REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 33958/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

28/2/2012
DATE

SIGNATURE

In the matter between:

ANTHONIE WELMAN Applicant

and

MARCELLE PROPS 193 CC Respondent

INVESTEC BANK LTD Intervening Creditor

JUDGMENT

TSOKA, J:

[1] This is an application to place the respondent Marcelle Props 193 CC ("*MP193*") under supervision and that business rescue proceedings be

commenced in terms of the provisions of Section 131 of the Companies Act 71 of 2008 ("*the Act*").

[2] The applicant launched a similar application in respect of Marcelle Props 194 CC ("*MP194*") under Case No. 33959/2011. In that application, the applicant seeks the same order as in the present application. The parties have agreed to argue the present application with the necessary modification with regard to MP194. It was further agreed that the judgement in MP193 shall also be the judgment in MP194. Both MP193 and MP194 are close corporations.

[3] The facts in this matter are uncomplicated and are, in the main, common cause. They are as follows. MP193 and MP194 are both indebted to Investec Bank Limited ("*Investec*"). MP193's indebtedness to Investec is over R 3,5m while the indebtedness of MP194 to Investec is about R 6,5m.

[4] The Indebtedness arose out of loan agreements entered into between the Close Corporations on 12 June 2008. Investec lent and advanced moneys to the Close Corporations for the purposes of purchasing five apartments in a development known as Harbour Bridge situate at Victoria & Alfred Waterfront, Cape Town. As security for the loans, Investec registered mortgage bonds over the properties.

[5] The Close Corporations are merely property owning entities. They do not trade. The applicant is their sole member, surety and co-principal debtor.

The properties were purchased for investment purposes. To this end the properties were rented out with a view to selling them once the property market improves. To service the mortgage bonds, the applicant relies on the rental derived from renting the properties.

[6] During the last quarter of 2010, the Close Corporations had been experiencing cash flow problems. The Close Corporations fell into arrears with their monthly instalments. The total amounts due under the loan agreements became due and payable. As a result, on 5 July 2011, Investec instituted liquidation proceedings against them.

[7] The Close Corporations opposed the liquidation proceedings and filed answering affidavits denying that their indebtedness to Investec was due and payable. It must be pointed out that the loan agreement in respect of MP193 was for a period of eighteen months, while in respect of MP194 the period was for five years. The period of the loan in respect of MP193 having expired, the applicant concedes that same is now due and payable.

[8] Subsequent to the filing of the answering affidavits, the applicant then launched the present application. Investec, as the "affected person" as contemplated in section 128(1)(a)(i) of the Act seeks to intervene in this application as it is entitled to in terms of section 131(3) of the Act. The application to intervene is granted. Investec is opposing the present application for business rescue to commence. The basis of the opposition by Investec is that the application is vexatious in that its sole aim is to frustrate

and delay the pending liquidation proceedings against the Close Corporations.

[9] In terms of section 131(1)(a) of the Act read with section 66 of the Close Corporation Act 69 of 1984, the Court may make an order placing a close corporation under supervision and commencing Business Rescue proceedings only if there is a reasonable possibility for rescuing the close corporation.

[10] Business Rescue proceedings are governed by Chapter 6 of the Act. In terms of Section 128(1)(h) "rescuing the company", in the present matter, a close corporation, means achieving the goals set out in the definition of "business rescue" in paragraph (b).

[11] Section 128(1)(b) reads as follows –

> *"'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;"*

[12] The issue for determination in this application is whether the development and implementation of the business rescue proceedings would maximise the likelihood of the Close Corporations' continued existence on a solvent basis thereby resulting in a better return for their creditors or shareholders than the pending liquidation proceedings.

[13] The following facts are common cause –

13.1 the two Close Corporations are not trading entities and rely on rental as their sole income;

13.2 the rental income derived from the five apartments, which are all rented out, is insufficient to service the mortgage bonds;

13.3 although the Close Corporations were in arrears at the launch of the liquidation applications, the arrears have been brought up to date;

13.4 the term of the loan agreement in respect of MP193 has come to an end and is now due and payable. MP193 is unable to settle the loan;

13.5 the term of the loan agreements in respect of MP194 has not as yet expired;

13.6 the applicant is unable to sell the five apartments as the property market remains depressed;

13.7 on 21 April 2011 Investec requested from the applicant, on behalf of the Close Corporations, certain information and documentation to enable it to determine whether going forward, the two Close Corporations would be able to regularly service the mortgage bonds. To date the applicant has not been able to comply with Investec's request;

13.8 although the applicant appears to depend on his benefactor Laurie Kempster ("*Mr Kempster*") to service the mortgage bonds, Mr Kempster is not a member of the two Close Corporations. Neither does he have any relationship with Investec;

13.9 during the hearing of the application, the applicant filed a supplementary affidavit indicating that the two Close

Corporations are up to date with their monthly commitments in respect of the mortgage bonds;

13.10 the term of the four loan agreements has not expired and the loans only became due and payable as a result of the Close Corporations being in arrears and payment in respect thereof having been accelerated in terms of the agreement;

13.11 the terms of the fifth loan agreement has expired and is due and payable;

13.12 the other four loan agreements would not be due and payable but for the acceleration clause exercised by Investec due to the arrears. If Investec abandons the calling-up of these four loans, the Close Corporation is likely to be solvent and be rescued;

13.13 the loan agreement in respect of MP193 that has expired, can only render the Close Corporation solvent and rescueable if the court extends the term thereof.

[14] In *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 (5) SA 422 (GNP) Makgoba J, described a similar application as a novelty brought about by the Act on 1 May 2011. He pointed out that business rescue plan may be similar to placing an ailing company

under judicial management governed by the repealed section 427 of the Companies Act 61 of 1973.

[15] Similarly, in the not yet reported judgment of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd (Registrar of Banks and another Intervening)* Case No. 15155/2011 WCC, delivered in November 2011, Eloff AJ also compared the provisions of the repealed section 427 of the Companies Act 61 of 1973 to the provisions of section 131(4) of the Act. Section 427 of Act 61 of 1973 speaks of "reasonable prospect" while section 131(4) of the Act speaks of "reasonable possibility". In pointing out the difference between the wording of the two sections, the learned acting judge in paras 21 and 22 of the judgment stated –

> *"21. ...The use of different language in this latter provision indicates that something less is required than that the recovery should be a reasonable probability. Moreover, the mind-set reflected in various cases dealing with judicial management applications in respect of the recovery requirement was that,* prima facie, *the creditor was entitled to a liquidation order, and that only in exceptional circumstances would a judicial management order be granted. The approach to business rescue in the new Act is the opposite - business rescue is preferred to liquidation.*
>
> *22. However, even if the substantive test with its lower threshold is satisfied, the Court still has a discretion not to grant the order. In exercising this discretion, the Court should give due weight to the legislative preference for rescuing ailing companies if such a course is reasonably possible. It would therefore be inappropriate for a Court faced with a business rescue application to maintain the mind-set (from*

the earlier regime) that a creditor is entitled ex debito justitiae *to be paid or to have the company liquidated."*

[16] To move away from the mind-set of the earlier regime of preferring liquidation to judicial management, and to promote compliance with the Bill of Rights as provided for in the Constitution, and to achieve the purposes of the Act as encapsulated in section 7 of the Act, it is necessary to determine the case made out by the applicant in this application.

[17] The gravamen of the application is found in paragraph 27 of the founding affidavit. It reads –

> *"27. As a result of the contractual arrangements with Investec, the full capital balances outstanding in terms of the loan agreements have now become due and payable. This occurred because the Respondent defaulted on the monthly instalments, as set out above. The Respondent is not able to pay the full amount owing to Investec. In fact, it is unlikely that the corporation will be able to pay all its debts (including the full balances owing to Investec) as they become due and payable within the next six months; but it will hopefully be able to maintain the monthly instalments. Mr Kempster and I have tried our outmost to keep the corporation afloat. The apartments are, moreover, tenanted, and the income rentals contribute to a large portion of the monthly instalments due. While we cannot predict the future, we trust that the apartments will be sold sooner rather than later. In the meantime, we shall ensure that the monthly instalments are met. We submit that there is a reasonable prospect that the respondent will be rescued in the event of it being afforded the opportunity of resolving its cash flow problems".*

[18] In argument, the applicant submits that there is light at the end of the tunnel in that, given time, the Close Corporations, if placed under supervision, would be rescued.

[19] As at the date the application was argued, all the arrears were settled. Both the December 2011 and the January 2012 instalments have been paid. The instalments were affected by a debit order.

[20] As pointed out above, the application is opposed. There are pending liquidation applications against the Close Corporations. Although it is so that the Close Corporations are not in arrears, and that all instalments in respect thereof are up to date, there are no facts stated as to the source and extent of the income from which the debit orders are met. As pointed out earlier, Mr Kempster is not a member of the Close Corporations. He has no legal relationship with Investec.

[21] On 21 April 2011, the applicant informed Investec that he had sold a wine farm for R 8m; that he had a distribution agreement with an entity known as Moulin Rouge regarding the financing of French Champagne; he had a four star bed and breakfast in Camps Bay which may be sold, probably for a profit, and that all the apartments over which Investec registered the mortgage bonds, are fully occupied, and that substantial rental is derived therefrom; he had filed a counter-claim in another matter from which he expects to receive an amount of R 2m.

[22] Investec then requested certain documentation, in substantiation of the applicant's assertion, and certain information with regard to the probable source of income to meet the monthly obligations in respect of the mortgage bonds. To date, the applicant has failed to provide Investec with this information.

[23] In his own words, the applicant is unable to settle the balance outstanding in respect of MP193 whose term has expired. The balance, in respect of MP193, is due and payable. MP193 is unable to pay this loan. Furthermore, the applicant is unable to furnish Investec with copies of the lease agreements in confirmation that the apartments are fully let.

[24] With regard to MP194, it is also common cause that the Close Corporation has defaulted on the monthly instalments. The mortgage bond in respect of this Close Corporation was also in arrears for a substantial period. In spite of his attempts to keep the Close Corporation afloat, it is a fact that *"...it is unlikely that the close corporation will be able to pay all of its debts (Including the full capital balances owing to Investec) as they become due and payable within the next six months."*

[25] It seems to me that the applicant is of the opinion that an application in terms of section 131 of the Act, is there for the asking. He forgets that one of the purposes of the Act as encapsulated in section 7, is to provide for the efficient rescue and recovery of the financially distressed close corporations in a manner that balances the rights and interests of all the relevant

stakeholders and to provide a practicable and effective environment for the efficient regulation of close corporations.

[26] The success of the close corporations depends on the applicant's hope that everything will be alright. It is indeed so that hope springs eternal. However, courts faced with rescue applications must bear in mind that there are other stakeholders, such as shareholders, whose interest must be taken into account and be respected. In terms of section 132(3) of the Act, the business rescue proceedings end within a period of three months unless the period is extended by the court on application. In the present matter, it is undisputed that for the next six months, it is unlikely that the Close Corporations will be able "*to pay all of its debts*" when due.

[27] Although it appears attractive that the arrears are settled and that there are debit orders in place, there are no concrete facts placed before the court to determine the source and extent of the debit orders so that the discretion the court has may be exercised in favour of the applicant.

[28] In my view, business rescue proceedings are not for the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which, given time, will be rescued and become solvent. To grant the present application, in these circumstances, would be to subvert the purposes of the Act and disregard the interest of other stakeholders.

[29] Because of the dearth of facts upon which this application is based, the court is unable to exercise its discretion in favour of the applicant. In the circumstances of this matter, it is preferable to have the Close Corporations liquidated than to place them under supervision hoping that business proceedings would cure the inevitable. The liquidation proceedings, in my view, would be in the interest of all the stakeholders, including the Close Corporations.

[30] In the result, the application to place the respondent under supervision and business rescue is dismissed with costs.

M TSOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	:	1 FEBRUARY 2012
DATE OF JUDGMENT	:	28 February 2012