REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case number 2011/35891

Date:06/02/2012

In the application between

A G Petzetakis International Holdings Limited	Applicant
and	
Petzetakis Africa (Pty) Ltd	1st Respondent
Sasol Polymers , a division of Sasol Chemicals Industries Ltd	2nd Respondent
Emeraude International	3rd Respondent
Germani Transport (Pty) Ltd t/a Heavy Haulage	4th Respondent
South African Pipe Manufacturers CC	5th Respondent
Engen Petroleum Ltd	6th Respondent
Marley Pipe Systems (Pty) Ltd	1st Intervening Party / Applicant for liquidation
NUMSA	2nd Intervening Party

Judgment by JP Coetzee AJ

BACKGROUND AND THE PROCEEDINGS DEALT WITH HEREIN

1. I will refer to the parties by name. A G Petzetakis International Holdings Limited ("Petzetakis Holdings") is the shareholder of Petzetakis Africa (Pty) Ltd (Petzetakis Africa"). The latter is clearly in financial trouble and unable to pay its debts. In rounded off figures, its assets are worth some R60 million. Its liabilities amount to some R225 million. It ceased trading in 2010. It ceased paying its employees since the middle of 2011. The rescue application presently to be referred to was preceded by the commencement of litigation against Petzetakis Africa which included liquidation applications against Petzetakis Africa amongst others by Sasol Polymers. It was also preceded by a failed attempt to compromise the debts due by Petzetakis Africa.

2. In September 2011 Petzetakis Holdings applied on an urgent basis for an order placing Petzetakis Africa under business rescue as contemplated in Chapter 6 of the Companies Act 71 of 2008 ("the rescue application"). On 23 September 2011 Coppin J struck that application from the roll for lack of urgency. After the delivery of further papers that application came before me on 03 February 2012 as an ordinary application.

3. Sasol Polymers, a creditor of Petzetakis Africa in an amount of some R32 million, was cited as a respondent in the rescue application and opposes that application. Their preceding liquidation application was also before me on 03 February 2012. Marley Pipe Systems (Pty) Ltd ("Marley") is a creditor of

Petzetakis Africa. When the papers were filed, their concurrent claim amounted to some R45 million. They were not cited as a respondent in the rescue application and sought to intervene in the rescue application. Marley counter applies for the liquidation of Petzetakis Africa. Marley is attempting to acquire the business or all or some of the assets of Pertzetakis Africa by inter alia acquiring claims against it. Emeraude withdrew its involvement. It was disclosed to me that, after the filing of papers, their claim was been acquired by Marley. Like Marley, NUMSA also sought to intervene in the rescue application. Unlike Marley, NUMSA sought a postponement. Petzetakis International also sought a postponement of the rescue application. Marley and Sasol Polymers opposed the applications for postponement and moved for provisional liquidation orders.

4. Marley and NUMSA are 'affected persons' as defined in section 128(1)(a) of the Companies Act. Marley is a creditor. NUMSA is a registered trade union which represents employees. In my view it follows that they have an automatic right to participate in the proceedings (without the need for an order authorising them to do so) in terms of section 130(4) of the Companies Act which provides that:

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

This view accords with the following remarks of Owen Rogers AJ in Cape Point Vinyards (Pty) Ltd v Pinnacle Point Group Ltd and Others 2011 (5) SA 600 (WCC):

"[21] … I do not think the legislature contemplated that an affected party would have to apply for leave to intervene in the proceedings. If the person is an "affected

person" such person has a right to participate in the hearing. If the person wishes to file affidavits, the court will obviously need to regulate the procedure to be followed to ensure fairness to all concerned. "

In Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others (33401/11 [2011] ZAGPHC 148 (23 September 2011) [30] Boruchowitz J held that

"Engen, as an affected person, has a right to participate in the hearing of an application in terms of s 131(1) of the Act. It would not require leave of the Court to intervene. Such leave may, however, be necessary as a procedural requirement. …"

Following the approach of Boruchowitz J and in the absence of any objection thereto I made an order allowing the intervention of NUMSA and Marley.

5. The postponement applications were then argued. The arguments lasted the whole of the Court day of Friday, 03 February 2012 until well after 16:00. Notwithstanding the late hour, the parties urged me to refrain from reserving judgment. I obliged. The reservation of judgment in a postponement application late on a Friday afternoon in effect constitutes the granting of the postponement. The application roll of this Court runs on a weekly basis until the last Court day of a given week. If I reserved judgment until the next Monday (as I was originally minded to do), that would inevitably have resulted in the matter being heard on a later date, even if I refused the applications for postponement.

6. I refused the postponement applications with costs. The late hour precluded me from providing reasons. I now do so.

DISCRETION TO POSTPONE

7. Van der Westhuizen J held as follows in Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae) 2007 (5) SA 620 (CC) (footnotes omitted):

“[10] It was made clear in National Police Service Union that the question is whether it is in the interests of justice for a postponement to be granted by this Court. A postponement cannot be claimed as of right. The party applying for postponement must therefore show good cause that one should be granted. The factors to be taken into account include -

'whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed'.

[11] In Lekolwane and Another v Minister of Justice and Constitutional Development this Court added the following factors to be considered in granting a postponement: (1) the broader public interest; and (2) the prospects of success on the merits. The following factors could non-exhaustively be added to the above: the reason for the lateness of the application if not timeously made; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that ultimately must be decided. In balancing these factors it is of vital importance to keep in mind that -

'(w)hat is in the interests of justice will . . . be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more

time, but account will also be taken of the need to have matters before this Court finalised without undue delay.'

[12] A standard way to mitigate prejudice to other parties is for the party asking for the court's indulgence to postpone a hearing - particularly one requested at the last minute - to offer, or to be ordered, to pay the costs of the postponement."

8. The factors now to be dealt with are particularly applicable in the present applications for postponement.

BUSINESS RESCUE

9. Section 131(4) of the Companies Act created the Court's power to make an order aimed at the rescue of a company and provides as follows:

"(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."

10. The definition of ‘business rescue’ in section 128(1)(b) of the Companies Act is:

“(b) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(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;”

11. The phrase of section 128(1)(b)(iii) constitutes an important element of the argument on behalf of NUMSA. In summary, I understand that part of the argument to be this:

    1. In terms of the definition in section 128(1)(b) 'business rescue' means proceedings to facilitate the rehabilitation of a company by providing for (i) temporary supervision, (ii) a temporary moratorium and (iii) the development of a rescue plan aimed at restructuring the company to enable it:

a) to continue its existence on a solvent basis or,

b) if that object cannot be achieved, to result in a better return for creditors or shareholders than would result from immediate liquidation. I will refer to this as the 'alternative object'.

2. Anderson Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective [2008] Potchefstroom Electronic Law Journal 4 says that Australian Courts on occasion utilised the Australian equivalent of the alternative object to assist in interpretation of sections their rescue provisions. They accepted that it is possible to use rescue procedure despite there being no intention to have the company or its business survive. They considered the alternative object a worthwhile goal in itself so as to justify rescue in preference to moving directly into a liquidation.

3. The argument on behalf of NUMSA is that further evidence of Petzetakis Holdings may demonstrate a prospect of continued existence of Petzetakis Africa, but the prospect that the alternative object will be achieved is more realistic.

12. In my view the status of the alternative object in the South African Companies Act depends primarily on an interpretation of that Act. The creation of the alternative object will probably give rise to more litigation. It is, for example, strange to create an object for a new remedy in a definition section. More importantly, it difficult to understand the reason behind the disjunctive reference to creditors or shareholders and the absence of a reference to employees in that definition. For present purposes this difficulty does not matter: The employees have not been paid their remuneration for a number of

months. Even if the exclusion of employees from the alternative object in section 128(1)(b) is deliberate, the employees in the present case also qualify as creditors to the extent of their unpaid remuneration. I proceed on the basis that the employees, represented by NUMSA, are entitled to the benefits of section 128(1)(b).

PROSPECTS OF ACHIEVING THE OBJECTS OF RESCUE

13. The granting of a rescue application predates the rescue plan. The future rescue plan and its alternative object are certainly factors which must be borne in mind when the rescue order is under consideration. For example, if an achievable draft rescue plan which has substantial support is provided at the time of the Court application for the rescue order that will improve the prospects of the application. But the absence of a final plan at the Court application phase will not necessarily be fatal to the application. At the time of the Court application, the provision which is directly relevant is section 131. That section is the source of the Court's power to make a rescue order. On my interpretation of section 131(4)(a) the prerequisites for a rescue order are that:

    1. Any one of sub-sections (i), (ii) or (iii) must be fulfilled; and

    2. The Court must be satisfied that there is a reasonable prospect of rescuing the company concerned.

14. The requirement for a reasonable prospect of rescuing the Company must be present, irrespective of which of sub-sections (i), (ii) or (iii) is applicable. This interpretation is based on these grounds.

15. Firstly this interpretation is supported by the form and wording of the section as it appears in the Government Gazette. The following word of warning is required on this point:

    1. The quoting of section 131 herein above accords with the form of that section as it appears in Government Gazette 32121 of 9 April 2009, and in publications such as the English version of Butterworths Statutes of the Republic of South Africa-Companies (the well known maroon loose leave books).

    2. The LexisNexis pocketsize 'Companies Act 71 of 2008 … Updated May 2011' and the Afrikaans version of Butterworths Statutes are different. In those publications the form of section 131(1)(a) indicates that the requirement that there must be a reasonable prospect for rescuing the company is limited to section 131(4)(a)(iii). They respectively incorporate the words

"… and there is a reasonable prospect for rescuing the company; or …"

and

"… en daar 'n redelike vooruitsig is dat die maatskappy gered kan word; of"

as part of subsection (iii).

    3. I accepted the version as in the Government Gazette as correct.

16. The second reason why I hold that the requirement for a reasonable prospect of rescuing the Company must be present, irrespective of which of sub-sections (i), (ii) or (iii) is applicable is that an interpretation that the second

requirement only needs to be present if sub-section (iii) is relied upon would be illogical: On such an interpretation a financially distressed company and a company which failed to pay its debts could be placed under rescue irrespective of the prospects of their recovery. Yet, a company which requires rescue for other just and equitable reasons of a financial nature can only be placed under rescue if there is a reasonable prospect of its recovery.

17. Section 131(4) does not incorporate the alternative object of the (at the section 131 stage future) rescue plan which is referred to in section 128, namely a plan which could result in a better return for creditors or shareholders than would result from immediate liquidation. It seems that the intention of the legislature on this point is as follows:

    1. The requirements for the granting of a section 131 rescue order include that the company under consideration must have a reasonable prospect of recovery.

    2. Once a company is under business rescue, its rescue plan may be aimed at the alternative object, namely a better return than the return of immediate liquidation.

18. To the extent that the alternative purpose may be sufficient at the time of the section 131 application, the likelihood of that purpose being achieved must appear from the founding papers. Eloff AJ said in Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd (15155/2011) [2011] ZAWCHC 442 (25 November 2011) is not addressed in the postponement applications:

“23. Reverting to the instant case, ... But, more importantly, there is, on the vague and undetailed information before me, no reason to believe that there is any prospect of the business of the respondent being restored to a successful one. There is not even a concrete plan available for consideration … .

24. Whilst every case must be considered on its own merits, it is difficult to conceive of a rescue plan in a given case that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company's business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice. One would expect, at least, to be given some concrete and objectively ascertainable details going beyond mere speculation in the case of a trading or prospective trading company, of:

24.1. the likely costs of rendering the company able to commence with its intended business, or to resume the conduct of its core business;

24.2. the likely availability of the necessary cash resource in order to enable the ailing company to meet its day-to-day expenditure, once its trading operations commence or are resumed. If the company will be reliant on loan capital or other facilities, one would expect to be given some concrete indication of the extent thereof and the basis or terms upon which it will be available;

24.3. the availability of any other necessary resource, such as raw materials and human capital;

24.4. the reasons why it is suggested that the proposed business plan will have a reasonable prospect of success.

25. In relation to the alternative aim referred to in section 128(b)(iii) of the new Act, being to procure a better return for the company's creditors and shareholders than would result from the immediate liquidation thereof, one would expect an applicant for business rescue to provide 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. It is difficult to see how, without such details, a Court will be able to compare the scenario sketched in the application with that which would obtain in an immediate liquidation of the company. Mere speculative suggestions are unlikely to suffice."

19. None of the parties (correctly so) argued that the papers in the rescue application demonstrate that either of the two objects referred to in section 128(1)(b)(iii) is achievable. The papers certainly do not demonstrate the existence of a reasonable prospect that Petzetakis Africa can successfully be rescued. On the contrary, the founding affidavit paints the picture of a company which is beyond rescue unless it receives a large financial injection and there is no indication of a reasonable probability that such a financial injection will be received. The papers also do not demonstrate a reasonable

prospect of a rescue plan which will achieve a better return than immediate liquidation.

THE POSTPONEMENT APPLICATIONS

20. Petzetakis Holdings wants the postponement to enable it to demonstrate a reasonable prospect of rescue by way of a supplementary founding affidavit which provides information of a restructuring in Europe which happened after the application had been launched.

21. NUMSA's application for postponement is different from the application of Petzetakis Holdings. NUMSA wants the postponement to consider filing papers. In addition to the possible prospects of the proposed supplementary affidavit of Petzetakis Africa, NUMSA also relies on the more realistic prospect that the alternative object of the rescue plan may be achieved (with less job losses than would occur in the event of liquidation). According to NUMSA the new component proving this prospect is that the Competition Commission's conditionally approved the proposed acquisition of the business or assets of Petzetakis Africa by Marley. NUMSA was aware of the rescue application and of the application for the approval of the Competition Commission, but they only acquired knowledge of the conditional approval on 17 January 2011. They had elected not to deliver papers before they acquired such knowledge.

22. The application need not be postponed for evidence proving the conditional approval of the Competition Commission is not required. That conditional approval is already before Court.

PROSPECTS OF SUCCESS

23. With reference to the prospect of success on the merits Counsel for Marley and Sasol Polymers referred to various points of criticism of the rescue application. I limit my consideration of this criticism to aspects which are important for purposes of the postponement application. The important defect in the founding papers is that, as pointed out above, they do not demonstrate a reasonable prospect that Petzetakis Africa can be saved or (to the extent that this might have sufficed) that there us a prospect that the alternative object is achievable.

24. Petzetakis Holdings and NUMSA (correctly so) do not contend that the rescue application as it stands can be granted. The purpose of the proposed postponement is that the application can be amplified with supplementary affidavit evidence.

25. Neither Petzetakis Holdings nor NUMSA provides any detail of the proposed supplementary evidence. The former's vague reference to a company restructuring in Europe does not begin to demonstrate that the proposed postponement will enable them to make out a case which proves a prospect of rescue or the alternative object. NUMSA's postponement application also falls short of identifying evidence to be presented which could demonstrate a reasonable prospect of recovery of the alternative object. To the extent that they do not know what the supplementary evidence will be, they cannot be faulted for not dealing with the detail thereof. However, a case cannot be postponed in the hope that evidence of which no detail is known will help to reach a favourable result, whatever the reason for the absence of detail. It is, for example, not good enough to speculate what the rescue practitioner may or may not be able to do.

26. Before a Court can make the rescue order which would give rise to the practitioner's opportunity to work out a rescue plan it must be satisfied that there is a reasonable prospect of rescuing Petzetakis Africa or, at best for NUMSA, that there is a prospect that the future rescue plan will achieve the alternative object of section 128(b)(iii), namely a better result than immediate liquidation. On the evidence as presented and the known evidence to be presented in the event of a postponement as disclosed, the Court cannot be so satisfied. If all the disclosed evidence is presented the prospects of success on the merits will remain totally against the granting of the rescue order. Neither of the applicants for postponement provided sufficient detail as to what evidence they will present if a postponement is granted to satisfy me that it may create a prospect of success on the merits which warrants the postponement. I again refer to the above quoted remarks of Eloff AJ in Southern Palace.

TIMING OF THE POSTPONEMENT APPLICATION

27. The explanation for the delay of Petzetakis Holdings to bring their postponement application is that they did not provide the necessary funds to their attorneys. If they chose not to do so, this is the poorest of explanations. If they were unable to do so, that is an indication of improbability that they will be able to raise the necessary money injection to rescue Petzetakis Africa. They provide no particulars of where and on what terms such money can be raised.

28. The explanation of NUMSA is that they awaited the outcome of the application to the Competition Commission before deciding on their course of conduct.

That is understandable. But that also constitutes a deliberate decision to withhold the delivery of affidavit evidence when they had the right to do so. To the extent that they had no evidence to deliver, their failure is understandable. However, at present the only new evidence is the conditional approval of the Competition Commission which is already before Court.

PREJUDICE

29. Chapter 6 of the Companies Act demonstrates a legislative intention that rescue proceedings must be conducted reasonably speedily. The reason is obvious. Pending rescue proceedings temporarily protects the company concerned from legal proceedings by its creditors for the recovery of legitimate claims without any input of the creditors and removes the unfettered management of the company from the directors. Delays will extend the duration of these temporary statutory arrangements, of which the duration is restricted by way of the procedure prescribed by the Act. For example, section 148 requires the business rescue practitioner to convene a meeting within 10 business days after being appointed. In terms of section 150(5) a business plan must be published within 25 business days after the appointment of the practitioner. Section 151 requires a meeting to be held within 10 business days after publication of the business rescue plan. In terms of section 152 the fate of the company is decided at the section 151 meeting. If the time periods are added up, it appears that the protection of the company without the co-operation of the creditors from the time of a rescue order should not be more than 2 to 3 months, even if there are many intervening non-business days.

30. I respectfully agree with the following remarks of Binns-Ward J in Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others (24850/11) [2011] ZAWCHC 464 (9 December 2011)

"[10] … It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases .a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings - however dubious might be their prospects of success in a given case -materially affects the rights of third parties to enforce their rights against the subject company …"

31. NUMSA attempted to limit the prejudice to creditors by proposing that I order severely restricted time periods for the delivery of further affidavits. Their proposed order, for example, provides that Petzetakis Holdings must deliver their supplementary founding affidavit within 2 weeks. Counsel for Petzetakis Holdings said that they need 4 weeks in that evidence needs to be obtained from Europe. Even if the 2 week limitation is ordered, it must be borne in mind that the affidavit to be delivered will be a supplementary founding affidavit. The other parties will have a right to answer, whereafter Petzetakis Holdings will have a right to reply. It appears unlikely that the delay caused by the postponement can be limited to less than approximately 2 months. Although the attempt of Petzetakis Holdings to bring this application on an urgent basis is now history, one cannot totally ignore that, some 4 months later, this same

party asks for a postponement which allows it another 4 weeks to supplement its papers.

32. The refusal of the postponement would not constitute an absolute and final barrier to the presentation of further evidence. Marley and Sasol Polymer asked for and I granted a provisional (not final) liquidation order. It follows that further evidence can be provided for consideration on the return day. Section 131(7) of the Companies Act also provides that business rescue can also be ordered in the liquidation proceedings.

CONCLUSION

33. For these reasons I refused the postponement applications.

34. Marley and Sasol then moved for a provisional liquidation order. The other parties did not oppose. I granted the provisional order.

JP Coetzee AJ 06 February 2012