

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION – EAST LONDON**

Case no EL : 926/2016  
GHT: 2226/2016

In the matter between:

**AL MAYYA INTERNATIONAL LIMITED (BVI)**  
(Formerly **AL MAYYA SOUTH AFRICA LTD (BVI)**)

**APPLICANT**

AND

**VALLEY OF THE KINGS THABA MOTSWERE  
PROPRIETARY LIMITED** (Reg no: 2008/012149/7)  
Carrying on business at **THABA MTSWERI, THABAZIMBI**)

**1<sup>ST</sup> RESPONDENT**

**THABA MOTSWERE GAME FARM (PTY) LTD**

**2<sup>ND</sup> RESPONDENT**

**THE COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION**

**3<sup>RD</sup> RESPONDENT**

**PHILLIPUS JACOBUS MOSTERT**

**4<sup>TH</sup> RESPONDENT**

**THE FIRST RESPONDENT'S EMPLOYEES**

**5<sup>TH</sup> RESPONDENT**

**FIRSTRAND BANK LIMITED**

**6<sup>TH</sup> RESPONDENT**

**GOVERNMENT OF FUJAIRAH**

**7<sup>TH</sup> RESPONDENT**

**SOUTH AFRICAN REVENUE SERVICES**

**8<sup>TH</sup> RESPONDENT**

**MINISTER OF TRADE AND INDUSTRY**

**9<sup>TH</sup> RESPONDENT**

**REASONS FOR ORDER**

**SMITH J:**

[1] The applicant brought an urgent application on 31 August 2016 for an order in terms of section 18 (3) of the Superior Courts Acts, 10 of 2013 ("the Act"), directing that paragraphs (a), (b) and (c) of my order, delivered on 23 August 2016, are not suspended pending the decision of the application for leave to appeal filed by the first and fourth respondents, or any subsequent appeal.

[2] The application was, as a result of a directive issued by me, heard in the Grahamstown High Court. The respondents were not represented at the hearing despite the fact that they had been given due notice.

[3] After hearing argument by Mr *Woodland SC*, who appeared for the applicant, I granted the order on 1 September 2016 and indicated that my reasons would follow. I now provide the following brief reasons for my decision.

[4] The applicant contended that if the business rescue order were not carried into effect, it would in all probability result in the winding up of the company at the instance of the Government of Fujairah. Since there is no conceivable defence to such an application, and the moratorium provided for in Chapter 6 of the Companies Act, 71 of 2008 ("the Companies Act") would not avail the company any longer, the interests of all the stakeholders, including shareholders and creditors, would be undermined.

[5] Section 18 of the Act provides as follows:

**"18. Suspension of decision pending appeal**

"(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[6] The applicant was accordingly required to establish that:

- (a) there were exceptional circumstances present; and
- (b) there is no likelihood that the respondents will suffer irreparable harm if the application is granted; and
- (c) there is likelihood that the applicant will suffer irreparable harm if the relief is not granted. (*Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* 20806/2013 [2016] delivered on 1 April 2016)

[7] During business rescue proceedings a financially distressed company is accorded wide-ranging protection. By way of example, in terms of section 133 of the Companies Act no legal proceedings (including enforcement actions) in relation to any property belonging to the company or in its lawful possession, may be commenced or proceeded with except, *inter alia*, with the written consent of the business rescue practitioner or the leave of the court. In addition, any surety or guarantee in favour of any other person may not be enforced by any person against the company except with the leave of the court. One of the objectives of the Companies Act is "to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the

rights and interests of all relevant stakeholders.” (Section 7(k) of the Companies Act)

[8] The noting of the application for leave to appeal has, in terms of section 18 of the Act, suspended the commencement of the business rescue proceedings and the protections accorded to the company in terms of Chapter 6 of the Companies Act. The company is thus left vulnerable and at the mercy of the Government of Fujairah (and other creditors), and its liquidation appears imminent. This state of affairs can by no stretch of the imagination be in any of the stakeholders’ interests.

[9] Mr *Woodland* has correctly submitted that if the applicant had instead instituted liquidation proceedings, a provisional order would not have been appealable and the noting of an application for leave to appeal against a final order would not have suspended the operation of the order. (Section 339 of the 1973 Companies Act, read with section 150 (3) of the Insolvency Act 24 of 1936)

[10] There can be little doubt that the policy considerations which underpin the abovementioned legal provisions in respect of a liquidation order are equally apposite to business rescue proceedings. The fact that an aggrieved party can, by virtue of the mere filing of an application for leave to appeal, suspend the implementation of business rescue proceedings and thereby nullify the wide-ranging protection accorded to a financially distressed company, must self-evidently weigh heavily with a court when considering whether exceptional circumstances as contemplated by section 18 (1) of the Act exist in a particular case. For the reasons that I have stated in my judgment in the main application,

there are reasonable prospects that the implementation of a business rescue plan will not only result in full settlement of creditors' claims, but will also ensure that the company continues to trade profitably. It can thus hardly be contended that to allow the alternative, namely liquidation, can conceivably benefit any of the stakeholders. I was accordingly satisfied that exceptional circumstances existed for the granting of the order.

[11] It is also self-evident from the foregoing that the applicant, the company and its creditors will suffer irreparable harm if the relief is not granted. It is manifest that the company is presently unable to pay its debts. For the reasons that I have stated in my main judgment, it is thus commercially insolvent and liable to be wound up should the Government of Fujairah proceed with its declared intention to institute liquidation proceedings. The latter has already delivered a notice in terms section 345 of the 1973 Companies Act, and I am constrained to accept that its threat to institute liquidation proceedings is indeed a serious one. As I have mentioned earlier, the company will have no defence against such an application. The resultant winding up of the company will no doubt have deleterious consequences for shareholders, creditors and employees alike.

[12] It is also manifest, for the same reasons, that there is no likelihood that the respondents will suffer irreparable harm if the relief is granted. The parties were *ad idem* that there are reasonable prospects that the company can be rescued, albeit that the respondents contended that the current management are quite capable of achieving those objectives themselves. There was even substantial agreement as to how that can be achieved, namely through the

responsible sale of selected animals, without compromising the company's core business.

[13] For the reasons which I have stated in my main judgment, I do not believe that the objectives of the business rescue can be achieved under the present management. In addition, in terms of section 137 of the Companies Act, Mostert will continue to exercise the functions of a director, albeit subject to the authority of the business rescue practitioner.

[14] I was accordingly satisfied that the applicant had made out a case for the relief sought in terms of section 18 of the Act and consequently granted the order.

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**J.E SMITH**  
**JUDGE OF THE HIGH COURT**

Appearances:

Counsel for the Applicant	:	Mr. S Woodland SC
Assisted by	:	Mr C Cutler
Attorneys for the Applicant	:	Gillian & Veldhuizen Inc. Suite B6, Westlake Square Westlake Drive Cape Town Micarle Van Heerden <a href="mailto:micarle@gvinc@law.co.za">micarle@gvinc@law.co.za</a> <b>C/O</b> Squires-Smith & Laurie Inc. 67 Beach Road Nahoon East London <a href="mailto:mandy@squires.co.za">mandy@squires.co.za</a>
Attorneys for the Respondents	:	Gravett Schoeman Inc. Bonza Road Beacon Bay East London Ian Theophilus ( <a href="mailto:ian@gslegal.co.za">ian@gslegal.co.za</a> )
Date Heard	:	31 August 2016
Date Delivered	:	15 September 2016