

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10046/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<p>29/4/20</p> <p>ML TWALA</p>	

In the matter between:

DANIEL TERBLANCHE

(Acting in his capacity as the appointed
Business rescue practitioner of South African
Express Airways SOC Limited)

FIRST APPLICANT

PHAHLANI MKHOBO

(Acting in his capacity as the appointed
Business rescue practitioner of South African
Express Airways SOC Limited)

SECOND APPLICANT

AND

**SOUTH AFRICAN EXPRESS AIRWAYS SOC
LIMITED (In business rescue) (Registration
No: 1997/016213/07)**

FIRST RESPONDENT

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

SECOND RESPONDENT

**AFFECTED PERSONS OF SOUTH
AFRICAN EXPRESS AIRWAYS SOC
LIMITED (Shareholders and creditors)**

THIRD RESPONDENT

JUDGMENT

TWALA J

- [1] The applicants in this case, being the Business Rescue Practitioners (BRP) of the first respondent, appointed as such in terms of the Court order dated the 6th of February 2020, came before me on urgent basis seeking an order discontinuing the business rescue proceedings and that the first respondent be placed in provisional liquidation and other ancillary relief.
- [2] As indicated above, this matter served before me in the urgent Court and I granted the order as prayed for in the notice of motion with my reasons therefore to follow. This judgment covers my reasons for granting the order. Further, it is noteworthy at this stage that, although the applicants listed the affected persons of the first respondent to be over 900 in number, there is no opposition filed in this matter.
- [3] It appears from the founding affidavit that the applicants held meetings after they took office with the creditors and affected persons of the first respondent wherein its appointment to office was endorsed. Thereafter the applicants approached the sole shareholder to assist with "post-commencement finance" which was not forthcoming. It approached the commercial banks and other

development finance institutions for finance but to no avail. The applicants were left with no option due to lack of funding to continue with business rescue as the expenses and debt kept on escalating. On the 17th of March 2020 the aircrafts were grounded since there was no money to pay for the insurance and the salaries of the employees. There was an outstanding debt due to SARS for pay as you earn in the sum of R150m. The total debt of the first respondent amounted to an amount in excess of R5 billion.

- [4] As indicated above that, although the applicants listed the affected persons of the first respondent to be over 900 in number, there was no opposition to this application. This necessitated the Court to extensively consider the issue of service of the Court process on the affected persons. However, I do not deem it necessary to dwell in the issue of urgency since matters of this nature are inherently urgent.
- [5] Advocate Cassim SC asserted that it was rather impossible to engage the services of the sheriff to effect service on 900 affected persons in this case considering the urgency of the matter – hence service was effected by e-mail. An attempt was made to serve the first respondent at its registered address but the premises were locked and the reception thereof was occupied or manned by security guards who refused to accept service of the documents. The respondents, including members of the sole shareholder, so it was argued, were informed of these proceedings by e-mail on the 25th of March 2020, a day after the notice of motion was issued. Some of the trade unions made proposals to the applicants on the 20th of April 2020 which is almost a month after they received the court papers.
- [6] It is trite that when a party initiates proceedings by way of application/motion, it must employ the services of the Sheriff of Court to serve the notice of motion

together with its annexures to the respondents as cited in the notice of motion. It is further trite that the rules are for the court and not the court for the rules. However, practitioners should be discouraged to disregard the rules of court for flimsy reasons.

- [7] In *Khunou & Others v Fihrer & Son* 1982 (3) SA (WLD) the Court stated the following:

"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner."

- [8] I am satisfied that, although the notice of motion and its annexures was not served in terms of the rules of Court, the respondents nevertheless were aware that this matter is before Court today and chose not to participate. I was shown e-mail printouts, which were not attached to the papers for security reasons, detailing the e-mail addresses to which the notice of motion was sent which e-mail addresses were obtained by the applicants during their business rescue meetings with the affected persons and from the records of the first respondent. Moreover, the applicants are seeking a provisional order which

also affords the respondents another opportunity to participate in these proceedings should they so require.

- [9] Further, it has long been settled that where there is non-compliance with the rules or regulations, the Court has discretion to condone the non-compliance. However, the discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. The court is entitled to overlook in proper cases any irregularity which does not work to substantial prejudice to the other party.

- [10] Section 141 (2) of the Companies Act 71 of 2008 provides as follows:

(2) *If, at any time during business rescue proceedings, the practitioner concludes that –*

(a) *there is no reasonable prospect for the company to be rescued, the practitioner must –*

(i) *so inform the Court, the company, and all affected persons in the prescribed manner; and*

(ii) *apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation;*

(b)

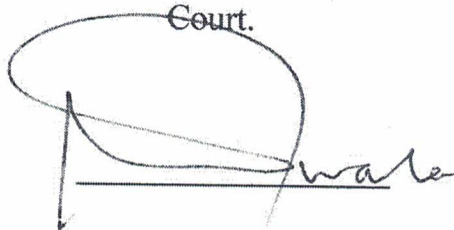
- [11] Advocate Cassim SC submitted that the applicants had no luck in raising the post-commencement finance from the commercial banks and even from the sole shareholder, which is the government of the Republic. Instead, the sole shareholder made certain proposals which could not bear any fruit and was not satisfied with the appointment of the applicants as practitioners as it wanted to appoint its own. No income was received in the month of March

2020 and the aeroplanes were grounded on the 17th of March 2020 since the practitioners could not raise funding even to pay for the insurance and the salaries of employees. At the same time, the debt was escalating due fixed operational costs. The applicants had no alternative but to bring these proceedings to discontinue the business rescue and place the first respondent in liquidation.

[12] Business rescue is a procedure to facilitate the rehabilitation of a financially distressed company. Therefore the company must be operational but have financial difficulties. In casu, the first respondent has ceased operating in the sense that it has grounded its aircrafts when its business is flying. I hold the view therefore that if the applicants could not raise the post commencement finance from the commercial banks and from the sole shareholder, which is the government of the Republic, business rescue was bound to fail. It is ineluctable that the applicants had no option but to bring an application to Court to place the first respondent in liquidation.

[13] In the circumstances, I make the following order:

The draft order as amended annexed hereto marked "X" is made an order of Court.

A handwritten signature in black ink, appearing to read 'Twala M L', is written over a horizontal line. A large, loopy circular flourish is drawn above the signature.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 28th April 2020

Date of Judgment: 29th April 2020

For the Applicant: Adv N Cassim SC

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