

SOUTH AFRICA / JUDGMENT

First Rand Bank Ltd v E Marais Incorporated (67542/13) [2013] ZAGPPHC 315 (1 November 2013) [2013] ZAGPPHC 315

COURT

North Gauteng High Court, Pretoria

BEFORE

Mothle S P

CASE / FILE NUMBER

67542/13

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IN

THE GAUTENG HIGH COURT, PRETORIA [REPUBLIC OF SOUTH AFRICA]

CASE

NUMBER: 67542/13

DATE:01/11/2013

In

the matter between:

FIRST

RAND BANK

LTD.....APPLICANT

And

E

MARAIS

INCORPORATED.....RESPONDENT

JUDGMENT

MOTHLE J

- [1] In this matter, the applicant brought an application by way of urgency in terms of Rule 6 (12) of the uniform Rules of Court, for leave to perfect the security of a debt concerning a Notarial Covering Bond.

- [2] The applicant seeks to attach and take in possession movable property belonging to the respondent, wherever it may be found and hold it as security during the period of indebtedness. The respondent is invited to show cause on Tuesday 26 November 2013 at 10H00, why the interim order sought should not be made a final order.
- [3] The application was launched on 24 October 2013 and set down for hearing on Tuesday 29 October 2013. It was in fact heard on 30 October 2013. The significance of these dates will be apparent later in this judgment.
- [4] On Monday 28 October 2013, the respondent's sole director, initiated Business Rescue proceedings in terms of section 129 of the Companies Act 71 of 2008 ("Companies Act"). The director's resolution and other documents were allegedly sent to the Commission.
- [5] On Wednesday 30 October 2013, the respondent appeared in court represented by counsel, and submitted a notice in terms of Rule 6 (5)
- (d) (iii), whereby counsel advised that the respondent intends to raise and argue a point of law.
- [6] The point of law raised by the respondent is that it has instituted Business Rescue proceedings and in terms of section 133 of the Companies Act, once rescue proceedings are initiated; there exists a general moratorium on any legal proceedings contemplated or in progress.
- [7] Section 133 provides as follows:

"133 General moratorium on legal proceedings against company-

- (1) During business rescue proceedings, no legal proceedings, 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, except-
- (a) With the written consent of the practitioner,
- (b) With the leave of the court and in accordance with any terms the court considers suitable:
- (c) As a set-off against any claim made by the company in any legal proceeding, irrespective of whether those proceedings commenced
- before or after the business rescue proceeding began;
- (d) Criminal proceedings against the company or any of its Directors or officers;
- (e) Proceedings concerning any property or right over which the company exercises the powers of a trustee; or
- (f) Proceedings by a regulatory authority in the execution of its duties after written notification to the business to the business rescue practitioner.

- (2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances
- (3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.”
- [8] The general moratorium is in effect or in legal parlance, a stay of proceedings. As it appears from the text of section 133, there are exceptions and proviso which allow the enforcement of a guarantee, with the leave of the court and in accordance with any terms the court considers just and equitable in the circumstances, see section 133(1)(b) and 133(2).
- [9] In response, the applicant contends that the business rescue Proceedings were not properly initiated as envisaged by section 129. Subsection of section 129 prescribes that a board of a company may resolve to initiate business rescue proceedings if it has reasonable grounds to believe that the company is in financial distress and there appears to be a reasonable prospect of rescuing the company. Subsection 2 thereof provides further that the resolution may not be adopted if liquidation proceedings have been initiated by or against the company. Most importantly, such resolution has no force and effect until it has been filed...
- [10] A perusal of copies of proof of registration for business rescue, which were attached to the Rule 6(5) (d) (iii) notice, indicates the following
- 10.1 They are dated Monday 28 October 2013, a day before the hearing of the application;
- 10.2. There is no stamp or signature of the commission, which provides proof of acknowledgement of receipt or filing of the business rescue application.
- [11] It seems to me that the business rescue application was initiated to thwart the proceedings, and not necessarily to rescue the business. The timing and the manner in which it was initiated, raises serious doubts as to whether the respondent genuinely intended to institute business rescue proceedings. The initiative appears to in effect frustrate the applicants attempt to perfect the security granted to it by the very respondent.
- [12] There is no proof that the business rescue proceedings had been filed with the Commission, as at the time of these proceedings. Section 133 does not apply.
- [12] In the premises I make the following order:
1. The point of law raised by the respondent in terms of Rule 6(5) (d) (iii) is dismissed

2. The applicant is granted leave to perfect the security granted to it by the respondent in accordance with the provisions of the General Notarial Covering Bond No BN16179/2011, by attaching all movable assets which forms the subject matter of the aforementioned General Notarial Covering Bond, which assets belong to the respondent wherever they may be found while the indebtedness to the applicant exists;
 3. The sheriff of whichever district where such movable assets may be found is authorised to attach all such assets.
4. The respondent, any business rescue practitioner appointed for the respondent or any other person or entity is prohibited from alienating, disposing of or encumbering the movable assets under attachment of this order, without the consent and approval of the applicant.
5. The applicant is granted leave to approach this court, on the same papers, supplemented as may be necessary, for further leave to take possession and sell or otherwise dispose of any of the movable assets under attachment;
 6. The respondent is ordered to pay the costs of the application.
 7. The above orders 1, 2, 3, 4, 5 and 6 operate as an interim interdict pending the return date of Tuesday 26 November 2013 at 10H00, where the respondent will have to show cause why the interim order should not be made a final order.

Mothle S P

Judge of the high Court Gauteng High Court Pretoria.

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