is not denied that the amount owing to the creditors approximates R6.5 million. It is also not in dispute that the first respondent does not have the means to pay its creditors from its bank account. As at the time the instant application was launched the first respondent’s bank balance was R1800. The balance remaining in trust with Whitesides attorneys was R96 923.00 which would leave a balance of R75 000.00 after deduction of the said attorneys’ administration fees. The third respondent seems to pin his hope on the creditors’ goodwill until he shall have negotiated finances for the first respondent, yet no disclosure is made as to what those negotiations entail.

[19] I am satisfied that it is available to the applicants to rely on section 131(4) independently of section 163 of the Act. The first respondent has been proven with the requisite degree to be financially distressed within the meaning and contemplation of

section 131(4)(a)(i) of the Act. In the light of the view I take of this matter, I shall not deal with the question of whether a case founded on section 163 has been made out. The remaining question to be posed and answered is whether the papers establish that there is a reasonable prospect for rescuing the first respondent.

[20] The term “reasonable prospect of rescuing the company” is not explained or defined in Chapter 6 of the Act. In *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*, Eloff J stated the following with regard to the meaning of “reasonable prospect”:

“24. Whilst every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company’s business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, ie by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the

case of a trading or prospective trading company, of-

24.1 the likely costs of rendering the company able to commence with its intended business, or to resume of its core business;

24.2 the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

24.3 the availability of any other necessary resource, such as raw materials and human capital;

24.4 the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.”

[21] The meaning of a “reasonable prospect” as in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* was confirmed on appeal and was summarised as follows:

“As a starting point, it is generally accepted that it is a lesser requirement than the ‘reasonable probability’ which was a yardstick under judicial management in terms of section 427(1) of the 1973 Companies Act… On the other hand, I believe it requires more than a mere prima facie case or an arguable probability. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on ‘reasonable’ – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough.”

[22] More apposite are the following comments made by Van der Merwe J in *Propsec Investment (Pty) Lt v Pacific Coast Investments 97 Ltd and Another*:

“I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high...”

In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business and the likely availability of the necessary cash resource in order to enable the company to meet its day to day expenditure or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability and unjustifiably limits the availability of business rescue proceedings.”

[23] The *Propsec* case was cited with approval by Brand JA in *Oakdene* case, in the following terms:

"I have indicated my agreement with the statement in Propsec that the applicant is not required to set out a detailed plan. That can be left to the business rescue practitioner after proper

investigation in terms of s 141. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b)."

- [24] In my view the papers establish with the requisite degree of proof that there is a reasonable prospect of rescuing the first respondent and restoring it to a solvent going concern. A detailed plan of how that will be achieved is a matter to be taken care of by the business rescue practitioner once appointed and has assumed duties.
- [25] The third respondent's apprehension that the business rescue plan contended for will severely damage the commercial reputation of the first respondent demonstrates the third respondent's lack of appreciation for what the instant proceedings seek to achieve. The fear entertained by the third respondent that the application has been motivated by a desire to oust him from directorship is similarly without merit. Nothing points to the fact that the third respondent will not exercise his duties. Exercising duties under the authority of a rescue practitioner does not in the least suggest a removal of the third respondent from directorship.
- [26] I am also satisfied, on the facts of this case, that a reorganisation of the first respondent will restore it to a profitable entity and avoid liquidation. Liquidation of the first respondent, which is looming, will indeed have catastrophic consequences for the applicants in the light of the value of the first respondent's assets, the sum of their loans and the extent of the first respondent's creditors.
- [27] The business rescue practitioner nominated by the applicants, Mr Neil McHardy, has been shown to meet the requirements set out in section 138 of the Act. The applicants have sufficiently explained why they prefer a practitioner who is not from the immediate area.
- [28] In all the circumstances the application must succeed, leaving the question of costs to be determined. The applicants have prayed that the costs of this application be costs in the business rescue proceedings in respect of the first respondent. That approach is justified. There is, however, no reason why the costs of the interlocutory application should not follow the result.
- [29] The order that I grant is the following:
1. The first respondent is hereby placed under supervision and commencing business rescue proceedings in respect thereof in terms of section 131(1) of the Companies Act 71 of 2008.
 2. Neil McHardy is hereby appointed as the interim business rescue practitioner, subject to ratification by the holder of a majority of the independent creditors' voting interest at the first meeting of the creditors, as contemplated in section 147 of the Companies Act.

4. The interlocutory application for the delivery of further affidavits lodged on 04 November 2015 is dismissed with costs.

S M MBENENGE

JUDGE MBENENGE

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