REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/13229

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

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SIGNATURE **DATE:** 29 July 2022

In the matter between:

KENIAS SIBANDA **FIRST APPLICANT**

YTS LIMITED **SECOND APPLICANT**

and

TRANSHUNT (PTY) LIMITED **FIRST RESPONDENT**

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **SECOND RESPONDENT**

THE MASTER OF THE HIGH COURT, GAUTENG LOCAL DIVISION JOHANNESBURG **THIRD RESPONDENT**

DIOB17UZZ (PTY) LIMITED	**INTERVENING FOURTH RESPONDENT**
TUNDRANAMIX (PTY) LTD LIMITED	**INTERVENING FIFTH RESPONDENT**
WINTERVIEW (PTY) LIMITED	**INTERVENING SIXTH RESPONDENT**
NADINE ANTOINETTE SVIRIDOV	**INTERVENING SEVENTH RESPONDENT**

JUDGMENT

MANOIM J

Introduction

[1] The applicant in this matter, whom I shall refer to from now as Sibanda, has brought this urgent application against the first respondent (which I will refer to from now on as Transhunt) to place it under business rescue in terms of the Companies Act 71 of 2008 (the Act).

[2] Transhunt has already been provisionally wound up. In the alternative Sibanda seeks that this order, which came as a result of a creditors voluntary winding up, be set aside.

[3] The second and third respondents have not opposed the application.

[4] The fourth, fifth and sixth intervenors, who do, are all shareholders of Transhunt, whilst the seventh respondent was formerly its sole director.

The Parties

[5] In order to bring an application for business rescue an applicant must be an 'affected person' as defined in terms of section 128(1)(a) of the Act. In Sibanda's case he alleges he is a creditor of the company which owes him a debt of R 1,6 million. Sibanda is a Zimbabwean citizen domiciled in that country and had to give security to bring this litigation.

[6] Although he need only rely on this fact to qualify as an affected person, Sibanda has a further relationship with Transhunt, which whilst not relevant to his status as an affected person, is relevant to understanding the context in which this application occurs. He is the founder of a family trust whose beneficiaries are his wife and children. This trust owns 100% of a company called Saxobrite (Pty) Ltd, which in turn owns 65% of Transhunt.

[7] The second applicant is a company called YTS. YTS is also a creditor of Transhunt. According to Sibanda, YTS owes Transhunt 93,4 million rand. Sibanda, through another trust known as the Ken Trust, of which he is the sole beneficiary, owns 60% of YTS. Both YTS and the Ken Trust are offshore entities registered in Guernsey. When this litigation commenced Sibanda alleged he was authorised to bring the application in the name of YTS as he was a member of its executive committee having been nominated to serve in this capacity by the Ken Trust.

[8] However, at the commencement of the urgent application a firm of attorneys representing YTS based in Guernsey, challenged Sibanda's authority to represent it. Sibanda's attorneys then withdrew their representation of YTS. Sibanda is not a director of the YTS nor is he a trustee of the Ken Trust, which despite being a trust for his family's benefit, is represented by professional trustees. Since then, YTS has played no part in these proceedings.

[9] Transhunt is the firm that Sibanda seeks to place in business rescue. Transhunt provides transport services to companies that haul heavy cargo between South Africa and neighbouring states in Southern Africa. Its business model is unusual in that its customers – allegedly only three of them on the intervenors version- were both debtors and creditors. This is because Transhunt served as an agent for these companies collecting from their customers (hence the creditor relationship as it had to repay these amounts to the three firms) whilst also charging a fee on top (hence its debtor relationship). Its assets are trailers, but it does not have the trucks to haul them.

[10] Sibanda despite the indirect 65% shareholding that his family trust holds in Transhunt via Saxobrite is not a director of Transhunt. Up until the time it was

voluntarily liquidated it had only one director, Natalie Sviridov. Sviridov wears many hats in relation to the companies Sibanda has an interest in. Apart from being an erstwhile director of Transhunt she was also until recently a trustee of the trust that owns the indirect interest in Transhunt. But she is also a director of a company called Transaction Carriers (Pty) Ltd or TAC, which, as I go on to discuss plays a central role in Sibanda's concerns and hence the need for business rescue. In the voluntary winding up she recorded affirmative votes for Saxobrite (65%) and two of the minority shareholder companies, who between them each held 10% of the shares in Transhunt; respectively, Diobuzz and Tundranamix. The third shareholder Winterview, holds 15% and its shares were voted by another director T. Hunter, based, like Sibanda, in Zimbabwe. Thus, shareholders holding 100% of the equity vote in favour of the winding up.

[11] Whatever the relationship between Sviridov and Sibanda was in the past, one that had her at the helm of looking after his business interests, that has since broken down and it is now that antagonism that fuels the current litigation. Sviridov was central to the decision to place Transhunt in voluntary liquidation. She prepared the financial statements and the statutory required Statement of Affairs which the meeting of shareholders is required to have before it to consider.[1] She despite being at the same time being a director of the Transhunt, also signed the resolutions on behalf the three of the four shareholders which voted to place the company in voluntary winding up.

[12] There is some dispute about whether the statement of affairs which is dated 18 February was actually presented at the meeting whose resolutions are dated the day before i.e. 17 February. The intervenors state the date of the statement of affairs is an error and the cart was not put before the horse and the resolution was adopted in a regular manner. The reason given for the resolution was that the company was unable to meet its financial commitments in the immediate to medium term and that its liabilities exceed its assets. The reasons given in the resolution for this state of affairs are the economic consequences of the Covid

[1] In terms of section 363(1) of the Companies Act 61 of 1973

pandemic and events pertaining to one of its largest customers, Biltrans Services, a Harare based company.

Case for Business Rescue

[13] In *Oakdene*[2] the Supreme Court of Appeal explained that business rescue has two objectives.

"The potential business rescue plan s[ection] 128(1)(b)(iii) thus contemplates has two objects or goals: a primary goal, which is to facilitate the continued existence of the company in a state of solvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation."[3]

[14] I will first consider whether Sibanda makes out a case for achieving the primary goal. *Oakdene* also explained what kind of case needs to be made out for this primary goal of business rescue. The language of section 131(4)(a)(iii) which is the provision Sibanda relies upon, is that it is *"just and equitable for financial reasons and there is a reasonable prospect for rescuing the company".* In *Oakdene* the court stated that a *'reasonable prospect'* meant less: *"than a 'reasonable probability'"* but "… *more than a mere prima facie case or arguable possibility. Of even greater significance ,….is that it must be a reasonable prospect – with the emphasis on 'reasonable' – which means it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough"*[4]*.* The court went on to state that this requires the applicant to establish these grounds in its founding papers. The court however also endorsed another decision which stated that what constitutes a " reasonable prospect" did not go so far as to require the

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[2] *Oakdene Square Properties (Pty) ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA)
[3] Ibid paragraph 23.
[4] *Oakdene,* supra paragraph 29

applicant to set out what was tantamount to a business plan.[5] That is the approach I will take here.

[15] Sibanda's case is premised on the theory that the business of Transhunt has been hijacked by TAC, which has, since the winding up order, taken over the former's customers, and key staff. If a Business Rescue Practitioner (BRP) is appointed, then this business can be won back, and the firm returned to profitability.

[16] There is a dispute of fact over whether the company was solvent when the voluntary winding up resolution was passed. Sibanda maintains that it was. According to him whilst its creditors amount to R105,950,692.88 its assets amount to R121,194,754.00. But the intervenors dispute this. This is because they identify the debtors as comprising the firms only three customers, all of whom, in their view, are troubled business. Hence although the books may reflect this debt is owed, much of it, they contend is doubtful.

[17] On their version Transhunt' s liabilities exceeded its assets. It owes it creditors R 105 million whilst its assets only amount to R 49 million (made up of trailers and other property R 25 million and recoverable debt of R 25 million) leaving a shortfall of R56 million.

[18] Transhunt' s business consisted of trailers of a certain size and contracts with key customers. Only the trailers remain. Sibanda's fear is that the real reason for the winding up was so that TAC could acquire its trailer assets at low prices. The intervenors deny this, arguing that no case has been made out to restore the business. What Sibanda needs to show, they argue, is that a BRP would be able to regain these customers and collect the outstanding debt. But it is not clear that the customers could be won back or that the BRP was in any better position than a liquidator to collect the outstanding debt. Whatever the efforts of a BRP these customers will decide where to place their business. No indication is given as to

[5] *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) paragraphs 11 and 15.

how these contracts will be restored. A BRP will not be able to force these customers back unless they are satisfied that Transhunt will serve them as it did in the past. But since the winding up the customers have gone elsewhere.

[19] At the same time Transhunt has lost its key staff. Sviridov had been a sole director for – years whilst Stenton, who is the deponent to the answering affidavit, was involved in some capacity in the management of Transhunt. Both are now gone as are some of the staff previously employed by Transhunt. Stenton states that after Transhunt was wound up its staff were unemployed and that *'TAC has tried to absorb them as best it can."* Stenton says Transhunt has no other contracts with customers other than its three contracts with YTS, Biltrans and Upman.

[20] But according to Stenton and not denied by Sibanda the latter directly or indirectly owns the majority of the shares in both these firms. Stenton's theory is that Sibanda wants to use the business rescue process so that he can by exercising this control, gain from the business rescue process a business plan that suits Transhunt's creditors at the expense of its shareholders. He suggests that it is Sibanda who wants to get hold of the trailers and dispose of them to one of his other entities.

[21] Whether this theory is correct or not I cannot say on these papers. But what is lacking in the founding affidavits is any explanation of how a BRP will be in any better position to get these firms to pay their debts or put differently what will change their inclination towards Transhunt if it is in business rescue. According to Stenton, between Biltrans; Upman and YTS, they owe Transhunt R71,061,822.61 as follows: Biltrans R52,100,570.79 100. Upman R4,289,730.67; and YTS R 14,671,521.15.

[22] According to Stenton: *"As already explained, Sibanda has destroyed the group's business and none of the three (Biltrans, Upman or YTS) are willing or able to pay their debts to Transhunt. Biltrans, for example, was Transhunt's largest debtor and owed Transhunt more than R42 million for over ten (10) months prior to its winding-up"*

[23] This swipe at Sibanda destroying the groups business is a reference Stenton makes to Sibanda having become active in the group companies by which he means, Biltrans and Upman, although it is not clear in what capacity. On Stenton's version, this intervention by Sibanda, which he says started in May 2021, proved disastrous, eventually causing a knock on effect on the Transhunt business because these three firms constituted the lion's share of its customer base, and hence led inevitably to its voluntary winding up in February 2022. The court is thus faced with two diametrically opposed narratives for Transhunt' s decline: the hijacking of a viable business by its erstwhile executives who also had a foot in a rival firm, or the decline in its customer base, orchestrated by interference by Sibanda, whose abrasive personal style was ill suited to running these businesses.

[24] The first challenge is that the BRP if appointed would not have access to the services of the erstwhile executives. At present the company does not have a board nor is it apparent that it has any senior management either. Secondly the BRP would thus have to take over the running of a company that has not traded for at least four months so would have to induce erstwhile customers who presumably have gone elsewhere, to return. No case is made out for why they would. Thirdly, this business provided support services to other businesses who in turn had their own customers who required goods to be transported. I will refer to these as the originating customers. The point made by Stenton is that to succeed under business rescue the BRP would have to ensure that Transhunt' s three direct customers still enjoy the custom of their originating customers. He disputes that they do. Sibanda makes out no case on this crucial issue. It is one thing to accuse erstwhile executive of hijacking a business. It is another to persuade the court how this business can be won back by a BRP.

[25] This leaves then the trailers the only asset the business has. However, without a customer base in what is a niche industry and with a history of having only three customers whose own business prospects are the subject of some doubt the prospects for the BRP finding new business using the trailers has not been made out.

[26] Thus, the primary case for business rescue is unpersuasive. The second consideration is whether business rescue would produce a better outcome for creditors and shareholders than would liquidation. No case is made out for why it would. As argued by Mr Strobl for the intervenors, a liquidator has greater powers than would a BRP. Given that debt has to be collected from the three companies some of whom are located in other jurisdictions, to the extent that these can be collected, the liquidator is better placed to do this. A BRP process is unlikely to be successful he argued, and I agree with this, and would only end up in liquidation with the creditors and shareholders worse off having to bear the expense of a failed business rescue.

Intervention

[27] When the main and urgent application were brought, only Transhunt, the CIPC and the Master were cited as respondents. The fourth to seventh respondents then applied to intervene. Mr Hershensohn, who appeared for Sibanda, correctly conceded to the intervention and I gave an order to that effect on the day of the hearing.

Urgency

[28] The applicant first brought this application for relief in the ordinary course on 6 April 2022. However, on 17 June 2022 he brought the urgent application on largely similar terms. The urgency was premised on a visit he had to the erstwhile premises of Transhunt when he had been refused entry by two security guards. What riled him were that these guards had previously been employed by Transhunt and were now wearing the insignia of TAC. Although he eventually gained entry this led to a dispute with TAC who in a lawyers letter accused him of trespass. The intervenors allege that TAC and Transhunt had always leased offices in the same premises and so there was nothing remarkable about this incident. Moreover, Transhunt was now in voluntary liquidation and so Sibanda, never a director, had no rights of access at all.

[29] The intervenors originally opposed the application on grounds of urgency as well. They pointed out that the resolution for the voluntary winding up was passed on 18 February 2022 and the urgent application was only brought four months later; moreover, there was no proper explanation for why the relief relied on in the main application, filed in April already, would not suffice.

[30] However, both parties are now agreed that I should not decide the matter on urgency but conclude on the main application. Neither litigant benefits from the existing status quo. From the applicant's perspective the longer the matter is delayed the less the prospects of successful business rescue when one bears in mind his thesis is that the business of Transhunt is in the process of being hijacked.

[31] From the interveners perspective final resolution is required for a different reason. Although the company is in winding up no liquidator has been appointed as the CIPC regards such a step as premature pending finalisation of the main application and the possibility that a court might order the company to be placed in business rescue instead.

[32] For this reason, I have decided the matter as one for final relief and have not decided it on urgency. In any event there is case law that suggests that business rescue applications are always urgent by the nature of the relief they seek.[6]

Conclusion

[33] Sibanda has not made out a case for business rescue on either of the objectives mentioned in *Oakdene* that I referred to earlier. Whilst he has raised serious questions about conflicts of interest of his erstwhile colleagues there are other remedies for him to pursue in this regard. Both the main application and the urgent application must be dismissed.

[6] *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another* and related matters. [2020] 3 All SA 499 (G) at paragraphs 4-to 5. *Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) at paragraph 10.

ORDER

[1] The first to fourth applicants in the intervention application are joined as the fourth to seventh respondents in the Main Application and the Urgent Application.

[2] The Main application and the Urgent application are dismissed.

[3] The first applicant is liable for the costs of the fourth to seventh respondents in respect of both the Main and Urgent applications.

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 29 July 2022.

Date of Hearing: 15 July 2022

Date of Judgment: 29 July 2022

Appearances:

Counsel for the First Applicant: Adv J Hershensohn

Instructed by: Mendelson Attorneys

Counsel for the Intervening respondents Adv W. Strobl

Instructed by: Andrew Garrat Incorporated