

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022-060026

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

A handwritten signature in black ink, appearing to be "J. M. M." or similar, written over the word "SIGNATURE".

04 May 2023

DATE

SIGNATURE

In the matter between:

NATIONAL EMPOWERMENT FUND

Applicant

and

FORTRESS INCOME (PTY) LTD

First Respondent

JHI PROPERTIES (PTY) LTD

Second Respondent

GCWABAZA HOLDINGS (PTY) LTD

Third Respondent

Neutral Citation: *National Empowerment Fund v Fortress Income (Pty) Ltd and 2 Others* (Case No. 2022-060026) [2023] ZAGPJHC 431(4 May 2023)

WRITTEN REASONS FOR ORDER

YACOOB J:

1. This application was set down in the urgent court on 20 December 2022. At that time the applicant sought the rescission of an order granted under case number 2022/11244, and the permanent stay of a warrant of execution issued pursuant to that order on 16 November 2022. The applicant also sought costs in respect of the parties opposing the application.
2. The matter was heard on 22 December 2022 to permit the filing of papers by the first and second respondents, who opposed the application. By that date the applicant had altered the relief sought, simply to stay the warrant of execution and all process resulting from it, pending the finalisation of the third respondent's business rescue proceedings, and costs. The order was granted in those terms, and costs against the first respondent after 20 December.
3. The first respondent has requested reasons for the decision.
4. The applicant approached the court on the basis that the third respondent was in business rescue, which business rescue proceedings had commenced on 15 August 2022. The warrant was therefore unlawfully issued as it was issued after the company was in business rescue, which was inconsistent with section 133 of the Companies Act, 71 of 2008, which provides for a moratorium on legal proceedings against the company without written consent of the business rescue practitioner or leave of the court.
5. The applicant has provided funding relief to the third respondent for use towards operating costs during the business rescue. The execution of the warrant resulted in the freezing of the bank account in which those funds were kept. This was the basis of the urgency.
6. The respondents raised the following points in opposition:
 - 6.1. The applicant had no *locus standi* because it was not a party to the order it was seeking to rescind;
 - 6.2. That other respondents in the matter in which the order was granted had not been joined;

- 6.3. There was no basis for the rescission as the order was granted before the company went into business rescue;
- 6.4. That the company was not in business rescue because a new business rescue practitioner had not yet been appointed after an existing one was relieved of his duties, and
- 6.5. The stay would achieve nothing as there was very little money in the account.
7. I found that the applicant's interest as the provider of post-commencement finance was sufficient to justify it seeking the stay of the warrant and resulting processes.
8. The applicant pointed out in its replying affidavit that the two additional respondents to the application which gave rise to the warrant were directors of the third respondent. It was not necessary to join them since the reason for this application was to protect the integrity of the business rescue proceedings, and there would be no substantial prejudice to them by not joining them. I consider that to be sufficient basis to reject the non-joinder point.
9. There was no reason to consider arguments relating to the rescission as it was no longer being sought. However it was clear that the stay was required because the issue and execution of the warrant while the third respondent was in business rescue was both unlawful and likely to interfere with the business rescue.
10. The applicant also pointed out in reply that although one business rescue practitioner had just resigned, the business rescue proceedings were continuing and a new practitioner was going to be appointed.
11. In any event, whether a new practitioner had yet been appointed is not relevant to whether the business rescue had come to an end. Section 132 of the Companies Act sets out exactly when business rescue proceedings come to an end, and does not include the resignation of a practitioner.

12. At the hearing counsel for the respondents indicated that the respondents had no issue with the stay, the only issue was with costs. It was submitted that the first time the respondents knew that only a stay was being sought was on the day of the hearing. However, the applicant had informed the legal representatives of the respondent on 20 December that the relief sought would only be a stay.
13. Counsel for the respondent submitted that the applicant should never have sought costs against the second respondent because it was only the managing agent of the first respondent. However costs were only sought against those respondents who opposed, and it was the second respondent who chose to oppose. If it truly had no interest it ought not to have opposed.
14. That said, it was clear from the affidavit that the true opposition was from the first respondent, and that therefore only the first respondent should have to pay costs, and that only from 20 December 2022, when its representatives were made aware of the change in the relief sought.
15. These, then, are the reasons for the order.



S YACOOB
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 22 December 2022
Date of Order: 22 December 2022
Date of Written Reasons: 04 May 2023

For the Applicant:

B Babha instructed by Madhlopa &
Thenga Inc

For the Respondents:

R Bhima instructed by Verton Moodley
Associates Inc