

SOUTH AFRICA / JUDGMENT

Tombstone v Commissioner for South African Revenue Services (7107/2017)

[2018] ZALMPPHC 38 (29 June 2018)

[2018] ZALMPPHC 38**COURT**

Limpopo High Court, Polokwane

BEFORE

M V Semenya

CASE / FILE NUMBER

7107/2017

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Source record**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****LIMPOPO DIVISION, POLOKWANE****CASE NO: 7107/2017****In**

the matter between:

THABALETSI

TOMBSTONE

APPLICANT

And

THE COMMISSIONER FOR SOUTH

AFRICAN

RESPONDENT

REVENUE SERVICES

JUDGMENT**SEMENYA J:**

1. The deponent to the applicant's founding and two supplementary affidavits has been appointed as business rescue practitioner (the practitioner) of the applicant in terms of s129 (3) (b) of the Companies Act 71 of 2008 (the Act). The applicant has launched this application in terms of s153 (1) (a) (ii) read with 153(7) of the Act. The order sought is for the setting aside of the respondent's

vote against the adoption of the business rescue plan developed on behalf of the applicant. The respondent is opposing the application

on the basis that the vote was appropriate and that it would not be reasonable and just to set its vote aside. The respondent

further alleges that it does not appear from the plan that the business of the applicant can be rescued.

2. In a resolution taken by the only member of the applicant on the 21 June 2017, it is stated that the applicant is financially distressed and that there appears to be reasonable prospects that it can be rescued. Further that the company voluntarily resolves to begin business rescue proceedings and to be placed under supervision. The practitioner invited all creditors to submit their claims up to the date on which the applicant was placed under business rescue proceedings, being the 2 June 2017.

On the 31 July 2017, the respondent wrote a letter to the practitioner advising him that according to its records the applicant failed to submit the following returns:

Income Tax for the period 2014 to 2016;

Value Added Tax (VAT) for January 2016 to date of the letter;

PAYE for December 2015 to July 2016 and April 2017 to May 2017.

3. The respondent indicated in the said letter that should the applicant fail to submit the said outstanding returns before publication of the business rescue plan (the plan), the returns will be regarded as falling outside the scope of the plan.
4. In the second meeting of creditors the practitioner informed the creditors that all creditors, inclusive of the respondent, are

concurrent creditors. The effect would be that none of them have a preferent claim against the applicant and would be paid out of the free residue. He further stated that all creditors who have provided finance to the applicant during the post-commencement rescue proceedings period will be given preference over unsecured claims.

5. It needs to be mentioned at this stage that the post-commencement creditor referred to happened to be the only member of the applicant whose claim amounted R896 000.00. When the respondent raised concerns about the idea of giving the member of the applicant preference over the other creditors, the practitioner changed and informed the creditors that the member of the applicant has indicated that she will wait for all other creditors to be paid before submitting her own claim. Despite informing creditors in a meeting that all are concurrent, the applicant stated in the replying affidavit that the respondent is a post-commencement creditor who has a preferential claim.

6. One of the purpose of the second meeting was to vote for or against certain amendments which were proposed by the respondent. According to the respondent the said amendments were intended to safeguard the interests of the general public in seeing to it that taxes are collected. However, all other creditors voted against the proposed amendment. It is common cause that 92% of the creditors, which comprises the respondent, voted against the adoption of the plan. According to the practitioner the reason furnished by the respondent's representative was that the plan benefited the member of the applicant only, ignoring the fact that the applicant had 38 employees. The practitioner then and there informed the meeting that he will apply to court for the setting aside of the results of the vote in terms of section 153 (1) (ii) of the Act.
7. It is common cause that the applicant's largest creditor is the respondent and that as at the date of the launching of this application, the respondent had submitted a preliminary claim in the amount of R1 283 446.00. The respondent arrived at this amount after the applicant submitted returns in respect of VAT. The respondent contended that the applicant's failure to submit its corporate income tax returns made it impossible for it to fully assess the applicant's indebtedness to it and to conduct investigations to determine whether all income generated by the applicant had been declared. The respondent's submission of tax returns was further required in order to make an accurate assessment of the applicant's liability to SARS.
8. Counsel for the applicant argued that submission of the returns would not have assisted the respondent in anyway as it was going to be a nil return. I however agree with counsel for the respondent that the applicant has a legal obligation to submit the returns. It is for the respondent to decide, after conducting the necessary investigations and assessment, whether the applicant owes income tax or not.
9. It is noteworthy that the applicant informed creditors in a meeting that it will not finalize its plan without submitting all its returns to the respondent. This in itself is an indication that the applicant was fully aware of its obligations to the respondent. According to counsel for the respondent a clause in the plan that provided that any creditor who fails to submit the claim by the 8 September 2017 will forfeit its claim in its entirety, is one of the factors that prompted the respondent's representative to vote against the adoption of the plan. The respondent avers that it is the applicant's failure to submit its returns that made it impossible for it to submit its claim.
10. It however remains to be determined whether the vote stands to be set aside on the ground that it is inappropriate as envisaged in s153 (1) (ii) of the Act. The requirements for the setting aside of a vote are laid down in s153 (7). The subsection provides that on application for the setting aside the result of the vote, the court may order that the vote be set aside if it is satisfied that it is reasonable and just to do so, having regard to the following factors:
 - (a). the interests represented by the person or persons who voted against the proposed business rescue plan;

(b). the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and

(c). A fair and reasonable estimate of the return to that person, or persons, if the company were to be liquidated.

11. Counsel for the applicant contended that this court should adopt a purposeful interpretation to the words used in the Act in the determination of the issues before it. Section 7 of the Act which provides that the purpose of the Act is the efficient rescue and recovery of financially distressed companies in a manner that balances the interests and rights of all stakeholders. Reference was made to the case of *Cooper Sunset Trading 220 (Pty) Ltd v Spar Group Limited and Another* (365/2014 [2014] ZAGPPHC 688; 2014 (6) SA 214 (LP) (9 May 2014) at [24] where it was stated that section 7k of the Act reads that one of the purposes of the Act is to provide for the efficient recovery of financially distressed companies in a manner that balances the rights of all relevant stakeholders.

12. Counsel for the respondent on the other hand referred the court to the decision in *DH Industries (Pty) Ltd v Gribnitz NO & Others* 2014 (1) SA 103 (KZN) at par 10 where it was stated that:

“I respectfully agree that the chapter as a whole reflects a legislative preference for proceedings aimed at the restoration of viable

companies rather than their destruction but only of viable companies, not all companies placed under business rescue.”

13. In the majority judgment of the SCA in *FirstRand Bank Ltd v KJ Foods CC* (In business rescue) (734/2015) [2015 ZASCA 50 (26 April 2017) at par [76] (KJ Foods) it was held that:

“In interpreting s153 (1) and (7) the words of the Act are taken into consideration. However, these words must not be considered in isolation, but in the light of the context of the provision, the Act as a whole and the purpose for which it was enacted. The

interpretation is ‘essentially one unitary exercise.

14. At par [80] the court stated that on an application to set aside the result of a vote in terms of s153(1)(a)(ii) and s153(1)(b)(i)(ii)(bb), the court is enjoined by s153(7) to determine only whether it is reasonable and just to set aside the particular vote, taking into account the factors set out in s153(7)(a) to (c) and all circumstances relevant to the case, including the purpose of business rescue in terms of the Act. The court stated that the vote would be set aside on application on the grounds that it is inappropriate, if it is reasonable and just to do so in terms of s153(7).

15. With regard to the interests represented, the respondent contended that it represents the general public’s interests, which in my view include the employees and creditors of the applicant. It was submitted that the respondent is an entity that is responsible for the collection of taxes and that voting for the adoption of the plan in the face of outstanding

returns would have amounted to dereliction of duty on its part. Counsel for the applicant on the other hand submitted that the court should take cognizance of the interests of its employees and other creditors into consideration and that they will lose employment should the applicant be liquidated. The applicant contended that the court have regard to the fact that the business is showing some improvement since the commencement of the proceedings.

16. I find it difficult to rely on information furnished by the practitioner that the business is recovering in view of the conflicting statements that he made in the meetings, founding and supplementary affidavits and replying affidavit. Although he indicated in a meeting of the creditors that the respondent is a concurrent creditor, the statement changed in the replying affidavit where he stated that the respondent is a post-commencement creditor and which has a preferent claim over others. I am of the view that

the statement was made because the applicant was aware that in terms of s153 (7) (b), the court is enjoined to determine the provisions

made in the proposed business plan with respect to the interests represented by the respondent.

17. The statement that the respondent is a post-commencement creditor cannot be correct for the purposes of this judgment. The issues

relate to the pre-commencement claim in the form of income tax and other tax returns for the year 2014 to 20016. That the applicant has paid the respondent VAT and UIF post-commencement cannot be regarded as an excuse. The respondent requires these returns for the purposes of determination and submission of its claim. As already stated, in the first meeting of creditors, the practitioner informed creditors that he will not finalize the plan before complying with its tax obligations. However, it appears from the papers that he intended to do the opposite. I find that no provisions have been made to cater for the interests represented by the respondent with respect to Income Tax.

18. Counsel for the applicant argued that the applicant became aware for the first time that the objection was based on the fact that the applicant failed to submit its income tax returns in the respondent's answering affidavit. In response to this argument, counsel for the respondent submitted that applicant has been aware of these concerns before the second meeting as they were raised in a letter addressed to the applicant on the 31 July 2017.
19. I agree with counsel for the respondent that the applicant cannot be permitted to decide not to submit returns on the basis that it was going to be a nil return. That would amount to usurping the functions of the respondent. I fail to find any valid reason why the applicant is reluctant to submit this returns if it indeed conducts itself in a bona fide manner. The applicant cannot hide behind the fact that it has paid VAT and UIF. The submission of Income Tax returns is compulsory. Furthermore, failure to submit returns is a criminal offence. This court cannot be seen to be promoting lawlessness.

20. Counsel for the applicant submitted that the business of the applicant has improved since the commencement of the business rescue

and that this aspect is to the benefit the creditors and employees. It was contended that a dividend of five cents (5c) in a Rand will be paid to concurrent creditors who have proved their claims to the reasonable satisfaction of the practitioner. Furthermore, the practitioner stated that should any money be recovered from the previous managers, 50% will go to the creditors. It is evident that the practitioner is unable to guarantee that any money will be so recovered. I find that in the absence of the correct assessment, the respondent would not be able to submit a claim which may be to the satisfaction of the practitioner.

21. In arriving at a conclusion that the setting aside of the vote will be reasonable and just, the SCA in KJ Foods noted that the interests protected in that case was that of a secured creditor and that its claim will in any event be paid in full. It was further found that the employees and other creditors will be better off if the vote is set aside.
22. However in the present case I am unable to rely on the information furnished by the practitioner in view of the contradictory statements that he made as referred to above. The respondent's claim is not yet submitted because of the conduct of the applicant. It is not clear whether the applicant will regard the respondent as a concurrent creditor or preferent one. Furthermore the respondents

stated in the answering affidavit that as at the voting date, the plan did not provide clear facts as to how the business was going to improve. I tend to agree with the respondent that the plan appears to be such that it was intended to benefit the applicant's member more than the creditors. Moreover the extent of the respondent's claim and the reasons for the applicant's reluctance to submit income tax returns are still not known.

23. I find that the vote was not inappropriate under the circumstances of this case. The respondent indeed has an obligation to protect the interests of the general public. It has also expressed a desire to reconsider its position should the applicant submits its returns in full and after proper assessment of the same. A failure to submit for a period of three years whilst the business was up and running is a fact that cannot be ignored.
24. In the circumstances I make the following order:
- i). The application for the setting aside of the respondent's vote against the adoption of the business rescue plan is dismissed;
- ii). The applicant is ordered to pay the costs of the application.

M.V SEMENYA

JUDGE OF THE HIGH COURT; LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF

: ADV. M NAUDE

INSTRUCTED BY

: VENNIS ATTORNEYS

FOR THE RESPONDENT : ADV. L NKOANA

INSTRUCTED BY

: STATE ATTORNEYS

DATE OF HEARING

: 30 MAY 2018

DATE OF JUDGEMENT

: 29 JUNE 2018

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