REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 46837/2018

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

19/6/19
DATE

SIGNATURE

In the matter between:

Kurt Robert Knoop, NO	First Applicant
Tailco Chrome (Pty) Ltd (in business rescue)	Second Applicant

And

Gabrial Jakobus Petrus Vorster, NO	First Respondent
Carolina Catharina Vorster, NO	Second Respondent
Bakwena Chrome (Pty) Ltd	Third Respondent
Sheriff of the High Court, Thabazimbi	Fourth Respondent

First National Bank Ltd	Fifth Respondent
Avrabix (Pty) Ltd	Sixth Respondent
Baron Mining (Pty) Ltd	Seventh Respondent
Tailco Steelpoort (Pty) Ltd	Eighth Respondent
Winter Robin Investments 21 (Pty) Ltd	Ninth Respondent

Judgment

Van der Linde, J:

[1] This is an urgent application by a business rescue practitioner ("BRP" or "business rescue practitioner", as context dictates) to rescind a default judgment for various amounts aggregating R16 697 993.70, taken by a major creditor against his ward, the 2nd applicant ("Tailco", or "the company", where appropriate), after the business rescue status had already incepted, and the statutory moratorium provided for in s.133(1) of the Companies Act 71 of 2008 ("the Act") operated. There is a counter-application by the creditor (comprising a trust, represented by the first two respondents, and the 3rd respondent) to set aside the business rescue resolution as a *nullity ab initio*, and in the alternative, to convert the business rescue into a liquidation in terms of s.132(2)(a)(ii) of the Act. The counter-applicants do not ask for both forms of relief cumulatively, although their case would not be prejudiced if the resolution were set aside, and simultaneously a provisional winding-up order issued.

[2] The primary case for setting aside the business rescue resolution is that it was a dishonest abuse of process; the case for winding up is that the 2nd applicant is commercially insolvent. It is in fact common cause that the 2nd applicant cannot (now) pay its debts as and when these

have to be paid, but the BRP says the business can yet be rescued. Apart from this, the applicants say that the winding-up application is not ripe, because it was first raised in the reconventional replying affidavits as new matter, and they have not answered that case. The counter applicants say the applicants in convention must either accept that the main and counter-applications are intertwined and apply for a postponement – which they have not done – or rest with the consequences that would follow if the court were to find that Tailco should be wound up, even if only provisionally.

[3] The applications were brought urgently. The main application is concededly urgent but not the reconventional application. Either way, there are two principled reasons why I believe they should both be dealt with now. The first is that they are, as I see it, intertwined. Whether business rescue proceedings should be permitted to be continued while a company is, in the words of Sutherland, J, (at para 20.2 of the ABSA Bank matter, referred to below) *"plummeting"* seems to me to be the other side of the winding-up coin. Creditors are potentially severely prejudiced; liabilities are being incurred unabatedly, likely diminishing the assets and the net asset value of the company.

[4] The second reason is that as a general proposition it is in the interests of the administration of justice that claims and counterclaims between protagonists be disposed of in the same proceedings. In these circumstances I proceed to consider both applications, bearing in mind the urgency of the matter and the need for quick resolution.

[5] The case in the founding affidavit of the applicants is then that a default judgement was given on 7 May 2019 by Mtati, AJ, and the application for rescission of that judgement is being brought under rule 42 (1) (a) of the uniform rules of court. That rule provides that a court may, either on its own accord or upon application by any party, who is affected by an order made, rescind or vary any order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby. Rescissions of judgements are normally granted under

this sub-rule where the error relates to the fact that a party affected by the judgement was not present when the judgement was given.

[6] This is not strictly what applies in the present matter, on the applicants' case. On the applicants' case the moratorium provided for in section 133 of the Act served, by operation of law, to preclude the judgement creditors from proceeding with the action and from asking the court on 7 May 2019 to grant a judgement. Therefore, the application ought strictly to have been brought under the common law on the basis that was simply no power vested in the court of 7 May 2019 to grant the judgement sought, as the legal proceedings upon which the matter rested had earlier become frozen in time.

[7] Be that as it may, there was no objection by the respondents (here I reference the first three respondents, the only ones participating in the matter before me) on this basis against the relief claimed, nor do they argue that, possibly, even if the applicants were correct, the appropriate basis for rescinding the judgement was the constitutional principle of legality, since under the law of the land there was no power to have granted the judgement, given the moratorium for which provision is made in section 133 of the Act.

[8] At all events, the founding affidavit explains that the judgement creditors (the first three respondents) applied on 14 December 2018 for the relief. The application was served on the second applicant on 10 January 2019 and on 17 January 2019 a notice of intention to oppose was delivered on behalf of the second applicant. On 1 February 2019 the attorneys for the second applicant (Schindlers) delivered notices in terms of rule 35 (12) and 35 (14) requesting the production of certain documents, and these were produced on 25 February 2019. By then the due date for the second applicant's answering affidavit, 7 February 2019, had come and gone.

[9] On 15 March 2019 the attorney for the judgement creditors (Mr Cilliers) warned that unless the answering affidavit was served within two days the application would be enrolled. Since the answering affidavit was not served by 17 March 2019 a notice of set-down was delivered

notifying the second applicant that the application had been set down for hearing on 7 May 2019.

[10]Thereafter, on 20 March 2019 Schindlers informed Mr Cilliers that the answering affidavit was in the process of being finalised, and he was requested to remove the matter from the roll, upon a tender of payment of the wasted costs for having set down the matter.

[11]Important events occurred before a response was received from Mr Cilliers. This was that on 9 April 2019, just short of a month before the enrolment date of the application for judgement, the directors of the second applicant resolved to commence business rescue proceedings, *"because it was in financial distress."* It is important to note here, before proceeding, what the response of the respondents was to this assertion that on 9 April 2019, *"the directors of the second applicant resolved to commence business rescue proceedings because it was in financial distress."*

[12]The response in the answering affidavit was: *"I admit the factual allegations contained in these paragraphs, but for the reasons set out above, deny that the actions of the second applicant and its directors have any valid legal consequence."* It is important to add, as well, that in the respondents' replying affidavit, filed in answer to the applicants' answering affidavit in the counter-application, it is the contention of the respondents that the second applicant is insolvent, and should in fact be liquidated.

[13]It is therefore appropriate already at this stage to engage on the debate as to whether it could be said that the business rescue proceedings were an abuse of process. It is difficult to conceive why the business rescue proceedings should be regarded as an abuse of process if it is common cause that the company was in financial distress. It certainly cannot constitute an abuse of process to prevent one energetic creditor obtaining a judgement and executing on it, to the prejudice of the body of creditors as a whole.

[14]To the contrary, the very purpose of business rescue proceedings is, as the name implies, to rescue the business, and the business can only be rescued if there is, at least for the time

being, a moratorium placed upon creditors executing upon the assets of the business, these being the very wherewithal required to lift the business out of the financial distress in which it finds itself.

[15]Continuing with the founding affidavit, the applicants disclosed that on 15 April 2019 Dr Buba was appointed as the business rescue practitioner, but three days after the default judgement was granted, on 10 May 2019, he resigned. On 16 May 2019 documentation was submitted for the appointment of a new business rescue practitioner but the Companies and Intellectual Property Commission advised that the nominated practitioner was too inexperienced to be appointed, having regard to the public interest score of the second applicant. Ultimately, on 23 May 2019, the first applicant was appointed as business rescue practitioner.

[16]The founding affidavit asserts that Schindlers were under the impression, having provided full detail of the claim of the judgement creditors as well as the litigation concerning that claim to Dr Buba, that he would have notified either the judgement creditors or at least their attorney, Mr Cilliers, that the second applicant had been placed in business rescue as of 15 April 2019. It would appear that Dr Buba did not do so and for that reason no person was present on behalf of the second applicant when the default judgement was taken on 7 May 2019.

[17]The judgement led to a writ of execution being issued on 22 May 2019 pursuant to which the bank account held by the second applicant at First National Bank was attached. On 28 May 2019 the second applicant received news of the attachment and notified Schindlers who in turn notified Mr Cilliers of the fact that the second applicant had been placed under business rescue with effect from 15 April 2019. Schindlers sought appropriate undertakings, but Mr Cilliers declined to give these, saying that his clients would continue with the enforcement of the default judgement. Yet further undertakings were sought on 30 May 2019, but to no avail. That led to the application being launched.

[18]The deponent to the applicant's founding affidavit deals with the financial distress of the second applicant in paragraphs 48 to 59. The response of the respondents to these paragraphs

is, apparently contradictory orderly, to deny the second applicant's alleged financial distress. They argue that the second applicant is able to put up cash as security and therefore this is evidence, *"of its financial health."*

[19]It seems to me that in the light of the changed tack by the respondents in their replying affidavit to their counter-application, it is unnecessary further to examine whether it could really be said that the second applicant is in financial distress. After all, at best for the respondents, the second applicant is either in financial distress or insolvent.

[20]Therefore it becomes necessary now to consider whether the case of the respondents for abuse of process is sound. The respondents (by that I continue to mean the first three respondents) say that their case rests on three pillars: first, the second applicant failed to comply with the mandatory provisions of section 129 (3) and (4) of the Act relating to notice of the business rescue proceedings and the appointment of a business rescue practitioner; second, as a consequence the business rescue resolution lapsed as a nullity by virtue of the provisions of section 129 (5) (a) of the Act; and third, the circumstances render it just and equitable for an order, *"doing away, ab initio, with business rescue."*

[21]Section 129 (3) of the Act compels a company within five business days after having adopted and filed a business rescue resolution, to publish a notice of the resolution to every affected person, and to appoint a business rescue practitioner. Section 129 (4) of the Act compels a company, after having appointed a business rescue practitioner, to file a notice of the appointment of a business rescue practitioner within two business days, and to publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

[22]The difficulty with the respondents' proposition is that the moment a company is placed in business rescue and the business rescue practitioner is appointed, the business rescue practitioner takes control of the company in terms of section 140(1)(a) of the Act; see also

section 137 of the Act. It is the business rescue practitioner whose duty it is then to give effect to these requirements of the Act.

[23]But the respondents themselves point out that non-compliance with these provisions do not result, without more, in ipso facto putting an end to business rescue. They referred me to **Panamo Properties (Pty) Ltd and another v Nel NO and others, 2016 (1) SA 202 (SCA) at [29]**, for the proposition that it remains for the court to consider whether it is just and equitable to set aside the resolution.

[24]I believe this reference to Panamo Properties is in fact incorrect. That judgement deals with a mortgage bond. There is a different judgement, reported at **2015 (5) SA 63 (SCA)** where Wallis, JA said that the legislative scheme of these sections is clear: the company may initiate business rescue by way of a resolution that is filed with CIPCSA; the resolution and the process of business rescue that it commenced, may be challenged at any time thereafter and before a business plan is adopted, on the grounds that the preconditions for the passing of the resolution are not present. If there is then non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity.

[25]But, the learned judge held, in all cases the court must be approached for the resolution to be set aside and for business rescue to terminate: *"That avoids the absurdity that would otherwise arise of trivial non-compliance with a time period, e.g. the appointment of the business rescue practitioner one day late as a result of the failure by CIPCSA to license the practitioner timeously in terms of s 138 (2) of the Act, bringing about the termination of the business rescue, but genuine issues of whether the company is in financial distress or capable of being rescued having to be determined by the court. There is no rational reason for such a distinction."*

[26]That really brings one back the full circle to question whether there could conceivably be any purpose in the second applicant deliberately – despite the damning evidence of Dr Buba being fully informed of the claim of the respondents – hiding from the respondents the business

rescue process. It seems to me that there can be no justification in such a contention. No advantage is to be gained; to the contrary, the advantage of a moratorium under section 133 of the Act beckons if that is what the company sought to achieve. The sooner all creditors know about this, the better, also for the company.

[27]In these circumstances the resistance to the applicant's relief in the main application fails and an order will issue in terms of prayers two to seven of the notice of motion. A special costs order is sought against the respondents for the conduct in persistently declining to accept that the effect of the business rescue resolution was to have triggered the legal moratorium. I have to say that the case for abuse of process is, in my view, remarkably thin and the applicants ought not to have been put to the expense of the contestation of their relief on that basis. A special costs order in respect of the application in convention is therefore warranted.

[28]That brings me to the counter application. As I have pointed out, it is based on the proposition that the company is insolvent and incapable of being rescued. As a general approach, it is helpful to have regard to the approach underscored by Eloff, AJ in Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd, 2012 (2) SA 423 (WCC) at [20] – [24]. In that matter the court dismissed an application for business rescue and placed the respondent in provisional winding-up. But the learned judge contrasted the wording of section 427 (1) of the Companies Act 61 of 1973, with the wording of section 131 (4) of the Companies Act 71 of 2008.

[29]In the case of the former provision, the legislature provided that a court may order a judicial management of a company if there was a *"reasonable probability"* that if placed under judicial management, the company will be enabled to pay its debts or to meet its obligations and become a successful concern.

[30]In the case of the latter provision, the language used is a *"reasonable prospect"* in respect of the recovery requirement. His Lordship held: *"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 to be granted. The approach to business rescue in the new Act is the opposite – business rescue is preferred to liquidation."

[31]This approach commended itself to Sutherland, J in this division in an unreported judgement of 13 August 2012, in the matter of ABSA Bank Ltd v New Citigroup (Pty) Ltd, case no 45670/2011, at [31]. With respect to both learned judges, in my view that is the correct approach. It is also the correct approach in this matter, where at paragraphs 48 to 59 the applicants dealt with the financial distress in which the second applicant finds itself. It will be recalled that the respondents declined to deal issuably with these assertions.

[32]It is true that the business of the second applicant, that of processing chrome ore and the sale of chrome concentrate and disposal of processed waste material, has up to now been carried on by means of a processing plant of the second applicant located at the Kroondal mine of Glencore Operations South Africa (Pty) Ltd, acting with its joint venture partners Merafe Resources Ltd and Merafe Ferrochrome and Mining (Pty) Ltd. That arrangement has come to an end and the current position is that the second applicant is to process the remaining feed until 31 July 2019, after which it will be accorded a reasonable time to decommission, dismantle and remove its plant from that mine. When it processes the ore, the plant generates revenue of approximately R308 035 per day.

[33]The deponent projects cash flow for the second applicant, were it in a position immediately to recommence business operations, up to February 2020 of in excess of R25 million. Of course one does not yet known which chrome tailings will be processed after the current contract will have run its course, but that is a matter with which the business rescue practitioner will deal.

[34]At the end of the day, the court has to decide whether it is preferable now, or more correctly put, just and equitable, to permit the business rescue to continue – actually, to be given a chance – or to issue a provisional winding-up order before the business rescue will have gotten off the ground. In my view the preferred approach is to permit the business rescue an opportunity to get off the ground, especially having regard to the fact that if job losses can be contained, that must be done. In these circumstances the counter-application must fail, with costs on the ordinary scale.

[35]In the result I make an order in terms of the draft order handed up to me by counsel for the applicants, which I have marked X, initialled, and dated.

WHG van der Linde
Judge, High Court
Johannesburg

Date heard: 14 June 2019
Date judgment: 20 June 2019

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