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

CASE NO: 2021/49669

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

29/12/2021 ..... Malindi .....
DATE SIGNATURE

In the matter between:

SOUTH CABLES AND ELECTRICAL (PTY) LTD	First Applicant
ASHDEM INVESTMENTS CC	Second Applicant
and	
WALRO FLEX (PTY) LTD (IN BUSINESS RESCUE)	First Respondent
WARREN RICHARD CASTLE N.O.	Second Respondent
WILHELM DANIEL JONKER N.O.	Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent
THE AFFECTED PERSONS RELATING TO WALRO FLEX (PTY) LTD (IN BUSINESS RESCUE)	Fifth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 20 December 2021.

JUDGMENT

MALINDI J:

Introduction

[1] The applicants seek leave to bring this application as contemplated by section 133(1)(b) of the Companies Act, 71 of 2008 (*"the Companies Act"*) and the termination of the first respondent's business rescue and its conversion into liquidation proceedings in terms of section 132(2)(a)(ii) of the Companies Act.

[2] The first, second and third respondents (*"the respondents"*) oppose the application.

[3] The first respondent placed itself into business rescue (*"BR"*) on 22 December 2020. This application is therefore launched some 9 months after the commencement of the business rescue proceedings (*"the proceedings"*).

[4] The business rescue plan (*"BR Plan"* or *"Plan"*) defines *"Commencement Date"* as meaning 22 December 2020, being the date upon which BR commenced in accordance with section 129(1), read with section 132(1)(a)(i) of the Companies Act.

Legal framework

[5] Section 128(1)(b) of the Companies Act provides as follows:

"(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";

[6] The temporary supervision by a Business Rescue Practitioner (*"BRP"*) to carry out the tasks that are set out in section 128(1)(b)(iii) begin when the company finds itself in the circumstances set out in section 132(1). In this case it started on 21 December 2020 upon the passing of a resolution in term of section 129. The applicants seek the bringing to an end the proceedings by converting the proceedings to liquidation proceedings in terms of section 132(2)(a)(ii).

[7] If the proceedings have not ended within 3 months after the start thereof they may be extended by leave of the Court upon application by the BRP. The BRP must, after obtaining the extension, comply with section 132(3)(a) and (b).

[8] Section 140(1) delineates the BRP's duties and those delegated by her/him to former board members or management of the company. It is significant that subsection (3)(a) endows the BRP with the status of an officer of the Court who *"must report to the court in accordance with any applicable rules of, or orders made by, the court"*.

[9] Section 142(3) shows the immediacy within which the proceedings start – i.e. with immediate effect after the occurrence of any of the events in section 132(1). Furthermore, the Plan must be published within 25 business days after the date on which the BRP was appointed, or upon such longer time as may be allowed by the Court in terms of section 150(5).

[10] The urgency with which the Plan must be executed was stated in *Koen & Another v Wedgewood Village Golf and Country Estate (Pty) Ltd & Others*[1] as follows:

"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."

[11] When the purpose of placing a company under business rescue is not achieved, or there is *prima facie* evidence of abuse of the proceedings, thereby prolonging the proceedings when winding up would better benefit creditors, or where the BRP has failed in his/her duties and functions as an officer of the Court, a conversion of the proceedings into liquidation proceedings may be appropriate. Importantly, the rights of third parties to enforce their rights against the subject company have to be guarded.

[12] In *Van Staden NO & Others v Pro-Wiz Group (Pty) Ltd*,[2] Wallis JA said:

"It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is

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1 *Koen & Another v Wedgewood Village Golf and Country Estate (Pty) Ltd & Others* 2012 (2) SA 378 (WCC) at [10].

2 *Van Staden NO & Others v Pro-Wiz Grup (Pty) Ltd* 2019 (4) SA 532 (SCA) as [22].

confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals, a punitive costs order is appropriate."

[13] It may be added that even in the absence of a deliberate use of these proceedings to delay a winding-up the inability to conclude proceedings expeditiously is itself a cause to call for the halting thereof.

Background

[14] The applicants set out the background as set out below.

[15] Walro Flex is a wholly owned subsidiary of Intakobusi Holdings (Pty) Ltd ("Intakobusi") which, in turn is owned inter alia by Carlos Palinhos ("Palinhos") and Mark Hughes ("Hughes").

[16] Intakobusi took control of Walro Flex in April 2017.

[17] By 31 October 2018, Intakobusi had:-

17.1 *"Loaned"* an amount of R14 143 216.00 from Walro Flex; and

17.2 Charged management fees to Walro Flex in the amount of R7 044 598.00.

[18] By 31 October 2018, other related companies (companies in which directors had direct or indirect interests) had loaned several millions of Rands from Walro Flex. In this regard:-

18.1 Argle Bargle 102 (Pty) Ltd (owned by Palinhos) had loaned an amount of R2 751 772.00;

18.2 Merry Thoughts 102 (Pty) Ltd (owned by Hughes) had loaned an amount of R2 751 772.00; and

18.3 Palinhos had loaned an amount of R566 067.00.

[19] The BRPs (and Palinhos and Hughes who each deposed to a confirmatory affidavit) admit that Walro Flex was financially strained during this period (October 2018).

[20] Notwithstanding Walro Flex's financial distress, during February 2019 Palinhos and Hughes bought themselves new Range Rover vehicles for a collective cost of R3.2 million.

20.1 The BRPs allege that the Applicants have *"provided no proof that Walro Flex purchased vehicles for its directors and the Second Respondent and I have found no evidence of this in our investigations"*.

20.2 However, neither Palinhos nor Hughes deny the allegation despite the fact that they both filed confirmatory affidavits.

[21] Walro Flex's audited financial statements for the year ending October 2019 (the "2019 AFS") reveals that:-

21.1 Walro Flex had made a loss of R10 345 300 for the financial year;

21.2 Walro Flex's net spend on operating activities was R42 455 711;

21.3 Walro Flex only had cash on hand of R1 184 175.00 at financial year end;

21.4 Walro Flex continued paying Intakobusi a "management fee", albeit reduced from R7 044 598.00 to R4 841 265.00.

[22] The following is added by the respondents to the above background.

[23] The first respondent is currently in business rescue. It has been in business rescue since 21 December 2020, on which date Walro Flex's directors passed a section 129 of the Companies Act resolution commencing the process.

[24] The second and third respondents are Walro Flex appointed business rescue practitioners (*"BRPs"*). They were appointed on 29 December 2020.

[25] A draft business rescue plan was published on 3 February 2021 and on 12 March 2021, after a few amendments were effected, a vote was held and the draft business rescue plan was approve by 97% of the creditors who voted.

[26] The applicants, who are both proven creditors, voted in favour of the Plan.

[27] The applicants have since been included in the list of concurrent creditors in Walro Flex's estate.

[28] The Plan contemplates its implementation over a period of no less than 36 months.

[29] The respondents submit that only 8 of those 36 months have lapsed since the Plan was approved and, in this time, Walro Flex's business rescue proceedings have proceeded well.

Analysis

[30] The respondents counter the applicants' averments by seeking to correct the 2019 Annual Financial Statements by attaching draft Annual Financial Statements for the year ending October 2020. They also challenge the total amounts alleged to have been paid to the directors and/or entities controlled by them as loans and management fees. In both instances even if the purported corrections are accepted as accurate, they do not negate the applicants' complaints that these payments reduce what could be a benefit to creditors. This situation should not be allowed to endure for any significant passage of time after the 3 months life span of the proceedings has been exceeded. This circumstance also lends itself to what the Companies Act discourages – that is any suggestion that the proceedings are being abused for purposes of avoiding winding-up of the company while the potential benefit to creditors is being dissipated.

[31] The prospects of a successful business rescue is dependent on a post-commencement financing (*"PCF"*) of R7 million which must be obtained. In the BRPs' own plan the rescue cannot commence or be achieved unless the PCF is secured. It is now some 11 months since the proceedings commenced, some 8 months beyond the prescribed 3 months to conclude rescue proceedings, without this investment being secured. It can therefore be concluded that if the PCF and any other capital investment were obtained now, the proceedings would be concluded in a period well beyond 12 months. The fact that the respondents are at the precipice of securing the PCF does not address the fact that the longevity and purpose of BR has already been defeated.

[32] In addition to the securing of the PCF being speculative, so is the securing of capital investment. Meetings with potential capital investors that are *"ongoing and are proceeding well"* does not conjure much hope of the reasonable prospect that were demonstrated at the time BR was applied for as continuing to exist 11 months later. As stated above these prospects have diminished.

[33] The respondents place must reliance on *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others*,[3] a case which dealt with the requirements to place a company into BR, where it is stated:

"On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect – which the emphasis on 'reasonable' – which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in its founding papers."

[34] It is submitted that since the respondents had to show a reasonable prospect of rescuing the company at the time of applying for BR, the applicants must show, in the converse of the standard, reasonable grounds that there is no longer or never was, a reasonable prospect of rescuing the first respondent.

[35] As stated above, securing PCF was a major factor determining the reasonable prospect of rescuing the company. However, since this has not been achieved 11 months after commencement and 8 months since the adoption of the Plan, the prospects have all but diminished. It is now speculation that Standard Bank is on the brink of providing the PCF. Furthermore, the allegations that the continued payment of management fees and loans (to the directors and/or the entities they control) and the deteriorating business health of the company contribute to the reduction of the company's value are based on reasonable grounds. Discontinuation of the BR proceedings is warranted in the circumstances.

[36] The respondents have failed to respond to a direct allegation that two of the directors bought themselves vehicles worthy R3.2 million in February 2019 where they admit that the company was already in financial distress during October 2018. How these

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3 *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2013 (4) SA 539 (SCA) at [29].

acquisitions were made is a matter within the personal knowledge of the directors and should have dealt with this instead of merely confirming the BRPs retort that the applicants have not provided proof that the company purchased them for the directors. This response lends credit to the applicants' submission that the directors not only ransacked the company's coffers when it was clear that it was in financial distress but they used BR proceedings in order to delay winding-up proceedings. As a result they continue to earn an income from the company during prolonged BR proceedings to the prejudice of creditors.

[37] The applicants cannot be bound to their vote in favour of the BR Plan when the circumstances have changed significantly since March 2021.

[38] In the circumstances it is too speculative to project that various classes of creditors will receive better dividends under BR as opposed to under liquidation. These projections were made at the time that the PCF and capital investments were envisaged at the time of passing the BR Plan.

Urgency

[39] I agree with the applicants that these proceedings are inherently urgent. The applicants acted with speed when it became apparent that the PCF would not be secured. It was during October 2021 that the applicants lost faith in the BR proceedings and demanding full reports from the BRPs. This view was preceded by various enquiries and investigations which revealed suspicious business transactions and failure to address them by the BRPs or their attorneys.

Costs

[40] Costs will follow the result and costs *de bonis propriis* are warranted. The benefit to creditors should not be reduced further by the company having to pay these costs when the directors have abused the proceedings and continued to benefit therefrom.

Conclusion

[41] Leave is granted in terms of section 133(1)(b) of the Company Act for the applicants to bring this application.

[42] The applicants have discharged the onus to prove that there remain no reasonable prospects of the company being saved. Furthermore, the directors engaged themselves in conduct before and during the BR proceedings which amounts to the conclusion that they abused the proceedings after having precipitated the company's financial distress over the preceding year.

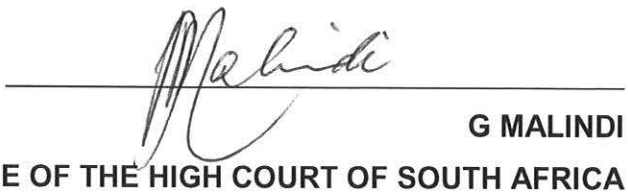
[43] I therefore make the following order:

1. The applicants are granted leave to bring the application as contemplated by section 133(1)(b) of the Companies Act, 71 of 2008.

2. The first respondent's business rescue is terminated.

3. The first respondent's business rescue is converted into liquidation proceedings in terms of section 132(2)(a)(ii) of the Companies Act.

4. The costs of this application are to be paid by the second and third respondents *de bonis propriis*.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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INSTRUCTED BY:	Elliot Attorneys
DATE OF THE HEARING:	24 November 2021
DATE OF JUDGMENT:	20 December 2021