

SOUTH AFRICA / JUDGMENT

Keaton Energy Holdings Ltd and Another v DGI Trading Mining Equipment (Pty) Ltd and Others (2024/020761) [2024] ZAGPJHC 327 (29 March 2024) [2024] ZAGPJHC 327

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2024/020761

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024 – 020761

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO

In the application by

KEATON ENERGY HOLDINGS LTD First

Applicant

KEATON MINING (PTY) LTD Second

Applicant

And

DGI TRADING MINING EQUIPMENT (PTY) LTD First

Respondent

IPP MINING AND MATERIALS HANDLING (PTY) LTD Second

Respondent

SG COAL (PTY) LTD Third

Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fourth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Companies Act 81 of 2008 - business rescue proceedings – reasonable prospect of success – less onerous than reasonable probability test in Companies Act 61 of 1973

Applicant required to place primary facts before court – secondary facts can be inferred from primary facts but in the absence of primary facts the inferences are mere speculation

Order

[1] In this matter I make the following order:

1. The application is dismissed;
2. The first applicant is ordered to pay the costs of the application, including the costs of two counsel where so employed

[2] The reasons for the order follow below.

Introduction

[3] This is an application in the urgent court by the first applicant, the sole shareholder of the second applicant, to place the second

applicant in business rescue. The second applicant is currently under provisional liquidation and the provisional liquidators are not cited as co-applicants or as respondents. This is fatal to the standing of the second applicant but nothing turns on this as the first applicant does have standing as an affected person as envisaged by section 128

(1) (a) of the Companies Act 71 of 2008.

[4] I deal with the question of joinder under a separate heading below.

[5] The provisional liquidation order referred to above was granted on 27 February 2024 in the High Court in Pretoria under case number 2023 – 101248 by Van der Schyff J. The return day of the order is 10 May 2024.

[6] The second applicant's confirmatory founding affidavit was signed on 25 February 2024, two days before the provisional winding

up order was granted and it was placed in the hands of the Master and then the provisional liquidators.

[7] The business rescue application is opposed by the second respondent.

[8] Section 131 of the Companies Act[1] reads as follows:

“131 Court order to begin business rescue proceedings

(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) An applicant in terms of subsection (1) must-

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1), the court may-

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-

(i) the company is financially distressed;

(ii) 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

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

(5) If the court makes an order in terms of subsection (4) (a), the court may make a further order appointing as interim practitioner

a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.

- (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.
- (8) A company that has been placed under supervision in terms of this section-
- (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance

with section 132 (2); and

- (b) must notify each affected person of the order within five business days after the date of the order.”

Urgency

- [9] There is a wealth of authority on the subject of urgent applications.[2] An urgent application must be brought as soon as possible and an applicant is expected to furnish cogent reasons for any delay.[3]

Questions of urgency and degrees of urgency are questions of fact. Business rescue proceedings are usually if not always by their very nature urgent to some or other degree. If a company can be rescued from doom with an attendant loss of wealth generation, employment opportunities, contribution to the fiscus through taxes, and the maintenance of a strong South African economy, it is in the interest of all parties and in the public interest that this be done sooner rather than later. Business rescue proceedings -

“by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue.”[4]

- [10] In my view a proper case has been made out to invoke rule 6 (12).

Reasonable prospects of success

- [11] The Companies Act of 2008 has done away with the “cumbersome procedure” described as judicial management in the previous Companies Act 61 of 1973.[5] under the 1973 Act a reasonable probability of success was required. The Act of 2008 introduced a less onerous, more flexible and practical approach. The applicant must satisfy[6] the court that there is a reasonable prospect[7] that the company can be rescued by being placed under supervision. [8]

The court must consider the application on its merits and must also guard against the possible abuse of the procedure.[9]

[12] The evidence to be placed before the court will depend on the objectives of the proposed rescue (whether it is intended to achieve the long-term continuation of the company or merely to ensure a better return for shareholders upon inevitable liquidation) and a cogent case must be presented. There must be sufficient factual detail to enable the court to determine whether there is a viable basis for the business rescue or that there is sufficient evidence before the court to justify an investigation in terms of section 141

(1) of the Companies Act.

Vague and speculative averments will not suffice.

[13] The starting point in any business rescue application must be that the restoration of a viable though troubled company is preferred to its demise.[10]

[14] In application proceedings the affidavits serve the purpose of pleadings and evidence. The facts must be set out concisely without

argumentative matter and the primary facts from which secondary facts may be inferred must be dealt with. Without the primary facts the secondary facts are mere speculation.[11]

[15] The second applicant is in financial distress. It was established in 2006 and it operates in the mining industry. It supplies coal to the domestic and the export market and its largest customer was the electricity generator Eskom. The second applicant's agreement with Eskom came to an end on 30 April 2022.

The company employs 36 employees and is a level I BBBEE business boasting 59.39% black ownership of which 2.7% is black female owned. During 2022 and 2023 the company entered into discussions with Eskom to secure a new contract and these negotiations are said to be at an advanced stage. No details of these negotiations are provided.

[16] The second applicant does not have sufficient working capital and is unable to service its monthly obligations to creditors or to meet orders from clients. It is stated without detailed evidence that the company will be able in the interim to generate revenue from sales to Eskom through rectification of the Moabsvelden Collery CSA which should enable the fuel sourcing team of Eskom to finalise new agreements. Eskom has granted an 18-month extension to the rectification but it is not clear when the 18-month period commenced and exactly what the effect of the decision is.

[17] The second applicant has also engaged with lenders and major stakeholders to allay their fears and it has become apparent that a single mining contractor willing to take on the mining risk would be essential to rescue the company. An immediate cash injection is required to support the mine restart and take over other related services at the mine. Should a single mining contractor be appointed and a new agreement be entered into with Eskom it would be possible to settle all the debts of the company. It would then be a profitable business.

[18] Discussions have been held with a number of stakeholders and an expression of interest has been received from a consortium of companies to take over as the single mining contractor. It is not clear whether an agreement is on the verge of being signed and if not, whether negotiations have progressed beyond an expression of interest.

[19] The consortium provided an operational and financial proposal in terms of which the consortium will assume control and responsibility for the operations. The proposal is not attached to the founding papers. Based on financial projections of which no detail is provided in the application the mine is expected to ramp up to full production volumes from May 2024 as mining is expected to commence in March

2024. The mine should then be expected to generate a positive cash flow from June 2024.

The business rescue practitioner to be appointed should be in a position to facilitate the conclusion of a management contract between the second applicant and the consortium, to engage with critical service providers, to ensure the procurement of equipment, to renegotiate or cancel onerous contracts, and to implement a cost saving programme.

[20] The second applicant expects to create a further 320 jobs on the commencement of mining and employees are sourced from residents living in the environment of the mine. This will in turn enable the second applicant to continue with its social labour plans.

[21] Once the consortium has assumed the management of the mine 70% of the cash flow will be used to repay creditors, 20% will be used for the ongoing rehabilitation of the farm Vangaatfontein where mining is being conducted, and 10% will be used for operational expenses. It is expected that creditors will be repaid in full but will not be paid interest.

There is however no details on a proposed contract with Eskom, no signed or even draft management agreement, no details of post commencement financing, no business or turnaround plan, and no production schedule and prices. The potential purchasers of coal other than Eskom have not been identified in any detail.

[22] The company was currently accumulating cash reserves (no details are provided) and it will be, according to the deponent, have a positive cash flow in four months. This means that the company will be able to repay creditors should a new management agreement be finalised.

[23] It is important to note that the agreement with Eskom terminated two years ago. If there was indeed a window of opportunity to salvage the relationship before the winding up of the company it would seem in the absence of evidence that the opportunity was never taken.

[24] The founding affidavit by the sole director of the first applicant contains little more than unsubstantiated opinions and a wish list of what the deponent would like to see happen at the mine. The affidavit is rife with speculation and inferences made from primary facts not contained in the affidavit. There is said to be an expression of interest document but the document is not placed before the court nor is there any supporting affidavit by any member of the consortium indicating that the consortium has firm and definite detailed plans

capable of implementation that would or may result in the rescue of the second applicant.

- [25] In the replying affidavit it is stated that the rescue plan is the combination of work and resources that have been allocated by the consortium to put together in a financial model annexed to the supplementary founding affidavit. The document annexed to the supplementary founding affidavit as “FA 2” is not legible but what can be seen is that it is comprised of data in various columns. It is not a financial model. If any submission were to be made and specific information contained in a financial model one would expect the submissions to be set out in the founding papers clearly and succinctly. It should not be left to the court to study the document without any information in the founding affidavit to see whether or not there might be statements of fact in the document of importance to the case.
- [26] It is stated in the supplementary founding affidavit that the turnaround proposal and financial model “will result in a full recovery by creditors of Keaton mining. A copy of the financial model is attached.” No facts whatsoever are alleged in support of the allegation that there will be a full recovery if the turnaround proposal and financial model, neither of which are before the court, are implemented.
- [27] The first applicant believes that there is a reasonable prospect of rescuing the company and that it would be in the best interest of all creditors, employees, suppliers and customers of the company to do so. The deponent’s averments are not supported by evidence and for this reason the application must fail.

Joinder

- [28] The first applicant brought a joinder application to join the two provisional liquidators and the Master of the High Court as the sixth, seventh, and eighth respondents. The present status of the joint liquidators was not clear but I understand that they do not oppose the joinder application. However because of the conclusion I came to it is in my view not necessary to further consider the joinder application.

Costs

- [29] This is a matter of some complexity and the employment of two counsel on both sides was justified.

Conclusion

- [30] For all the reasons set out herein I make the order in paragraph 1 above. As this is an urgent application it will be furnished to the parties via email over the Easter holidays but the deemed date of publication will be 2 April 2024.

MOORCROFT AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 2 APRIL 2024

COUNSEL FOR THE APPLICANTS: P

NGCONGO

L PHALADI

INSTRUCTED BY: EDWARD

NATHAN SONNENBERGS

COUNSEL FOR THE SECOND RESPONDENT: NGD MARITZ SC

D SWART

INSTRUCTED BY: JW

BOTES INC

DATE OF ARGUMENT: 28 MARCH 2024

DATE OF JUDGMENT: 29 MARCH 2024

- [1] See Delport Henochsberg on the Companies Act 71 of 2008 443 et seq and specifically the analysis of section 131 commencing at 481.
- [2] See Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A), Luna Meubelvervaardigers (Edms) Bpk v Makin and Another t/a Makin's Furniture Manufacturers 1977 (4) SA 135 (W) East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd 2011 JDR 1832 (GSJ), Siyakhula Sonke Empowerment Corporation (Pty) Ltd v Redpath Mining (South Africa) (Pty) Ltd and Others 2022 JDR 1148 (GJ) paras 7 and 8, Allmed Healthcare Professionals (Pty) Ltd v Gauteng Department of Health 2023 JDR 3410 (GJ), Van Loggerenberg Erasmus: Superior Court Practice 2023 vol 2 D1 Rule 6-1. See also the "notice to legal practitioners about the urgent motion Court, Johannesburg" issued by the Deputy Judge President on 4 October 2021.
- [3] Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004
- (2) SA 81 (SE) 94C–D; Stock v Minister of Housing 2007
- (2) SA 9 (C) 12I–13A; Kumah v Minister of Home Affairs 2018
- (2) SA 510 (GJ) 511D–E.

- [4] Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others 2012 (2) SA 378 (WCC) para 10.
- [5] See Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) para 20.
- [6] Section 131 (4).
- [7] See Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd [2013] ZASCA 68 para 22.
- [8] See the judgement by Binns-Ward J in Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others 2012 (2) SA 378 (WCC) paras 17 to 20.
- [9] Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) para 3, PFC Properties (Pty) Ltd v Commissioner South African Revenue Service and Others 2024 (1) SA 400 (SCA), Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC 2013 (6) SA 540 (WCC) para 20.
- [10] See DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others 2014 (1) SA 103 (KZP).
- [11] Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) 78I, Willcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) 602A, Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) 793D, Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) 324D-F.

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