

SOUTH AFRICA / JUDGMENT

Pruta Securities (Jersey) Limited v Roper N.O and Others (EL1522/2023) [2023] ZAECELLC 31 (24 October 2023) [2023] ZAECELLC 31

COURT

Eastern Cape High Court, East London Local Court

BEFORE

T.V Norman

CASE / FILE NUMBER

EL1522/2023

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT]

CASE NO.: EL1522/2023

In the matter between: - PRUTA SECURITIES (JERSEY) LIMITED Applicant and STEPHEN MARK ROPER N.O First Respondent FLOORWORX AFRICA (PTY) LIMITED Second Respondent THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC) Third Respondent THE EMPLOYEES OF FLOORWORX Fourth and Further Respondents (and other affected person in the Business Rescue)

JUDGMENT

NORMAN J:

- [1] Pruta Securities (Jersey) Limited (Pruta), a private company with limited liability, duly incorporated as such under the laws of Jersey, has its registered address at 47-49 La Motte Street, St. Helier, Jersey C.I, is the applicant herein. In the founding affidavit deposed to by Mr Mark Carpenter, Pruta is described as holding a number of investments in the Republic of South Africa. However, it does not conduct business within South Africa and has no employees within the country.
- [2] Pruta, on an urgent basis, approached this court seeking , inter alia, leave to institute this application against the first respondent, Mr Stephen Mark Roper(the BRP) who is cited in his official capacity as a business rescue practitioner of Floorworx and the second respondent, Floorworx (Africa (Pty) Ltd) (Floorworx) and to proceed therewith in accordance with the provisions of section 133 (1) (b) of the Companies Act No.71 of 2008 (the Companies Act). Pruta contends that it is a creditor of Floorworx and an affected person as envisaged in

sections 139(2) and 128(1)(a) of the Companies Act. It further contends that Floorworx is unable to pay its debts as contemplated in section 344(f) read with section 345 of the Companies Act No. 61 of 1973. It also relied on the provisions of section 344(f) for its contention that the winding up of Floorworx is just and equitable.

- [3] Pruta further seeks an order terminating the business rescue of Floorworx and an order by way of a rule nisi to have Floorworx placed under provisional winding-up. It further seeks costs against those respondents who oppose the application.
- [4] Pruta had launched proceedings for the removal of the BRP under case number 2023-013252. It contends that the issues in the removal application do not arise for consideration in this application.
- [5] It also cited the Companies and Intellectual Property Commission (CIPC) as the third respondent. It further cited “THE EMPLOYEES OF FLOORWORX and all other affected persons in the Business Rescue”, as fourth and further respondents. The application is opposed by both the BRP and Floorworx who raised only points of law in terms of Rule 6 (5) (d) (iii) of the Uniform Rules of Court.

Jurisdiction

- [6] In a supplementary affidavit, deposed to by Pruta’s attorney of record, Mr Mitchell John Morrison, Pruta drew the attention of this court to the fact that the BRP amended the registered office of Floorworx to the premises of Floorworx within the jurisdiction of this court. It is the same address where the principal business of Floorworx is conducted at Bert Klipping Street, Wilsonia, East London. It is also the same address of Floorworx as reflected on the third respondents’ records. Accordingly, this court does have jurisdiction to entertain this matter[1].

Background

facts

- [7] Floorworx is a company that imports, manufactures and sells floor covering materials. It was placed in business rescue on 22 February
- 2022. A business rescue plan was approved and adopted on 31 May 2022. Creditors of Floorworx have received payment subsequent to the adoption of the business rescue plan. Pruta provided Post-Commencement Finance (PCF) to Floorworx in terms of a Post-Commencement Finance Agreement (PCFA) concluded on 23 March 2022. Pruta advanced R20 million to Floorworx which was paid in three tranches of R1 million, R2 million and R17 million, respectively. The PCFA and the material terms thereof are not in issue herein. Pruta contends that it holds no further or different securities for the debt owed to it by Floorworx. Pruta alleged that Floorworx is indebted to it in the amount of R21 074 014. 45. Pruta contends that the amount is due and payable and remains unpaid.

- [8] Pruta analysed the projections of cash flow forecast submitted to it by the BRP and Floorworx's attorneys, revealing a negative cash-flow ranging between (R42 ,765, 533 and – R11, 999 ,304) over the next year. According to Pruta this means, in reality, not only that Floorworx is insolvent but also that it will continue to trade under insolvent circumstances for the foreseeable future.
- [9] Pruta also analysed and compared the balance sheets for April 2022 and April 2023 and concluded that cash on hand decreased by R26.3 million rand (R28 million in April 2022 down to R2 million in April 2023); trade and other payables increased from R26.6 million in April 2022 to R50,3 million in April 2023, evincing an increase in liabilities of R23,8 million. In this regard, Pruta alleged that the business is being carried on recklessly and the pre-commencement creditors are unaware of the position and will likely be left with nothing upon liquidation of Floorworx.
- [10] It alleged that Floorworx is in a far worse financial position than it was when it was first placed in business rescue some 19 months ago. It stated that under the BRP the position of Floorworx has deteriorated from financial distress to clear and hopeless insolvency. It is of the view that the winding up of Floorworx is just and equitable as contemplated in section 344(f) of the Companies Act 61 of 1973.
- [11] To allow Floorworx to trade in insolvent circumstances and to allow that state of affairs to continue would seriously prejudice creditors and other affected persons. Pruta stated that the last published update report furnished to creditors and affected persons by the BRP was in April 2023. It submitted that the ongoing business rescue has no prospects of rescuing Floorworx.

Legal objections

- [12] The BRP and Floorworx raised the following legal points: First, the 'affected persons' or at least the creditors of Floorworx have not been cited or joined to the application. Second, there has been no service on creditors or affected persons by the Sheriff of the High Court. Third, Pruta does not possess the necessary standing to terminate the business rescue proceedings of the second respondent. Fourth, that the matter is not urgent. On these bases they contended that the application should be struck from the roll or be dismissed with costs.
- [13] In the supplementary affidavit, referred to above, Mr Morrison addressed, amongst others, the points of law raised by the BRP and Floorworx. He contended that the 'affected persons' of Floorworx are cited and joined as 'further respondents'. He stated that this was done out of an abundance of caution because they are not required to be joined as parties to the application in terms of the Companies Act. In this regard he relied on sections 130(3)(b) and 145 the Companies Act which merely requires 'notice' to be given to such persons.

- [14] He submitted that notice to the ‘affected’ persons has been given. He sent an email together with a covering letter, the notice of motion and the founding affidavit by email to all the ‘affected persons’ cited as further respondents as he had ascertained to the best of his knowledge. He also made reference to the fact that he, together with the applicant, ascertained as reflected in annexure “CA1”, that there are approximately 131 creditors of Floorworx. They had made enquiries from the former directors and employees of Floorworx who are reflected on the business rescue plan. He was not able to verify all the email addresses hence he requested the BRP to transmit the notice to all the “affected persons”.
- [15] He complained that although the BRP had sent communication to the ‘affected persons’ before in the form of circulars on no less than 23 occasions he refused or failed to circulate the notice of motion and the founding affidavit to such persons. He contended that the applicant had taken every reasonable step to ensure that due to the urgency of the matter and the practicalities of notifying approximately 131 creditors situated around the country, that they were all given effective notice. He submitted that to effect service by the Sheriff to all these persons would consume an inordinate amount of time because the matter is urgent. On this basis, he asked the court to condone this method of notice and the failure to have all the creditors served by the Sheriff. The fact that service has been effected by way of email, he submitted, that is what is envisaged in the Companies Act as read with Regulation 124 and Regulation 7 in a manner contemplated in Table CR3.
- [16] He further disclosed settlement proposals between the parties and counsel for the BRP and Floorworx objected to the disclosure of those proposals and asked the court to strike out those allegations.

Legal

submissions

- [17] Mr Buchanan SC appeared for Pruta and Mr van Tonder appeared for the BRP and Floorworx.

Applicant’s

submissions

- [18] Mr Buchanan made the following submissions: That the procedure of filing only points of law without opposing affidavits is a procedure that is frowned upon by the courts. In this regard he relied on the authorities set out in Erasmus Superior Court Practice[2]. In addressing the non – joinder point with reference to the authority relied upon by the BRP and Floorworx, in Absa Bank Limited v Naude N.O and Others[3] , he submitted that the Absa case is distinguishable from the case at hand because Absa sought to set aside the business rescue plan on the basis that it was unlawful and invalid, in circumstances where it had not joined the creditors of the company. He distinguished the position of Pruta from that case on the basis that the creditors referred to in the Absa case existed at the time of the

commencement of the business rescue and had cast their votes in respect of the proposed business rescue plan. In casu, he argued, Pruta was not a creditor at the time of the acceptance of the business rescue plan but provided loan finance thereafter. He argued that a post business rescue creditor is entitled to proceed to enforce and recover its debt in the ordinary course. Otherwise were it to be barred from doing so, it would be without recourse.

- [19] Floorworx defaulted in respect of the amounts due by it and therefore this application has been brought by Pruta in its capacity as a creditor. He relied, in this regard, on Wescoal Mining Pty Ltd and Another v Phahlani Mkhombo N. O and Others[4].
- [20] He submitted that the facts that the applicant has put up which are not contested on affidavit by the BRP and Floorworx, are to be deemed to be correct. This is a normal liquidation application and the applicant is not enjoined to join all the creditors. The interests of the creditors are to be dealt with in the normal course of publication of the orders in the newspapers. He submitted that the matter is urgent and that the court should grant the orders prayed for.
- [21] He also sought an order that the relief in the notice of motion maybe amplified by directing the BRP to provide an updated list of existing creditors of Floorworx and provide for notice of entities reflected in such list by way of appropriate email communications and publication in an appropriate local newspaper. He submitted that notifying the creditors does not require service by the Sheriff. In this regard, he relied on Engen Petroleum v Multiwaste[5].

BRP and Floorworx submissions

- [22] Mr van Tonder, on the other hand, made these submissions: The applicant seeks a specific order that the business rescue process be terminated. It is on the back of this relief that the creditors must be joined. The non-joinder of the creditors is fatal to the application[6]. In this regard he referred the court to Absa Bank Ltd v Naude NO & Others for the submission that failure to have the application served by the Sheriff is not proper notice.
- [23] The citation “further respondents”, as found in the Absa Bank case, above [7] is also not sufficient. Relying on Cooper NO and Another v Knoop NO and Others, he argued that creditors have to be joined and served. He submitted that Pruta is neither a creditor nor an affected person and for that reason it has no standing whatsoever to bring this application.
- [24] He submitted that urgency is self- created.[8] The mere fact that the BRP and Floorworx filed the notice on legal points within the time afforded to them by Pruta does not mean that Pruta has met the requirements of Rule 6 (12) (a)[9]. He conceded that the facts stated by Pruta are to be deemed as correct.

- [25] Pruta's reliance on section 130(3) of the Companies Act in its attempt to avoid joinder of the affected persons and / or service by the Sheriff is misplaced because notice as envisaged in that section is confined to matters where an application is brought prior to the adoption of a business rescue plan.
- [26] He further relied on section 132 (2)(a)(ii) of the Companies Act for the submission that the business rescue of Floorworx cannot end because it trumps winding up.
- [27] In reply, Mr Buchanan suggested that if the court is of the view that these creditors have to be joined, he proposed an order that will not dismiss the application, but the court would put a hold on the judgment and postpone the matter to enable the formal joinder to take place. In that regard, the court would have to uphold the joinder point raised by the respondents but afford the applicant an opportunity to join the interested parties. If the court were to follow the alternative proposition costs would also stand over. In this regard, he submitted that it would not be fair and just to dismiss the application since the indebtedness is not disputed.
- [28] Mr van Tonder rejected this proposed alternative course on the basis that the locus standi point still stands. He persisted that the application should be dismissed with costs.

Discussion

Urgency

- [29] The BRP and Floorworx contend that this application is not urgent. I disagree. There are allegations relating to potential risk and prejudice to creditors and affected persons on the basis, inter alia, that the BRP's monthly reports lack the true facts and thus make it difficult for creditors to assess the true financial position of Floorworx. It is alleged that Floorworx is hopelessly insolvent and is thus trading in a reckless manner. As aforementioned those allegations have not been dealt with by the BRP. I am satisfied that those allegations created sufficient

urgency to warrant a hearing of this matter on truncated time frames. There were no delays on the part of Pruta from the time it made demand of payment up to the time of institution of these proceedings. This point must accordingly fail.

Pruta's standing

- [30] The meaning and purpose of 'business rescue' is encompassed in section 128 of the Companies Act. It is meant to facilitate the rehabilitation of a company that is financially distressed by providing for, inter alia, the temporary supervision of the company, management of its affairs, business and property; a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and 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.[10]

[31] The BRP and Floorworx contend that Pruta is neither an affected person nor a creditor. The definition of an affected person in the Companies Act is as follows:

"128 Application and definitions applicable to Chapter

(1) In this Chapter-

(a) 'affected person', in relation to a company, means-

(i) A shareholder or creditor of the company;

(ii) Any registered trade union representing employees of the company; and

(iii) If any of the employees of the company are not represented by a registered trade union, each of those employees or their respective

representatives"[11]

[32] Pruta contends that it is a creditor of Floorworx and an affected person in the business rescue of Floorworx. It relies in this regard on section 139 (2) and 128 (1) (a) of the Companies Act. At the outset section 139 (2) deals with the removal and replacement of a business rescue practitioner and finds no application in these proceedings. I made reference to the definition of an affected person, supra. In the heads of argument submitted on behalf of Pruta, the following is stated:

"5. The applicant in this application is a creditor of the second respondent. In this regard it is however essential to point out that the indebtedness of the second respondent to the applicant arose subsequent to the commencement of the business rescue proceedings. Accordingly, the applicant is not an affected person as defined in section 128(1)(a) of the Companies Act. (my emphasis)

[33] Mr Buchanan adopted the same stance in argument. I regard the concession made in the heads of argument as properly made and I need not deal with this aspect further.

[34] Section 135 provides for post – commencement finance. It provides:

'135 Post-commencement finance

(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee—

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection (3)(a).

- (2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing—
- (a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
- (b) will be paid in the order of preference set out in subsection (3)(b).
- (3) After payment of the practitioner's remuneration and costs referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—
- (a) in subsection (1) will be treated equally, but will have preference over—
- (i) all claims contemplated in subsection (2), irrespective whether or not they are secured; and
- (ii) all unsecured claims against the company; or
- (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
- (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.'

[35] The Companies Act refers to the financiers such as Pruta as "lenders" instead of 'creditors'. It confers on the lenders a preferent claim against the company, which preference will remain in force even where business rescue proceedings are superseded by a liquidation order. The question is whether the choice of a name 'lender' means that a financier in the position of Pruta is not a creditor for the purpose of instituting termination of business rescue proceedings and winding up processes against Floorworx. A comprehensive answer to this question will entail a complex interpretation exercise which, due to lack of sufficient time, lack of factual material from the BRP and Floorworx, this court does not deem it prudent to delve into definitive decisions in relation to that question, as cautioned by the Constitutional Court in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [12].

[36] In *Wescoal Mining Pty Ltd*, supra, Wilson J, raised this aspect, albeit obiter. He stated:

"26. It also strikes me that section 135 of the Act does not describe post – commencement financiers as "creditors" at all, but as "lenders". The word choice is significant. It indicates that post – commencement financiers are not to be treated as the type of "creditor" to which the business rescue provisions of the Act address themselves."[13]

[37] Section 132 (2) (a) provides for the termination of business rescue proceedings. It deals with such termination when the court sets aside the resolution or order that began those proceedings; or has converted the proceedings to liquidation proceedings. They will also end when the BRP has filed with the Commission a notice of the termination of business

rescue proceedings[14]. The Companies Act places certain obligations on the BRP in circumstances where the business rescue proceedings have not ended within three months after the start of those proceedings or such longer time as the court, on application by the practitioner, may allow. In that case the BRP must prepare a report on the progress of the business rescue proceedings and update it at the end of each subsequent month until the end of those proceedings; and deliver the report and each update in the prescribed manner to each affected person, and to the court (if the proceedings have been the subject of a court order) or the Commission in any other case.

[38] In my view, the choice of the word “lender” could never have been employed by the Legislature with the purpose of excluding lenders as ‘creditors’ post- commencement

of business rescue. If that was the intention such exclusion would have been expressed in clear terms.

[39] Stroud’s dictionary defines ‘Lend’ as follows: ‘Lend’ (Exchange Control Act 1949 (c.14), s.1.(1): must be given its natural meaning connoting the existence of a legal lender- borrower relationship[15]. The Oxford Dictionary defines, ‘creditor’ as – ‘one who gives credit for money or goods; one to whom a debt is owing’.

[40] Pruta’s position as a lender is not synonymous to creditors prior commencement of business rescue proceedings. The argument that it has no standing to bring the application would leave it without recourse. Most importantly, it would tamper with its right to have a dispute that it has determined at a fair public hearing. Otherwise a financier, post – commencement of business rescue, would be placed at the mercies of Floorworx and the BRP and that would possibly render the PCFA nugatory. That could never have been the intention of the Legislature.

[41] In the PCFA under definitions it is recorded:

2.1.21 “Post BR – Creditors’ means those creditors who have a valid and existing claim against the Company in respect of goods or services provided after the BR Date and the Lender as a creditor in terms of this Agreement.”

[42] For all the above reasons I am of the view that Pruta as a lender, is a creditor. It follows that it has standing to seek leave to inter alia institute these proceedings. The standing point must accordingly fail.

Non – joinder of creditors and affected persons

[43] In Absa Bank Ltd v Naude NO & Others[16] the Supreme Court of Appeal when dealing with non-joinder of creditors stated:

“[11] I therefore conclude that the court below was correct in upholding the non-joinder point. It was submitted in argument that if we were to reach that conclusion, the proceedings should be stayed and the bank should be afforded an opportunity to join the creditors. Here though a simple declaratory order was sought with no consequential relief such as the repayment by the creditors of the amounts received

in terms of the plan. The undesirability of a declaratory order in a vacuum has recently been stressed by this court in City of Johannesburg v South African Local Authorities Pension Fund[17]. It was conceded that in any event the relief would have to be amended to provide inter alia for the repayment by creditors. There thus seems to be little point in keeping this application alive and remitting the matter to the high court. This disposes of the appeal and in the result it must fail.”

- [44] The decision of the Supreme Court, above, is binding on this court. The creditors who had voted for business rescue would definitely have a direct interest where those proceedings are to be terminated by this court and a provisional winding up of Floorworx is sought. The employees as affected persons would have a direct interest. There has been no effort at all on the part of Pruta to establish the names and surnames of the employees who are not represented by a trade union who will be affected by the order it seeks, or those who are represented and who their representatives are. It did not establish whether they are all represented by National Union of Metalworkers of South Africa (NUMSA) even though it, on its own, had stated in relation to the list of creditors: “The addresses of this e-mail, numbering approximately 131, as reflected on CA1, represent all the known creditors of the second respondent as best the applicant and I were able to ascertain, having made enquiries from the former directors and employees of the second respondent.” Making an effort to join the unrepresented employees of Floorworx by their names would demonstrate that, in line with the provisions of section 128(1)(a)(iii) and section 10 of the Constitution of the Republic of South Africa, their dignity is respected and protected.
- [45] Most importantly they would appreciate that they have a say in the matter as affected persons. Instead of joining the trade union, NUMSA, Pruta simply gave notice to it. That did not equate joinder of NUMSA to the application. The significance of joinder is that it is an invitation to the joined party to exercise a choice, whether to enter the fray or simply abide the decision of the court. Joinder would be most beneficial to employees, for example, where the employees’ employment was going to last a year under business rescue proceedings, their position would change drastically and to their disadvantage under provisional winding up.
- [46] In *Golden Dividend v Absa Bank*[18], the Supreme Court of Appeal restated the test for joinder as:
- “whether there has been non – joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.”*[19] *It follows that the non – joinder point must succeed.*

The citation as “Further Respondents and other affected persons in the Business Rescue”

- [47] This form of citation lacks identity. One does not know by just having regard to the citation and nothing more, who the affected persons are. This type of citation leaves it to the reader and his or her imagination to decide whether he or she thinks he is a respondent. It removes the responsibility from Pruta to identify the respondents with sufficient clarity so that the Sheriff would know who to serve. Instead, it places it on people who do not even know why

they would be affected or be respondents in this litigation to decide for themselves. That does not accord with the purpose of the Companies Act to, amongst others, promote compliance with the Bill of Rights as provided for in the Constitution.[20] This manner of citation, given the nature of the proceedings, where the creditors are identifiable from the business plan, is not only inadequate but it is not sanctioned by the Uniform Rules of Court. The point relating to citation in this regard by the BRP and Floorworx must succeed.

Non – service point

[48] Pruta relied on the fact that section 130 (3) of the Companies Act, enjoins an applicant to serve a copy of the application on the company and notify each affected person. Section 131 (2) (b) provides that an applicant must ‘notify’ each affected person of the application in the ‘prescribed manner’. These provisions applied in the Engen Petroleum Limited, supra, because they relate to an urgent application that was brought by Engen, an intervening creditor, seeking to set aside the resolution

placing the company under supervision and commencing business rescue proceedings on the basis that they had lapsed for want of compliance with certain procedural requirements laid down in the Act. Engen was a creditor prior to the adoption of the resolution for business rescue, which was passed without its knowledge. That distinguishes it from the case at hand. Therefore the methods of service and notice provided for in section 131(1)(a)(b), were applicable in that case because the nature or substance of the application fell squarely within the provisions of section 131 of the Companies Act. I find that the non- service point has merit and must accordingly succeed.

[49] Rule 4 of the Uniform Rules of Court provides:

“4 Service

(1) (a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners ...”. (my underlining). The rule provides a litigant with an option of seeking alternative methods where service by the sheriff is not possible.[21]

[50] Pruta in its supplementary affidavit contended that it had done everything possible to notify the creditors and affected persons. For example, it attached a printout with various email addresses. Under “Subject it has: “Court application – Notice to Interested and Affected Persons- Floorworx Africa (Pty) Ltd (in business rescue) Date: 04 October 2023 18:12:00. Attachments: Interested and Affected Parties – Floorworx (Pty) Ltd (In business Rescue) Provisional winding – up 04.10.2023 pdf; Pruta Floorworx NOM and FA as Issued and Served.” It has a message:

“Dear Sirs

Enclosed and attached, please find correspondence and court papers for your attention.

Kind Regards”

- [51] There are fundamental difficulties with this form of service. First, it makes no mention of the date of hearing of 10 October 2023 at 09:30 am. Second, it requires a person to have access to the Notice of Motion. Third, it does not convey to the person what is required of him or her or it and thus assumes that the person has the ability and the means to open the attached notice of motion and affidavit. Fourth, it identifies the persons by referring to their email addresses and without their identities. It leaves it up to them to decide whether they are ‘affected’ or ‘interested persons’. I accordingly find that there was no adequate service on the affected persons who have a direct and substantial interest in the business rescue proceedings.
- [52] That is not the end of the matter. The fact that Pruta is a creditor post – commencement of business rescue proceedings does not mean that it can overlook, ignore or disregard the process that has been approved by the general body of creditors. Central to that process is, amongst others, preservation of jobs and rehabilitation of Floorworx. The Companies Act places certain obligations on the shoulders of the BRP[22], as the overseer of Floorworx. In *Knoop and Another NNO v Gupta (No 1)* [23], at para 39, Wallis JA stated:
- “When one is dealing with a company that is placed in business rescue voluntarily by way of a resolution of the board of directors, the process of business rescue is conducted on the basis of the actions of the company; affected persons, that is, shareholders, any trade union representing employees and employees; the BRP; and the creditors. It is the company, acting through its directors that commences the process and appoints the BRP...” (footnotes omitted).*
- [53] It is common cause that the business rescue proceedings have been ongoing for 19 months. It does not appear that the three months was extended by means of a court order. The business rescue process cannot simply be allowed to continue without some form of accountability to the court, (especially in circumstances where the process is being challenged) and to the creditors by the BRP. For that reason, and irrespective of the findings on the joinder and service legal points, this court is not inclined to dismiss the application outright.
- [54] The BRP and Floorworx elected not to engage with the merits as aforementioned. The issues raised by Pruta about the state of Floorworx, must be dealt with speedily. Floorworx and the BRP do not have the luxury of time to continue with the proceedings for as long as they wish without updating their creditors about the state of the company. It is for that reason that the substantive relief will not be dealt with until the orders this court intends to make have been complied with.
- [55] This court has a discretion to either afford the BRP and Floorworx an opportunity to file answering affidavits or to dispose of the matter on the applicant’s version. The latter option is not attractive because it does not give the court an opportunity to get the opinion of the BRP on the state of the company that it is enjoined to oversee. The financial documentation put up by the applicant goes up to April 2023. There is insufficient information in relation to

employees of Floorworx. It is for that reason that after disposing of the legal points the BRP and Floorworx would be afforded an opportunity, to deal with the merits of the matter on time frames to be set out by this court. Section 152

- (4) and (5) of the Companies Act provide that the business plan that has been adopted is binding on Floorworx, on each creditor and every holder of the company's securities and further enjoins Floorworx under the direction of the BRP to implement the plan as adopted. Those obligations are imposed by statute and must be taken into account when a court is called upon to interfere with the business rescue process.

- [56] There is another reason that militates against dealing with the merits of this case without hearing the BRP and Floorworx. The relief sought for the termination of the business rescue proceedings, if granted, without hearing them, will effectively remove the BRP. Although there is no such relief sought in the notice of motion, such result would be prejudicial to the BRP and Floorworx. They would have been deprived of an opportunity to deal with that aspect head-on. In the Knoop decision, *supra*, Wallis JA stated:

"[28] Section 34 of the Constitution guarantees a 'fair public hearing' before a court. In De Beer, Yacoob J said: 'A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order'. Where an issue is not raised in the pleadings or affidavits in a case, and the order granted is one on which neither party has been heard, there is a breach of a fundamental constitutional right." (footnotes omitted).

I am of the view extending an opportunity to them to file answering affidavit will be fair and just.

- [57] There are at least 131 creditors that have to be served by the sheriff. If they have to be served physically it would take an inordinate amount of time for the sheriff to serve on each one wherever they are located. Their location might also necessitate appointment of other sheriffs should they be outside the jurisdiction of this court. The only practical manner of effecting service on such a large number of creditors is to authorise the sheriff to serve on all the creditors by way of email transmission, similar to the manner prescribed in the Act and Companies Regulations, 2011[24]. The Regulations relate to notices to be given; however, they give detail on matters to be considered when notice is given electronically. I see no harm in importing those considerations into the order and modify them to be consistent with the obligations of the Sheriff when serving court processes.

- [58] It is the duty of the Sheriff, when serving process, to explain the nature and exigency thereof to the person on whom service is effected[25]. The sheriff will be directed to place on email a cover message setting out the name address and telephone number of the

sender; the name of the person to whom the email is addressed and the name of the person's attorney, if applicable; the exact orders sought in paragraphs 1 to 5 of the Notice of Motion, the date to which the matter is postponed and the date by when the recipients who wish to oppose should file their answering affidavits and any other matter that the Sheriff is enjoined to do when serving process.

[59] In my view, that is the only practical manner of service that will be adequate, expeditious and effective. A publication in the newspapers may not yield the desired result of bringing the application to the attention of all creditors and those affected soon. I accordingly authorise service to be effected by the Sheriff by way of electronic mail to all the creditors, interested and affected persons.

Costs

[60] Mr Buchanan submitted that issues of costs should be reserved. Mr van Tonder asked for the dismissal of the application with costs. As aforementioned this court has postponed the merits of the matter. It might not be prudent to deal with the issues of costs at this point. I am persuaded that costs should be determined once the merits have been determined.

ORDER

[61] In the circumstances I accordingly make the following Order:

1. Applicant's non-compliance with the rules relating to time periods is hereby condoned and the matter is enrolled on an urgent basis.
2. Applicant is granted leave to institute this application against the First and Second respondents in accordance with the provisions of section 133
(1) (b) of the Companies Act No. 71 of 2008.
3. First and Second Respondents' objections based on urgency and on locus standi, are dismissed.
4. First and Second Respondents' objections based on non-joinder of creditors and affected persons and on non-service by the Sheriff are upheld.
5. Costs relating to the legal points are reserved.
6. The application is postponed to Tuesday, 05 December 2023 at 09h30.
7. First Respondent is directed to provide to the Applicant's attorneys of record a complete list of the particulars of the affected persons and creditors, their telephone or mobile numbers, email addresses and physical addresses within (5) five days hereof.
8. Applicant is granted leave to join all creditors, interested and affected persons known to it and as furnished to it by the First Respondent, within (10) ten days of receipt of the list referred to, above, from the First Respondent.
9. The Sheriff is hereby authorised to effect service on all the creditors, interested and affected persons in the following manner:

Service on employees of the Second Respondent

9.1 By effecting service on all the employees of the Second Respondent who are not represented by a trade union at their place of employment.

9.2 By effecting service on the representatives of the employees or their trade unions in respect of those employees who are represented.

9.3 In addition, thereto by serving a full copy of the application on the Human Resources Manager of the Second Respondent.

Service on creditors and affected persons

10. The Sheriff is authorised to serve a full copy of the application on all creditors and affected persons joined to this application, by way of electronic mail in the following manner:

10.1 The sheriff is directed to place on each email a cover message setting out the following:

10.1.1 the name address and telephone number of the sheriff;

10.1.2 the name of the person or entity to whom the email is addressed and the name of the person's attorney, if applicable;

10.1.3 the description of the documents being sent and the number of pages transmitted,

10.1.4 the orders sought in paragraphs 1 to 5 of the Notice of Motion,

10.1.5 the date to which the matter is postponed;

10.1.6 a copy of this order and judgment;

10.1.7 the name of the person from the Sheriff's office to be contacted in the event a full copy of the application has not been transmitted; and any other matter that the Sheriff is enjoined to do when serving process; and

10.1.8 the documents to be transmitted by email must be provided and delivered in a manner and form such that they can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.

Further conduct of the matter

11. First and Second Respondents are directed to file their answering affidavits to the applicant's founding affidavit, if they so wish, within (7) seven days of this Order.

12. The First Respondent is directed to file a report on the progress of the business rescue proceedings, within (7) seven days of this Order.

13. The Applicant is directed to file its replying affidavit within (5) five days of receipt of the answering affidavits from the First and Second Respondents.

14. All the creditors, affected persons and interested persons who will be joined and served are directed to file their answering affidavits, if they so wish, within 10 (ten) days from the date of service of the process on them by the Sheriff.

15. Heads of argument are to be delivered by all the parties by no later than 30 November 2023.

T.V NORMAN

JUDGE OF THE HIGH COURT

Matter Heard on : 10 October 2023

Judgment

Delivered on : 24 October 2023

APPEARANCES: For the APPLICANT: ADV BUCHANAN SC Instructed by: FULLARD MAYER MORRISON INC. 4 MORRIS STREET WEST RIVONIA TEL: 011 234 3029 FAX: 011 234 5546 REF: P1413/M morrison EMAIL: morrison@fullardmayer.co.za c/o STIRK YAZBEK ATTORNEYS 18 VINCENT ROAD VINCENT EAST LONDON TEL: 043 726 8310 EMAIL: gary@stirkyazbek.co.za REF: GJ STIRK/ks/MAT50618 For the First and Second RESPONDENTS: ADV VAN TONDER Instructed by: B.Van Niekerk/ P. Munga Smit Sewgoolam Incorporated 12 Avonwold Road, Saxonwold, Email:Bouwer@smitsew.co.za/ Parveen@smitsew.co.za

[1] Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A) 499 at paras A -B.

[2] Erasmus Superior Court Practice, Second Edition, Volume 2 at D1-64.

[3] Absa Bank Ltd v Naude N.O and Others 2016

(6) SA 540 (SCA) at paras [8] to [11].

[4] Wescoal Mining Pty Ltd and Another v Phahlani Mkhombo N. O and Others (Gauteng Case No. 079991/2023) at paragraphs 25 and 26.

[5] 2022

(5) SA 596 (GSJ) at para 18.

[6] In this regard he relied on the provisions of section 152 (4) and 5 of the Companies Act which provides: “(4). A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every

holder of the company’s securities, whether or not such a person – (a) Was present at the meeting; (b) Voted in favour of adoption of the plan; or (c) In the case of creditors, had proven their claims against the company.

(5) The company, under the direction of the practitioner, must take all the necessary steps to – (a) attempt to satisfy any conditions on which the business rescue plan is contingent; and (b) implement the plan as adopted.”

[6] In this regard he relied on the provisions of section 152 (4) and 5 of the Companies Act which provides:

“(4). A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every

holder of the company’s securities, whether or not such a person –

- (a) Was present at the meeting;
 - (b) Voted in favour of adoption of the plan; or
 - (c) In the case of creditors, had proven their claims against the company.
- (5) The company, under the direction of the practitioner, must take all the necessary steps to –
- (a) attempt to satisfy any conditions on which the business rescue plan is contingent; and
 - (b) implement the plan as adopted.”

[7] At para 11 thereof.

[8] *Schweizer Reneke Vleis Mkpy (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) PHF11 (T)

[9] *Caledon Street Restaurant CC v D’Aviera* (1998) JOL 1832 (SE) applied in *Garth Merrick Voight NO and Another v EGH IP (Pty) Ltd and Others* (unreported) Case no. 1076/2021, dated 04 May 2021 (ECD, Grahamstown) at para 29-33.

[10] See: Chapter 6 definition in Section 128(1) (b) of the Companies Act 71 of 2008.

[11] See: Chapter 6 definition in Section 128 (1) (a) of the Companies Act 71 of 2008.

[12] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023

(4) SA 325 (CC) at paras 250 -251; *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) at para 9.

[13] *Wescoal Mining Pty Ltd v Mkhombo NO and Others*, supra, at para 26.

[14] Section 132 (2) (b).

[15] Stroud’s in his work: “Judicial Dictionary of words and phrases, Sixth Edition, Volume 2 G-P.

[16] 2016 (6) SA 514 (SCA) at para 11 thereof.

[17] [2015] ZASCA 4 para 8.

[18] *Golden Dividend v Absa Bank* (569/2015) [2016] ZASCA 78 (30 May 2016) at para 10.

[19] *Gordon v Department of Health, KwaZulu – Natal* [2008]ZASCA 99

[2008] ZASCA 99; ; 2008 (6) SA 522 (SCA) paras [9] and [11] at 529 C and 530 F.

[20] Section 7 of Companies Act 71 of 2008.

[21] Rule 4(2) of the uniform Rules of Court; *Absa Bank Ltd v Naude* supra @ 542H.

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- [22] Section 128 (1)(d) which provides: ‘business rescue practitioner’ means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and ‘practitioner’ has a corresponding meaning.’
- [23] Knoop and Another NNO v Gupta (No 1) [23](115/ 2020) [2020} ZASCA 149 (19 November 2020).
- [24] Companies Regulations, 2011 published under GN R351 in GG 34239 of 26 April 2011 ; Regulation 7 and section 6 (10) and (11) of the Act.
- [25] Uniform Rule 4 (1) (d).
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Prepared on 14 October 2026 · Esheria