

SOUTH AFRICA / JUDGMENT

Veramoothea v Le-Nash International Investments (Pty) Ltd (Orafol Safety Systems (Pty) Limited and Orafol Europe GmbH (Intervening)) (40352/2016) [2017] ZAGPPHC 380 (2 June 2017)

[2017] ZAGPPHC 380**COURT**

North Gauteng High Court, Pretoria

BEFORE

Tuchten

CASE / FILE NUMBER

40352/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 40352/2016****DATE:**

02/06/17

In

the matter between:

SOUNDRAJEN

MOOTHSAMMY

VERAMOOTHEA

Applicant

and

LE-NASH

INTERNATIONAL INVESTMENTS (PTY) LIMITED

Respondent

ORAFOL

SAFETY SYSTEMS (PTY) LIMITED

First Intervening Party

ORAFOL

EUROPE

GmbH

Second Intervening

Party

JUDGMENT

Tuchten J:

1 The applicant, the sole director of and shareholder in the respondent (the Company), applies to have the Company placed under supervision, for business rescue proceedings to commence in terms of s 131(1) read with s 131(4)(a) of the Companies Act, 71 of 2008 (the Act) and for the appointment of an interim business rescue practitioner to the Company. I shall call the applicant's application the business rescue application. All references in this judgment to sections in a statute are to the Act unless otherwise stated.

2 The Company itself does not oppose the application. It is however opposed by the two intervening parties, who are related companies. Their position is that the business rescue application is a stratagem designed to stave off liquidation and to frustrate the intervening parties in the enforcement of their claims against the Company. The intervening parties say that the Company is insolvent and has no genuine prospect of being rescued. On that footing, the intervening parties ask for leave to intervene, if such leave is necessary, and a liquidation order under s 131(4)(b).

3 There are in fact already liquidation proceedings pending and unopposed. The first intervening party brought an application to wind up the Company in the Johannesburg High Court by notice of motion dated 18 March 2016 under case no. 09859/2016. The case in the Johannesburg High Court could not proceed because the present application for business rescue was brought in this court by notice of motion dated 19 May 2016 and s 131(6) suspends liquidation

proceedings pending, inter alia, the adjudication of the business rescue application.

4 The application to intervene was not opposed. Counsel for the applicant and the intervening parties both accepted that if the business rescue application failed, liquidation at the instance of the intervening parties must follow. So the question is whether the business rescue application should succeed.

5 A court may uphold a business rescue application if certain

jurisdictional prerequisites identified in s 131(4) of the Act are present and, in addition, "there is a reasonable prospect of rescuing the company". The prerequisites that the company be financially distressed and has failed to pay its debts are present. The issue is whether the Company can be rescued.

6 "Rescue" in this context means in the language of s 128(1)(b)(iii) 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.

7 The discretion conferred on the court by s 131(4) requires a value judgment. The "reasonable prospect" contemplated by the section is a lesser requirement than reasonable probability but requires more than a mere prima facie case or arguable possibility. It must be based on reasonable grounds. A mere speculative suggestion is not enough. The applicant must establish these grounds within the ordinary rules of motion proceedings. This means that the applicant must place before the court a factual foundation that there exists a reasonable prospect that the desired object can be achieved.[1]

8 In his founding affidavit, the applicant asserted that as at 19 May 2016 (the date on which the founding affidavit was signed) the Company had assets of value more than R31 million against liabilities of some 29 million. He excluded from these liabilities the sum of nearly R6.5 million for loans made to the Company by the intervening parties on the absurdly flimsy and unsubstantiated basis that he "disputes the validity" of the working capital loan agreement under which the loans were made. Counsel for the applicant could not advance any basis upon which it might be said that the Company did not owe this amount to the intervening parties.

9 But the Company's unaudited financial statements for the years ending 31 December 2015 and 2016 are before me. In those statements, total assets as at 2015 were stated to be some R21 million against total liabilities of R32 million. The comparable figures for 2016 are assets of R12 million against liabilities of R27,5 million. The discrepancies were not explained.

10 The applicant does not suggest that there exists a commitment to inject capital. But he does say that the Company has secured lucrative contracts to the value of some R168 million. Including

contracts from the North West Province and the Gauteng Province. But those contracts, whose face revenue value amounts to some R145 million, were awarded to the Company in joint venture with a party only identified as Kingsway Signs. It is not said what percentage of the venture will accrue to the Company and, more importantly, whether any portion of the new work will constitute profit in the hands of the Company and, if so, how much.

11 In addition, the applicant claims that the Company will achieve savings because it has succeeded in obtaining its raw materials at prices which are lower than was previously the case. But in the income statements forming part of the financial statements the cost of sales for 2015 is given as R37,5 million on revenue of R64,2 million (58%) as against cost of sales for 2016 of R23 million on revenue of R44,1 Million (52%). This is not a significant difference in the context of the case.

12 The financial statements show a total loss for 2015 of R6,3 million and a total loss for 2016 of R3,5 million. Contributing to the reduced loss was income of some R600 000 from the sale of assets. In addition, a notional tax liability of over R1 million was included as reducing the loss. But the Company had no taxable income for 2016 and neither paid nor became liable for tax. So when the sale of assets and the notional tax liability are removed from the account the reduction in the loss sustained year on year from 2015 to 2016 is only some R1 million on revenue which had equivalently dropped by R20 million.

13 The applicant has put up what he describes as a business rescue plan. But it is no plan at all. It is merely an aggregation of Excel slides cut and paste for the purpose. For example, in item iii on p18 of the plan, it is declared that "No agreements will be cancelled and the Company will use the remaining funds to invest in new properties and continue its operations, albeit on a smaller scale".

14 But the business of the Company is that of a signage manufacturer,

supplying road signs and general signage, not an investor in properties. And the case sought to be made on behalf of the Company is that it will increase its operations, not reduce them.

15 The only attempt at a forecast in the plan is a spreadsheet at p25 of the plan. With no explanation of how the figures are derived, the plan asserts that the Company will generate operating surpluses for the years December 2016 to December 2020 beginning at R200 000 and rising to R575 000 in 2019. But the actual figures demonstrated by the financial statements show that the Company, far from generating an operating surplus as at December 2016, showed a loss for the year of over R3,5 million.

16 The plan, which was not confirmed under oath by its author, Mr MT Tayob, is therefore quite valueless as a demonstration that there is a reasonable prospect that the Company can ever be turned around to show a profit year on year. That being the case, there is no reasonable prospect of an increased dividend to creditors being produced by the proposed business rescue. Because the Company will continue to sustain losses, the potential dividend can only get smaller. Perhaps the dividend will get smaller year by year at a slower rate than has up till now been the case. But that cannot satisfy the requirements of the measure. Even more remote is the prospect that the Company can be returned to solvency in the foreseeable future.

17 This is enough to determine the fate of the application but there are some alarming features of the applicant's case which cast strong doubts on the bona fides of the application. The first is the feeble and apparently dishonest attempt to deny the liability of the Company for the loans made to it by the intervening parties. If the applicant has been dishonest on this score, why should one trust the accuracy of his bookkeeping in general?

18 The second alarming feature is that as at December 2015, the financial statements show that the Company owed R2,8 million to associated entities. The equivalent entry for 2016 shows that the Company repaid these loans during 2016. It paid its associates at a time when the Company could not pay its trade creditors and suffered from what the applicant calls "severe cash flow shortages".

19 As the business rescue application must fail, I considered whether a provisional or a final order of liquidation should issue. I see no benefits to be gained from issuing a provisional order. Counsel for the intervening parties moved for a final order and no argument was addressed by counsel for the applicant in opposition to this request.

20 The question of costs was not argued. If either side is dissatisfied with the costs order I propose to make, the issue may be set down for argument.

21 I make the following order:

1 The application to place the respondent under supervision and for business rescue proceedings to commence is dismissed.

2 The application by the intervening parties for leave to intervene in the business rescue application is granted.

3 The respondent is hereby placed under liquidation pursuant to the provisions of s 131(4)(b) of the Companies Act, 71 of 2008.

4 The costs of the business rescue application and the application to place the respondent under liquidation incurred by the intervening parties, on the scale as between attorney and client, will form costs in the liquidation of the respondent.

5 The preceding costs order is provisional. If any party is dissatisfied with the costs order it may be set down for reconsideration before a judge in chambers within ten days after this judgment is handed down, failing which the costs order will become final.

NB Tuchten

Judge of the High Court

2 June 2017

VeramoothealeNashOrafo4l 0352 16

[1] Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 4 SA 539 SCA paras 18-21 and 29

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/380.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/veramoothea-v-le-nash-unknown-topic-agpphc-2017>

Prepared on 25 October 2026 · Esheria