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

CASE NO: 30706/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
DATE: 3/8/2021

In the matter between:

ERF [....] HYDE PARK (PTY) LTD	**FIRST APPLICANT**
KHOMOTSO TEFFO N.O.	**SECOND APPLICANT**

And

UNITED TECHNICAL EQUIPMENT COMPANY (PTY) LTD	**FIRST RESPONDENT**
TERRENCE KOMMAL	**SECOND RESPONDENT**
SHERIFF SANDTON SOUTH	**THIRD RESPONDENT**
REGISTRAR OF DEEDS, PRETORIA	**FOURTH RESPONDENT**

JUDGMENT

MAKUMEJ:

INTRODUCTION

[1] In this application which was brought on an urgent basis in terms of

Rule 6(12) of the Uniform Rules the Applicant seeks the following relief:

a) Declaring the sale in execution of the first Applicants immovable property being Erf [....] Hyde Park Extension 47, Johannesburg which sale took place on the 15th June 2021 to be unlawful and be set aside.

b) Interdicting the Respondents from selling alienating, encumbering and transferring the immovable property to the second Respondent or any other person whilst the Applicant is still under business rescue.

[2] This matter served before me in the urgent court on the 6th July 2021 and stood down for argument on the 7th July 2021.

[3] It is common cause that the first Applicant owns the immovable property known as [....] Hyde Park, Johannesburg. Mr Bamoza Eric Molefe is presently the sole director of the Applicant. He and his family live on the property it is their residential home. The property is located at 2 Townsend Avenue, Hyde Park, Sandton.

[4] During or about the 27th July 2020 the first Respondent obtained a money judgment against the Applicant in this court for payment of the amount of R9 million (See case number 34709/2019) Mr Eric Bamoza Molefe and his wife Veronica Sibongile Molefe were co-defendants in that matter in their capacities as Trustees of a Trust,

[5] Simultaneously with the judgment the court declared the immovable property owned by the Applicant specially executable.

EVENTS THAT TOOK PLACE PRIOR TO AND AFTER THE JUDGMENT

REFERRED TO ABOVE

[6] It needs be mentioned that at the time that judgment was entered against the Applicant as described above the directors of the Applicants were the daughters of Mr BE Molefe namely:

i) Jessica Molefe;

ii) Violet Molefe.

[7] On the 7th November 2019 a resolution was passed by the Company (Applicant) in terms of which it was resolved to voluntarily begin business rescue proceedings and to place the Applicant under supervision since according to the directors there existed then reasonable grounds and belief that the company was in financial distress. The resolution authorised Mr Eric Bamoza Molefe to sign all documents on behalf of the company to give effect to the resolution. In the resolution one Michiel Jacobus Van Tonder was appointed business rescue practitioner for the company.

[8] That resolution was never given effect to and accordingly lapsed in terms of Section 129 (5) (a) of the Companies Act 71 of 2008.

[9] The judgment referred to above in paragraph (4) was granted after it was opposed. Counsel appeared on behalf of the Applicant. Applicant's attorneys then one Mario Kyriacon engaged first Respondent's attorneys in an attempt to settle the judgment debt. The negotiations came to a nullity.

[10] On the 28th May 2021 the first Respondent in its capacity as the judgment creditor published notices in both the Star Newspaper and the Government Gazette that a sale in execution of the attached immovable

property will take place on the 15th June 2021.

[11] On the 27th May 2021 first Respondent's attorneys received an email from one Michael Snyman informing them that they as JF Van Deventer. Incorporated had just been appointed to act as attorneys for the Applicant and requested that they be invited on case line's to enable them to peruse the court file and advise their client accordingly. This was done. However Mr Snyman never reverted to first Respondent attorneys as to what their instructions were.

[12] On the 15th June 2021 third Respondent proceeded with the Sale in Execution and sold the property to the second Respondent. The Sale in Execution took place earlier in the day and at 14h32 first Respondent's attorneys received an email from the Applicant's attorneys namely Messrs Mashabane and Associates in which they informed first Respondent's attorneys that the Applicant had been placed under business rescue and that the second Applicant is the appointed Business Rescue practitioner.

[13] In the letter the Applicants attorneys called upon the first Respondent's attorneys to admit that the sale was null and void as it took place when the Applicant was already under Business rescue they demanded an undertaking to that effect by close of business on the 15th June 2021 failing which they will launch on urgent application in the High Court to set aside the sale.

[14] The urgent application was only launched on the 28th June 2021 some 13 days later. The Respondent's attorneys responded to that letter on the 17th June 2021 informing them that it was the first time that this information was brought to their attention and then requested that Applicants attorneys urgently forward to them the following document's

a) the resolution adopted to commence business rescue proceedings (Section 129(1) of the Companies Act.

b) A copy of the letter or notice that they the Applicant sent to first Respondent attorneys as is set out in their letter of the 15th June2021.

c) Notice of appointment of the business rescue practitioner (Section 129(3) and (4) of the Companies Act).

d) A sworn statement of the facts relevant to the grounds on which the board resolution was founded.

[15] No response was forthcoming from Applicant's attorneys instead the second Applicant send a letter on the 18th June 2021 to the Sheriff (third Respondent) asking them to confirm if the sale did in fact take place despite them having informed the Sheriff about business rescue.

[16] It was only after receiving the letter mentioned above that Mashabane attorneys responded on the 21st June 2021 and attached a document marked "MNI" which they say is a confirmation from CIPRO that the Applicant was placed under Business Rescue. The document marked "MNI" is not from CIPRO it is in fact a document attached to the replying affidavit by the second Applicant which is signed by Mr Eric Bamoza Molefe dated the 11th June 2021 in which he says he in his capacity as the sole director of the Applicant has appointed the secondApplicant as business rescue practitioner.

[17] On the 18th June 2021 the second Applicant sent a letter to all creditors inviting then to a creditors meeting to be held on the 25th June 2021. On the 25th June 2021 at the said, creditors meeting first Respondent's attorneys Ms Silberman informed the second Applicant that until they shall have received documents requested on the 17th June 2021 they are unable to participate meaningfully in the business rescue proceedings.

[18] Documents were eventually sent to Ms Silberman and from that the

first Respondent deduced that the whole business rescue was a nullity. This was confirmed by CIPRO who on getting the truth removed the company from business rescue.

[19] The business rescue process is bristling with procedural irregularities as will be demonstrated hereunder.

[20] The first Respondent decided to do its own investigation and to get to the root of the origin of the business rescue application and in the process discovered that in fact the Applicant was never in business rescue at the time the sale in execution took place.

[21] It is common cause that voluntary proceedings to place a company under business rescue commences with a board resolution. Such resolution must be adopted at a board meeting and will only take effect once it has been filed with CIPRO in terms of Section 129 (2)(b).

[22] Annexure "VK12" is an official document issued by CIPRO which indicates that Mr Molefe was appointed a director of the Applicant on the 10th June 2021 that is on the same day that his two daughters resigned as Directors. Which means that as on the 9th June 2021 his two daughter were the only directors who had the authority to resolve about placing the company under business rescue not Mr Molefe.

[23] This then means that what appears on annexure "VK13" being a letter from CIPRO signed by one Joel Mphahlele and dated the 9th June 2021 in which it is indicated that the Applicant was placed under Business Rescue on the 9th June 2021 is flawed not only because Mr Molefe was not a director capable of adopting a resolution in terms of Section 129(1) but also that the documents that he places reliance dated 9th June 2021 is not a resolution in terms Section 129 (1) it is just notification that the second Applicant has been nominated as a business rescue practitioner.

[24] On the 14th June 2021 the second Applicant addressed a letter to all creditors and affected persons in which he says that the company was placed under business rescue on the 14th June 2021. This is clearly in contradiction with the CIPRO letter signed by Mphahlele dated the 9th June 2021.

[25] Based on the above irregularities CIPRO amended its records on the 28th June 2021 to place the Applicant back in business (See Annexure VK19"). When this application was launched the company was not in business rescue accordingly the second Applicant had no *locus standi* there is accordingly no evidence before this court to accede to the notice of motion. The Application falls to be dismissed on that basis alone. Secondly a letter was produced in the supplementary affidavit by the second Respondent to the effect that the second Applicant Khomotso Teffo is not a registered Business Rescue Practitioner. He is accordingly disqualified and could never have been appointed by CIPRO had that information been made available to CIPRO.

[26] The second Applicant in his own words at paragraph 17 of his replying affidavit tells the court that on Monday the 28th June 2021 he was informed that the status of the first Applicant had been changed to indicate that the first Applicant is no longer in business rescue, that being the case he could never have been acting as a business rescue practitioner of a company that was not in business rescue. Despite that he proceeded to depose to an affidavit.

[27] In his replying affidavit the second Applicant makes a new case and now relies on the resolution passed during November 2019 to place the Applicant under business rescue. This is flawed and untenable because that resolution lapsed and in any case in his founding affidavit he relies on the resolution apparently passed on the 9th June 2021 (See paragraph 10 of his founding affidavit).

THE APPLICATION OF THE LAW TO FACTS

[28] The Supreme Court of Appeal in **Panamo Properties (Pty) Ltd and Another v MEC and Others NNO 2015 (5) SA 63 (SCA)** dealt with an almost similar matter. In paragraph 3 of that judgment Wallis JA summarising the facts therein said the following:

> "[3] In order to prevent a sale of the property and afford the Nels time to resolve Panama's financial problem the Trust resolved on the 19th August 2011 to place Panamo in business rescue. A little over two years later in September 2013 the Trust sought an order declaring that the original resolution to place Panamo in business rescue had lapsed and consequently that the entire business rescue process was a nullity. That was after the appointment of a business rescue practitioner (Mr van der Merwe the second Applicant), the adoption of a business rescue plan and the sale of property pursuant to that plan. It is undisputed that the sole purpose behind the application was to prevent the sale of the property and to prolong Mr and Mrs Nels occupation of their home."

[29] Although the facts as I indicated in this matter are similar to those in Panama the distinguishing factor which led to the Supreme Court of Appeal finding that the resolution had not lapsed for want of compliance with Section 129 (3) and (4) is that in Panama a business plan had already been adopted and the property was sold in terms of that plan. In this matter none of that had taken place in accordance with the November 2019 resolution. In the present matter the sale of the immovable property arises out of a judicial attachment pursuant toa judgment that still stands.

[30] Section 133 of the Act temporarily halts legal processes against a Company in Business Rescue. It is designed to provide the company with breathing space whilst the Business Rescue Practioner attempts to rescue the company by designing and implementing a business plan.

[31] The court in **Chetty t/a Nationwide Electrical v Hart N.O. and Another 2015 (6) SA 424 (SCA) at paragraph [40]** concluded as follows:

> "But Section 133 (1) (a) is not a shield behind which a company not needing protecting may take refuge to fend *off* legitimate claims. Thus Section 133 (1) (b) which is to be read disjunctively with Section 133(1)(a) because of the use of the word "or" in exception (a) - (e) permits a creditor to seek the court's imprimatur to initiate or continue legal proceedings against a company in the event of a practitioner refusal to give consent or directly, even without the permission of the practitioner having been sought. So Section 133(1) (a) is not an absolute bar to legal proceedings being instituted or continued against a company under Business Rescue. This is a strong indication that non- compliance with the section is not to be visited with the Sanction of a nullity."

[32] In the present matter the Applicant and the Business Rescue Practitioner did not inform the Respondent that business rescue had commenced there was therefore no basis for having to have first sought the consent of the practitioner prior to going ahead with the sale in execution. In any case as in the Chetty decision failure to have sought such consent does not invalidate the sale in execution.

[33] The first Applicant knew as far back as the 28th May 2021 that a sale in execution was set for the 15th June 2021 the easiest route would have been to bring an application to stay the sale rather than embark on its dubious process of business rescue which process as I have indicated above was flawed and of no effect. This application falls to be dismissed with costs. What remains is who is to be held liable for the costs.

[34] It is so that the issue of costs is always at the discretion of a trial court. In this matter the Company was dragged through a process of business

rescue which was flawed and meant only to stop the transfer of a sale that had taken place lawfully and procedurally correct.

[35] The deponent to the affidavit being the second Applicant had no *locus standi* to bring the application and must bear the legal costs in his personal capacity or a punitive scale.

In the result I make the following order:

ORDER

1. The application is dismissed.

2. The second Applicant is ordered to pay the costs of this application onan attorney and client scale.

DATED at JOHANNESBURG this the 3rd day of AUGUST 2021.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	7TH JULY 2021
DATE OF JUDGMENT	:	3RD AUGUST 2021
FOR APPLICANT	:	ADV S MATHIBA
INSTRUCTED BY	:	Messrs Mashabane & Associates Inc
FIRST RESPONDENT	:	ADV JE SMIT
INSTRUCTED BY	:	Messrs Werksamans Attorneys

SECOND RESPONDENT	:	ADV SNYMAN
INSTRUCTED BY	:	Messrs Seddat Attorneys