

SOUTH AFRICA / JUDGMENT

Gupta v Knoop N.O and Others (84095/2018) [2019] ZAGPPHC 960; 2020 (4) SA 218 (GP) (13 December 2019) [2019] ZAGPPHC 960

COURT

North Gauteng High Court, Pretoria

BEFORE

A.P. Ledwaba, N. Janse van Nieuwenhuizen, M.L.
Senyatsi

CASE / FILE NUMBER

84095/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

Case

No: 84095/2018

13/12/2019

In

the matter between: CHETALI
GUPTA
APPLICANT
and
KURT
ROBERT KNOOP N.O.
FIRST RESPONDENT
JOHAN
LOUIS KLOPPER N.O.
SECOND RESPONDENT
KURT
ROBERT KNOOP
THIRD RESPONDENT
JOHAN
LOUIS KLOPPER
FOURTH RESPONDENT
THE
COMPANIES AND INTELLECTUAL
PROPERTY
COMMISSION
FIFTH RESPONDENT

JUDGMENT

LEDWABA DJP

INTRODUCTION

[1] The parties requested that this special motion application be heard by the full Court on account of the novel and complex issues raised in the papers. This Court has on occasion adjudicated matters involving the issue of the removal of business - rescue practitioners (BRPs) who have been appointed by companies forming part of the so called Oakbay Group of companies (Oakbay Group) owned and controlled by the Gupta family.[1] However, the nature of the matter before us raises a number of particularly unique and crisp issues that require the attention of the Full Court.

[2] In terms of the notice of motion, the applicant seeks an order in the following terms:

2.1. Ordering the removal of the first and second respondents as business rescue practitioners of Islandsite Investments One Hundred and Eighty (Pty) Ltd ("Islandsite") in terms of section 139(2) of the Companies Act[2] (the Act) or in the alternative;

2.2. Ordering the first and second respondent to deliver to the applicant within 7 days of the date of this order -

2.2.1 The report contemplated in section 132(3)(a) of the Act on the progress of the business rescue proceedings in respect of Islandsite;

2.2.2 Each monthly update as referred to in section 132(a) of the Act of the report referred to in paragraph 2.2.1 above, and that such report and such updates include at least the following information : all assets of Islandsite sold; the selling price of all such assets sold; all costs and disbursements incurred in respect of such sales; all fees and charges levied by the first and second respondents and a complete reconciliation between the monies paid out to creditors and all of the foregoing or in the alternative;

2.3. Ordering the first and second respondents to deliver to the applicant, within 7 days of the date of this order, a notice of substantial implementation of the Business Plan adopted in respect of Islandsite as contemplated in section 132(2)(b)(ii) of the Act and that such report and such updates include at least the following information: all assets of Confident Concept sold; the selling price of all such assets sold; all costs and disbursements incurred in respect of such sales; fees and charges levied by the First Respondent and a complete reconciliation between the monies paid out to creditors and the foregoing;

2.4. Ordering the removal of the first respondent as business rescue practitioner of Confident Concept (Pty) Ltd ("Confident Concept") in terms of section 139(2) of the Act or in the alternative;

2.5. Ordering the first respondent to deliver to the applicant, within 7 days of the date of this order:

2.5.1. the report contemplated in section 132(3)(a) of the Act on the progress of the business rescue proceedings in respect of Confident Concept;

2.5.2. each monthly update as referred to in section 132(3)(a) of the Act of the report referred to in paragraph 2.2.1 above or in the alternative;

2.6. Ordering the first respondent to deliver to the applicant, within 7 days of the date of this order, a notice of substantial implementation of the Business Plan adopted in respect of Confident Concepts as contemplated in section 132(2)(b)(ii) of the Act; and that such report and such updates include at least the following information: all assets of Confident Concept sold; the selling price of all such assets sold; all costs and disbursements incurred in respect of such sales, all fees and charges levied by the first respondent and a complete reconciliation between the monies paid out to creditors and all of the foregoing;

2.7. Costs of suit against the first and second respondents;

2.8. costs of suit against the third and fourth respondents, jointly and severally with the first and second respondents;

2.9. further and/ or alternative relief.

PRELIMINARY

ISSUES

- [3] The application before us was initiated in November of 2018. The reason that there was a delay in the merits of the matter being heard was due to a number of challenges mounted by the respondents in respect of the following: the respondents challenged the authority of the applicant's attorneys to act on behalf of the applicant in terms of Rule 7 of the Uniform Rules of Court,[3] the respondents challenged the locus standi of the applicant to bring the application and also challenged the validity of the confirmatory affidavit filed by the applicant. The respondents have in turn filed an application for security of costs against the applicant.
- [4] In August 2019, a judicial management meeting was held with the parties' legal representatives to discuss and give directions regarding the hearing of the interlocutory applications, the main application, the filing of further affidavits and heads of argument. Numerous letters were exchanged between the parties and the office of the Deputy Judge President. For the sake of expediency, the parties had to be forewarned that their issues should not be ventilated by correspondence. A directive was in turn issued stating that the interlocutory application in respect of the issue of security for costs would be heard before the main application. The other issues raised would then be argued when the main application on the merits was heard.
- [5] The issue concerning the application for security for costs was ultimately resolved between the parties in respect of the amount and the form of security that would be tendered with the applicant paying the agreed amount through her attorneys. This, in the Court's view, weakened the respondents' contention that the applicant's attorneys lacked the requisite authority to act on her behalf. In any event, the applicant in turn filed a document titled "Instruction Mandate" evidencing that she had indeed instructed her attorneys to act on her behalf. The respondents, however, disputed the validity of this document as well.
- [6] The challenge brought by the respondents that the applicant lacked standing was ultimately resolved as it was established that the applicant, as a 25% shareholder in the both companies in question, could be regarded as an "affected person" as contemplated in terms of section 128(1)(a)(i) of the Act and thus possessed the requisite standing to bring the application.
- [7] In the answering affidavit, the respondents disputed the validity of the confirmatory affidavit filed by the applicant. The respondents contended that given that there was a discrepancy between the date on which the applicant signed the affidavit (28 November 2019) and the date on which the affidavit was subsequently commissioned by the commissioner of oaths (29 November 2019), the validity of the affidavit had to be questioned.

[8] When disputes arise regarding the validity of an affidavit, regard must be had to the general requirements for affidavits as contained in the provisions of the Regulations Governing the Administering of an Oath or Affirmation, GN R1258, GG 3619, 21 July 1972 (the regulations) promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act.[4] In terms of regulation 4, the following is required when a deponent attests to an affidavit:

"4 (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

(2) The commissioner of oaths shall-

- (a) sign the declaration and print his full name and business address below his signature; and
- (b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."

[9] Having regard to the regulations, no direct mention is made regarding the import of having the date on which the deponent affixes their signature on the affidavit and the date on which the affidavit is commissioned by the commissioner of oaths be the same. Having further regard to the regulations, it seems that an important requirement regarding the validity of an affidavit is rather that it be signed by the deponent in the presence of the commissioner of oaths as stipulated in terms of regulation 3(1). Considering the facts of this matter, no evidence was presented by the respondents to substantiate the allegation that the applicant may have signed the affidavit in the absence of the commissioner or that the affidavit was in fact not signed by the applicant at all. The

only argument put forward by the respondents was that because the dates on the affidavit were different, the affidavit must be

defective. However, the difference in the dates provided in the affidavit could be as a result of a number of factors such as the

applicant having signed the affidavit in the presence of the commissioner and inadvertently signing the incorrect date.

[10] Regard should of course also be had to the onus that the respondents bear in circumstances where such allegations are made. In *Ladybrand Hotels (Pty) Ltd v Stellenbosch Farmers' (Ltd)*,^[5] the court had to decide on a case concerning the admissibility of an affidavit which was attacked on the basis that the certification did not state that the deponents had signed the affidavit in the presence of the commissioner of oaths. In casu the court held that the maxim *omnia praesumuntur rite essa acta* applied meaning there was an onus on the party disputing the validity of the affidavit to prove the existence of a failure to comply with the prescribed formalities by providing evidence in this regard and that in the absence of such evidence, the objection would fail. Our view is that the respondents have

failed to provide this Court with sufficient evidence indicating that the instruction mandate and confirmatory affidavit were indeed defective. In any event, it is this Court's view that the discrepancies raised by the respondents concerning the validity of the instruction mandate and affidavit are not so material as to justify the dismissal of the application. The Court therefore finds that both the instruction mandate and confirmatory affidavit are admissible.

- [11] On the other hand, the counsel for the applicant mounted a challenge regarding the supplementary affidavits that were filed by the respondents after the pleadings were closed and the heads of argument were delivered. In exercising our discretion on whether the supplementary affidavits should be allowed or not, we have considered, inter alia, the degree of materiality of the evidence, the prejudice (if any) that each party would suffer, and the need to bring finality to these proceedings. We are satisfied that there are exceptional circumstances justifying that the supplementary affidavits be allowed.

FACTUAL

BACKGROUND

- [12] The three Gupta brothers and the applicant, being the wife of one of the brothers, each hold a 25% shareholding in Islandsite and Confident Concept. On 16 February 2018, the Directors of Islandsite adopted a resolution that there existed reasonable grounds to believe that the company was financially distressed and there appeared to be reasonable prospects that the company could be rescued and placed under supervision in terms of the provisions of section 129(1) read with section 129(2) of the Act. On 20 February 2018, the Companies and Intellectual Property · Commission of the Republic of South Africa (CIPC) effectively issued the Notice of Beginning of Business Rescue Proceedings. On 20 and 22 February 2018, the Notice of Appointment of the Business Rescue Practitioners' was issued by CIPC appointing the first and second respondents as the BRPs of the companies.[6]

- [13] The primary reason cited for the financial distress of Islandsite was the so called "un-banking"[7] of the company together with a group of indirectly related entities linked to the Gupta empire. The four main banking institutions in South Africa decided to distance themselves from the entities and the company on account of reputational risk. This in turn adversely affected the company's ability to continue running its business in the in the ordinary course beyond 31 March 2018.[8] According to the Directors, the solutions available to the BRPs given the number of unsuccessful requests made to numerous financial

institutions to allow banking facilities was to either conclude a sale

of the business as a going concern or enter into a management contract with an arm's length party. The proposed solutions would be put in place in order to maintain the continued trading status of the business and thereby assist in preserving the employment of staff.[9]

[14] As far as Confident Concept was concerned, a similar resolution arose and, in response to the un-banking of the company, the Directors adopted a resolution that although the company was under financial distress, reasonable prospects that the company could be rescued and placed under supervision in terms of the provisions of section 129(1) read with section 129(2) of the Act existed.[10]

[15] According to the Business Rescue Plan for Islandsite, the total market value for both immovable and movable property is R 513 808 274.00.[11] In terms of the Business Rescue Plan for Islandsite, the following is a list of known creditors as at the commencement of Business Rescue proceedings:

a. Secured Creditors -

i. Bank of India (covering mortgage bonds iro overdraft): R 31 735 306.08

ii. Cession loan (lease): R 22 022 275.00

b. Preferent Creditors -

i. Employees: R 459 112.18

ii. SARS: R 2 651 686.87

c. Concurrent Creditors -

i. Trade Creditors: R 26 394 657.24

d. Intercompany Loans -

i. Oakbay: R 6 930 471.16

ii. Sahara Computers (under scrutiny by FICA and CIPC):

R 467 008 796.54

iii. Veriana: R 5 673 731.68

iv. Security Deposit/ West Dawn: R 200 255 000.00

v. Before the Wind: R 13 818 813.30

Total creditors: R 776 949 850.05.[12]

[16] According to the Business Rescue Plan for Confident Concept on the other hand, the total market value for both immovable and movable property is R174 371 150.04.[13] In terms of the Business Rescue Plan, the following is a list of known creditors as at the commencement of Business Rescue proceedings:

i. Bank of India (special and general notarial bond): R 7000 000.00

ii. Bank of Baroda (mortgage bond): R 56 510 997.00

- iii. First National Bank (ace: 3 000 014 394 531): R 2 880 000.00
- iv. First National Bank (ace: 3000 014 395 295): R 3 600 000.00
- v. Barloworld (improvement lien): R 2 254 552.29
- b. Termed Preferent Creditors -
 - i. Employees: R 1 178 740.05
 - ii. SARS: R 2 238 160.93
 - c. Concurrent/ Trade & Accrued Creditors -
 - i. Trade Creditors: R 1 631 751.03
 - d. Other: Related party liabilities:
 - i. Islandsite: R 119 015 132.00
 - ii. Sahara Computers: R 652 379.17
 - e. Post Business Rescue Creditors -
 - i. Bank of India: R 178 820.41
 - ii. Bank of Baroda: Interest on Loan: R 1 274 660.08
 - ii. RMS Power Tronics: R 24 000.00
- Total creditors: R198 435 192.96.[14]

[17] In the minutes of the first creditors/ affected parties meeting of Islandsite Investments held on 5 March 2017, it was recorded that Islandsite deals with the hospitality industry and invested funds. It was in turn recorded that the company owns residential and commercial property. According to the minutes, the financials of the company indicated that the company makes a profit of approximately 4 million rand and its book value is estimated at about 275 million rand. The company's debtors are in turn estimated at 48 million rand and its main source of income was recorded as being rental income. According to the minutes, the primary reason for the company being under financial distress appeared to be the negative inferences attributed to the Gupta family which in turn adversely impacted on the juristic entities in which the family had links to either directly or indirectly.[15]

[18] However, in terms of the minutes, the BRPs were of the opinion that the entity was rescuable against a careful cash flow structure, a respect by creditors of the moratorium set out in section 133 of the Act and amendable post commence finance in terms of section 135 of the Act.[16]

[19] With regard to Confident Concept, according to the minutes of the first creditors/ affected parties meeting held on 5 March 2017, it was recorded that the entity deals with investments and residential properties and has about 18 employees. The assets of the entity have

however not been valued and much like Islandsite, the reason for the entity's financial distress appeared to be the negative inferences attributed to the company's association with the Gupta family which in turn impacted negatively on the juristic entities in which the family had links to. Furthermore, much like Islandsite, according to the minutes, the BRPs were of the opinion that the entity was rescuable again against a careful cash flow structure, a respect by creditors of the moratorium set out in section 133 of the Act and amendable post commence finance in terms of section 135.

[20] However, tension seems to have arisen between the companies' shareholders and BRPs and it is as a result of this that the applicant seeks an order removing the first and second respondents as BRPs of the companies. The applicant contends that the removal of the first and second respondents as BRPs is necessary as:

20.1. the conduct of the first and second respondents in respect of the companies has not been in good faith;

20.2. the conduct of the first and second respondents amounts to a failure to perform the duties of a business rescue practitioner as contemplated in terms of section 139(2)(a) of the Act;

20.3. the conduct of the first and second respondents amounts to a failure to exercise the proper degree of care in the performance of a business rescue practitioner's functions as contemplated in terms of section 138(2)(b) of the Act;

20.4. the conduct of the first and second respondents evidences a conflict of interest or lack of independence as contemplated in terms of section 139(2)(e) of the Act;

20.5. the conduct of the first and second respondents is not consistent with the conduct of an officer of the court as contemplated in terms of section 140(3)(a) of the Act; and

20.6. the conduct of the first and second respondents is not consistent with the responsibilities of a director of the companies in question as contemplated in section 140(3)(b) of the Act.

ISSUE

[21] In a nutshell, having regard to the facts and circumstances of the matter, this Court must decide whether the first and second respondents should be removed as business rescue practitioners of Islandsite and Confident Concepts in terms of section 139(2) of the Act.

APPLICABLE STATUTORY PROVISIONS

[22] The Act has introduced business rescue provisions to provide for the efficient rescue and recovery of financially distressed companies. In interpreting how the Act is to operate, there is a need to carefully balance the rights and interests of all relevant stakeholders.[17]

[23] Section 128(1)(b) of the Act defines business rescue to mean:

"... proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for -

- (i) the temporary supervision of the company, and of the management of its affairs, business and property;
- (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company."

[24] Integral to business rescue proceedings is of course the BRP who is defined in terms of section 128(1)(d) of the Act as "a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings." Of particular relevance in respect of BRPs is section 139(2) of the Act which reads as follows:

"Removal and replacement of practitioner -

- (2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:
 - (a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
 - (b) failure to exercise the proper degree of care 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 interest 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."

[25] What is vital is for this Court to therefore determine whether the BRPs in casu executed their duties in accordance with the standard set not only by the Act but by the courts as judicial officers or whether the applicant has successfully made out a case demonstrating that the BRPs acted in a manner short of the required standard in terms of the Act.[18]

[26] As an officer of the court, it is an uncompromising requirement that a BRP executes his/her duties in good faith bearing in mind that the benefit of earning fees should never outweigh the duty to act in good faith.[19] Good faith implies that the BRP . is obligated to execute his/her duties with the utmost trust, confidence and loyalty to the

benefit of all stakeholders in the business rescue process. By virtue of their role, BRPs are therefore held at a higher professional and ethical standard. In *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others*, . Dambuza AJA, writing for the Supreme Court of Appeal (SCA), held that:

"The conduct of the practitioner in this case raises serious concerns. This is because of the responsibility he had, as a business practitioner under the Act, which he does not seem to have appreciated. A business rescue practitioner must be held to a high professional and ethical standard. In addition to the powers and duties specifically conferred on business rescue practitioners by Chapter 6, they are also officers of the court (s 140(3)(a)) and have the responsibilities, duties and liabilities of a director as set out in ss 75 to 77 (s 140 (3)(b)). It was the duty of the practitioner in this case to conduct a careful assessment of Kariba's affairs and to prepare a plan that adequately reflected the prospects of Kariba's rescue. Against this standard, and the standard expected of the practitioner as an attorney, the attitude displayed by the practitioner in regard to serious concerns expressed by the bank regarding what it considered to be the shortcomings in Kariba's affairs and the rescue plan, is disturbing... The apparent lack of appreciation, by the practitioner, of the seriousness of the office he held is unacceptable. In addition, the practitioner was expected to act objectively and impartially in the conduct of the business rescue proceedings." [20]

[27] Having regard to the above, we find the BRPs' conduct in casu to be at odds with the requirements as set out in the Act. As judicial officers, the first and second respondents failed to execute their duties with the highest level of good faith, objectivity and impartiality on several fronts, the sale of the assets of the

companies being the first. The sale of the companies' assets seemed to be a frequent feature in the argument raised by the first and second respondents in response to the question regarding the execution of their duties. The first and second respondents argued

that in the execution of their duties, they had overseen the sale of numerous properties belonging to the companies. However, we find this argument to be untenable. It cannot be that the first and second respondents can unabatedly continue to sell off the assets of the respective companies and earn fees and commissions without having a plan regarding how the respective businesses are going to operate moving forward once the creditors have been paid. Business rescue proceedings are not intended to continue indefinitely. As the SCA in *Diener N.O. v Minister of Justice and Others* aptly put it, the rationale underlying business rescue:

".. . is that it must end, either when its aim has been attained or when the realisation arises that rescue is not attainable. To this end, s 132(3) provides that if business rescue proceedings have not ended within three months of commencement or a longer period sanctioned by a court, the BRP must prepare a progress report which he or she must update monthly until the end of the business rescue proceedings, and deliver the report and each update to each affected person and to either the court (if the proceedings were the subject of a court order) or the Commission." [21]

[28] We therefore find the first and second respondents continual earning of fees and commissions despite their failure to timeously conclude the business rescue proceedings in respect of both companies to be wholly at odds with their mandate in terms of the Act.

[29] Moreover, other than stating that the companies were rescuable, the first and second respondents have failed to make out a cogent case to support their opinion that reasonable prospects of rescue exist.[22] What is more, in terms of the Business Rescue Plans for both companies, the first and second respondents have failed to deal with

how they would manage to secure a bank account with a licensed bank in order for the companies to continue with their business given the fact that both companies have been un-banked.

[30] The first and second respondents' lack of good faith in conducting the affairs of the companies is again demonstrated in their contention that there exists an element of criminal unlawfulness in the manner in which the board and shareholders have conducted the affairs of the companies. As judicial officers, the first and second respondents bore the onus of reporting such suspicions to the relevant authorities. Their failure to do so, in this Court's view, is dispositive. Not only does this mean that the first and second respondents' investigation into the affairs of the companies has been tainted as a result of their potential failure to be forthcoming regarding any dubious activities on the part of the board and shareholders, the first and second respondents' failure to report its findings to the relevant authorities in turn also taints their impartiality as officers of the court. Given the nature of the office of a BRP and that the ability to execute one's duties as a BRP requires a high level of impartiality and independence,[23] the conduct of the first and second respondents in failing to report such findings is critical and speaks to whether the respondents are indeed fit and proper to execute the duties of a BRP.

[31] In the answering affidavit, the respondents contend that although the initial reason for the commencement of business rescue proceedings was the un-banking of the Gupta linked companies, it later emerged that the entire group was in financial turmoil due to the gross and reckless mismanagement of the affairs of the companies.[24] The respondents further submit that both Islandsite and Confident Concept form part of the Gupta empire through which billions of rands were channelled under the direction and control of the board of Directors, management and shareholders. We however find the unsubstantiated nature of the first and second respondents' allegations in this regard particularly vexing. Again, if the first

and second respondents were so aggrieved at the alleged mismanagement of the companies and the unsavoury and criminal activities that the companies were being subjected to at the hands of the board and shareholders, as an integral part of their judicial duty, the first and second respondents could have and should have reported their findings to the appropriate authorities. Raising such allegations at this stage appears to be a grossly disingenuous litigation tactic that again does not put the first and respondents' conduct as officers of the court in the best of light.

- [32] It is in turn both intriguing and troubling that the first and second respondents have filed papers vilifying the companies' board and shareholders alleging that they have mismanaged the affairs of the companies and in the same breath want to rescue the companies for the ultimate benefit of the same board and shareholders. This again speaks to the credibility of the first and second respondents and begs the question whether the accusations levelled at the board and shareholders are truly being raised in good faith. Lastly, this Court cannot overlook the position of conflict that the first respondent may potentially find himself in as a BRP for both companies. This Court finds that the gravity of the position held by a BRP requires the utmost level of impartiality and independence and in the event that such impartiality and independence may potentially be compromised, intervention is warranted.
- [33] In terms of section 139(2) of the Act, a court is only required to order the removal of a BRP based only on one of the listed grounds. We however find that a case has been made out for the removal of the first and second respondents as BRPs on several grounds; namely a failure to perform the duties of a BRP in terms of section 139(2)(a) and the presence of a conflict of interest/ lack of independence in terms of section 139(2)(e).
- [34] This Court therefore finds that a sufficient case has been made out justifying the removal of the first and second respondents as BRPs of both companies. The fact that the first and second respondents conduct may have been tainted with impropriety and the fact that a potential conflict may exist compromising the first and second respondents' execution of their duties is sufficient to warrant their removal bearing in mind the high standard of professional and ethical duty that BRPs are held to in terms of the Act.

ORDER

- [35] Once an order removing a BRP has been granted in terms of section 139(2), section 139(3) provides that either the company or creditor who nominated the BRP must appoint a new practitioner. Section 139(3) however does not provide a time limit within which a new BRP should be appointed. There therefore seems to be a lacuna within the section in this regard.
- [36] The only section that provides for a time limit within which a BRP should be appointed is section 129(3)(b) of the Act. In terms of section 129(3)(b), a BRP must be appointed by the company within five business days after the company has adopted and filed a resolution to commence business rescue proceedings. Importantly, should the company fail to comply with the strict provisions of section 129(3), the resolution placing the company under business rescue lapses and is a nullity in terms of section 129(5).
- [37] Using section 129(3)(b) as a guide and in an effort to ensure legal certainty, this Court recommends that an order instructing the respective companies to appoint new BRPs be effected with the consequent of such a failure being the termination of the business rescue proceedings. This Court in turn recommends that the respective companies be given 10 business days within which to effect such appointments.

COSTS

[38] In the normal cause of events, costs follow the event and the successful party is ordinarily entitled to his or her costs.[25] However, having carefully considered the circumstances of this case and exercising our judicial discretion, we find that no order as to costs should be made.

[39] In the result the following order is made:

39.1 The first and second respondents are removed as business rescue practitioners of Islandsite Investments One Hundred and Eighty (Pty) Ltd and Confident Concept (Pty) Ltd in terms of section 139(2) of the Companies Act 71 of 2008.

39.2 The respective companies, Islandsite Investments One Hundred and Eighty (Pty) Ltd and Confident Concept (Pty) Ltd, are ordered to appoint suitable business rescue practitioners within 10 (ten) business days of the order of this Court in terms of section 139(3) of the Companies Act 71 of 2008.

39.3 In the event that the respective companies, Islandsite Investments One Hundred and Eighty (Pty) Ltd and Confident Concept (Pty) Ltd, fail to appoint suitable business rescue practitioners within 10 (ten) business days of the order of this Court as per 39.2 above, the business rescue proceedings will be deemed to have terminated ex lege.

39.4 The applicant's attorneys of record are ordered to deliver a copy of the judgment and order of this Court to the fifth respondent.

39.5 The applicant's attorneys of record are ordered to deliver a copy of the judgment and order of this Court to the affected parties as listed in the Business Rescue Plan prepared for Islandsite Investments One Hundred and Eighty (Pty) Ltd and Confident Concept (Pty) Ltd respectively.

39.6 No order as to costs is made.

A.P. LEDWABA

DEPUTY JUDGE PRRESIDENT OF

THE GAUTENG DIVISION,

PRETORIA

N. JANSE VAN NIEWENHUIZEN

JUDGE OF THE GAUTENG

DIVISION, PRETORIA

M.L. SENYATSI

ACTING JUDGE OF THE

APPEARANCES

For Applicant:

Adv Michael R Hellens SC

Adv JP Snijders

Instructed by:

BDK Attorneys

For first to second Respondents: Adv P Stais SC

Adv G Wickins

Instructed by:

Smit Sewgoolam Inc

[1] See for example Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others (2019] ZAGPPHC 411.

[2] 71 of 2008.

[3] Page 9 of the respondents' answering affidavit.

[4] 16 of 1963.

[5]

[1974] 1 All SA 438 (O). See also Breda NO v The Master of the High Court, Kimberley [2015] ZASCA 166.

[6] Page 74 of the Business Rescue Plan prepared for Islandsite by the first and second respondents .

[7] A colloquial term used to describe a situation where a person or company is without a bank account and is barred from opening one.

[8] Supra n 6.

[9] Ibid.

[10] Page 148 of the Business Rescue Plan prepared for Confident Concept by the first and second respondents .

[11] Pages 74 -5 of the Business Rescue Plan prepared for Islandsite by the first and second respondents.

[12] Ibid at page 75.

[13] Page 149 of the Business Rescue Plan prepared for Confident Concept by the first and second respondents.

- [14] Page 150 of the Business Rescue Plan prepared for Confident Concept by the first and second respondents. Interestingly, according to the Business Rescue Plan for both companies, the costs associated with a business rescue are significantly lower than those incurred in liquidation . This in turn allegedly results in better dividends to creditors and affected parties.
- [15] Page 83 of the Business Rescue Plan prepared for Islandsite by the first and second respondents.
- [16] Ibid.
- [17] See section 7(k) of the Act. See also *Diener NO v Minister of Justice and Correctional Services and Others* [2018] ZACC 48; 2019 (2) BCLR 214 (CC); 2019 (4) SA 374 (CC); *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) and *Firststrand Bank Ltd, Wesbank Division v PMG Motors Alberton (Pty) Ltd and Others* [2013] 4 All SA 117 (GSJ).
- [18] See this Court's decision in *Commissioner for the South African Revenue Service v Louis Pasteur Investments (Pty) Ltd and Others* (2018] ZAGPPHC 287 where this Court, per Pienaar J, at para 27 held that "It should be kept in mind that Second Respondent in his capacity as a senior business rescue practitioner of First Respondent is an officer of the Court in terms of section 140(3)(a) of the Companies Act, besides the fact that he is a duly admitted attorney and as such also an officer of the Court... The business rescue practitioner is required to be objective and impartial in his conduct... This obligation with which the business rescue practitioner is burdened applies even though an Applicant intends proceeding with an application to have such business rescue practitioner removed in terms of section 139(1) or (2) of the Companies Act."
- [20] *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others* [2015] ZASCA 69; 2015 (5) SA 192 (SCA) at paras 35, 37- 8.
- [21]
- [2017] ZASCA 180; [2018] 1 All SA 317 (SCA) at para 28.
- [22] See *Oakdene Square Properties {Pty} Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA) at para 30.
- [23] Section 139(2)(e) of the Act.
- [24] The respondents go on to contend that in the answering affidavit that the Islandsite company does not have any cash flow. There are however no accurate and reliable financial records to check the so-called inter-company loans. It is therefore difficult to ascertain the exact liabilities of the companies

[25] See *Pelser v Levy* 1905 TS 466 469 ; *Van Vuuren v Jonker* 1910 TPD 686 687 ; *Fripp v Gibbon & Co* 1913 AD 354 363 ; *Sackville West v Nourse* 1925 AD 516; *Pyatt Ltd v Commissioner for Inland Revenue* 1925 AD 298; *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A); *Union Government v Gass* 1959 4 All SA 392 (A).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2019/960.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/gupta-v-knoop-no-and-others-unknown-topic-agpphc-2019>

Prepared on 13 October 2026 · Esheria