

SOUTH AFRICA / JUDGMENT

QBX Consulting Services (Pty) Ltd v Mafuri Turnkey Accelerated Construction (25077/2016) [2017] ZAGPPHC 535 (16 August 2017)

[2017] ZAGPPHC 535

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose AJ

CASE / FILE NUMBER

25077/2016

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 25077/2016

Not

reportable

Not

of interest to other judges

16/8/2017

CASE

NO:25077/2016

In

the matter between:

QBX
CONSULTING SERVICES (PTY)
LTD Applicant
MAFURI
TURNKEY ACCELERATED
CONSTRUCTION Respondent

JUDGEMENT

MOKOSE AJ

- [1] This is an opposed application in terms of Section 131(1) of the Companies Act 71 of 2008 for an order placing the respondent under supervision and commencing business rescue proceedings, alternatively, an application to place the company under liquidation in terms of Section 131(4)(b) of the Act.

Section 131(1)

Companies Act 71 of 2008

Section 131(4)(b)

- [2] The applicant is a provider of technical and professional services to the industrial mining and engineering sector who renders services to the respondent. The respondent, in turn, renders construction services to inter alia various government departments .

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various government departments .

- [3] The applicant alleges that an agreement was concluded between it and the respondent wherein the applicant was to render project management services of all projects in which the respondent was engaged at the time for an agreed fee. The applicant alleges that it first attended to an investigation into all the projects from which time it became aware that all the projects were distressed in that they were running behind schedule and that certain subcontractors and service providers had not been paid by the respondent. The applicant alleges that it rendered a service to the respondent then rendered an invoice which the respondent did not pay.
- [4] The applicant then sent a letter of demand in terms of Section 345 of the Companies Act when there had been no payment of the invoice. There was no response to the letter of demand. The applicant then concluded that the respondent is commercially insolvent, cannot pay its debts and is financially distressed.

Section 345

Companies Act when

- [5] The respondent opposed the application on the basis that there is a material dispute of fact between the parties in respect of the locus standi of the applicant. The respondent admits that there were negotiations between it and the applicant but that no agreement was entered into between the parties. This can be seen in the letters by the applicant to the respondent dated 24 December 2015 and 7 January 2016 in which a proposal is set out. There is no further evidence that it was accepted or that the Service Level Agreement (SLA) was signed between the parties.
- [5] The respondent opposed the application on the basis that there is a material dispute of fact between the parties in respect of the

locus standi

of the applicant. The respondent admits that there were negotiations between it and the applicant but that no agreement was entered into between the parties. This can be seen in the letters by the applicant to the respondent dated 24 December 2015 and 7 January 2016 in which a proposal is set out. There is no further evidence that it was accepted or that the Service Level Agreement (SLA) was signed between the parties.

[6] Section 131(1) of the Companies Act as amended reads as follows:

Companies Act as

"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."

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resolution contemplated in Section 129, an affected person may apply to

Section 129

court at any time for an order placing the company under supervision and commencing business rescue proceedings."

[7] Section 128(1)(a) of the Act provides that an affected person in relation to a company means:

Section 128(1)(a)

(i) a shareholder or creditor of the company;

a shareholder or creditor of the company;

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

any registered trade union representing employees of the company; and

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

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[8] The applicant submitted that he is a creditor of the respondent and as such, an affected person as contemplated in Section 128(1)(a)(i) of the Act. He submits that he is a creditor on the basis of an agreement entered into between the parties. The respondent disputes

this for the following reasons:

Section 128(1)(a)(i)

· that the applicant had been invited to prepare a proposal which was never accepted;

that the applicant had been invited to prepare a proposal which was never accepted;

· no SLA was signed by the parties; and

no SLA was signed by the parties; and

· no agreement entered into although access was given to the applicant to conduct research as to the projects;

no agreement entered into although access was given to the applicant to conduct research as to the projects;

[9] The respondent referred to the observations made by Harms DP in the matter of National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para [26] to the effect that motion proceedings such as these before us, are aimed at the resolution of legal issues based on common cause facts. They are simply not geared toward the decision of factual disputes. Harms DP reminded us that it is well established that, where in motion proceedings disputes of fact arise on the papers, the matter can only be decided on the respondent's version of the disputed facts, unless that version is so far-fetched or clearly untenable that it can justifiably be rejected merely on the papers.

[9] The respondent referred to the observations made by Harms DP in the matter of

National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA)

[2009] ZASCA 1

2009 (2) SA 277

at para [26] to the effect that motion proceeding such as these before us, are aimed at the resolution of legal issues based on common cause facts. They are simply not geared toward the decision of factual disputes. Harms DP reminded us that it is well established that, where in motion proceedings disputes of fact arise on the papers, the matter can only be decided on the respondent's version of the disputed facts, unless that version is so far-fetched or clearly untenable that it can justifiably be rejected merely on the papers.

[10] Counsel for the respondent also referred the court to the matter of *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at para 3 where the court made reference to Harms DP's observations in the *National Director of Public Prosecutions v Zuma* (supra) and applied the same principles in a business rescue application.

[10] Counsel for the respondent also referred the court to the matter of

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at para 3 where the court made reference to Harms DP's observations in the *National Director of Public Prosecutions v Zuma* (supra) and applied the same principles in a business rescue application.

[11] In the matter before us, there is a factual dispute as to the locus standi of the applicant. The respondent's version is not far-fetched and untenable that it can justifiably be rejected merely on the papers. For this reason and on the papers before me, the applicant cannot be found to be an affected person.

[12] Secondly, Section 128(f) defines "financially distressed" as follows:

Section 128(f)

"in reference to a particular company at any particular time, means that-

"in reference to

particular company at any particular time, means that

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months."

it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months."

[13]Section 131(4)provides as follows:

Section 131(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-

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

(i)the company if financially distressed;

the company if financially distressed;

(ii)the company has failed to pay over any amount in terms of an obligation under or in terms ofapublic regulation, or contract, with respect to employment-related matters; or

the company has failed to pay over any amount in terms of an obligation under or in terms of 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 isareasonable prospect for rescuing the company; or (b)..... .."

it is otherwise just and equitable to do so for financial reasons, and there is

reasonable prospect for rescuing the company; or (b)..... .."

[14] In general, what would be required of an applicant in a business rescue application is that the company must be financially distressed and secondly that there must be a reasonable prospect for rescuing the company concerned. Eloff AJ in the matter ofSouthern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd2012

(2) SA 423(WCC)at para 24 considered that:

Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd2012

(2) SA 423(WCC)

2012

(2) SA 423

"One would expect, at the least, to be given some concrete and objectively ascertainable details going beyondamere speculation in the case ofatrading or prospective trading company, of"

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24.1.the likely costs or rendering the company able to commence with its intended business, or to resume the conduct of its core business;

the likely costs or rendering the company able to commence with its intended business, or to resume the conduct of its core business;

24.2.the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on Joan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available.

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24.3.the availability of any other necessary resource, such as raw materials and human capital;

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24.4.the reasons why it is suggested that the proposed business [rescue]will havea reasonable prospect of success."

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will have

a reasonable prospect of success.

[15] However, in the matter ofPropspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd2013 (1) SA 542(FSB)Van der Merwe J at 545 H was of the view that an application for business rescue may be brought by a person such as an employee or a creditor who does not necessarily have access to or a full picture of the company's financial affairs and that in terms ofSection 141(1) of the Act, a practitioner must investigate the company's affairs, business, property and financial situation as soon as practicable after being appointed.

[15] However, in the matter of

Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd2013 (1) SA 542(FSB)

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Section 141

[16] The judgements present two differing views in ascertaining whether a company is financially distressed or not. There is no decided case in the Gauteng Division nor has it been decided in the SCA. I am, however, inclined to follow the decision of the Western Cape Division and order that the applicant must give concrete and objectively ascertainable details going beyond mere speculation. The applicant has failed to give such details in his application and for that reason, I order that the prayer that the respondent be placed under supervision and business rescue fails.

LIQUIDATION APPLICATION

[17] In the alternative, the applicant has applied for an order that the respondent be placed under liquidation in terms of Section 131(4)

(b) of the Act. Section 131(4) (b) provides that:

Section 131

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

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

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

[18] Counsel for the applicant contended that although the demand in terms of Section 345 of the Act was sent to the respondent, it has not responded to it, nor has it proffered a version that the notice was not received. Accordingly, the respondent is deemed unable to pay its debts. It has failed to rebut any notion that it is not financially distressed.

[19] Counsel for the respondent is of the view that the application is malicious in that it admits that the respondent has various

government contracts totalling about R3 billion and that the respondent stands to receive large amounts of money should it perform

on all its contracts.

[20] I am of the view that on the applicant's own version, the respondent is commercially solvent and able to pay its debts. The applicant has not presented sufficient information for this court to make a decision regarding the solvency of the respondent. The alleged debt which has caused the applicant to bring this application first needs to be proven at trial for the applicant to qualify to bring this application at all.

[21] In the premises, I dismiss the application with costs.

MOKOSE AJ

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