

SOUTH AFRICA / JUDGMENT

S E Ventures (Pty) Ltd v Kareeboom Kimberley (Pty) Ltd and Others (6017/2022) [2023] ZAFSHC 373 (4 October 2023) [2023] ZAFSHC 373

COURT

Free State High Court, Bloemfontein

BEFORE

PR Cronjé

CASE / FILE NUMBER

6017/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

no: 6017/2022

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

S

E VENTURES (PTY) LTD

and

KAREEBOOM

KIMBERLEY (PTY) LTD

[In

liquidation]

MARYNA

ESTELLE SYMES N.O.

REINETTE

STEYNSBURG N.O.

[The

Second and Third Respondents being

cited

herein in their respective capacities as

the
duly appointed and final liquidators of the
First
Respondent]
THE
MASTER OF THE HIGH COURT,
BLOEMFONTEIN
THE
COMPANIES AND INTELLECTUAL
PROPERTY
COMMISSION (“CIPC”)
Applicant
First
Respondent
Second
Respondent
Third
Respondent
Fourth
Respondent
Fifth
Respondent

CORAM: PR CRONJÉ, AJ
HEARD

ON: 03 AUGUST 2023
DELIVERED
ON: 04
OCTOBER 2023

JUDGMENT

BY: P R CRONJÉ, AJ

[1] The Applicant (“SEV”) is the sole shareholder and a creditor of the First Respondent (“Kareeboom”) in the amount of R19,152,716.00,. Kareeboom was finally liquidated on 28 April 2022.

[2] SEV seeks the following relief:

2.1 That Kareeboom be placed under supervision and commencing business rescue proceedings as envisaged in terms of Section 131(1) as read with Sections 131(4)(a) and 131(6) of the Companies Act no. 71 of 2008 (“the Act”); and

2.2 Appointing Reinette Pieters (“Ms Pieters”) of BDO Business Restructuring (Pty) Ltd (“BDO”) as the interim business rescue practitioner (“BRP”) of Kareeboom as contemplated in terms of Section 131(5) of the Act.

[3] It is SEV's case that Kareeboom is financially distressed as defined in section 128(1)(f) of the Act. SEV submits that as an alternative to the section, it is just and equitable that Kareeboom be placed under business rescue for financial reasons. It further submits that there is a reasonable prospect of rescuing

Kareeboom as contemplated in Section 128(1)(h) as read with Section 128(1)(b) of the Act. This can be achieved, according to SEV, via the adoption and implementation of any of the four (4) rescue plans proposed by SEV. As an alternative, it states that if it is found that it is not possible for Kareeboom to continue in existence, placing Kareeboom under business rescue will provide for the facilitation of a better return for the creditors and/or shareholders of Kareeboom, than would result from liquidation.

[4] One of the creditors of Kareeboom was Beyond Invest (Pty) Ltd ("BI")

which was finally liquidated on 19 February 2021. The liquidators of BI brought an application for liquidation of Kareeboom, contending that it was commercially insolvent and indebted to BI for R7,006,745.88. It is pursuant to BI's application that Kareeboom was placed under final liquidation. The sole and only asset of Kareeboom is a farm, in extent: 1584,2319 hectares. On 12 September 2022, Kareeboom received an offer for the farm from Kalahari Land & Cattle Company (Pty) Ltd

("Kalahari") for R6,336,927.60. The mortgagee confirmed the offer. The sale has not yet been approved by the second meeting of creditors and/or the Master.

[5] Kareeboom purchased the farm on 30 June 2015 for R23,940,000.00 which was bonded to FNB for R10,000,000.00. According to the Tokologo Municipality, the municipal value of the farm in May 2022 was R27,960,000.00. On 29 January 2020, the farm was placed in the market for R15,000,000.00 with FNB expecting between R10,000,000.00

and R13,000,000.00 as forced sale value.

[6] In an open-market valuation conducted by Capital Harvest on 1 October 2018, it was determined that the farm had a market value of R9,505,000.00. The intention was to redevelop the farm into a solar

energy facility and an application for an amendment to the Land Use Rights in terms of the Physical Planning Act (Act 88 of 1967) was not successful. The farm is presently zoned as "Agricultural 1" and no other Land Use Rights have been approved.

[7] The liquidators contend that Kareeboom is not only commercially insolvent but also factually insolvent. They obtained a valuation of the farm on 19 May 2022 from Mr JS Hugo who is a qualified and professional valuator. The market value and forced sale was determined at R5,544,800.00 and R3,326,880.00 respectively.

- [8] On 12 September 2022 the liquidators received an offer of R6,336,927.60, which offer was accepted by the mortgagee, to wit FNB.[1] Kalahari leases the farm from Kareeboom at an annual rental rate of R150,000.00. All the affected entities, being creditors of Kareeboom, is owed R27,095,059.76, being inter alia FNB and SARS.
- [9] In a settlement agreement between the liquidators of BI and SEV, SEV subordinated its claim against Kareeboom in favour of BI for R7,006,745.88 and BI undertook not to oppose the current business rescue application.
- [10] SEV contends that the farm was acquired by Kareeboom for inter alia purposes of leasing a portion thereof to Rodicon Trading & Investment (Pty) Ltd (“Rodicon”) and that Rodicon will undertake the development and operation of a 150 MW plant on the farm. The farm would then be leased to a third party developer for the construction and operation of the plant.[2]
- [11] SEV states that the respective permits and approvals were already obtained by Rodicon in order to proceed with the construction of the plant – either by tendering successfully to the Department of Energy on the bid submission date for Bid Window 7 during or about January 2023 (“the seventh bid”) of the South African Renewable Energy Independent Power Producer Procurement Program (“REIPPPP”) - alternatively by engaging in a partnership with or being appointed by a private entity to proceed therewith.
- [12] At present the business of Kareeboom is essentially that of a rental enterprise, generating income from leasing it to Rodicon and Zuikerkop. It is alleged that upon the commencement of the construction of the plant, the rental payable by inter alia Rodicon, will increase exponentially which will facilitate the continued existence of Kareeboom in a state of solvency. The rehabilitation of Kareeboom relies primarily on its ability to lease the farm to Rodicon, alternatively a third-party developer for purposes of constructing and operating the plant. BI’s and FLP’s claims would be settled in full.
- [13] The construction of the plant will be undertaken by Rodicon in two phases, each phase being twelve (12) months and intended to run consecutively.[3] The rental payable by Rodicon to Kareeboom will increase upon the completion of each phase and thereafter at a rate of 6% per annum. Reference is made to forecasted assumptions vis-à-vis the rental payable by Rodicon to Kareeboom over the course of the following twenty (20) years.
- [14] Rodicon previously submitted a tender to the Department for a 75 MW SPV renewable energy facility on the fourth bid submission date (August 2014) and was unsuccessful. In a letter from the Department of Energy, dated 5 June 2015, it is inter alia stated that competing bid responses were ranked on the basis of their combined score for price and economic development and that preferred bidders were appointed based on the ranking of their bid responses relative to others. Rodicon was ranked below those bidders.[4] SEV’s contention that Rodicon was not selected based on price only, is not correct as the correspondence refers to price and economic development.

- [15] Rodicon intended to submit a seventh bid response in January 2023. The previous bid for which Rodicon tendered was for 75 MW whereas the seventh bid will be for 150 MW. SEV contends that the overall financing in respect of the development and construction of the plant will become available to Rodicon, inter alia “upon confirmation of the acceptance by the Department of the seventh bid”.^[5]
- [16] SEV strongly relies on Clause 15.2.2 of a Settlement Agreement concluded between inter alia BI and SEV. It reads:
- “15.2.2 In respect of which SE Ventures, the sole shareholder of Kareeboom Kimberley, has mooted, bringing an application to convert the liquidation proceedings, to business rescue proceedings, which application the liquidators^[6] will not oppose, SE Ventures herewith subordinating all its claim(s) (shareholders loans and otherwise) in respect of Kareeboom Kimberley for the benefit and in favour of Beyond Invest, which subordination the liquidators herewith accept, to ensure that Beyond Invest claims against Kareeboom Kimberley receive preference to payment of the claims of SE Ventures against Kareeboom Kimberley, which subordination shall endure until the claim of Beyond Invest in respect of Kareeboom Kimberley, circa R7,006,745.88 has been settled in full.”^[7] [my emphasis]*
- [17] It is important to note that Kareeboom and/or its liquidators were not parties to that agreement. SEV contends that BI is now the “major creditor of Kareeboom” in respect of voting rights vis-à-vis the plan to be presented to the creditors of Kareeboom and bearing in mind the undertaking provided by BI’s liquidators that they will not oppose the application, mitigates in favour of granting of the business rescue application in that it is an indicator of the likelihood of the adoption and successful implementation of the proposed business rescue plan.^[8]
- [18] It appears that during the first meeting of creditors on 29 August 2022, the claim of SEV was rejected and it is stated that it appears that the presiding officer had difficulties with proof of a subordinated claim, notwithstanding the provisions of the Insolvency Act.^[9]
- [19] Kareeboom’s only source of revenue is at present the rental received and to ensure that the rental continue and income increase, the plant will cause Kareeboom when placed under business rescue, to continue as a going concern.^[10]
- [20] On SEV’s version, Kareeboom’s total liabilities are R26,315,170,91, excluding the claim of Zuikerkop which was already admitted. SEV concede that Kareeboom is factually insolvent in an amount of R2,000,415.91.^[11]
- [21] The prospects for success in the application of SEV hinges on the four (4) plans it proposes.
- [22] The primary goal of business rescue is to facilitate the continued existence of the company in a state of solvency and to provide an alternative in the event that achievement of the primary goal provides not to be viable in that it would facilitate a better return for the creditors or shareholders than would result from its immediate liquidation.^[12]

Plan 1: selection of Rodicon as preferred bidder for the supply of SPV to Eskom:

[23] In terms of this plan, Rodicon would proceed with the necessary preparations for and consequent submissions of the seventh bid and the farm will remain available as the prospective site for the construction of the plant. The requisite finance will become available to settle FLP and BI whereafter it will continue trading as a rental enterprise vis-à-vis the boundary plant.[13]

[24] Importantly, SEV states:

“113. With regards to the financing of the construction of the boundary plant, SEV and Rodicon are currently engaging with various financiers in preparation for the submission of the seventh bid.

114. Whilst the details pertaining to such negotiations cannot be disclosed at this juncture, it is noteworthy, that in respect of the fourth bid, the anticipated costs of the development of the 75 Megawatt boundary plant, was estimated to be in the region of R900,000,000.00.”[14] [my emphasis]

[25] The bid guarantee of Standard Bank amounts to R7,500,000.00.[15] The Nedbank guarantee refers to the project as the design, construction, commissioning and operation of a 75 MW plant.

[26] The Nedbank warranty furthermore states that the terms and requirements set out in the term sheet are provisional, non-exhaustive and may be subject to amendments necessitated by the terms of reference under the REIPPPP or project documents and/or amendments to any legislation, regulation,

guidelines or directive governing the REIPPPP.[16]

[27] The facility amounts are R1,086 billion (senior debt), R60 million (VAT), R15 million (guaranteed working capital facility) and the maximum amount will be determined having regard to the project’s ability to support such gearing. Nedbank will seek approval to underwrite a maximum of R1,086 million plus VAT plus the working capital facility subject to credit approval.[17]

[28] SEV continues to state that it is unable to reveal the details pertaining to potential financiers in respect of the seventh bid. Rodicon is currently engaging two commercial banking institutions, alongside two (2) well-known and respected international financial institutions. Once the submission date for the seventh bid is announced, Rodicon will be in a position to secure the necessary guarantee from the institution in respect of which the loan development finance agreement is to be concluded, and which will then form part of the seventh bid tender pack.[18]

[29] I pause to state that on 12 February 2014, and still in respect of a 75 MW plant, the Civil Aviation Authority, after evaluating the site position and reviewing the information received on 4 October 2013, had no objection.[19] The correspondence of SRK, dated 22 April 2014, is also in respect of a 75 MW boundary plant.[20] The correspondence from the Department of Environmental Affairs dated 8 August 2014 refers to a 75 MW plant and authorization was granted for a generating capacity of up to 75 MW.[21]

[30] The conditions for the authorization include inter alia that the activity must commence within a period of three (3) years from date of issue of the authorization and if not, a new application

must be made.[22]

[31] It is therefore not correct to state that all permits and approvals have been obtained to proceed with the submission of the seventh bid.

[32] It is stated that “operating on the assumption that Rodicon is selected as a ‘preferred bidder’” the financial forecasts for the ensuring twenty (20) year period is attached.[23]

Plan 2: engagement with the private sector:

[33] SEV is of the view that should the plan as prepared in terms of option 1 be accepted, it would be adopted by the creditors and convert Kareeboom to a state of solvency. It keeps the door open that Rodicon may not be the preferred bidder. Rodicon, however, has the ability to sell power to any customer of its choice and will continue to lease the farm which will make financial forecasts under plan 1 still applicable. SEV states: “Various power supply proposals which has been under negotiation with various major customers, are now able to be taken forward should it be determined by the BRP that option 1 not form the basis upon which the plan is to be formulated.”[24]

Plan 3: third-party developer:

[34] Several third-party developers have approached Kareeboom with offers to take over the lease from Rodicon where that third-party would become responsible for the submission of the seventh bid and would then proceed with the construction and operation of the plant. A lease concluded with a third-party developer would include additional option fees which would be used to pay FLP and BI. Again reference is made to confidentiality agreements which may not be disclosed. It is conceded that option 3 is not the most commercially attractive route, but remains available.[25]

Plan 4: sale of the farm by the BRP’s:

[35] SEV considered the possibility that plans 1, 2 and 3 may not materialize. However, placing Kareeboom under business rescue would result in a better return for creditors or shareholders.

- [36] The liquidators contend that FNB is still owed an amount of approximately R143,946.97 plus further interest at prime plus 2%. SARS is owed R715,786.96. In the liquidator's report, dated 2 December 2022, it is stated that after receipt of the notification of the business rescue application on 25 November 2022, the liquidators communicated with the attorneys of SEV to enquire whether SEV was willing to take over the property against value.
- [37] They further submit that SEV is well aware of who the creditors of Kareeboom are, yet failed to give notice to them.[26] They submit that on this basis alone, the application stands to be dismissed.
- [38] The Act provides that the efficient rescue and recovery of a financially distressed company has to be conducted in a manner that balances the rights and interests of all relevant stakeholders. To satisfy the test, it has to be shown that the company is financially distressed, that it is just and equitable to do so for financial reasons, and that there are reasonable prospects of rescuing the company.

ARGUMENTS

- [39] SEV relies on PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others (Case no 543/21) and Brita De Robillard NO and Another v PFC properties (Pty) Ltd and Others (Case No 409/22)[27] where it was held that there must be a reasonable prospect of rescuing the company and further, that it must be just and equitable to place it under supervision. It also relies on Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)[28] where it was held that the question whether there is a reasonable prospect can only be "yes" or "no"
- [40] For an argument that there would be a better return, it relies on Commissioner of South African Revenue Services v Beginsel NO and Others[29] where it was held that one of the purposes of business rescue is 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.

- [41] SEV contends that the market-value of the farm is in the region of R24,314,755.00.
- [42] The liquidators submit that a distinction needs to be drawn between financially distressed, factually insolvent or commercially insolvent. They highlight the tenuous basis on which SEV submits that the company can be rescued. The application is based on nothing more than unjustified reliance on uncertain future events. The critical question is whether there is a reasonable prospect for rescuing of Kareeboom. In Oakdene supra[30] it was held:

“[29] This leads me to the next debate which revolved around the meaning of ‘a reasonable prospect’. As a starting point, it is generally accepted that it is a lesser requirement than the ‘reasonable probability’ which was the yardstick for placing a company under judicial management in terms of s 427(1) of the 1973 Companies Act (see eg Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA 423 (WCC) para 21). On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – with the emphasis on ‘reasonable’ – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough.” [my emphasis]

[43] In *Chauke and Others v Koedoeskop River Farms Alfa CC and Others*[31] it was held that in the absence of a factual basis, the Court would not be able to find a reasonable prospect.[32]

[44] In *FirstRand Bank v Normandie Restaurants*[33] it was emphasised that business rescue is a temporary measure:

“[20] The temporary measures envisaged by the Act are aimed at maximising the likelihood of the company continuing in existence on a solvent basis and at creating a 10 better return for the creditors and shareholders. As stated in Oakdene Square Properties (para 31): ‘The development of a plan cannot be a goal in itself. It can only be the means to an end. That end, ... 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 the liquidation process.’ The measures proposed in the business rescue plan will, in my view, not provide for a temporary solution as envisaged in s 128(1)(b). They do no more than plan a long-term debt management process.” [my emphasis]

[45] The liquidators submit that FNB has not given consent for the sale of the farm or that it be further mortgaged. On this basis, the provisions of Section 136(2) of the Act cannot be satisfied.

[46] They further submit that Rodicon was already unsuccessful in its bid for the 75 MW plant and all the documentation during 2014 is therefore irrelevant. A lease agreement has still to be concluded between Rodicon and the liquidators and there is no lease agreement before Court. There is furthermore no certainty when the seventh bid will open and whether it will be accepted. Rodicon does not have a generation, transmission or distribution licence that is required. The first, second and third plans will therefore be completely unlawful and/or illegal without the licences. The guarantees of Standard Bank lapsed on 18 August 2015.

[47] The fourth plan constitutes nothing other than an informal liquidation in terms of which SEV endeavours to sell the farm. No indication is given what such a sales price could be.

CONCLUSION

- [48] I carefully perused the four plans proposed by SEV and find them lacking in detail and firm foundation. The first three plans are solely reliant on the approval of a 150 MW plant. The previous approvals all lapsed and nothing shows that there is any real prospect for success by either Rodicon or any of the other entities to develop a plant. Even if a plant is to be built, it will take years to become operative and financially viable.
- [49] SEV relies on confidential negotiations, agreements or prospective arrangements. It did not take the liquidators or this Court into its confidence.
- [50] Its challenges were exacerbated by its failure to place a proper valuation of the farm before Court. There is no rational basis for a price other than the valuation of the liquidators.
- [51] Even if it may be argued that the liquidators did not sufficiently address all the aspects in the founding papers, this Court has to be satisfied that a reasonable prospect exists.
- [52] I cannot find that there are, objectively speaking, any foundation to support the relief sought. All the plans and scenarios are in my view speculative. Previous applications were for a plant of lesser capacity, the land is not zoned for the purpose envisaged, the liquidity of Rodicon - or any other party for that matter - is uncertain, and the negotiations are kept secret. Over and above that is the liabilities that, as matters presently stand, exceed the value. As long as the valuation of the liquidators stand, there are insufficient assets not only to pay the creditors a reasonable dividend but also to conclude that better value can be achieved. I find no basis for the relief on the principle of just and equitable.
- [53] Costs should follow the result.
- [54] I therefore make the following order:

ORDER

1. The application is dismissed with costs.

P R CRONJÉ, AJ

For the Applicant: Adv. A H Cowlin JP Joubert Attorneys Symington De Kok Attorneys For the Second and Third Respondents: Adv L Meintjes Noordmans Attorneys For the Fourth and Fifth Respondents: No appearance

- [1] Pleadings, page 631 - 640
- [2] Pleadings, page 18, para 49
- [3] Pleadings, page 20, para 54 - 55
- [4] Pleadings, page 83, para 3.2
- [5] Pleadings, page 21, para 60

- [6] Of BI
- [7] Pleadings, page 230 - 231
- [8] Pleadings, page 26, para 85 - 86
- [9] Pleadings, page 27, para 90; page 28, para 93
- [10] Pleadings, page 29, para 98
- [11] Pleadings, page 32, para 105
- [12] Pleadings, page 32, para 107
- [13] Pleadings, page 33, para 111 - 112
- [14] Pleadings, page 33, para 114
- [15] Pleadings, page 359
- [16] Pleadings, page 389
- [17] Pleadings, page 391
- [18] Pleadings, page 34, para 117 - 118
- [19] Pleadings, page 403
- [20] Pleadings, page 404 - 409
- [21] Pleadings, page 413
- [22] Pleadings, page 418, para 6
- [23] Pleadings, page 35, para 122
- [24] Pleadings, page 37, para 131
- [25] Pleadings, page 38, para 135
- [26] This is denied by SEV
- [27]
- [2023] ZASCA 111 (21 July 2023)
- [28] (Pty) Ltd (609/2012) [2013] ZASCA 68 (27 May 2013) at para [29]; See also African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others (228/2014) [2015] ZASCA 69; 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA) (20 May 2015) para [21]
- [29] (15080/12) [2012] ZAWCHC 194; 2013 (1) SA 307 (WCC) (31 October 2012)
- [30] See also African Banking supra at para [3]
- [31] (77792/2018) [2019] ZAGPPHC 992 (12 December 2019) at para [20]

[32] See also African Banking *supra*

[33] 189/2016

[2016] ZASCA 178 (25 November 2016)

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