

SOUTH AFRICA / JUDGMENT

Matebesi and Another v Naicker and Others (2024-041410) [2024] ZAGPJHC 424 (3 April 2024)

[2024] ZAGPJHC 424

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2024-041410

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024 – 041410

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

In the application by

MATEBESI, DAVID KEEBINE

First Applicant

VAN ROOYEN, BRIAN GEORGE

Second Applicant

and

NAICKER, CINDY, NO

First Respondent

IMFUYO PROJECTS (PTY) LTD

Second Respondent

(In Business Rescue)

IMFUYO AIR PRODUCTS (PTY) LTD

Third Respondent

SOUTH AFRICAN RESTRUCTURING

AND INSOLVENCY PRACTITIONERS

ASSOCIATION NPC Fourth

Respondent

COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

Fifth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Section 139 of the Companies act 71 of 2008 - application for the removal of the first respondent as business rescue practitioner consequent upon the suspension and revocation of her licence to practice as business rescue practitioner – first respondent failing in duties

Punitive cost order justified

Order

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

1. The First Respondent (CINDY NAICKER) be and is hereby removed from office as the Business Rescue Practitioner of the Second Respondent and Third Respondent (“the Companies in business rescue”);
2. The First Respondent be and is hereby directed to immediately cease to carry out any work in her capacity as the Business Rescue

Practitioner of the Companies in business rescue;

3. The First Respondent be and is hereby directed to immediately disclose the total amount she paid herself in her capacity as the Business Rescue Practitioner of Second Respondent and Third Respondent and provide all invoices relating to her fees thereof;
4. The First Respondent should forfeit the fees and/or remuneration she has earned since coming into office, and if such fees and/or remuneration have already been paid, then the First Respondent is hereby ordered to pay back such fees and/or remuneration to the Second Respondent and Third Respondent (“the Companies in business rescue”);

5. ZOLANI PRINCE BUBA, with Identity Number 8[...], as nominated by the Applicants (the affected Persons), be appointed to replace the First Respondent as the Business Rescue Practitioner of the Second Respondent and Third Respondent in terms of the provisions of Section 139(3) of the Companies Act 71 of 2008;
 6. The First Respondent be and is hereby be ordered in her personal capacity to pay the costs of this application on a scale as between attorney and client, being not less than the fees taxed on scale C.
 7. A copy of this order together with the application papers shall forthwith be delivered to all affected persons known to the applicant and to the CIPC.
- [2] The reasons for the order follow below.

Introduction

- [3] This is a judgement in the urgent court. The applicants seek all an order that the first respondent be removed in terms of section 139 (2) of the Companies Act 71 of 2008 as the business rescue practitioner of the second and third respondents and for related relief. Section 139 read as follows:

“139 Removal and replacement of practitioner

- (1) A practitioner may be removed only-
 - (a) by a court order in terms of section 130; or
 - (b) as provided for in this section.
- (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;

[Para. (a) substituted by s. 89 of Act 3 of 2011 (wef 1 May 2011).]

- (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.

(3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130

(1) (b) to set aside that new appointment.”

[4] As will be shown below the removal of the first respondent is based on and justified by section 139 (2) (a), (b), (d), and (f) of the Act.

[5] The application is opposed by the first respondent and counsel was briefed to appear to argue the matter and also to seek a postponement

from the bar, but the first respondent did not file any affidavits in response to the main application or in support of the application for a postponement brought on her behalf.

Analysis

[6] The applicants collectively hold 53% of the shareholding of the second respondent and are directors of the third respondent. The

second respondent is the shareholder of the third respondent. The applicants derive their standing from section 128 (1) (a) (i) of the Companies Act 71 of 2008 as they are affected persons in terms of the Act.

[7] The second and third respondents adopted resolutions in terms of section 129 (1) and (2) of the Companies Act on 21 July 2020 to place the two companies in business rescue. The first respondent accepted an appointment as business rescue practitioner by the first respondent (the Companies and Intellectual Property Commission, CIPC). Her appointment was confirmed during July 2020.

[8] The first respondent failed to perform her duties as business rescue practitioner. In the four years since her appointment she has failed to deliver monthly reports and to prepare a business rescue plan for consideration and when the business rescue proceedings were not completed within three months as envisaged in section 132 (3) of the Companies Act she did not prepare a report on the progress of the business rescue proceedings. She did not fulfil her duties imposed on her by section 141 (1) of the Companies Act. She did not apply court and did not consult with creditors of the company's in business rescue in order to extend the publication of the business rescue plan as contemplated in section 150 (5) of the Companies Act

[10] The applicants have not been provided with bank statements and it is impossible to verify her activities. A business rescue practitioner[1] is in a position of trust in relation to all affected parties and must be able in appropriate circumstances to account for fees taken, expenditure incurred, and decisions made.

- [11] A criminal case of misappropriation of funds and of fraud was opened under case number CAS 236/4/2024 at the Benoni police station on 10 April 2024.
- [12] The debts of the second respondent increased from R831,292. 84 when the first respondent was appointed to R5,731,242. 12. The debts of the third respondent totalled R106,378. 49 when the first respondent was appointed and the present status is not known. The first respondent should have disclosed these details to affected parties but failed to communicate with them.
- [13] The first respondent's licence to practice as a business rescue practitioner was suspended by the CIBC on 23 December 2023 and subsequently revoked as reflected in a publication dated 8 April
2024. Section 138 (1) requires a business rescue practitioner to be licensed as such by the CIBC.
- [14] The applicants addressed a letter to the first respondent on 3 April 2024 requiring her resignation as business rescue practitioner. The first respondent replied on 5 April 2024 to state that –
- “an appropriate response dealing with all aspects of the contents” [of the applicants’ letter] “will follow in due course therefor [sic] failure to respond to those contents shall not be construed as an admission thereon.... We urge your clients to refrain from any further disruption of the business rescue process, any disruption henceforth will be deemed as malum in se and we will be using the appropriate forum for remedy.”*
- [15] The promised response never materialised. When the application was brought the first respondent opposed the application but did not file any answering papers. The first respondent made no attempt to explain why she should be permitted to remain as business rescue practitioner of the two companies despite the allegations of dereliction of duty to which no answer was provided and despite the revocation of the licence. She made no attempt to answer the very serious allegations made against her in the founding affidavit. The revocation of a business practitioner's license on its own is of course per se a ground for removal from office and from my reading of the Companies Act this is not a discretionary decision. Removal must follow and removal must also follow when any of the other grounds for removal are proven.
- [16] For these reasons and on the basis of the facts set out above as alleged by the applicant a punitive cost order on the scale of

attorney and client, payable by the first respondent de bonis propriis, and on a scale not less than scale C, is justified, and the CIBC should be requested to carry out its own investigations into the business rescue proceedings of these two companies as well as the conduct of the first respondent.

- [17] The first respondent was removed as the business rescue practitioner in two other applications in this Division. In the matter of the National Empowerment Fund v Naicker and L&R Buildings and Civils construction (Pty) Ltd under case number 5332 of 2022 the High Court in Johannesburg set aside a resolution by the board of directors of the second respondent to appoint the first respondent as business rescue practitioner on 26 July 2022. On 13 September 2023 the High Court in Pretoria set aside the appointment of the first respondent as business rescue practitioner and ordered her to forthwith vacate her office under case number 09692 of 2022 in the matter between Tradmet Ltd and Naicker NO and others. She was ordered to pay the cost of the latter application and an attorney and client scale.
- [18] The applicants seek the appointment of Dr Zolani Prince Buba who is a registered senior business rescue practitioner as the business rescue practitioner of the two companies. He has consented to such appointment.
- [19] The application was served by the sheriff on an adult person at the first respondent's place of residence on 17 April 2024. It was also served by electronic mail by the attorneys for the applicants. There is no merit in the contention made from the bar that the application was not properly served on the first respondent.
- [20] I also find that the applicant is urgent on the grounds of the interests not only of the applicants and the two companies and the other affected parties, but in the public interest.

Conclusion

- [21] For the reasons as set out above I made the order in paragraph 1.

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 3 MAY 2024

COUNSEL FOR THE APPLICANT: B F GEDEDGER INSTRUCTED BY: MCONTSI ATTORNEYS

COUNSEL FOR THE FIRST RESPONDENT: S NAIDOO INSTRUCTED BY: N MAHARAJ ATTORNEYS

DATE OF ARGUMENT: 30 APRIL 2024 DATE OF JUDGMENT: 3 MAY 2024

[1] See in general Delport Henochsberg on the Companies Act 71 of 2008 443 et seq.

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