

SOUTH AFRICA / JUDGMENT

Fleming and Another v PSV Holdings Ltd and Others (16217/2022) [2024] ZAGPJHC 170 (22 February 2024) [2024] ZAGPJHC 170

COURT

South Gauteng High Court, Johannesburg

BEFORE

Turner AJ

CASE / FILE NUMBER

16217/2022

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‘REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
1.NOT
REPORTABLE
2.
NOT OF INTEREST
TO OTHER JUDGES
22
February 2024
CASE

NUMBER: 16217/2022

DATE:

In the application of :	IAN BRYCE FLEMING N.O. 1st Applicant PETER CAMERON GORDON N.O. 2nd Applicant and PSV HOLDINGS LTD 1st Respondent (Registration number: 1998/004365/06) in business rescue COMPANIES AND INTELLECTUAL PROPERTY COMMISSION 2nd Respondent THE AFFECTED PERSONS RELATING TO PSV HOLDINGS LTD (IN BUSINESS RESCUE) AS PER ANNEXURE "A" TO THE NOTICE OF MOTION 3rd Respondent
Delivered:	22 February 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10:00 on 22 February 2024.
Summary:	Insolvency – Business Rescue – Application by business rescue practitioners to put company in final winding up – opposition by party proposing recapitalisation – delays and unfulfilled promises making recapitalisation highly unlikely and opposition unsustainable.

Order:

1.
The business rescue proceedings of the first respondent are discontinued and terminated.
2.
The first respondent, PSV Holdings Limited, Registration No. 1998/004365/06, is placed into final winding-up in the hands of the Master of the High Court.
3.
DNG Energy (Pty) Ltd (the affected person opposing this application) is to pay the costs of the application on the scale as between attorney and client.

JUDGMENT

Turner AJ

- [1] The applicants in this matter are the business rescue practitioners of the first respondent, PSV Holdings Limited (“PSVH”), a listed company that was placed in business rescue during 2020. PSVH is a holding company and its subsidiaries have already been placed in liquidation or business rescue. It is clear from the papers that the subsidiaries hold no value for PSVH.
- [2] The business rescue plan for PSVH that was presented and approved in August 2020 identified creditors to the value of approximately R31 million and noted that concurrent creditors would receive an estimated two cents per Rand in a liquidation scenario (i.e. 2% recovery). The business rescue plan was motivated on the basis that a shareholder in PSVH, being DNG Energy (Pty) Limited (“DNG”), would recapitalise the business, allowing a 100 cent or 100% recovery for creditors. The business rescue plan also noted that Mr AD Mbalati, a related party to DNG, had offered to provide a facility of R2 million (on loan) for post-commencement finance.
- [3] Since August 2020, neither Mr Mbalati nor DNG has provided the R2 million post-commencement finance nor has a capital injection been made into PSVH (as contemplated or at all). During that period, there have been a number of negotiations between the interested parties and re-packaged capitalisation proposals by DNG and Mr Mbalati but none has come to fruition.
- [4] The applicants now apply for the final winding-up of PSVH. The application is opposed by DNG (as an affected party) whose answering affidavit is deposed to by Mr Mbalati. There was initially some confusion over whether the party opposing the application was DNG or Mr Mbalati personally. This was clarified in argument when Mr Cohen, for the respondent, confirmed that the party opposing the application is DNG, not Mr Mbalati personally.

- [5] In the answering affidavit, DNG contended that the applicants had concluded an agreement with it in relation to the mechanism for recapitalisation. It argued that the existence of this agreement precluded the applicants from winding up the company. In argument, however, respondent's counsel abandoned reliance on such an agreement, correctly acknowledging that no such agreement that would bind the applicants had been established on the papers. Counsel also did not rely on the other defences raised in the answering affidavit. Instead, he presented an alternative draft order proposing to extend the business rescue proceedings.
- [6] This draft order proposed that the matter be removed from the roll and inter alia: that within 30 days, DNG place an amount of R15,000,000 in escrow against the issue of 250,000,000 shares being issued; that the PSVH shareholders meet to approve this share issue in terms of section 41(3) of the Companies Act; an amended business rescue plan be proposed to and accepted by the majority of creditors; and that the recapitalised amount be used to settle the BRP costs and all other creditors claims (at 50 cents in the Rand). The draft order also tendered the costs of the application – namely all of the costs of the application to date.
- [7] When the draft order was first presented, its terms also contemplated orders being granted compelling third parties to do various things. On recognising that these parties were not before the court and that it would be inappropriate to grant an order with such terms, the draft order was amended to remove the offending elements.
- [8] The idea behind the draft order was that if DNG did not comply with its obligation to make payments (within 30 days) or shareholders did not give their approval (within 45 days) the applicants could return to court for a final winding-up order.
- [9] Respondent's counsel motivated this approach with reference to New City[1] and emphasised the discretion which a Court has to grant in an application for business rescue (and analogously, to extend business

rescue proceedings) where the proposed alternate solution would provide material benefits to creditors that are unlikely to be

realised in liquidation.

- [10] The matter stood down for the applicants' representatives to take instructions from the applicants and Regis Holdings, the major shareholder in PSVH, on the terms of the new draft order. After the adjournment, Mr Marais, who appeared for the applicants, confirmed that the proposal was rejected. The rejection went both to the substance (including the conditionality attached to the proposal) as well as to the bona fides of the proposal. Counsel relayed the applicants' contention that there is strong evidence to suggest that the new proposal is merely a delaying tactic, is not bona fide and is not workable.

- [11] While it is no doubt preferable to give a company every reasonable chance to recover from business rescue proceedings, there are a number of indicators in the current matter which sway me in exercising my discretion in favour of the applicants.
- [12] First, the business rescue proceedings are supposed to be resolved within three months but the current matter has been dragging on for some 42 months. The primary reason for these delays appears to be the unfulfilled promises made by DNG (and Mr Mbalati). The correspondence relied upon by the parties shows that Mr Mbalati, directly or through DNG, has made multiple undertakings to pay funds to the business rescue practitioners, all of which have failed.
- [13] Second, I would expect that if there were a reasonable prospect of rescuing the company, the business rescue practitioners would be the first parties to support that plan. Not only would this improve their record on successful turnarounds, they would benefit from continued employment in this matter and be able to secure significant benefits for creditors. Their opposition to the draft order shows there is no belief whatsoever in DNG's promises being realised.
- [14] Third, DNG Energy produced this proposal (and abandoned its other defences) on the morning of the hearing, without any evidential support. Counsel explained that he was only appointed shortly before the hearing and had brought the New City judgment to DNG's attention. However, the workability of the proposal and the source of the funds to make the proposed payments was not addressed by DNG on affidavit – which would have been a minimum requirement in the context of this matter where so many prior proposals were not realised. In my view, insufficient evidence has been produced to support this alternative and the delays in producing this alternative (together with the applicants' rejection) renders the proposal "too little, too late".
- [15] Fourth, the opportunity remains for DNG and Mr Mbalati to engage with the liquidators and to acquire the business or settle the debts of PSVH, if the stated purpose is bona fide.
- [16] I agree with the submissions by the applicant that the only reasonable inference to draw, given the conduct of DNG prior to the hearing, is that this is a desperate "last gasp" attempt to delay the liquidation of the company. Knowing that its previous conduct had frustrated the applicants and other shareholders, DNG needed to have produced significantly more evidence to establish the existence of a bona fide offer before making this last-minute attempt to delay the consequences of liquidation.
- [17] In the circumstances, I am unable to agree with or accept DNG's proposal.
- [18] Mr Cohen confirmed that there is no dispute regarding the applicants' entitlement to liquidation relief if his counter proposal is rejected.

[19] Insofar as costs are concerned, DNG tendered the costs of this application in the event that its draft order was granted, recognising that the grounds on which it had initially opposed the application were not sustainable. It seems to me that if the draft order is rejected and the application is granted, there is no reason to make the costs of this application “costs in the liquidation”. In the absence of the unsustainable defences raised by DNG, the matter would have proceeded unopposed and all of the costs incurred by the applicants would have been avoided.

[20] If a party and party costs award were to be granted, the creditors of the company would be further prejudiced by costs that ought not to have been incurred. In the circumstances, the attorney-client scale should be used to tax the applicant’s costs to reduce this prejudice.

[21] In the circumstances, I make the following order:

TURNER AJ

Gauteng Division, Johannesburg

Heard on: 23

January 2024

Judgment date: 22

February 2024

For the applicant: Adv

B Marais

Instructed by: De

Vries Incorporated Attorneys

For DNG (affected person) : Adv S Cohen

Instructed by: Larry

Marks Attorneys

[1] Absa Bank Ltd v New City Group (Pty) Ltd (SGHC Case No. 45670/2011), judgment by Sutherland J (as he then was) dated 13 August 2012.

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