

SOUTH AFRICA / JUDGMENT

Van der Merwe and Others v Ikageng Electrical Contractors (Pty) Ltd and Another; Voltex (Pty) Ltd t/a Lighting Structures and Atlas Group v Ikageng Electrical Contractors (Pty) Ltd (1580/2020; 2247/2019) [2020] ZAFSHC 266 (24 December 2020)
[2020] ZAFSHC 266

COURT

Free State High Court, Bloemfontein

BEFORE

C.J. Musi

CASE / FILE NUMBER

1580/2020; 2247/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION,
BLOEMFONTEIN

Reportable:	Of
Interest to other Judges:	Circulate
to Magistrates:	NO NO NO Case No.: 1580/2020 In the matter between: - THERESA VAN DER MERWE 1st Applicant NEO DISEKO 2nd Applicant REMAINING AFFECTED PERSONS 3rd

Applicant
and
IKAGENG
ELECTRICAL CONTRACTORS (PTY) LTD
1st
Respondent
VOLTEX (PTY)
LIMITED T/A
LIGHTING
STRUCTURES AND ATLAS GROUP
2nd
Respondent
AND
Case No.: 2247/2019
VOLTEX (PTY) LTD
T/A
LIGHTING
STRUCTURES AND ATLAS GROUP
Applicant
IKAGENG
ELECTRICAL CONTRACTORS (PTY) LTD
Respondent

JUDGMENT

BY: C. J. MUSI, JP

HEARD ON:

15 OCTOBER 2020

DELIVERED ON: 24 DECEMBER 2020

- [1] This judgment concerns two interrelated applications that were consolidated. At the centre of both applications is Ikageng Electrical Contractors (Pty) Ltd a company incorporated in terms of the laws of South Africa (Ikageng). In the one application, Mesdames Theresa van der Merwe and Neo Diseko (applicants), both employees of Ikageng, sought an order that Ikageng be placed under supervision and that business rescue proceedings be commenced with in terms of section 131 of the Companies Act No 71 of 2008 (Act)[1]. They are both affected parties in terms of section 128(1)(a) of the Act[2]. In the other application Voltex (Pty) Ltd t/a Lighting Structures and Atlas Group, a company incorporated in terms of the company laws of South Africa (Voltex), sought an order for the final winding up of Ikageng.

- [2] Ikageng is the first respondent in both applications. In the business rescue application Voltex is cited as the second respondent and ABSA Bank Limited is cited as an affected party. The two employees of Ikageng also aver that they were authorised by other employees – union members and non-union members - of Ikageng to depose to their respective affidavits on behalf of those employees. The union decided not to enter the fray.
- [3] I am constrained to take a step backward in order to properly contextualize this saga. On 21 May 2019 Voltex launched an application, in this court, for the winding up of Ikageng. On 30 May 2019 Mr Moselane, the sole director and major shareholder of Ikageng[3] launched an application for Ikageng to be placed under supervision and that business rescue proceedings be commenced with (first business rescue application). The business rescue proceedings suspended the winding up application in terms of section 131(6) of the Act[4].
- [4] The business rescue proceedings were strenuously opposed by Voltex. On 12 February 2020 the business rescue application was dismissed with costs. After the dismissal of the business rescue application Voltex decided to proceed with the winding up application. On 19 March 2020 Mr Moselane filed an answering affidavit, on behalf of Ikageng, in the winding up application. Voltex subsequently filed its replying affidavit.
- [5] On 12 May 2020 the present applicants launched these business rescue proceedings. The winding up application was therefore suspended for a second time. The parties correctly agreed that if the business rescue application is unsuccessful, then the winding up order should be granted. This judgment will therefore primarily focus on the business rescue application.
- [6] Ms van der Merwe is the financial manager of Ikageng. She applied successfully to file a further affidavit, deposed to on 6 October 2020, in order to show that Ikageng can be saved. She stated that Ikageng is financially distressed within the meaning of section 128(1)(f) of the Act[5], in that it appears to be reasonably unlikely that it would be able to pay all of its debts as they become due and payable within the ensuing six months or it is reasonably likely that it will become insolvent, within the immediately ensuing six months unless it is rescued.
- [7] It is common cause that the indebtedness of Ikageng to Voltex is R10 148 241.
49. This amount has become due and payable together with interest thereon. Ms van der Merwe stated in her founding affidavit that Ikageng owes ABSA Bank R17 382 145.60. In ABSA's affidavit it is stated that Ikageng is indebted to it as follows:
- R17 490 595 on overdraft together with interest at the rate of prime plus 3% per annum which interest is compounded monthly;
 - R2 099 859 in respect of a commercial property finance account with interest at prime rate plus 2% per annum which interest is compounded monthly in arrear;

- R1 221 193 in respect of a mortgage loan account with interest running at prime rate plus 1% per annum which interest is compounded monthly in arrear;
 - the arrears on 10 instalment sale agreements which amount to approximately R6 000 000.
- [8] Ms van der Merwe did not mention, in her founding affidavit, that Ikageng also owed the South African Revenue Service (SARS) substantial amounts of money. In the business rescue application brought by Mr. Moselane, he stated that he entered into a settlement agreement with SARS on 29 May 2019 in terms of which Ikageng would settle its indebtedness to SARS by way of three monthly payments of R500 000 the balance to be reviewed. The settlement agreement showed that Ikageng was indebted to SARS as follows:
- Company Income Tax for 2017 and 2018 in the sum of R3 863 704.95;
 - Value Added Tax (VAT) in respect of the period August 2018 to March 2019 in the sum of R 2 852 329.45; and
 - Pay As You Earn (PAYE), Unemployment Insurance Fund (UIF) and Skills Development Levy (SDL) in respect of the period from March 2017 to April 2019 in the sum of R 560 530.20.
- [9] In her replying affidavit Ms van der Merwe stated that the indebtedness to SARS is common cause and that her understanding was that the indebtedness to SARS was settled. However, she stated that in as far as SARS remains a creditor she would cause the application to be served on SARS.
- [10] Ikageng's business is categorized into two distinct activities, i.e. infrastructure electrical construction works and electrical maintenance works. The former aspect of its business consists of:
- the establishment of electricity substations;
 - the supply and installation of streetlights;
 - the supply, erection, establishment, and computer programming of 40m lighting masts, but particularly in townships in formal and informal settlements. The power of such lighting masts and the use of necessary electricity is adjusted by computer from the offices of Ikageng in order to ensure a saving of electricity to the various municipalities.
- [11] Voltex is one of only two suppliers of electrical mast equipment in the country. It no longer supplies such equipment to Ikageng with the result that Ikageng ceased installing masts. It still provides electrical maintenance work to Provincial Governments and Municipalities.

[12] According to Ms van der Merwe, the cause of Ikageng's cash flow crisis was the non-payment by the aforementioned Government institutions. She stated that Ikageng is an ailing business but that it is neither chronically nor terminally ill. She pointed out that from 1 April 2019 to 29 February 2020 Ikageng managed to trade and generate an income of R40 465 476.27, with liabilities amounting to R44 262 816.39. During the same period it paid some of its creditors R6 286 530.80.

[13] She further stated that Ikageng earns a monthly income in excess of R2 000 000 from Centlec. Its debtors owe it R1 348 426.69. Mr Moselane's loan account at Ikageng was R28 226 79.99. He sold a property in Plettenberg Bay and reduced the loan account by R1 400 000. Its fixed assets comprise of immovable property situated at 2 Alpha Street, East End, Bloemfontein. The property was purchased in 2014 for R5 379 419.60. ABSA has a mortgage over the property in the sum of R3 510 263.81 and the fair market value of the property is R8m. She lists the additional assets of Ikageng as:

- plant equipment

R 2 198 271.70

- motor vehicles

R 13 606 681.46

- furniture and fittings

R 1 089 566.20

- computer hardware

R 342 432.08

- computer software

R 298 583.34

R 17 535 534.78

[14] She further pointed out that during this saga Ikageng managed to secure numerous tenders. On 20 September 2019 it entered into a two-year contract with the Greater Taung Local Municipality and earns a profit of R150 000. The total profit for the duration of the contract would be R2 700 000.

[15] Ikageng entered into a 36 months' contract with the King Sabata Dalinyebo Municipality, during February 2020, to provide meter reading services. Van der Merwe projects that Ikageng will receive approximately R400 000 per month of which approximately R280 000 would be profit.

- [16] Ikageng also has a contract with Centlec, since 10 December 2018, in terms of which it electrifies houses built by Mangaung Municipality. According to van der Merwe, the average invoicing is R2.3 million per month of which approximately R1.6 million per month is profit. Centlec has paid R7 314 879.44 since the work on the contract commenced, in July 2019, and a profit of R 5.1 million has been made by Ikageng on the contract. Centlec owed Ikageng R2 482 745 as at 29 February
2020. Centlec has since paid R697 946.13 of that amount.
- [17] On 5 August 2020 JUA Developers appointed Ikageng as a sub-contractor for a contract sum of R2 697 709.56. According to van der Merwe the job was performed and JUA was invoiced. Ikageng's profit would be R2 023 282.18. The money was not yet paid in October 2020.
- [18] The Centlec contract is still extant and R697 946.13 is due and payable to Ikageng.
- [19] She further stated that the total value of all the current contracts is R37 775 213.04 of which the projected profits would be R24 498 802.25. She indicated that Ikageng is currently negotiating contracts with different municipalities.
- [20] Mesdames van der Merwe and Diseko stated that having regard to the facts as set out above, it is clear that Ikageng is not to be wound up but be placed under business rescue instead. They stated a winding up order would have dire consequences for Ikageng in that many of its customers would not award it tenders and its employees would suffer. They contended that Ikageng can and should be saved because it has clearly shown that it could trade under very difficult circumstances.
- [21] They also pointed out that Ikageng's employees would lose their jobs if it is wound up. Mr Moselane is earning a salary or receiving an income of R200 384.53 per month from Ikageng.
- [22] Voltex agreed that Ikageng is financially distressed. It, however, pointed out that it cannot be saved. It is therefore common cause that Ikageng is trading under insolvent circumstances. Voltex pointed out that in the business rescue application brought by Mr Moselane, he indicated that the liabilities of Ikageng amounts to R32 295 574.45. Van der Merwe in this application stated that Ikageng's liabilities are R44 262 816.39. It stated that although the amounts mentioned by van der Merwe are unreliable, they clearly indicate that Ikageng's financial position is worsening.
- [23] Voltex pointed out that Ikageng is trading under insolvent circumstances but yet Mr Moselane borrowed an amount of R28 000 000 from Ikageng. It further emphasised that van der Merwe could not substantiate her assertions and based most of her testimony on speculative hypotheses.
- [24] ABSA stated that Ikageng owes it R33 023 706.39 excluding interest on the said amount. ABSA pointed out that Ikageng is hopelessly factually and commercially insolvent.

- [25] ABSA produced an email sent to it by van der Merwe. In the email she required from the bank whether it could block Mr Moselane from accessing Ikageng's bank account for purposes of making transactions. ABSA has obtained a judgment against Ikageng with regard to 10 instalment sale agreements and has cancelled all such agreements. It took possession of all the movables which are the subject matter of the instalment sale agreements. It indicated in no uncertain terms that it is not prepared to hand over the movable assets to the business rescue practitioner in order for such practitioner to continue with the business of Ikageng. During a meeting held on 6 March 2020 between ABSA's attorney and Mr Moselane the latter indicated that Ikageng requires the movable assets for it to conduct its business. Van der Merwe was also present at that meeting. At the same meeting Mr Moselane offered to pay ABSA R400 000 per month in order to pay Ikageng and the Moselane Family Trust's debts. The offer was refused.
- [26] Both ABSA and Voltex made it clear that they would not vote in favour of any business rescue plan in light of the conduct of Ikageng and Mr Moselane.
- [27] It is common cause that Ikageng is financially distressed and factually insolvent. ABSA and Voltex are Ikageng's major creditors with joint claims amounting to R43 171 947.70. Ikageng is also indebted to SARS. Although van der Merwe is uncertain about the extent of Ikageng's indebtedness to SARS, she stated that it might be R7 439 807.26 and that Ikageng's liabilities are therefore R51 702 623.65. Van der Merwe did not disclose that RMD Kwik Form South Arica (Pty) Ltd has obtained a judgment against Ikageng in the amount of R772 811.00.
- [28] The question to determine is whether there are reasonable prospects of rescuing Ikageng. In showing reasonable prospects of rescuing Ikageng, the applicants must set out how, at this stage, the company can be rescued. They need not set out a detailed or an elaborate plan because the business rescue practitioner will have to come up with a business rescue plan. The court will then assess the reasonable prospects of rescuing the company based on the facts set out by the applicants. In Oakdene[6] the following was said:
- [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. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers.

[30] Self-evidently it will be neither practical nor prudent to be prescriptive about the way in which the appellant must show a reasonable prospect in every case. Some reported decisions laid down, however, that the applicant must provide a substantial measure of detail about the proposed plan to satisfy this requirement (see eg Southern Palace Investments 265 (Pty) Ltd paras 24-25; Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd 2012

(2) SA 378 (WCC) paras 18-20). But in considering these decisions Van der Merwe J commented as follows in Propspec Investments v Pacific Coasts Investments 97 Ltd 2013

(1) SA 542 (FB) para 11:

“I agree that vague averments and mere speculative suggestions will not suffice in this regard. There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved. But with respect to my learned colleagues, I believe that they place the bar too high.”

And at para 15:

“In my judgment it is not appropriate to attempt to set out general minimum particulars of what would constitute a reasonable prospect in this regard. It also seems to me that to require, as a minimum, concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available, is tantamount to requiring proof of a probability, and unjustifiably limits the availability of business rescue proceedings.”[7]

[29] It is clear that the applicants were not candid in their application. They downplayed Ikageng’s liabilities. The indebtedness to SARS was not mentioned and when the applicants replied to this issue they were vague.

[30] The true state of Ikageng’s assets and liabilities is also unclear. In the business rescue application brought by Mr. Moselane he stated that Ikageng’s liabilities were R32 295 574.45. Its liabilities were stated by the applicants to be R51 702 623.65. This amount excludes the judgment debt of RMD Kwik Form (Pty) Ltd.

[31] Its assets was valued by the applicants as R17 535 534. In the business rescue application brought by Mr. Moselane, Ikageng’s assets were valued to be R27 462 622.15. It is not clear whether the motor vehicles as part of the assets, include those repossessed by ABSA. There is no proper valuation of Ikageng’s assets. Although the applicants do not state on what basis they valued the assets, it is clear that Ikageng’s assets are diminishing whilst its liabilities are increasing exponentially.

- [32] In the teeth of this bad state of financial affairs, Ikageng still pays Mr. Moselane a salary of approximately R200 000.00 per month. It also uses the company's finances to pay the debt of the Moselane family trust (trust). It pays approximately R30 000 per month on a property owned by the aforementioned trust.
- [33] Ikageng's vehicles were attached by ABSA. The applicants did not mention that fact in their founding papers. Mr Moselane admitted to ABSA's lawyer that Ikageng would not be able to function without the vehicles. How Ikageng managed or will manage to generate income without the vehicles is also not explained.
- [34] Ikageng has discontinued its business of installing high masts because there are only two suppliers of high mast equipment in this country – Voltex is one of them. As a result of the liquidation proceedings, Voltex no longer wants to do business with Ikageng. The other supplier would also not supply Ikageng with such equipment. A part of Ikageng's business therefore had to close down. It now mainly does maintenance work for municipal and other State entities.
- [35] The applicants stated that the main reason why Ikageng is experiencing financial problems was because the municipal entities with which it did business did not pay it. They however allege that the municipal entities would pay Ikageng monies due to it, this time around. According to the applicants therefore, the cause of Ikageng's financial woes would be the source of its financial well-being. They do not explain why the municipalities would all of a sudden honour their obligations.
- [36] The applicants stated that Ikageng has an income of R40 465 476. No indication is given as to how much of that amount constitutes profit. The assertion lacks detail. Voltex correctly pointed out that although the applicants stated that Ikageng has paid some of its creditors, it is not clear how those creditors were selected to the exclusion of Voltex, which is one of its major creditors. Those payments might be voidable dispositions, because they clearly favoured some creditors above others whilst Ikageng was insolvent.
- [37] Van der Merwe stated that Ikageng concluded contracts with the Greater Taung Local Municipality from which it received R360 000 per month with a projected profit to 20 September 2021 in the sum of R2 700 000. First, the applicant only attached one contract between Ikageng and the Greater Taung Local Municipality. Second, that contract clearly states that Ikageng would be engaged on an as and when required basis. Third, in terms of the payment schedule attached by van der Merwe, the last payment received from this municipality was on 30 January 2020. She made two affidavits, one on 5 May 2020 and the other on 6 October 2020, there is no explanation as to why the payments received from this municipality were not updated. This flies in the face of her assertion that Ikageng received and will continue to receive R360 000 per month from this Municipality. She rather opted to attach a schedule of average invoices and expenditure from 30 March 2020 to 21 September 2021. Where is the proof of payment for the period February 2020 to September 2020? Only a preview invoice for February 2020 was attached.

[38] She stated that Ikageng entered into a contract with the King Sabata Dalinyebo Municipality and that it would earn R400 000 per month of which R280 000 would be profit. The contract was entered into on 21 February 2020. No payment schedule of any kind is attached to the papers to show the veracity of this assertion. Ikageng was appointed as one of the service providers to read meters at R450 per meter per month. The contract states that:

‘The municipality shall have the right to terminate the agreement without prejudice to any of its other rights upon the occurrence of any of the following cases:

11.1 the commencement of any action for the dissolution and or liquidation of the service provider except for the purpose of the amalgamation or restructuring approved in advance by the municipality;

11.2 the service provider receives a court order to be placed under the judicial management or commence liquidation procedures that are not withdrawn within five days...’

[39] It is clear from the above that the King Sabata Dalinyebo Municipality may terminate the contract at any time. One can only speculate on why such clause was written into the contract if this Municipality knew, at the time of the agreement, that there were steps taken to liquidate the company. It begs the question: was the Municipality told about the pending liquidation proceedings?

[40] The information with regard to the Centlec contracts is also very sketchy. Van der Merwe elaborated the one contract. She stated that the contract was entered into on 10 December 2018. Work commenced in July 2019. She stated that Ikageng was to generate an amount of approximately R2 300 000 a month from the Centlec contract in the course of electrifying approximately 80 to 95 houses per month whenever they are built. Its profit is R1.6m per month. She further stated that Centlec has paid the sum of R7 314 879.44 since the work on the contract commenced for a profit of approximately R5.1m to date. If the contract commenced in July 2019 at R2 300 000 per month, this would translate into 9 months to the date of the 5 May 2020 affidavit.

$R2\ 300\ 000 \times 9 = R20\ 700\ 000.$

The profit would be $R1\ 600\ 000 \times 9 = R14\ 400\ 000.$

Centlec only paid R7 314 879.44. The figures just do not add up.

[41] The other Centlec contract was, inter alia, for the manufacture, supply, delivery, erection, testing and commissioning of 40m high mast lights. As stated above Ikageng is no longer in the business of erecting high mast lights. Van der Merwe does not state how Ikageng would fulfil its obligations with regard to this contract.

[42] The applicants also mention prospective tenders that Ikageng might win. This is purely speculative and no court can attach any weight to such assertions.

- [43] Both ABSA and Voltex have indicated that given the totally poor case made out by the applicants as to the reasonable prospects of rescuing Ikageng or ensuring a better dividend for the creditors, they would not vote in favour of a business rescue plan based on these speculative facts. This will obviously sound the death knell of Ikageng. Given the scant facts, the lack of proper valuations, the down-playing of the liabilities of Ikageng, I do not blame them for taking that stance. Under the circumstances it seems to me to be a reasonable position to take.
- [44] It is true that liquidation would cause suffering to Ikageng's employees. On the facts and circumstances of this matter, it would be imprudent to avoid the inevitable based on the regrettable loss of employment that the workers might suffer. The liquidators might decide to sell Ikageng and thereby save the employees their jobs. If that does not happen, then Mr. Moselane is to be blamed for the situation in which the workers would be. He dissipated the money of Ikageng.
- [45] Liquidations will, in most cases, affect the livelihoods of the workers. On the other hand, the interest of creditors should also be considered. In *BP Southern Africa (Pty) Limited v Intertrans Oil SA (Pty)*[8] the following was said with regards to employees:
- [77] On behalf of the employers it was submitted that the court should prefer business rescue proceedings to the death knell of liquidation. In particular, it was submitted that the cases have preferred business rescue proceedings to liquidation, one of the reasons being that job losses often occur in liquidation. It was accordingly submitted that in this case, where there was a "tussle" as to whether business rescue proceedings or liquidation was the preferred route, the court should opt for business rescue.
- [78] The most recently released national statistics of official unemployment of greater than 27% are, of themselves, hugely disquieting and generally supportive of the employees' argument. Further job losses will not help our challenged economic circumstances.
- [79] The difficulty is that, as is often the case, one is not simply dealing with a case where the choice between the one or the other is evenly balanced. When business rescue will probably not rescue the company, it would be manifestly wrong to perpetuate that state. It is thus unavoidable to engage on the merits of the tussle, and to decide which standpoint is likely correct.
- [80] Where a company is distressed, it is not always the solution to deny principal creditors, without whose preparedness to have extended working capital in the first place the business would not have existed at all, the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts are not prepared to enforce commercial securities, investment, the essential precursor to employment opportunities, will seek other pastures.[9]

- [46] During the business rescue proceedings launched by Mr Moselane, the first and the second applicants filed confirmatory affidavits. They were in league with Mr. Moselane. The first applicant, as the financial manager, knew or ought to have known that Mr. Moselane has a huge loan account. She knew or ought to have known that the company finances are used to pay the debt of the trust. She knew or ought to have known that the company is in a precarious position due to Mr. Moselane's mismanagement.
- [47] She did not explain why she filed the confirmatory affidavit in that business rescue application. She waited until a day before the first business rescue application was dismissed to inform ABSA that Mr. Moselane is mismanaging the company. There is no reason why she could not inform the trade union that Mr. Moselane's conduct were ultimately to the detriment of the livelihoods of the workers. That would at least have given the union an opportunity to consider how to protect the interests of its members, including having Mr. Moselane declared a delinquent director.
- [48] The applicants failed to show that Ikageng can be rescued or that business rescue proceedings might result in a better deal for creditors. In my judgment the application to place Ikageng under supervision and that business rescue proceedings be commenced ought to be dismissed. It follows that the application for Ikageng's winding up ought to succeed.
- [49] This business rescue application has some strange and disconcerting features. The two applicants pretend that this is an arm's length application. The applicants failed to mention Mr. Moselane's inappropriate conduct in their affidavits in favour of the first business rescue application. They now make use of the same attorney who represented Mr. Moselane during the first business rescue application. I agree with Voltex that it is indeed difficult to avoid the inference that this business rescue application was contrived to delay Ikageng's winding up and is an abuse of this Court's process.
- [50] There is no indication that the first and second applicants were authorized by the other employees to institute these proceedings. They both stated that they were authorized to file affidavits on behalf of the employees. The authority to file an application on behalf of somebody is a far cry from authority to launch an application. It would be totally unfair and unjust to mulct the other employees in costs. There is no reason why the applicants should not be ordered to pay the costs of this application.
- [51] I accordingly make the following order:

CASE NO 1580/2020

1. The application that the first respondent, Ikageng Electrical Contractors (Pty) Limited, be placed under supervision and to commence business rescue proceedings is dismissed.

2. The first and second applicants are ordered to pay the costs of Voltex and ABSA Bank, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel where two counsel were employed.

CASE NO 2247/2019

1. The respondent, Ikageng Electrical Contractors (Pty) Limited, is placed under final winding up order. Ikageng,

C.J. MUSI, JP

Appearances:

For the Applicants: Adv. S. Grobler SC

Instructed by Blair Attorneys

Bloemfontein

For the 2nd Respondent: Adv. S. Symon SC with Adv N. Segal

Instructed by Lovius Block

For the ABSA Bank Ltd: Adv. S. Tsangarakis

Instructed by Symington & De Kok

- [1] Section 131 reads as follows: '(1) 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. (2) An applicant in terms of subsection (1) must (a) serve a copy of the application on the company and the Commission; and (b) notify each affected person of the application in the prescribed manner. (3) Each affected person has a right to participate in the hearing of an application in terms of this section. (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 (i) the company is financially distressed; (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a 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 is a reasonable prospect for rescuing the company; or (b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation. (5) If the court makes an order in terms of subsection (4) (a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147. (6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will

suspend those liquidation proceedings until (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for. (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company. (8) A company that has been placed under supervision in terms of this section (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132 (2); and (b) must notify each affected person of the order within five business days after the date of the order.'

[1] Section 131 reads as follows:

'(1) 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.

(2) An applicant in terms of subsection (1) must

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(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

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a 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 is a reasonable prospect for rescuing the company; or

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

(5) If the court makes an order in terms of subsection (4) (a), the court may make a further order appointing as interim practitioner a person

who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.

- (6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until
 - (a) the court has adjudicated upon the application; or
 - (b) the business rescue proceedings end, if the court makes the order applied for.
- (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.
- (8) A company that has been placed under supervision in terms of this section
 - (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132 (2); and
 - (b) must notify each affected person of the order within five business days after the date of the order.'
- [2] Section 128(1)(a) reads as follows: '(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;'
- [2] Section 128(1)(a) reads as follows:

'(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;'
- [3] He owns 90% shares in Ikageng and his wife owns the remaining 10%.
- [4] Section 131 (6) provides: (6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for.
- [4] Section 131 (6) provides:

- [5] Section 128(1)(f) states: '(f) 'financially distressed', in reference to a 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 (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;'
- [5] Section 128(1)(f) states:
- '(f) 'financially distressed', in reference to a 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
- (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;'
- [6] Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd 2013 (4) SA 539 (SCA).
- [7] Ibid paragraphs 29 and 30.
- [8] 2017
- (4) SA 592 (GJ).
- [9] Ibid paras 77 to 80.

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