

SOUTH AFRICA / JUDGMENT

Kgoro Consortium (Pty) Ltd and Another v Cedar Park Properties 39 (Pty) Ltd and Others (935/2020) [2022] ZASCA 65 (9 May 2022)

[2022] ZASCA 65

COURT

Supreme Court of Appeal

BEFORE

Van der Merwe JA, Plasket JA, Mbatha JA, Carelse
JA, Matojane AJA

CASE / FILE NUMBER

935/2020

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 935/2020

In the matter between:

KGORO CONSORTIUM (PTY) LTD

FIRST APPELLANT

REGIMENTS CAPITAL (PTY) LTD

(In liquidation)

SECOND APPELLANT

and

CEDAR PARK PROPERTIES 39 (PTY) LTD

(In liquidation)

FIRST RESPONDENT

VANTAGE MEZZANINE FUND II

PARTNERSHIP

SECOND RESPONDENT

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

THIRD RESPONDENT

And in the matter of:

SMIT SEWGOOLAM INCORPORATED

APPELLANT

In re:

KGORO CONSORTIUM (PTY) LTD

FIRST APPELLANT

PARTNERSHIP

SECOND RESPONDENT

MUNICIPALITY

THIRD RESPONDENT

Neutral Citation: Kgoro Consortium (Pty) Ltd and Another v Cedar Park Properties 39 (Pty) Ltd and Others (935/2020) [2022] ZASCA 65 (9 May 2022)

Coram:

VAN DER MERWE, PLASKET, MBATHA and CARELSE JJA and MATOJANE AJA

Heard:

9 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 9 May 2022.

Summary: Company law – business rescue proceedings – whether reasonable prospect of rescuing company as contemplated in s 131(4)(a) of Companies Act 71 of 2008.

Costs – costs de bonis propriis ordered against attorneys – no opportunity afforded to state case – special costs order set aside.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Twala J, sitting as court of first instance):

In the Kgoro appeal:

1 The second respondent's application for leave to file supplementary heads of argument is dismissed with costs.

2 The appeal is dismissed with costs.

In the Smit Sewgoolam appeal:

1 The appeal is upheld with costs.

2 Paragraph 3 of the order of the court a quo is set aside.

Mbatha JA (Van der Merwe JA, Plasket JA and Carelse JA and Matojane AJ concurring)

[1] On 30 June 2020, the Gauteng Division of the High Court, Johannesburg (the high court) dismissed an application for the placing of the first respondent, Cedar Park Properties 39 (Pty) Ltd (in liquidation) (Cedar Park), under supervision and commencing business rescue proceedings (para 2 of the order). The application was brought by the first appellant, Kgoro Consortium (Pty) Ltd (Kgoro). The second appellant, Regiments Capital (Pty) Ltd (in liquidation) (Regiments) intervened to support the application. The second respondent, Vantage Mezzanine Fund II Partnership (Vantage), opposed the application. The high court ordered the attorneys for the appellants, Smit Sewgoolam Incorporated (Smit Sewgoolam), to pay Vantage's costs de bonis propriis on the attorney and client scale (para 3 of the order). It also directed the Registrar of the high court to forward a copy of its judgment to the Gauteng Legal Practice Council for an investigation into the conduct of the responsible attorney at Smit Sewgoolam (para 5 of the order). With the leave of the high court, the appellants appeal against para 2 of the order. Smit Sewgoolam appeals against paras 3 and 5 of the order, with the leave of the court a quo. Regiments did not participate in the appeal.

Kgoro appeal

[2] The background of the matter is as follows. Cedar Park is a wholly owned subsidiary of Kgoro. Regiments is the majority shareholder in Kgoro. Cedar Park was used as a special purpose vehicle for the purchase of the property described as the Remaining Extent of Erf 575, Sandown Extension 49 Township, Gauteng (the property) and the development thereof by the construction of residential units, shops, business premises and hotels. The property was secured from the City of Johannesburg Metropolitan Municipality (City of Johannesburg), the third respondent, for the sum of R280 million, with payment to be made once the property was developed.

[3] On 5 June 2013, Cedar Park concluded a loan facility agreement with Vantage in the amount of R150 million in respect of the development of the property, which became due and payable, together with interest, on 30 June 2018. Kgoro provided a guarantee for Cedar Park's indebtedness to Vantage. As a consequence, Kgoro pledged and ceded all rights, title and interest in its shares in Cedar Park in favour of Vantage as security for the guaranteed obligations. It is common cause that Cedar Park failed to meet its obligations in terms of the

loan facility agreement.

- [4] As a consequence, on 6 December 2018, Vantage launched an application for the winding-up of Cedar Park for failing to make payment in the amount of more than R300 million that was due and owing. When Cedar Park failed to file an answering affidavit, Vantage enrolled the liquidation application for hearing on the unopposed roll for 18 February 2019. However, three days before, on 15 February 2019, Kgoro lodged the application to place Cedar Park under supervision and commence business rescue. The application for liquidation, therefore, had to be removed from the court roll.
- [5] Vantage consequently brought an application to intervene in the business rescue application and filed an answering affidavit thereto. Kgoro failed to file a replying affidavit thereto within the prescribed time limits, which prompted Vantage to enrol the application for hearing. This was, however, followed by the application to intervene in the proceedings by Regiments. After Kgoro finally filed its replying affidavit to Vantage's answering affidavit in the business rescue application in respect of Cedar Park, the application came before Twala J, in the high court.
- [6] Before the high court, the appellants sought to make out a case for placing Cedar Park under supervision and commence business rescue in terms of s 131(4) of the Companies Act 71 of 2008 (the Companies Act) on the basis that it was financially distressed, that it was just and equitable that it be placed under supervision, and that there were reasonable prospects of rescuing it. In essence, the appellants' case was that the 'Kgoro Sandton' development was a valuable project with great financial prospects, as the property was situated in a sought after part of Gauteng, namely Sandton. The value of the property on the open market was said to be at least R1,494 billion and the forced sale value R1,046 billion. It was described as a financially viable project which had attracted a lot of interest from potential purchasers, irrespective of the delays in the development of the property occasioned by the late registration of the property in Cedar Park's name, the opposition from neighbouring property owners and the delay in obtaining vacant possession.
- [7] On the other hand, Vantage contended that the appellants had not made out a case on the papers for such relief and that there were no reasonable prospects of Cedar Park being rescued, that a liquidation of Cedar Park would be to the advantage of creditors and that the appellants were dilatory in the conduct of the proceedings to the prejudice of the creditors of Cedar Park. Vantage advanced two main arguments: First, Kgoro did not have the locus standi to bring the application, on the basis that it had ceded all its shares to Vantage in securitatem debiti, and as a result it was not an affected person. Second, the appellants had failed to show that there would be a reasonable prospect of rescuing Cedar Park as contemplated in s 131(4)(a) of the Companies Act. I find it expedient to first determine the second argument.
- [8] The application was brought in terms of s 131(1) of the Companies Act. Section 131(4) provides that after considering the application in terms of subsec 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) 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
- (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company.’

Affected persons, like Vantage, are of course allowed to challenge the application, on the basis of its not meeting the requirements in s 131(4) of the Companies Act.

[10] It was common cause that Cedar Park was financially distressed in terms of the Companies Act. The question, therefore, turns on the consideration of whether the appellants made out a case for achieving any of the two objectives set out in s 128(1)(b)(iii) of the Companies Act. The applicant in business rescue proceedings bears the onus to prove that the company under consideration would have reasonable prospects of recovery. This is a factual question, for which a material foundation needs to be laid out in the founding affidavit by the applicant for business rescue.

[11] In determining this issue, the court a quo relied on passages in *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) and *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC). Counsel for Vantage correctly conceded that the court a quo had erred in this regard. In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*

[2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) paras 30-31, this Court said:

‘[30] Self-evidently it will be neither practical nor prudent to be prescriptive about the way in which the appellant must show a reasonable prospect in every case. Some reported decisions laid down, however, that the applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement (see eg *Southern Palace Investments 265 (Pty) Ltd* paras 24-25; *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) paras 18-20). But in considering these decisions Van der Merwe J commented as follows in *Propspec Investments v Pacific Coasts Investments 97 Ltd* 2013 (1) SA 542 (FB) para 11:

“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.”

And at para 15:

“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.”

[31] I agree with these comments in every respect. Yet, the appellants contended that the bar should be set even lower than that. Relying on the reference in s 128(1)(b) to “the development and implementation, if approved, of a plan to rescue the company” their argument was that the reasonable prospect for rescuing the company in s 131(4) demands no more than the reasonable prospect of a rescue plan. According to this argument, the applicant for business rescue is therefore not required to show a reasonable prospect of achieving one of the goals contemplated in s 128 (1)(b). All the applicant has to show is that a plan to do so is capable of being developed and implemented, regardless of whether or not it may fail. Once it is established that it is the intention of the applicant to develop and implement a rescue plan which has that as its purpose, so the argument went, the court should grant the business rescue application even if it is unconvinced that this will result in the company surviving insolvency or even achieve a better return for creditors and shareholders. I do not agree with this line of argument. As I see it, it is in direct conflict with the express wording of s 128(1)(h). According to this section “rescuing the company” indeed requires the achievement of one of the goals in s 128(1)(b). Self-evidently the development of a plan cannot be a goal in itself. It can only be the means to an end. That end, as I see it, must be either to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process. I have indicated my agreement with the statement in Propspec 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).’

[12] This Court in *Newcity Group (Pty) Ltd v Pellow NO and Others*

[2014] ZASCA 162 (SCA), endorsed the meaning of the phrase ‘reasonable prospect’ as set out in the *Oakdene* judgment. It stated as follows at para 16:

‘ . . properly described [reasonable prospect means] a yardstick higher than “a mere prima facie case or an arguable possibility”

but lesser than a “reasonable probability” – a prospect based on reasonable grounds to be established by a business

rescue applicant in accordance with the rules of motion proceedings.’

In this regard, ‘vague and speculative suggestions’ will not suffice. It is important to take cognisance of what this Court said in *Panamo Properties (Pty) Ltd and Another v Nel N O and Others*

[2015] ZASCA 76; 2015 (5) SA 63 (SCA); [2015] 3 All SA 274 (SCA) para 1, that business rescue proceedings under the Companies Act are intended to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all the relevant stakeholders. It held further that these proceedings contemplate the temporary supervision of the

company and its business by a business rescue practitioner.

[13] The question is whether Kgoro nevertheless made a case for placing Cedar Park in business rescue. As I have said, this requires an analysis of its founding affidavit. Before I do so, I have to consider Vantage’s application for leave to file supplementary heads of argument. The purpose hereof was to refer this Court to a multitude of paragraphs in two reports of the Judicial Commission of Enquiry into State Capture. These were purportedly references in the reports to Regiments and individuals connected to it. On the strength hereof Vantage sought to argue that this Court should ‘. . . draw negative inferences against the case for the business rescue of Cedar Park’. It suffices to say that it would be quite impermissible for this Court to have regard to (selective) passages in a report that was not introduced into evidence and that in any event did not relate to Kgoro or Cedar Park. The application must be dismissed with costs.

[14] It appeared from the evidence that, despite the loan obtained from Vantage, Cedar Park had not meaningfully commenced the envisaged development of the property and was unable to pay its debts. In its founding affidavit Kgoro said that the construction in respect of the project would take five to ten years at a cost of in excess of R6 billion. In the founding affidavit Kgoro paid no more than lip service to achieving the primary goal of the continued existence of Cedar Park as a solvent company. The court a quo correctly pointed out that Kgoro presented no evidence as to how the construction costs would be financed in an accepted business rescue plan. Kgoro’s case fell woefully short of showing a reasonable prospect of Cedar Park continuing with the development of the property on a solvent basis. In fact, the whole tenor and import of the application was that the development project, including the property, could be sold for around the amounts mentioned above.

[15] In this regard, Kgoro relied in the founding affidavit on an agreement of sale called the Cedar Park Sale of Development Enterprise Agreement (the Sale of Enterprise Agreement), concluded in 2018, as a financially viable offer on the table from a potential buyer of the Kgoro Sandton development. This agreement was subject to a number of suspensive conditions to be fulfilled at various time periods. At the hearing before us counsel for Kgoro accepted that this agreement had lapsed for want of fulfilment of the suspensive conditions. The other evidence in the founding affidavit as to the interest in purchasing the

development enterprise was rather vague and tentative. But even if it is accepted that there was interest in acquiring the development, it is to no avail. The mere fact that the development could be sold did not result in showing the aforesaid alternative object of business rescue. Kgoro had to go further and show that business rescue would result in a better return for creditors or shareholders of Cedar Park than would result from immediate liquidation. As Brand JA said in *Oakdene* para 33, an applicant that relies on this ground for business rescue cannot simply offer ‘. . . an alternative, informal kind of winding-up’. Kgoro made no attempt in the founding affidavit to show that such a better return would be achieved by placing Cedar Park in business rescue.

- [16] In sum, the aforementioned contentions raised by Kgoro go against the principles set out in *Oakdene*, where this Court held that the primary goal is to facilitate the continued existence of the company in a state of solvency and a secondary goal, which is provided for as an alternative in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from the immediate

liquidation. This Court in *Oakdene* held that the requirements for granting an order in terms of s 131 of the Companies Act entail that the company under consideration must have reasonable prospect of recovery or of a better return. In the result, I find that Kgoro failed to meet the threshold required to put Cedar Park under supervision and commence business rescue. It follows that it is not necessary to consider Vantage’s contentions as to lack of locus standi on the part of Kgoro. For these reasons the Kgoro appeal must fail.

Smit Sewgoolam appeal

- [17] As I have said, Smit Sewgoolam was ordered to pay costs *de bonis propriis* on a punitive scale and the high court directed that the Registrar forward the judgment to the Gauteng Legal Practice Council to investigate the conduct of the attorney involved in this matter. In essence, the court *a quo* penalised Smit Sewgoolam for failing to disclose that a previous order of the high court had interdicted the implementation of the Sale of Enterprise Agreement.
- [18] There is no basis to interfere with the referral under para 5 of the order. There were *prima facie* reasons for an investigation into the conduct in question. As to para 3 of the order, it is trite that costs *de bonis propriis* should only be ordered in exceptional circumstances (*Grobbelaar v Grobbelaar* 1959
- (4) SA 719 (A) at 725). There must have been conduct which is egregious on the part of the particular attorney to attract such an order of costs. The assessment of the gravity of the conduct is objective and lies at the discretion of the court (See *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC)). The Constitutional Court in *SA Liquor Traders’ Association and Others v Chairperson, Gauteng Liquor Board and Others*

[2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) para 54, held that an order for costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. In the light of what follows, however, it is not necessary to consider the alleged misconduct on the part of Smit Sewgoolam.

[19] Such an order may not be made against a party or person that had not been afforded a proper opportunity to respond to the allegations in question and to state his or her case in respect of the envisaged costs order. See, for instance, the judgments of this Court in *C B and Another v H B* 2021

(6) SA 332 (SCA) para 20 and *Chithi and Others; In re: Luhlwni Mchunu Community v Hancock and Others*

[2021] ZASCA 123 (SCA). This is the reason why the costs order against Smit Sewgoolam cannot stand. Although Vantage alluded to this in its answering affidavit in opposition to the business rescue application and Kgoro responded thereto in the replying affidavit, the draft order that Vantage subsequently presented to the court a quo reasonably indicated to Smit Sewgoolam that no costs order would be sought against it. The court a quo did not call upon Smit Sewgoolam to explain itself. In the circumstances, it was denied an opportunity to state its case. In the result, its appeal must succeed with costs.

[20] In consequence of the foregoing, the following orders are issued:

Y T MBATHA

JUDGE OF APPEAL

APPEARANCES

For first appellant: M v R Potgieter SC (with T Scott)

Instructed by:

Smit Sewgoolam Incorporated, Johannesburg

McIntyre Van der Post Incorporated, Bloemfontein

For second respondent: K van Huyssteen

Instructed by:

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Lovius Block Attorneys, Bloemfontein

For Smit Sewgoolam: T Scott

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