

SOUTH AFRICA / JUDGMENT

Vengadesan NO and Another v Standard Bank Limited (7415/2017) [2018] ZAKZDHC 59 (30 November 2018) [2018] ZAKZDHC 59

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Steyn

CASE / FILE NUMBER

7415/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU

NATAL LOCAL DIVISION, DURBAN

CASE

NO. 7415/2017

In

the matter between :

ADRIAN
VENGADESAN
N.O. FIRST
APPLICANT
D
& H FLOORING CC (IN BUSINESS
RESCUE) SECOND
APPLICANT
(Registration No. 1993/002084/23)
and
THE
STANDARD BANK
LIMITED RESPONDENT
(Registration
No. 1962/000738/06)

JUDGMENT**STEYN J**

[1] This is a dispute wherein the applicants, the business rescue practitioner and the business in rescue, seek an order directing the respondent (Standard Bank) to make payment of funds held in a bank account with the respondent bank. The respondent in turn has instituted a counter-application seeking an order that the first applicant file a notice to terminate the business rescue proceedings

and that the first applicant pay the costs of the counter-application.

Background

[2] Second applicant is a close corporation that provides flooring and tiling services. Its sole member is Mr Devanand Hurdayal. In March 2016, the aforesaid member was of the opinion that the second applicant was in financial distress but that there were reasonable prospects of rescuing the corporation as ascribed in s 128(1)(h) of the Companies Act 71 of 2008 ('the Act'). After the necessary notice was lodged, the first applicant was appointed as the business rescue practitioner of the second applicant on 4 March 2016.

[3] After a series of intended meetings, the first applicant sent out a notice[1] of a meeting that would be held on 25 May 2016 at Imperative Financial Solutions. The first applicant avers that the respondent

advised him that it would vote in favour of the business plan by proxy, and accordingly the proxy was sent to the respondent's

representative, Vinsen Pillay.

[4] On 19 September 2016 the first applicant sent a letter to the respondent informing it that the funds in the second applicant's

account were required for paying creditors and to continue trading. The respondent acted in accordance with the instruction. However,

when a further sum of R1 million was deposited into the second applicant's bank account, the respondent placed a hold on the money and refused to release it. First applicant claims that the money is needed for trading and hence should be released.

[5] The application is opposed by the respondent. The respondent contends that the business rescue plan has never been approved in terms of s 152 of the Act.[2] Respondent denies that all of the known creditors were notified (see "AV3" and "VP2") or that he received a notice as referred to in "AV13". He requested from the first applicant a copy of the minutes of the said meeting. No minutes were filed as part of the record when the application was heard. It is this lack of proof that forms the basis of the respondent's opposition to the application.

The issues to be considered

[6] The issues that need to be considered are:

- (a) Whether the applicants are entitled to the money in the account held at the respondent bank and whether the business rescue plan was approved?
- (b) In terms of the counter-application, whether ss 151, 152 and 153 of the Act have been complied with. If not, whether the respondent is entitled to its relief?

[7] In relation to the money that was placed on hold, the respondent relied on “S-VP3”[3] which is a banking facility agreement entered into by the second applicant and the respondent. The overdraft facility as per “S-VP3”

was to the amount of R1 700 000. The expiry date of the overdraft was 22 June 2015.[4] In terms of clause 4.2.1.9 of the agreement, the facilities were granted at the respondent’s sole discretion, with the following

condition attached thereto:

‘If there is a Material Deterioration in your financial position we may immediately suspend or withdraw, without notice to you, all or part of the Limit, or Reduced Limit (if applicable), and all amounts owing will immediately become due and payable to us.’

(My emphasis.)

Respondent dealt with the arranged limit in paras 23 to 26[5] of the answering affidavit and the allegations were not disputed by the applicants.[6] In my view the applicants have failed to show that they are entitled to the funds in the account.

Any approval of a business rescue plan?

[8] It is necessary for the determination of the application to consider the content of “AV13”,[7] the letter that was sent to all known creditors on 19 May 2016:

‘1. We refer you to the notice of appointment of the Business Rescue Practitioner transmitted on the 11 March 2016

2. You are hereby notified in accordance with section 151 of the companies act 71 of 2008 (as amended), that the business rescue

practitioner of the close corporation D and H Flooring has convened a meeting of creditors.

3. The appointed business rescue practitioner will be presiding over the second meeting of creditors of D and H Flooring to be held at the following time and place.

Date : 25 May 2016

Venue : Imperative Financial Solutions

47 Victoria Embankment

3rd Floor Harbour View

Durban Central

Time : 11:00.

4. Agenda for the meeting of creditors

4.1 Introduction to the proposed business rescue plan for consideration by creditors

4.2 Business Rescue Practitioners opinion of the prospect of business rescue

4.3 Employees, creditors and representatives to address any concerns at the meeting

4.4 Invite discussion, and conduct a vote on any motions to :

- Amend the proposed business rescue plan
- Vote in favour of the proposed business rescue plan

4.5 Close meeting.'

[9] The development and approval of a business rescue plan is dealt with in terms of s 150(1) to 150(5) of the Act. An analysis of the subsections shows that sufficient information needs to be provided so as to enable the creditors to make informed decisions. In my view s 152 of the Act stipulates what should happen at the meeting where the business rescue plan is considered:

'(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees' representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to –

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or

(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).

[10] The respondent in its answering affidavit challenges the fact that the business rescue plan has been approved. In its opposition of the plan being adopted in accordance with the Act, respondent states the following:

'51.

As has already been pointed out herein, the First Applicant has never acquiesce (sic) to the Respondent's requests to provide it with a copy of the minutes of the alleged meeting that was held on the 29th of May 2016, nor has the First Applicant provided it with proof that the provisions of section 152 (and if applicable, section

153) of the companies act have been complied with.

52.

It is respectfully submitted that, in order for the proposed business plan to have been properly approved, the provisions of section 152

(1) and (2) would have to have been complied with. If they were not, the proposed business plan would not have been approved on a preliminary basis, would be deemed to have been rejected, and could then only have been considered further in terms of section 153 of the act.

53.

If no person took any action as contemplated in subsection 153 (1) of the companies act, the First Applicant would be obliged to file a notice of termination of the business rescue proceedings, in accordance with the provisions of section 153 (5) of the companies

act.[8]

[11] First applicant in its replying affidavit makes a bold statement that the plan was approved in accordance with s 152 of the Act and claims that all other creditors had voted in favour of the plan being adopted.[9] No minutes of such meeting or the outcome of the meeting are put up in support of the first applicant's contention. It is evident from s 152 of the Act that a formal meeting is required where various stakeholders, namely employees and known creditors, will have an opportunity to address the meeting, exercise their rights to vote or request an adjournment of the meeting so that a revised plan may be presented if needed. All of the aforesaid, in my view, requires detailed minutes to show statutory compliance. None of that has been submitted by the first applicant.

[12] At para 11 of the first applicant's replying affidavit, he states the following:

'VINSIN on or about the 23rd of June 2016 forwarded a further email to me, a copy of which is annexed hereto marked "AV3" requiring further amendments.

On the 1st of July 2016 I sent an email to VINSIN and in terms of which I advised that the business plan had been amended as requested by him, a copy of same is annexed hereto marked "AV4". On the 27th of July 2016 I sent an email to VINSIN and forwarded a copy of the ballot sheet to him, a copy of which is annexed hereto marked "AV5". On the 24th of November 2016 I sent an email to the Respondents (sic) legal representative advising him that Standard Bank had agreed to adopt

the business rescue plan providing certain requirements were met and which were in fact adhered to, and that we were still awaiting the proxy vote, a copy of the email is annexed hereto marked “AV6”.[10]

(My emphasis.)

[13] The aforesaid paragraph contradicts the first applicant’s averment in para 9 of the same affidavit that the business rescue plan has been adopted:

‘The plan has been approved pursuant to the provisions of Section 152 of the Companies Act No 71 of 2008. VINSIN had flatly refused to return his proxy vote and as a result voting closed. The fact that he didn’t cast his vote does not mean that that amounted to a no vote. All other creditors voted in favour of the plan being adopted. I have in terms of Section 132 (3) (a) and (b) prepared and delivered reports on the progress of the business rescue proceedings.’[11]

[14] First applicant then relies on “AV6” in support of his contention that the respondent agreed to adopt the plan. “AV6” is an email that was sent to the legal representative of the respondent on 24 November 2016. Para 2 of the email reads:

‘Please note that there is no proxy vote from Standard Bank voting against the business rescue plan. If Standard Bank was not happy with the plan they were given an opportunity to vote against the plan. If Standard Bank did not vote

for or against the business rescue plan then we can assume that the bank have wavered their right to vote.’[12]

[15] If what the first applicant claims is true, then there would be no need to speculate about the vote of the respondent or be concerned about any objection because the minutes will reflect the conduct of the respondent. This letter does not support the averment made by the first applicant.

[16] On application of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[13] it is required of me to examine the undisputed averments of the first applicant together with the averments made by the respondent.

Evidently, the bald allegation of the first applicant is so implausible in the absence of any proof of the meeting where the proposed plan was adopted, that it warrants rejection on the papers.[14] The applicants have failed to establish grounds for the relief sought.

[17] Respondent, however in its counter-application argued that the failure of the first applicant to submit proof of the adopted

business rescue plan must lead to the logical inference that the plan was never approved on a preliminary basis as determined by the Act. This court can therefore safely infer that the plan was rejected in terms of s 152(3)(a) of the Act. It would therefore be proper for this court to direct the first applicant to file a notice of termination of the business

rescue proceedings pursuant to the provisions of s 153(5) of the Act.[15]

[18] Counsel acting on behalf of the first applicant argued that this court should in the absence of a replying affidavit filed by the respondent, accept the version of the first applicant, i.e. that the business rescue plan has been approved in terms of s 152 of the Act.

[19] The application and counter-application cannot in this instance be decided in isolation. I have found in the preceding paragraphs that the business rescue plan has not been adopted and have given my reasons for rejecting the first applicant's version that there was compliance with s 152 of the Act. The full court in this division in *Cypress Entertainment CC & another v Interactive Trading 269 (Proprietary) Limited & another*[16] succinctly stated that factual averments can seldom stand in isolation from the matrix of circumstances which require consideration in arriving at a specific decision.[17]

[20] Once the finding has been made that there was a failure on the part of the first applicant to comply with the Act, it follows that the business rescue proceedings have to come to an end. [18] In the light of this finding the respondent would be entitled to the relief sought.

[21] Accordingly it is ordered:

- (a) The first and second applicants' application is dismissed.
- (b) The counter-application succeeds and the first applicant is directed to file a notice of the termination of the business rescue proceedings in respect of the second applicant, forthwith.
- (c) First and second applicants are directed to pay the respondent's costs jointly and severally, the one paying the other to be absolved.

Application heard on:

22 August 2018

Counsel for the first

and second applicants:

Mr SM Alberts

Instructed by:

V Chetty Inc.

Counsel for the respondent:

Mr IL Topping SC

Instructed by:

Garlicke & Bousfield Inc.

Judgment

handed down on:

30 November 2018

[1] See “AV13” a letter dated 19 May 2016.

[2] I consider the following subsections most relevant: ‘152 Consideration of business rescue plan

(1) At a meeting convened in terms of section 151, the practitioner must –

(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees’ representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to –

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors’ voting interests, and satisfactory to the practitioner; or (ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).

(2) In a vote called in terms of subsection (1) (e), the proposed business rescue plan will be approved on a preliminary basis if –

(a) it was supported by the holders of more than 75% of the creditors’ voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors’ voting interests, if any, that were voted.’

[2] I consider the following subsections most relevant:

‘152 Consideration of business rescue plan

(1) At a meeting convened in terms of section 151, the practitioner must –

(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

- (b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;
 - (c) provide an opportunity for the employees' representatives to address the meeting;
 - (d) invite discussion, and entertain and conduct a vote, on any motions to –
 - (i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or
 - (ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and
 - (e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).
- (2) In a vote called in terms of subsection (1) (e), the proposed business rescue plan will be approved on a preliminary basis if –
- (a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and
 - (b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.'
- [3] Pages 181-191 as per the supplementary affidavit filed on 13 August 2018.
- [4] Clause 4.2.1.12. This clause should however be read with clause 4.5 which provides for a review of the present facility by no later than 22 May 2015.
- [5] Pages 151-152.
- [6] Pages 251-252.
- [7] Page 88.
- [8] Pages 162-163 paras 51 to 53.
- [9] Page 245 para 9.
- [10] Page 246.
- [11] Page 245.
- [12] Page 276.
- [13] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
- [14] See *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & another* 2011 (1) SA 8 (SCA) para 19 endorsing a so-called robust approach.

[15] Section 153(5) of the Act reads: ‘If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings.’

[15] Section 153(5) of the Act reads:

‘If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings.’

[16] *Cypress Entertainment CC & another v Interactive Trading 269 (Proprietary) Limited & another* AR204/2013 [2015] ZAKZPHC 31 (19 June 2015).

[17] *Ibid* para 15.

[18] See s 153(1)(a) of the Act that regulates the proceedings when a business rescue plan has not been adopted.

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